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THE MILITARY JUSTICE SYSTEM IN SRI LANKA –

A SUPREME COURT JUDGMENT, AN OPINION AND A LOOK AT COMPARATIVE LAW

LAW & SOCIETY TRUST

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Editor's Note ... ...

The Review deals in this instance with a subject of exceptionally acute controversy regarding the operation of the military justice system in Sri Lanka, centering on a judgment delivered by a Divisional Bench of the Supreme Court (*Fonseka v. Kithulegoda*, SCM 10.01.2011) in early January 2011.

The Issue commences with a cogent and succinct reflection on the case by Professor ***Eugene Fidell*** who has long standing expertise in the area of US military justice. This reflection is useful for its venturing beyond the confines of the strict legal principles, to bring the concept of justice into the discussion. This is a concern that we will return to later.

Judicial reasoning in this case needs to be encapsulated first. The Supreme Court's majority and concurring opinions in *Fonseka v. Kithulegoda,* which the Review publishes for the easy reference of its readers, agreed on the core point in issue, namely that any court" in Article 89(d) of the Constitution refers not only to the Supreme Court, Court of Appeal, the High Court of the Republic of Sri Lanka and the other Courts of First Instance but also to a court martial constituted under the Army Act No. 17 of 1949.

The majority opinion, it was clear, appeared to be judicially aghast over the consequences of ruling otherwise on this 'most intriguing issue' as the judges would have it. Thus, as was opined, was it the case that any person under sentence of death or imprisonment by a court martial, which sentence is valid and operative, would still be entitled to hold his seat in Parliament and be part of the Legislature? If that be the case, then, as the then Chief Justice Asoka de Silva (with three judges of the Supreme Court agreeing) pointed out:

> *"...the argument, if pursued to its logical conclusion, amounts to a statement that the Legislature may comprise of persons actively serving prison sentences or/and languishing in death row awaiting execution at the instance of the Executive of the State."*

Based on a sweep of case law and relevant constitutional provisions, the majority opinion concluded that the court martial exercises judicial power and is recognized by the Constitution as such in terms of the second limb to Article 4(c) of the Constitution. In somewhat circuitous reasoning, it was also decided that Article 13(4) of the Constitution brings the court martial within the description of not only a "court" but a "competent court", since, in terms of Article 13(4), only a "competent

Court" can impose sentences of death or imprisonment.

The counter argument, that a conviction and sentence, including a sentence of death, passed down by a court martial is given validity only by the confirming authority (which is the Executive President), thus detracting from the 'judicial' nature of the process, that in any event, a court martial is *ad hoc* with its members comprising part of the executive and lack fair trial guarantees, was not accepted by the Court.

The concurring opinion in this case, differed with the majority opinion and declined to hold that a court martial exercises judicial power, instead holding that a court martial, as presently structured, falls within Article 4(b) of the Constitution, which deals with the executive power of the People. Having expressed that opinion, Justice S. Marsoof however goes on to analyse the language of Article 89(d) of the Constitution and brings a court martial within the ambit of Article 13(4) of the Constitution as an 'extraordinary court'.

In reflecting on this decision of the Court, Professor Fidell in his contribution to this Issue, written on invitation by the *LST Review*, agrees with the view that a court martial may be a specialized court. However, his concerns embrace a wider viewpoint which emerges from the concluding paragraph in his essay thus;

> *"Sri Lanka's military justice system deserves a thorough review perhaps by the courts and certainly by Parliament. Only in this fashion can the highest goal – public confidence in the administration of justice – be served."*

Only a few would disagree with this sound advice. The deficiencies of military justice systems are not peculiar to Sri Lanka but are contained, in greater or lesser extent in comparative jurisdictions, including in the US.

However, the value of increasingly predominant international standards on the use of court martial and procedures relevant thereto, in particular, the Decaux Principles, needs to be taken into account by concerned members of the legal fraternity and public commentators in this country. Towards this end, the Review also publishes extracts from a useful decision by the Supreme Court of Canada which unequivocally pronounced on the institutional independence of this tribunal, concluding that the structure of a General Court Martial in that particular case, violated the accused's right to a fair trial.

Regional developments in this respect are also of interest. In mid 2011, the Supreme Court of Nepal, in an opinion of a Special Bench presided over by the Chief Justice, emphasized that the military justice system of Nepal should conform to essential

principles of constitutional supremacy and rule of law. In particular, it was stated that the establishment and functioning of a military tribunal should be independent, impartial and fair.

However, the fact that persons involved in investigation, prosecution, and judgment delivery by a military tribunal, are from active chain of military command, that the tribunals are formed on an ad hoc basis and that persons with legal and judicial expertise are not involved, raised serious concerns. It was observed by the judges that Nepal's military justice system should contain adequate guarantees regarding the jurisdiction, function, working system, working environment, and terms, conditions and other facilities for the members of the tribunal and that their impartiality, independence, fairness and accountability should be ensured.

Specifically, it was recommended that the Military Act should be reformed to allow military personnel to enjoy the benefits of fair trial and to form a Task Force comprising representatives from the judicial, legal, and security sector to review the existing provisions and suggest required reforms following consultations with legal and judicial experts, military officers, other security agencies, civil society and human rights activists.

Kishali Pinto-Jayawardena

THE FONSEKA COURTS-MARTIAL: AN OPPORTUNITY FOR LAW REFORM

Eugene R. Fidell[*]

The various legal proceedings in Sri Lanka involving Gen. Sarath Fonseka, are of interest to many of us in other jurisdictions for a variety of reasons. I would like to offer some remarks in this respect because the Military Justice course I teach at Yale Law School includes a substantial comparative law element. Perhaps a Sri Lankan reader may find it helpful to have these thoughts from an outsider with no particular axe to grind with respect to either the domestic political implications of the cases or Gen. Fonseka's performance of duty before his retirement, court-martial convictions, or exclusion from Parliament.

I will comment first on the judgment of the Supreme Court, on referral from the Court of Appeal, in the case concerning whether Gen. Fonseka's court-martial convictions disqualify him from sitting in Parliament.[1] The question is whether a court-martial is a court for purposes of the disqualification provision found in Articles 89(d) and 90 of the Constitution. This is not a hard question. It is widely recognised that courts-martial may be "specialized courts." Yet they remain courts. Many countries have faced comparable issues in myriad settings. In the United States, for example, general and special court-martial convictions are deemed prior convictions for purposes of the *Federal Sentencing Guidelines* that apply to civilian federal criminal prosecutions.[2]

There is an argument that gives me pause as to whether a court-martial should be deemed a court. It arises from Section 77(2) of the Sri Lanka Army Act, which permits a person who has been convicted by a court-martial to be tried thereafter by a civilian court. Since the same sovereign is responsible for both the civil and the criminal process, this provision surely violates the principle of double jeopardy, even though, as Marsoof, J notes in his concurring opinion,[3] Parliament has provided that the later civilian court must take into account the court-martial punishment when imposing punishment. If a second prosecution is permitted, does that not suggest that the forum in which the earlier prosecution was conducted was not really a "court"? On the other hand, the requirement of Section 81 of the Army Act that courts-martial apply civil court rules of evidence certainly suggests that Parliament views courts-martial as courts of law in every sense of the term.

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[*] Eugene R. Fidell was President of the National Institute of Military Justice, a US-based nongovernmental organisation, from 1991 to 2011. He is a Senior Research Scholar in Law and the Florence Rogatz Lecturer in Law at Yale Law School.

[1] *Fonseka v. Kithulegoda & Others*, SC Ref. No. 1/2010, CA (Writ) App. No. 676/2010 (Sri Lanka Jan. 10, 2011).

[2] U.S. Sentencing Commission, Federal Sentencing Guidelines Manual § 4A1.2g (2010 ed.) ("Sentences resulting from military offencceses are counted if imposed by a general or special Court Martial. Sentences imposed by a summary Court Martial or Article 15 proceeding [comparable to summary trial under Sri Lanka Army Act ss 42-44] are not counted" in computing civilian federal defendant's criminal history).

[3] *Fonseka v. Kithulegoda & Others*, *supra* note 1 (Marsoof J, concurring), at p. 9.

It is a nice debater's point that a court-martial must qualify as a court for the purposes of Articles 89(d) and 90 since such a court can adjudge the death penalty, and it would make no sense for an individual under this ultimate sentence to be able to sit in Parliament. But the point lacks analytical force because, until a sentence is confirmed, upheld on judicial review and carried into execution, there is no logical reason compelling expulsion or disqualification... although a person under a military sentence of death would have a hard time persuading a court to grant bail or otherwise release him so he could perform legislative duties.

Be that as it may, there is no need to resort to rhetoric. It is enough to look to the statute creating courts-martial – the Army Act – and to the terms of the Constitution. Article 89(d) refers to "*any* court,"[4] suggesting that it be read broadly rather than narrowly, even though doing so in this context deprives an otherwise eligible citizen of the opportunity to hold elective office and deprives the electors of their choice of candidate as determined at the polls. From this perspective, the question the Court of Appeal referred to the Supreme Court was, with respect, an easy one as to which only one answer was really possible.

To hold, however, that a court-martial is a court is not the end of the conversation; it is rather only the beginning. Some courts stand on stronger footing than others, and their work may be more likely than that of others to convince observers – by which I mean not only the immediate parties, but also the public in Sri Lanka and elsewhere – of the regularity of the proceedings and the justice of the outcome. From this perspective, regardless of the immediate outcome (which some may find frustrating for political reasons), there is great value in the very fact that the Sri Lankan military justice system has indirectly come under the microscope through the parliamentary eligibility litigation.

The Army Act, descendant of British legislation from 1881,[5] dates to 1949 and is badly out of date. Since its enactment, there have been dramatic changes in military justice around the world. While certainly there are countries whose comparable legislation is even older, a military justice code whose broad outlines date to 1949 (never mind 1881) almost certainly would benefit from a thorough fresh look. (I say this fully mindful that much of the military justice code of my own country – which a distinguished friend once described as an aging beauty[6] – dates to 1950, and indeed, parts of it were inspired by the Articles of War that may be traced back to George III.[7] Our statute at least has been significantly revised since 1950, albeit not as much as needed to keep abreast of best practices in this area.) Doubtless there are many issues competing for parliamentary attention in Sri Lanka. Perhaps the Army Act can be moved up in the queue and changes made that would make courts-martial "courts" in more than in name only.

If and when Parliament does turn to this task, it should consider the emerging body of international learning on the administration of justice by military courts. Much of this terrain has been mapped in

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[4] Emphasis added.

[5] Army Act, 44 & 45 Vict. c 58.

[6] Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, The Law Review of Michigan State University-Detroit College of Law, 57 (2002).

[7] *See generally* William Winthrop, Military Law and Precedents 21-22, 931 *et seq.* (2d ed. 1920).

the UN *Draft Principles Governing the Administration of Justice Through Military Tribunals*.[8] These remain under consideration within the UN deliberative process, but there is much of value in the draft and no effort at national legislative updating would be complete without taking it into account. In addition, there is a wealth of pertinent case law from the European Court of Human Rights[9] and the comparable Latin American and African bodies. The same is true of decisions of national courts. Landmark cases in court after court and country upon country have focused on the need for independence and impartiality, both as to the military justice system as a whole and as to performance of the military judicial function.[10] Independence from the chain of command is a recurring contemporary theme. Perfect independence would require complete reliance on the civilian courts (assuming they enjoy independence), and many countries have declined to go in that direction.[11] Another major contemporary theme concerns the limitation of court-martial jurisdiction to military personnel and military offenses. National practice of course varies, but where these lines are drawn is a critical legislative judgment and speaks volumes about the strength of civil society in any country.

Turning to the Fonseka courts-martial themselves, I am not privy to the records of trial and therefore offer no opinion as to Gen. Fonseka's guilt or innocence or the correctness of the sentences. But as the judicial process and public discourse unfold, some points might be worth considering. For one thing, one wonders about the second court-martial's exercise of jurisdiction since Gen. Fonseka had been dismissed from the service by sentence of the first court-martial. (It is not clear, for that matter, why there were two courts-martial, rather than one, unless Gen. Fonseka requested that the charges be severed.) This, one would think, made him a civilian, and as such no longer properly subject to court-martial jurisdiction. To be sure, a number of countries, including in some circumstances Sri Lanka (through Section 57(1) of the Army Act), seek to continue court-martial jurisdiction after separation from active duty. Doing so is not in keeping with contemporary international standards.

The composition of the courts-martial also seems problematic given Gen. Fonseka's rank. Of course, it can be a challenge in any military justice system to find officers senior to an accused who is himself a senior officer. The rule of necessity may have to come into play, but before an officer junior to the accused is permitted to serve on the court-martial board every effort should be made to see if, for example, there are more senior retired officers who might be recalled to active duty in order to perform "jury duty." Inability to seat a military jury whose members were not senior to the accused strikes me as a compelling reason to try the charges in a civil court, assuming they lend themselves to being framed within the terms of the civilian criminal law.

Questions of jury composition aside, it would be concerning if any of the charges were civil in nature and hence within the ambit of the civil courts. Notwithstanding Army Act Sections 35 and 47(1), contemporary international standards strongly disfavor the use of military courts to try civil offenses. To be sure, national practice does not invariably meet those standards. Even in the United States courts-martial possess subject matter jurisdiction over civil as well as military offenses by serving

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[8] E/CN.4/2006/58 (2006).

[9] *E.g., Findlay v. United Kingdom*, [1997] ECHR 8, 24 Eur. Hum. Rgts. Rep. 221.

[10] One of the most influential of the national court decisions was the ruling of the Supreme Court of Canada in *R. v Généreux*, [1992] 1 SCR 259, 88 DLR 4th 100, 70 C.C.C.3d 1.

[11] Australia has had particular difficulty finding the proper approach given its constitutional provisions regarding the judicial power. *See Lane v. Morrison*, [2009] HCA 29.

personnel, although the power to try civilian offenses is used less and less frequently. Our Supreme Court unwisely upheld the broad power of courts-martial to try civil offenses in *Solorio v. United States*,[12] abandoning its prior (and in my view correct)[13] "service-connection" test from *O'Callahan v. Parker*[14] and *Relford v. Commandant, U.S. Disciplinary Barracks*.[15] This puts the United States at odds with current human rights best practices. It is a position I cannot recommend to other countries – at least those that have a functioning civil court system.

Modern military justice systems increasingly confer on the judge advocate or military judge the power to rule authoritatively on issues of law, rather than merely advising the members of the court-martial panel.[16] The Army Act Section 54 seems to give the judge advocate a merely advisory role.

However Gen. Fonseka's cases ultimately turn out, Sri Lanka's military justice system deserves a thorough review perhaps by the courts[17] and certainly by Parliament. Only in this fashion can the highest goal – public confidence in the administration of justice – be served.

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[12] 483 U.S. 435 (1987).

[13] Full disclosure: I represented the American Civil Liberties Union as an *amicus curiae* before the Supreme Court of the United States in *Solorio*.

[14] 395 U.S. 258 (1969).

[15] 401 U.S. 355 (1971).

[16] *E.g.*, Rule for Courts-Martial 801(e)(1)(A), *Manual for Courts-Martial, United States* II-75 (2008 ed.) ("Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final").

[17] As I read Marsoof J's concurring opinion – particularly his discussion of *Gunaseela v. Udugama*, 69 NLR 193 (Sri Lanka 1966), on pp. 12-13 – he is willing to explore the consistency of the Army Act with the current 1978 Constitution. *See also* Nigel Hatch, *Has the SC reintroduced sovereignty of British monarch in Courts-Martial judgment in Gen. Sarath Fonseka's case?*, The Island, Feb. 17, 2011 (noting issue of post-enactment judicial review of pre-1972 legislation but declining to explore implications of concurring opinion's approach). Given the dramatic changes in international standards for the administration of military justice since 1966, it would certainly be regrettable if Sri Lankan constitutional law on the important subject of military justice were deemed frozen for all time by *Gunaseela*.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of reference under *Article* 125 of the Constitution of the Republic.

Gardihewa Sarath C. Fonseka
No. 6, 37th Lane, Queens Road,
Colombo 03

SC REF No: 1/2010
CA (Writ) Application No. 676/2010

PETITIONER

Vs.

1. **Mr. Dhammika Kithulegoda**
   Secretary General of Parliament of the Democratic Socialist Republic of Sri Lanka.

2. **Mr. Dhammika Dassanayake**
   Deputy Secretary General of Parliament of the Democratic Socialist Republic of Sri Lanka.

3. **Mr. Dayananda Dissanayake**
   Commissioner of Elections, Elections Secretariat, Rajagiriya.

4. **Mr. J. Sylvester**
   The Returning Officer – Colombo District, District Secretariat, Colombo.

5. **Major General V.R. de Silva**
   The Commissioner General of Prisons, Prison Headquarters, Colombo 8.

6. **Lt. Gen. Jagath Jayasuriya**
   Commander of the Sri Lanka Army, Army Headquarters, Colombo 2

7. **Lakshman Nipunarachchi**
   No.7, Rajaye Niwasa, Bokundara, Piliyandala

8. **Hon. The Attorney General**
   Attorney General's Department, Colombo 12.

RESPONDENTS

Before: J.A.N. De Silva, CJ
Dr. Shirani A. Bandaranayake, J
R.A.N. Gamini Amaratunga, J
Saleem Marsoof, J
K. Sripavan, J

Counsel: Mr. Romesh De Silva PC, Mr. Saliya Peries, for the Petitioner.
Mr. Shibly Aziz PC with Mr. C. Warnasuriya for the 7th Respondent.

Attorney General Mr. Mohan Pieries PC with Deputy Solicitor Generals Mr. S. Rajaratnam and Mrs. S.W.F. Jameel, and Senior State Counsel Mr. A.N.R. Pulle for the Respondents.

Entertained Submissions in Open Courts on: 9-12-2010 and 13-12-2010

Written Submissions tendered on: 23-12-2010

Decided on: 10-01-2011

J.A.N. De Silva, CJ

The Court of Appeal has referred the following question to the Supreme Court:

> "Whether the words 'any court' referred to in Article 89(d) of the Constitution refer to the Supreme Court, Court of Appeal and the other Courts of First Instance, to the exclusion of tribunals and Institutions or whether the words 'any court' include a Court Martial."

The Court of Appeal referred to Articles 24(5), 105 and 13(4), of the Constitution, and to Section 2 of the Judicature Act No 2 of 1978, as amended.

The argument for the Petitioner is that:

1. 'any court' referred to in Article 89(d) does not include Courts Martial, as per Article 105 of the Constitution;
2. Judicial power of the People is exercised through courts, tribunals and institutions created and established, or recognised, by the Constitution *vide* Article 4 (c) of the Constitution and as such, not through Courts Martial that are convened by, consisting of, and confirmed by, the Executive;
3. Article 24 of the Constitution which deals with the language of the Courts, has in an inclusive application, included tribunals and other institutions within its limited purview, and, as such tribunals and other institutions are not "courts" with reference to the rest of the Constitution;
4. Courts Martial are *ad hoc* appointments and lack the permanency and other features of regular Courts;
5. Courts Martial are not bound by the Evidence Ordinance nor the Code of Criminal Procedure,

and members of a Court Martial are not members of the Judiciary but are part of the Executive;

6 Courts Martial are limited to military matters;

7 Courts Martial do not observe principles of fair trial;

8 Article 13(4) does not confer to a Court Martial the 'dignity of a competent Court'. Courts Martial survive solely due to Article 16(1) which permitted their continuity under the new Constitution.

9 A Court Martial does not comprise judicial officers as in the interpretation clause of the Constitution with reference to Article 170; and

10 Equating a military tribunal to a High Court would harm the Courts and the judicial power of the people;

The Attorney General responds as follows:

1. The disqualification in Article 89(d) should be viewed from the context of its inclusion and not in a vacuum;

2. The vacancy of the Parliamentary seat occurs by operation of law in the event of the occurrence of a disqualification set out in Article 89(d);

3. On a moral basis, a person serving a term of imprisonment is disqualified from either being elected or continuing as a member of Parliament;

4. The convictions and sentence of Courts Martial are akin to those imposed by civil Courts, having regard to fundamental rules of procedure at the hearing;

5. A sentence of death or imprisonment can be imposed only by a competent court and the Court Martial being empowered to impose such sentences in terms of Section 133 of the Army Act is therefore a competent Court in terms of Article 13(4) of the Constitution;

6. Article 16 of the Constitution has kept the Court Martial's power of imposing death sentences and sentences of imprisonment alive;

7. A Court Martial administers justice and is also a Court in terms of Article 16 and as such comes under Article 4(c) of the Constitution;

8. Section 2(1) of the Evidence Ordinance presumes a Court Martial to be a Court and the rules of evidence applicable in a civil Court also apply to Courts Martial (*vide* Section 81 of the Army Act);

9. The confirming authority's role of giving "validity" to the conviction and sentence passed by the Court Martial, is a protective measure for the benefit of the accused, and cannot be seen as a factor of bias or partiality;

10. The words "any Court" in Article 89(d) must be considered from the point of view of the intention of the Legislature; and

11. If the contention of the Petitioner be valid then it would lead to an absurd situation where persons convicted of criminal offences and sentenced to imprisonment by a Court Martial may continue to sit and vote in Parliament, but not so a civilian similarly convicted and sentenced by a civil Court.

Having regard to the parameters of the question referred and the plurality of arguments presented it is best that the question and all the arguments be considered as a whole and not piecemeal. The argument of the Petitioner in its broadest sense would be that the disqualification process that would be set in motion by a relevant conviction and sentence handed down by a competent court as contemplated in Article 89(d) of the Constitution would not be so set in motion by a conviction and sentence by a Court Martial, the same not being a court in terms of the Constitution. So also that the Court Martial is convened by, and comprises, the Executive.

The Petitioner relies on Articles 105, 4(c), 24 and 170 of the Constitution and on the provisions of the Evidence Ordinance which have excluded its application to Courts Martial, and *ad hoc* nature and the differences in procedure between regular courts and Courts Martial including an inherent denial of a fair trial in Courts Martial.

The Attorney General's response is that Article 89(d) should not be taken out of context and in isolation and that it seeks to prevent persons convicted and serving sentences from occupying seats in Parliament. He also forwards an observation of an anomalous situation where a person sentenced to death by a Court Martial would continue to occupy his seat in Parliament whereas a person sentenced to death by a court of civil jurisdiction would be disqualified by reason of the conviction and sentence. The Attorney General relies on Article 13(4) to substantiate his argument in that in terms of Article 13(4) only a competent Court can impose a sentence of death or imprisonment and the Court Martial being empowered to impose such sentences it is a competent court in terms of that Article.

The Attorney General has countered the argument of the Petitioner that the Court Martial has been kept alive by Article 16 in contravention of Article 13(4) with the statement that Article 16 and 105(2) have kept all laws existing at the time of the Constitution alive and as such the Court Martial under the Army Act continues validly and comfortably with the Constitution.

The Attorney General also points out that in terms of Article 16 the provisions of Article 4(c) of the Constitution are satisfied in that a Court Martial has been recognised as a court administering justice.

He further submits that the role of the Chief Executive in certifying the verdict and sentence is merely to give effect to the findings of the Court Martial and does not interfere with the judicial character of the hearing.

Before examining the relevant Constitutional provisions I would prefer to examine the relevant decisions of the Privy Council and the Supreme Court that touch upon the subject matter as tendered by the respective parties to this action.

Now, I will consider the relevant decisions that have a bearing on the issue, as cited by parties,

namely, *Bribery Commissioner v Ranasinghe, Privy Council*[1], *Walker Sons & Co. Ltd. and Others v Fry*[2], *Liyanage and Others v The Queen*[3], *Panagoda v Budinis Singho,*[4] *and Gunaseela v Udugama (Major General and Commander of the Army).*[5]

In *Bribery Commissioner v Ranasinghe (see fn 3)*, Privy Council, the Respondent was convicted and sentenced by the Bribery Tribunal which was created by the Bribery Amendment Act 1958. The members of each Tribunal were drawn from a panel of members appointed by the Governor General on the advice of the Minister of Justice. In appeal the Supreme Court declared the conviction void in that the appointment of members to the Panel from which the Tribunal was drawn was unconstitutional as per the Ceylon (Constitution) Order in Council 1946 and 1947 whose general conception was similar to the British parliamentary democracy.

For clarity, I will reproduce below, Sections 53(1) and 55(1), of the Ceylon (Constitution) Order in Council 1946:

> 53(1) There shall be a Judicial Service Commission which shall consist of the Chief Justice, who shall be the Chairman, a Judge of the Supreme Court, and one other person who shall be, or shall have been, a Judge of the Supreme Court. The members of the Commission, other than the Chairman, shall be appointed by the Governor General.
>
> 55(1) The appointment, transfer and dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission.
>
> 3(1) of the Order in Council sets out the interpretation of "judicial office" as any paid judicial office and Section 55(5) defines "judicial officer" as the holder of any judicial office but does not include the Supreme Court or Commissioners of Assize.

The issues before the Privy Council were whether the statutory provisions for the appointment of the members of the Panel of the Bribery Tribunal otherwise than by the Judicial Service Commission was in conflict with Section 55 of the Constitution. The Privy Council held that it was invalid for the reasons that the Tribunal performed judicial functions and as such Section 41 which provided for the appointment of the panel was in conflict with Section 55 of the Ceylon (Constitution) Order in Council. It held further that the relevant provisions amounted to an amendment to the Constitution and there was no certificate from the Speaker that the Act had passed with a two third majority which was necessary in terms of Section 29(4) of the Order in Council. The Privy Council accordingly declared that the persons composing the Bribery Tribunal which tried the respondent were not lawfully appointed and the appeal (by the Bribery Commissioner) was dismissed. This judgment was delivered in 1964.

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[1] (1964) 66 NLR 73
[2] (1965) 68 NLR 73
[3] (1965) 68 NLR 265
[4] (1966) July 22nd 68 NLR 490
[5] (1966) July 22nd 69 NLR 193

The Privy Council also observed that the Constitution did not deal specifically with the judicial system and as such "...the power and jurisdiction of the Courts are therefore not expressly protected by the Constitution.[6]

Dr Lakshman Marasinghe,[7] in his work *The Evolution of Constitutional Governance in Sri Lanka,* summarizes *Bribery Commissioner v Ranasinghe* in the following terms:

> "The basic issue before the Privy Council was whether the Bribery Amendment Act- which was passed by a simple majority- was constitutional and was therefore valid, in the light of Articles 53 and 55 of the Constitution[8]. .....To that question the Privy Council gave a negative answer. They found the provisions of the Act to be in conflict with Articles 53 and 55 of the Constitution."[9]

Then came the decision in *Walker Sons & Co and Others v Fry*[10][*sic*]. This was a consolidated appeal heard by a Full Bench headed by Sansoni C.J. Six cases were heard together by a reference under Section 51 of the Courts Ordinance. The question was whether the tribunals should have been appointed by the Judicial Service Commission since they had purported to exercise judicial power. In two the Tribunals concerned were Labour Tribunals, in one the Tribunal was an arbitrator to whom a dispute was referred by the Minister of Labour under Section 4 (1) of the Act, in two more the Tribunal was an Industrial Court of one person to whom the dispute was referred by the Minister under Section 4 (2) of the Act, and the last Tribunal was an arbitrator to whom the dispute was referred by the Commissioner of Labour under Section 3 (1) of the Act.

Sansoni C.J. observed that the Industrial Disputes Act No 43 of 1950, Part III provided for collective agreements, and settlements by conciliation and arbitration and Part IV for the constitution of [*sic*] Industrial Courts, from a panel appointed by the Governor General, to whom such disputes might be referred for settlement. It also provided for the reference of disputes for settlement by arbitration.[11]

Tracing its history, his Lordship noted that Act No 62 of 1957 amended the original Act and introduced Labour Tribunals in Part IV A, and particularly Section 31B, which conferred "power which it has been argued, amounts to judicial power. By the same Act, Labour Tribunals were included among those to whom disputes could be referred for arbitration but that amendment merely added one more kind of arbitrator to those already in existence."[12]

In a majority decision Court held

> "that a Labour Tribunal exercises judicial power when it acts under Part IV A,

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[6] At p.74

[7] Emeritus Professor of Law, University of Windsor, Canada

[8] At p.120

[9] At p.121

[10] (1965) 68 NLR 73

[11] p.76

[12] *Walker Sons & Co. Ltd v Fry*, (1965) 68 NLR 73 at 76

particularly Section 31B, of the Industrial Disputes Act (as amended [*sic*] by Act No 62 of 1957). Therefore, as it is also a holder of a public office, it is a 'judicial officer' within the meaning of Section 55 of the Ceylon (Constitution) Order in Council, 1946, and has no jurisdiction to exercise judicial power unless it has been appointed by the Judicial Service Commission."

With reference to disputes referred by the Commissioner or the Minister for settlement by conciliation or by arbitration or by an Industrial Court in Part II, the findings of Sansoni C.J. were that the tribunals need not be appointed by the Judicial Service Commission since the offices were arbitral in nature, but that they had by an excess of jurisdiction, exercised judicial power. These were referred to a bench of two judges for determination regarding the issuance of writs.

It was also held that,

> "The jurisdiction of Labour Tribunals set out in Part IV A of the Industrial Disputes Act is not the only power given to them. The Act, in Sections 3(1)*d) and 4(1), contemplates a Labour Tribunal acting as an arbitrator. A Labour Tribunal need not be appointed by the Judicial Service Commission if it performs only arbitral functions."[13]

Four of the six cases in *Fry* were referred to a Bench of two judges for determination regarding the issue of writs. In the hearing into these four cases T.S. Fernando J., and Sri Skanda Rajah J. [*sic*], being unable to agree on the nature of the order to be made, referred the issue to the Chief Justice who in turn directed that the applications be heard before a Bench of five judges, whose Order it is that is under consideration now. These cases were reported under *Moosajees Ltd. v. Fernando and others*[14] which will be considered next. It must be remembered here that *Moosajees* came after the Privy Council decision in *Liyanage and others v. The Queen.*[15]

As mentioned earlier, this case emerged due to the reference of four matters that came up in *Fry*[16] before a Bench of two judges to determine the matter of the issue of writs. Between the cases of *Fry* (30th November 1965) and *Moosajees Ltd v. Fernando* (16th May 1966) came the judgment above discussed- *Liyanage and Others v. The Queen* (2nd December 1965) which was decided by the Privy Council. *Liyanage* will be considered after this- but the pivot on which *Moosajees* was decided by the Bench of five judges was the decision in *Liyanage.*

In *Moosajee* the Court held, following the decision of the Privy Council in *Liyanage and others v. The Queen,*[17] that if the respective tribunals had exercised judicial power, as found by the previous Collective Bench, and also found by itself, then the appointments must be made by the Judicial Service Commission, and as such the awards were quashed. The main judgment is that of T.S.

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[13] At p. 73
[14] (1966) 68 NLR 414
[15] (1962) 64 NLR 313
[16] above
[17] (1965) 68 NLR 265

Fernando J.[18] Now I will go into *Liyanage v. The Queen* on which *Moosajees* was based.

The Trial at Bar of the case of *Queen v. Liyanage* and others has seen a chequered career- in the first instance, in *Queen v. Liyanage*[19] the Trial-at-Bar was convened by the Minister of Justice from Judges of the Supreme Court. The issue taken up as a preliminary objection by the accused was the "unconstitutionality of certain provisions of the Criminal Law (Special Provisions) Act[20]" designed "to obtain from this Court a declaration that Sections 8 and 9 of that Act which relate to the power of the Minister of Justice to issue respectively a direction that persons accused of certain offences be tried before the Supreme Court at Bar by three Judges without a jury and to nominate those three Judges are *ultra vires* the powers of the Legislature as granted by the Ceylon (Constitution) Order in Council, 1946."[21]

Section 8 of the Act provided that "any direction issued by the Minister of Justice under Section 440A of the Criminal procedure Code shall be final and conclusive, and shall not be called in question in any Court, whether by way of Writ or otherwise" This provision was held to be *intra vires* the Legislature.[22]

Section 9 provided that,

> "Where the Minister of Justice issues a direction under Section 440A of the Criminal Procedure Code that the trial of any offence shall be held before the Supreme Court at Bar by three Judges without a jury, the three Judges shall be nominated by the Minister of Justice....."

The Supreme Court at Bar held, "that Section 9 of the Criminal Law (Special Provisions) Act is *ultra vires* the Constitution because (a) the power of nomination conferred on the Minister is an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of Section 52 of the Ceylon (Constitution) Order in Council, 1946 or is in derogation thereof, and (b) the power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the Judicature."

The decision in *The Queen v. Liyanage,* above, was not challenged by an appeal to the Privy Council. Instead the Criminal Law Act No 31 of 1962 was passed substituting the Chief Justice for Minister of Justice as being empowered to nominate the Bench of the Supreme Court at Bar. Most of the other provisions of the original Act were preserved which included a restricted admissibility of confessions made to police officers, statements made in the course of investigation and such other provisions and in effect struck down many protections that the general law offered to the accused. The appellants were convicted and sentenced by the Supreme Court at Bar.

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[18] *Moosajees*, at p. 420
[19] (1962) 64 NLR 313
[20] Act No 1 of 1962
[21] At p. 343
[22] At p. 347

The appeal from this to the Privy Council gave rise to an observation by Lord Pearce, who also decided *Bribery Commissioner v. Ranasinghe,* that after independence the Courts continued without change under the Charter of Justice, 1833 even up to the time of *Liyanage v. The Queen.* As such, no specific reference was made to the judicial power of the Courts when the change of sovereignty occurred. But Lord Pearce referred to his own judgment in *Bribery Commissioner* and reiterated that the framers of the Constitution had given thought to and made provision for the independence of the judiciary with special reference to the establishment of the Judicial Service Commission which managed the appointment of Judges and which was also composed of members of the Judiciary or past members. These observations culminated in the following formulation by Lord Pearce:

> "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to, or be shared by, the executive or the legislature."[23]

The impugned Acts were held to be *ultra vires* and invalid in so far as they constituted a grave and deliberate interference with the judicial power of the judicature.

Bearing all these matters in mind, let us now see what happened in *Panagoda v. Budinis Singho*[24] which added a new element to the issue: The question in this case was whether the offices of Commissioner of Workmen's Compensation, Deputy and Assistant, could lawfully be appointed only by the Judicial Service Commission. H.N.G. Fernando, S.P.J., observed that the Workmen's Compensation Ordinance was enacted in 1934, prior to the Ceylon (Constitution) Order in Council, 1946. Commenting on *Moosajee*, his Lordship noted that the decision did not deal with whether the Industrial Court or an arbitrator comprised a "judicial office" as contemplated in Section 55 of the Constitution and that Section 55 concerned itself only with judicial offices. So also, his Lordship observed that *Moosajee* had not considered the position of the effect of Section 55 of the Order in Council on legislation enacted prior to Section 55.

> "On the other hand the reference to the Privy Council judgment, as also in an earlier judgment (*Bribery Commissioner v. Ranasinghe*) to the danger that an Act of Parliament would result in an erosion of judicial power if it was lawful for such Acts to confer judicial power on any authority not forming part of the Judicature duly constituted under the Constitution, is an indication that their Lordships were concerned primarily with the validity of legislation enacted subsequently to the

[23] *Liyanage and Others v. The Queen ,(1965) 68 NLR 265 at 282*
[24] ((1966)68 NLR 490

Constitution itself."[25]

The vein of the judgment is that if the Constitution intended to strike down previous legislation it would have done so in express terms.[26] His Lordship held that the impugned offices need not be appointed by the Judicial Service Commission even though they may exercise judicial functions.

The reasoning behind this decision is reflected in the case of *Gunaseela v. Udugama (Major General and Commanded of the Army),* cited by the Attorney General, where the main argument of the Petitioner was, quote:

> "..there was an exercise of judicial power by the officers constituting the Court Martial, who were persons (*sic*) not appointed thereto by the Judicial Service Commission, and that such exercise conflicts with the principle of Separation of Powers, which principle has been declared in the recent judgment of the Privy Council in *Liyanage v. the Queen*[27] to be embodied in our Constitution.[28]

> "the Crown has not contended, on the one hand, that the Court Martial has not exercised judicial power; nor on the other hand has it been seriously argued on behalf of the Petitioners that membership of a Court Martial is "paid judicial office" within the meaning of Section 55 of the Constitution. A Court Martial is not a paid office; it is a body consisting of Service Officers convened *ad hoc* for the trial of particular cases, and the duty to serve as a member of such a Court is only one of the several kinds of duties which a Service Officer can under the relevant Statutes be called upon to perform...A Court Martial bears no resemblance to a Labour Tribunal established under the Industrial Disputes Act."[29]

H.N.G. Fernando, S.P.J., goes on to observe that the Army Act was enacted after the then Constitution came into operation. The Constitution "has had not the effect of invalidating any pre existing Statute in virtue of which judicial power was exercisable by a person not holding a paid judicial office, These reasons apply equally to a case where an Act of Parliament merely re-enacts pre-existing law." Here Fernando, S.P.J., has taken his reasoning in *Panagoda* a step further and applied it to re-enaction of pre-existing legislation.

> "The Army Act, 1881, of the United Kingdom was, like many other British enactments, part of the law of Ceylon long before the Independence of Ceylon."[30] "For a long period therefore the law of Ceylon provided for the trial by Courts Martial of certain offences committed by 'persons subject to military law'.....These Courts were convened under the Army Act, 1881, which, in Section 55 provided for the confirmation by a Colonial Governor of sentences imposed by such Courts, and in Section 122 provided for the issue of Warrants by a Colonial

[25] At p. 493-494
[26] See p. 495
[27] (1965) 68 NLR 265
[28] At p. 194 above
[29] At p. 194
[30] At p. 194

Governor for convening Courts Martial. Indeed the law of Ceylon continued to be the same even after Independence, until the Army Act of the United Kingdom ceased to be in force with the enactment of our Army Act (Cap 357). The constitution, powers and functions of Courts Martial under the present law are not substantially different from those of the Courts Martial constituted in Ceylon under British rule."[31]

Fernando S.P.J., was of the view that the Courts Martial of Ceylon could exist independently of the judicature as in American and Australian systems. But the issue in the present case is whether the Courts Martial can exist within the present Constitution. In the cases studied, the issues revolved around the Ceylon (Constitution) Order in Council, 1946 and the establishment of the Judicial Service Commission therein. But, as pointed out in *Panagoda* and developed in *Udugama* one must also bear in mind the effect of succeeding Constitutions on existing legislation. In summary, *Bribery Commissioner v. Ranasinghe, Fry,* and *Moosajee* all revolved around the Judicial Service Commission as established by the Order in Council, 1946 and the boundaries of judicial power in terms of office. On the other hand *Budenis* and *Udugama* went a step further and introduced a new element: the effect of succeeding Constitutions on existing legislation or the consequences of re enactment of existing legislation after a new Constitution. When considering the history of political affairs of this nation one must be mindful that it has seen successive Constitutions as well as numerous Constitutional amendments.

In the Republican Constitution of 1972 Article 12 provided for the continuance of existing written and unwritten law unless specifically excluded by the Constitution. The only laws that were declared to cease were the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, the Royal Titles Act, and certain provisions of the Royal Executive Powers and Seals Act.[32]

In the present Constitution Articles 16, 105(2) and 168 (1) kept all existing laws in force as well as all courts tribunals and institution created for the administration of justice except the Supreme Court. It may be relevant to quote the observations made by Justice Mark Fernando in the reference of *Ratnasiri Perera v. Dissanayake, Assistant Commissioner of Co-operative Development and Others*[33] as follows:

> "After the Privy Council decision in *Liyanage v. The Queen*, he modified this view (see *Moosajees v. Fernando*) in relation to post-Constitution legislation – holding that there could be no erosion of judicial power. But he maintained this view in regard to pre-Constitution legislation, holding in *Panagoda v. Budinis Singho*, that where "the holder of some office established mainly for administrative purposes was entrusted also with judicial power necessary for effectively securing the purpose of the establishment of the office", such officer could validly exercise judicial power despite want of appointment by the J.S.C. Thus the office of Commissioner for Workmen's Compensation, established prior to the Constitution, was an administrative tribunal, a small part of its functions being judicial, and was not a judicial office. Dealing with a similar question in regard to powers exercised by officers

[31] At p.195
[32] The Constitution of Sri Lanka, 1972, Article 12
[33] (1992) 1 SLR 301

administering the income tax laws in *Xavier v. Wijeyekoon*,[34] he held that the Commissioner of Inland Revenue, in imposing a penalty for making an incorrect return, does not exercise judicial power; such a penalty is a civil, rather than a criminal sanction, and is intended to protect the revenue against loss and expense arising from the taxpayer's fraud. In approving that decision, the Privy Council in *Ranaweera v. Wickramasinghe*[35], held that although such public officers have to act judicially, they are not holders of judicial office; "where the resolution of disputes by some Executive Officer can properly be regarded as being part of the execution of some wider administrative function entrusted to him, then he should be regarded as still acting in an administrative capacity, and not as performing some different and judicial function". In this background, it may well be that Article 170 does not permit an erosion of existing jurisdictions; nor the mala fide entrustment of judicial power to pubic officers, in order to achieve indirectly a result which cannot be achieved directly; and only allows the conferment of some judicial power or function which can properly be regarded as being ancillary to some wider administrative function entrusted to an executive officer."

Now, I will examine the legal provisions that touch upon this issue:

At the outset I observe that Article 16, 105(2) and 168 (1) have preserved the validity of all existing laws at the time of the enactment of the Constitution and the jurisdiction of the Supreme Court in terms of Article 125 is limited to the interpretation of the Constitution. The Supreme Court has no power to strike down existing legislation. Accordingly, Courts Martial in terms of the Army Act are valid and operative and at no stage of these hearings did the Petitioner attempt to challenge the validity of Courts Martial in concept. Indeed it was the contention of the Counsel for the Petitioners that the concept of Court Martial is valid and that they would not be challenging its conceptual reality. So, it is clear that on both sides there is consensus that the concept of the Court Martial is valid and operative in the present context. I am also in agreement with this resolution and hold that the concept of the Court Martial is valid under this Constitution.

As pointed out by the Attorney General, interpretation of a constitutional provision cannot be made in a vacuum- such interpretation should coincide and be comfortable with the rest of the Constitution. For this purpose it is necessary to examine the intention of the Legislature when it comes to interpretation.

The Petitioner argues that the Court Martial is not a 'court' within the meaning of the Constitution for the reason that it is convened by and comprises the Executive, requires certification by the convener for validity, does not follow set procedures as a civil court, is not manned by a judicial officer as per Article 170, is not subject to the Evidence Ordinance, does not come within the provisions of Article 105(1), 4 (c), lacks permanency of regular courts, is limited to military matters, consist of *ad hoc* appointments, does not adhere to the principles of fair trial, and is in conflict with Article 13(4) of the Constitution by virtue of Article 16.

Shortly stated, it is the contention of the Petitioner that the Court Martial lacks the features of the

[34] (1966) 69 NLR 197

[35] (1961) 72 NLR 553

court of civil judicature and is not covered by Article 105 of the Constitution as a court and contravenes Article 4(c).

Let us now consider whether these submissions withstand scrutiny on a broader wavelength i.e. the concept of Courts Martial and its bearing on the issue, its power to impose death sentences and sentences of imprisonment, and the object of the disqualification in Article 89(d) which is in question.

As I have held earlier, the concept of Court Martial is a valid and operative part of the law and the Supreme Court cannot strike down existing legislation. It is undisputed that the Court Martial is empowered to impose sentences of death and/or imprisonment. Then it follows that a sentence of death or imprisonment handed down by a Court Martial is valid until and unless overturned by a Court of competent jurisdiction.

Now, the Petitioner's contention is that he cannot be unseated by a conviction and sentence of a Court Martial: or, in positive terms, he is entitled to sit and vote in Parliament in spite of the fact that he is under a sentence of imprisonment by a Court Martial.

Then, as observed by the Attorney General, is it then, the contention of the Petitioner that any person under sentence of death or imprisonment by a Court Martial, which sentence is valid and operative, still entitled to hold his seat in Parliament and be part of the Legislature of this nation?

If that be the case, then the argument, if pursued to its logical conclusion, amounts to a statement that the Legislature may comprise of persons actively serving prison sentences or/and languishing in death row awaiting execution at the instance of the Executive of the State.

Let us now consider the submissions of the Attorney General and see whether this logical absurdity can be avoided. He submits that Article 16 and 105(2) keep the Army Act- and, as such, the Court Martial, is alive and operative. He further contends that in terms of Section 133 of the Army Act the Court Martial is empowered to impose sentences of death and/or imprisonment. He states that in terms of Article 13(4), only a competent court can impose any sentence of imprisonment or death. Accordingly, he submits that the Court Martial, being empowered to impose sentences of imprisonment and/or death, is a competent court in terms of Article 13(4), and as such, attracts the provisions of Article 89(d) of the Constitution.

To my mind, this argument appears to be sensible up to this point.

But one must now consider the Petitioner's argument that in terms of Article 105, a Court Martial is not recognised as a court and what Article 89(d) demands is a conviction by a court and nothing less. So also, in Article 4(c) it is provided that the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions, and so on, but Courts Martial are not referred to. Hence, the Petitioner contends that the Court Martial is not a 'court' in terms of the Constitution.

When taken in isolation, or as the Attorney General puts it, in a vacuum, this argument has merit. I will now proceed to examine whether the argument fits in with the rest of the Constitution, because,

as I have earlier expressed, a Constitutional interpretation must withstand the Constitution as a whole and not merely parts of it.

Let us consider Article 4(c) and its implications on the matter in issue here and its relationship to Article 105(1) and (2) which appear to be the main Constitutional combatants in this most intriguing issue and their relationship to the relevant provisions of the Army Act as canvassed by the parties. A reproduction of Article 4(c) would be as follows:

4(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law.

105(1) Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be-

(a) The Supreme Court of the Republic of Sri Lanka,

(b) The Court of Appeal of the Republic of Sri Lanka,

(c) The High Court of the Republic of Sri Lanka and other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.

105(2) All courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication of settlement of industrial and other disputes, other than the Supreme Court, shall be deemed to be courts, tribunals and institutions created and established by Parliament. Parliament may replace or abolish, or, amend the powers, duties, jurisdiction and procedure of such courts, tribunals and institutions.

Let us now set down the relevant provision of the Army Act:

46(1) A general Court Martial may be convened by the President or such officer not below that of a field officer as may be authorized by the President.

(3) The president of a general Court Martial shall be appointed by the authority convening such Court Martial, and shall not be that authority or an officer of a rank below that of a field officer...*proviso*

63(1) .....the conviction of and sentence passed on, an accused by a Court Martial shall not be valid until confirmed by the authority having power under s 64 to confirm such conviction and sentence.

64 The authority who shall have the power to confirm the conviction of an accused, and the sentence passed on him, by a Court Martial shall,

(a) if that Court Martial is a general Court Martial, be the President or such officer of a rank not below that of field officer as may be authorized by the President, or

(b)

65 (powers of confirming authority)

Now, it seems that there is no contest between parties that a Court Martial, in trying a case, acts judicially. The Petitioner complains this is an instance where judicial power is exercised by the Executive and as such causes a disruption in the separation of powers and offends Article 4(c) of the Constitution.

It is relevant at this point to set out Article 16 of the Constitution which reads:

16(1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

(2) The subjection of any person on the order of a competent court to any form of punishment recognised by any existing law shall not be a contravention of the provisions of this Chapter.

(The said Chapter III refers to Fundamental Rights)

Let us now join Article 105(2) to Article 16:

105(2) All courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication of settlement of industrial and other disputes, other than the Supreme Court, shall be deemed to be courts, tribunals and institutions created and established by Parliament. Parliament may replace or abolish, or, amend the powers, duties, jurisdiction and procedure of such courts, tribunals and institutions.

The position would be that all courts institutions and tribunals except the Supreme Court existing at the time of the promulgation of this Constitution and the existing related laws continue so under this Constitution. So, the Army Act has been recognised under this Constitution. It follows then that the concept of the Court Martial which is part and parcel of the Army Act, and its competency to convict and impose punishment as according to the Army Act, is also recognised by this Constitution. Further support for this conclusion is added by Article 142:

142. The Court of Appeal may direct-

(i) that a prisoner detained in any prison be brought before a Court Martial or...for trial...;

Here again one finds support for a contention that the Court Martial is recognised by the Constitution- in direct and unequivocal terms.

So, considering Article 4(c) in relation with Articles 105(2), 16, and 142, one is driven to the conclusion that the Court Martial is an entity exercising judicial power and recognised by the Constitution as such in terms of the second limb to Article 4(c).

Now, as I have pointed out earlier, there is no contest that the concept of the Court Martial is a reality and that it has the power to hear and try cases, act judicially, and impose valid sentences including imprisonment and/or death. The only quarrel here is whether the Court Martial is "any Court" in terms of Article 89 of the Constitution. The validity of the concept of Court Martial in itself and its power to determine cases and impose sentences of imprisonment and/or death not being contested, and, the only contest being its status in the hierarchy of institutions dispensing justice, Article 13(4) of the Constitution brings it within the description of not only a "court" but a "competent court", since, in terms of Article 13(4), only a "competent Court" can impose sentences of death or imprisonment.

Accordingly, having regard to the manifest intention of Article 91(a) read with 89(d) to safeguard the integrity of Parliament, the recognition of Courts Martial in Article 4(c) of the Constitution as well as in the direct reference to Courts Martial in Article 142, the recognition of legislation inclusive of the Army Act and Courts Martial therein existing at the time of coming into force of the Constitution in terms of Article 16(2) and 105(2), the power of Courts Martial to impose sentences of death and imprisonment in terms of Section 133 of the Army Act read with Article 13(4) of the Constitution wherein it provides that such sentences may be imposed only by competent courts, I hold that the Court Martial in terms of the Army Act is a "court" in terms of Article 89(d) of the Constitution.

Chief Justice

Dr. Bandaranayake J
I agree

Judge of the Supreme Court

Amaratunga J
I agree

Judge of the Supreme Court

Sripavan J
I agree

Judge of the Supreme Court

SALEEM MARSOOF, J.

I have had the benefit of perusing the draft judgement prepared by My Lord the Chief Justice, and agree with the conclusion reached by him. I set out my reasons in a separate judgement.

The Court of Appeal has, in terms of Article 125 of the Constitution, referred for the determination of the Supreme Court, the question whether the words "any court" in Article 89(d) of the Constitution refer only to the Supreme Court, Court of Appeal, the High Court of the Republic of Sri Lanka and the other Courts of First Instance, to the exclusion of other tribunals or institutions administering justice, or alternatively, whether the words "any court" include a Court Martial constituted under the Army Act No. 17 of 1949 (Cap. 357 of LEC 1956).

The question has been posed in the factual context that the Petitioner, who was elected as a Member of Parliament at the General Election held on 8th and 20th April 2010 for the Colombo District, having contested the said election as a candidate of the Democratic National Alliance (DNA), was while he was so holding office as a Member of Parliament, tried by a Court Martial constituted under the Army Act on several charges, and was convicted and sentenced on 17th September 2010 to an aggregate of 30 months rigorous imprisonment on several counts. The said sentence having been confirmed by the President of Sri Lanka on 29th September 2010, action was initiated by the 1st Respondent Secretary-General of Parliament to declare that the seat held by the Respondent has been vacant, and that the 7th Respondent, Lakshman Nipunarachchi, who "secured the next highest number of preferences" as contemplated by Article 99(13)(b) of the Constitution, as amended by the Fourteenth Amendment to the Constitution, as being "elected to fill such vacancy". The said declaration was made and it was duly published in the Gazette dated 8th October 2010 (P19). The Petitioner has in his writ application dated 12th October 2010 filed in the Court of Appeal, in the course of which the reference under Article 125 has been made, sought mandates in the nature of *certiorari* to quash the several decisions made to declare that the Petitioner's seat as a Member of Parliament has fallen vacant, as well as to quash the declaration contained in the Gazette Notification P19 that the 7th Respondent was elected to Parliament to fill the ensuing vacancy. The Petitioner has also sought a mandate in the nature of *mandamus* directing the relevant respondents to take all necessary steps according to law to enable the Petitioner to sit and vote in Parliament and to exercise his powers, privileges and immunities as a Member of Parliament.

In this context, it is important to note that the Petitioner, who was sworn in as a Member of Parliament on 24th April 2010, commenced serving his sentence of rigorous imprisonment, which exceeded six months, with effect from 17th September 2010. The learned Attorney General has submitted that the Petitioner's seat became vacant by operation of law in terms of Article 66(d) read with Article 89(d) of the Constitution, and the vacancy has been filled as provided in Article 99(13)(b) of the Constitution. Although the Petitioner has on several grounds, which need not be adverted to in detail in this determination, challenged the position that his seat had thus become vacant, what is important for this determination is that the Petitioner has submitted in the Court of Appeal as well as in this Court that, a Court Martial constituted under the Army Act is not a "court" within the meaning of Article 89(d) of the Constitution, and that a conviction and sentence imposed by a Court Martial does not activate the disqualification set out in that article.

For the purposes of this determination, it is necessary to have a closer look at Articles 66(d) and 89(d) of the Constitution. Article 66(d) is fairly straight forward and provides that the "seat of a member (of Parliament) shall become vacant if he becomes subject to any disqualification specified in Article 89 or 91". Article 89(d) provides as follows:-

> "89. No person shall be qualified to be an elector at an election of the President, or of the Members of Parliament or to vote at any Referendum, if he is subject to any of the following disqualifications, namely -
>
> (d) If he is *serving* or has during the period of seven years immediately preceding *completed serving* of a sentence of imprisonment (by whatever name called) *for a term not less than six months* imposed after conviction by *any court* for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving, or has during the period of seven years immediately preceding completed the serving, of a sentence of imprisonment for a term not less than six months awarded in lieu of execution of such sentence....." (*emphasis added*)

It is important to note that there is no definition of "court" in Article 170 of the Constitution, and the wide definition found in Article 24(5) of the Constitution which defines a "court" to mean "any court or tribunal created and established for the administration of justice", admittedly covering within its ambit even a Court Martial, is expressly confined in its application only to Article 24 that deals with language of the courts and other tribunals.

Eminent Counsel appearing for the Petitioner and the 7th Respondent have argued with great force, both before the Court of Appeal as well as before this Court that, insofar as a Court Martial is not a "court" that has been created and established as contemplated by Article 4(c) read with Article 105 of the Constitution, a person who is serving a sentence of imprisonment exceeding 6 months imposed by a Court Martial, does not become disqualified from sitting and voting in Parliament by reason of Article 89(d) of the Constitution.

A point of divergence between the submissions of the two eminent Counsel was that, while learned President's Counsel for the 7th Respondent contended that a Court Martial is an emanation of the "executive power of the People" referred to in Article 4(b) of the Constitution and was not a court established to "protect, vindicate and enforce the rights of the People" as contemplated by Article 105 of the Constitution, learned President's Counsel for the Petitioner submitted that a Court Martial was a tribunal or institution, but not a court, exercising the "judicial power of the People" within the meaning of Article 4(c) of the Constitution. I shall revert to this divergence later on in this determination.

The learned Attorney General, however, submitted that a Court Martial is a court "created and established, or recognized, by the Constitution" within the meaning of Article 4(c) of the Constitution, and that it was therefore a "court" competent to impose punishment, including the death sentence. He stressed that a Court Martial having been in existence even during the pre-independence period, its continued existence was "recognized" by the Constitution as envisaged by Article 4(c), by both

Article 16(1) and Article 168(1) which ensured the continuance in force of all "existing written law" including the Army Act, under which the Court Martial in question was convened.

At this stage, it will be useful to recount that Sri Lanka, or "Ceylon" as it was then named, gained independence from the British on 4th February, 1948, a date which is still commemorated as our independence day, despite the fact that since then we have had two new constitutions, by the first of which Sri Lanka was proclaimed as a "Republic" in 1972. The Constitution that is now in force was promulgated on 7th September 1978, as the Constitution of the Democratic Socialist Republic of Sri Lanka, and has undergone eighteen amendments since then.

The Army Act was enacted in 1949, soon after independence, with the view to replacing the United Kingdom Army Act of 1881, which applied in Ceylon at the time she gained independence. Under British rule, courts martial had been constituted from time to time upon warrants issued by the colonial Governor under Section 122 of the Army Act of 1881 to try certain offences committed by "persons subject to military law". Section 55 of the said Act required that all sentences imposed by the Court Martial should be confirmed by the Governor.

Although the Army Act of 1881 was an enactment of the British Parliament which applied to Ceylon, and despite the early decision in *Grant v. Gould* [1792] 2 H. Black 100, which clarified that under the English common law the writ of prohibition lay against even a Court Martial as much as against a subordinate regular court, in 1915 a Full Bench of the Supreme Court of Sri Lanka took a different approach in the case reported as *Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334, in refusing to issue a writ of prohibition against the Field General Court Martial to try one Edmund Hewavitharatna on charges of treason and treason-felony. Learned President's Counsel appearing for the 7th Respondent, has strenuously contended that the said decision fortifies his position that a Court Martial was not a subordinate court but simply an arm of the executive, and that being a decision of a Full Bench of the Supreme Court, it is binding on this Court. However, it is clear from the judgments of Wood Renton [*sic*], C.J. (with whom Shaw, J. and De Sampayo, A.J. concurred) that the decision turned on a consideration of the structure and provisions of the Courts Ordinance No. 1 of 1889 (Cap. 6 of LEC 1956), especially Section 46 of that Ordinance. There was no express reference to a Court Martial in that Section, and De Sampayo, A.J. observed at page 339 of his judgment that "it is inconceivable that, if such extraordinary Courts as Courts Martial were intended to be affected, they would not have been mentioned specifically by name." The decision is only of persuasive authority, being a decision of the Supreme Court made at a time that it was not the apex court of the country, and it cannot be regarded as binding on this Court.

It is necessary to stress that what was sought to be achieved by the enactment of the Army Act No. 17 of 1949 (Cap. 357 of LEC 1956), was to continue in Ceylon after independence, substantially the traditional British system relating to the discipline, trial and punishment of members of the armed forces embodied in the United Kingdom Army Act of 1881. An important question that arises in this context is whether Articles 16(1) and 168(1) of the Constitution, relied upon by the learned Attorney General, have preserved the provisions of the Army Act enacted in 1949, and subsequently amended from time to time. It is remarkable that Article 168(1) of the Constitution is couched in language similar to, and reminiscent of, Section 12(1) of the first Republican Constitution of Sri Lanka proclaimed in 1972, which read thus:-

> "Unless the National State Assembly otherwise provides, all laws, written and unwritten, *in force* immediately before the commencement of the Constitution, except such as are specified in Schedule 'A' shall, *mutatis mutandis,* and except as otherwise expressly provided in the Constitution, continue in force. The laws so continuing in force are referred to in the Constitution as 'existing law'." (*emphasis added*)

In the same lines, Article 168(1) of the present Constitution enacted in 1978, provides that-

> "Unless Parliament otherwise provides, all laws, written laws and unwritten laws, *in force* immediately before the commencement of the Constitution, shall, *mutatis mutandis*, and except as otherwise expressly provided in the Constitution, continue in force." (*emphasis added*)

A singular feature of both these provisions was that they sought to keep alive only the laws that were *in force* at the time these constitutions were enacted, in 1972 and 1978 respectively, and logically, it is necessary to go back to 1972 to examine whether at the time of the proclamation of the first Republican Constitution, the provisions of the Army Act of 1949 relating to Court Martial were *in force*. In this context, a question of considerable difficulty that could arise is whether the provisions of any legislation enacted by Parliament purportedly in terms of the Ceylon (Constitution) Order in Council of 1946 (Cap. 377 of LEC 1956), may be considered to be in force notwithstanding any inconsistency with the said Order in Council, until and unless the provision is set aside or quashed by a court of law. The Republican Constitution of Sri Lanka of 1972 introduced a system of pre-enactment judicial review, which has been also embodied in the present Constitution of 1978, which prevents any court or tribunal from inquiring into, pronouncing upon or in any manner calling in question the validity of any legislation enacted under those Constitutions. Did these Constitutions fetter the power of any court or tribunal to review pre-1972 legislation on the ground of inconsistency with the provisions of the Ceylon (Constitution) Order in Council of 1946?

Prior to 1972, there were a large number of cases in which legislation enacted under the said Order in Council were reviewed by our courts and when found to be *ultra vires* the powers of Parliament conferred by the Ceylon (Constitution) Order in Council of 1946, whether in whole or in part, declared to be void. I see no reason in principle to hold that this Court cannot similarly review any Act of Parliament enacted under the said Order in Council even after the Order in Council itself was replaced by an autochthonous constitution in 1972, as these legislation derive their legal force from the parent Order in Council. In *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC) at page 280, Lord Pearce, after noting that the Ceylon (Constitution) Order in Council of 1946 and the Independence Act of 1947 had the combined effect of giving "the Ceylon Parliament the full legislative powers of a sovereign independent State", went on to observe that-

> "Those powers, however, as in the case of all countries with written constitutions, *must be exercised in accordance with the terms of the constitution from which the power derives*" (*emphasis added*)

In my considered opinion, Acts such as the Army Act of 1949, which were enacted without the benefit of pre-enactment judicial review for constitutional inconsistency, could be challenged on the

ground that any of their provisions are *ultra vires* the Order in Council under which they themselves derived their legal force, and the ouster clauses found in Section 49(3) of the 1972 Constitution and Article 80(3) of the present Constitution, will have no application.

Learned President's Counsel for the Petitioner and the 7th Respondent have not been able to refer to any decision of our courts which had declared any provision of the Army Act to be *ultra vires* the provisions of the Ceylon (Constitution) Order in Council of 1946. However, they have invited the attention of Court to several celebrated pre-1972 decisions of our courts, such as *Sendahira v. Bribery Commissioner* (1961) 63 NLR 313, *Queen v. Liyanage* (1962) 64 NLR 313 (SC) which was affirmed in *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC), *Piyadasa v. Bribery Commissioner* (1962) 64 NLR 385; *Jailabdeen v. Danina Umma* (1962) 64 NLR 419, *Bribery Commissioner v. Ranasinghe* (1964) 66 NLR 73(PC), *Walker Sons Co Ltd v. Fry* (1965) 68 NLR 73 and *United Engineering Workers Union v. Devanayagam* (1967) 69 NLR 289 (PC) in support of the proposition that the exercise of judicial power by courts martial violated the doctrine of separation of powers, and in particular, the cherished concept of the independence of the judiciary, which have been recognised and given effect to by our courts in those decisions.

In *Sendahira v. Bribery Commissioner,* Sansoni, J. at page 318 of his judgment, echoing the words of Lord Atkin in *Toronto Corporation v. York Corporation* [1938] AC 415, referred to the "three principal pillars in the temple of justice", namely, the appointment of the superior court judges by the Governor-General, the holding of judicial office during "good behavior" and the principle that the salaries of judges shall be charged on the consolidated fund and cannot be reduced during their tenure, and proceeded to refer to Section 55 of the Ceylon (Constitution) Order in Council adding that "the framers of our Constitution erected a fourth pillar in that temple when the power of appointment, transfer, dismissal and disciplinary control of judicial officers was vested in the Judicial Service Commission."

In *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC), Lord Pearce at page 282 of his judgment, after subjecting the Ceylon (Constitution) Order in Council to close analysis, observed that-

> "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall only be vested in the judicature. They would be inappropriate in a Constitution by which it was intended that that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with it remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to, or be shared by the executive or legislature."

The question therefore is whether the provisions of the Army Act of 1949 under which courts martial were constituted and convened, interferes with the judicial power that was exclusively vested in the judiciary under the Ceylon (Constitution) Order in Council. For the purpose of answering this question, it is necessary to examine the provisions of the Army Act pertaining to courts martial. A Court Martial may be constituted under the provisions of the Army Act to try any person subject to military law, who is charged with any military or civil offence, and comprises of officers of the Army

of appropriate rank. Section 45 of the Army Act [*sic*], classifies courts martial as general, field general and district courts martial, which differ [*sic*] from each other in regard to the process by which they are convened, their jurisdiction as well as the type of punishment that can be meted out by each such courts martial. According to Section 46(1) of the Army Act, a General Court Martial may be convened by the Governor-General or such officer of a rank not below that of field officer as may be authorized by the Governor-General.

A fundamental characteristic of a Court Martial is that it has jurisdiction, only with respect to a "person subject to military law", which phraseology has been defined in Section 34 of the Army Act. It is important to observe that under the said Act it is only a Court Martial that is competent to try a person subject to military law for a *military offence*, although Section 77(1) of the Act provides for sharing of jurisdiction between a Court Martial and a regular court by enabling a person subject to military law to be tried for any *civil offence* by either a Court Martial or by a civil court which is not a Court Martial. A civil offence has been defined in Section 162 of the Army Act to mean "an offence against any law of Sri Lanka, which is not a military offence". It is noteworthy that military offences are defined, and punishments prescribed, under Part XII of the Act, and in Part XV thereof the Act also seeks to define certain offences which are not military offences for which any person other than a person subject to military law may be tried in a civil court, and any punishment prescribed by the Army Act may be imposed.

The principle of double jeopardy is recognised by Section 58 of the Army Act to the extent that it provides that a Court Martial shall not try a person for any offence if he has been already acquitted or convicted of that offence by a Court Martial or by a competent civil court or the charge against him has been dismissed by his commanding officer, or he has been dealt with summarily for that offence by his commanding officer or other commander or officer of superior rank. However, if a person subject to military law, has been convicted of an offence and sentenced to punishment by a Court Martial and he is afterwards tried for, and convicted of an offence by a civil court, then in awarding punishment, the civil court is required by Section 77(2) to "have due regard to such punishment imposed by the Court Martial as that person may have already undergone". It is important to note that the exception to the principle of double jeopardy created by Section 77(2) only applies with respect to a civil offence.

A significant feature of the Army Act is that where a person subject to military law is convicted of a military offence by a Court Martial, the punishment that maybe imposed have been prescribed in Part XII of the Army Act, but where the conviction is for a civil offence the scale of punishment is prescribed in Sections 131 and 132 of the Act. Such punishment could include the death sentence for offences such as treason and murder, and it is expressly provided in Section 132(b) that where the Act does not specify a punishment for an offence, the convicted person shall "suffer the punishment prescribed for such offence by any law of Sri Lanka" other than the Army Act. It is expressly provided in Section 63(1) of the Act that a conviction of, and the sentence passed on, an accused by a Court Martial shall not be valid until confirmed by the authority having power under Section 64 to confirm the same, and according to Section 64(a), if the Court Martial is a General Court Martial, the authority empowered to confirm the conviction and sentence is the Governor-General or such officer of a rank not below that of field officer as may be authorized by the Governor-General.

From this examination of the provisions of the Army Act relating to the institution of Court Martial, it becomes clear that while the jurisdiction of a Court Martial is confined to a special category of persons, namely, members of the armed forces, who are "subject to military law", a duality in its constitution is also discernible in that, while it functions primarily as a disciplinary authority for the Armed Forces as an arm of the executive, it is also vested concurrently with regular courts with judicial power to try such persons for civil offences committed by them. The question whether these provisions of the Army Act were inconsistent with the provisions of the Ceylon (Constitution) Order in Council of 1946 in the light of the celebrated decisions relating to judicial power and the independence of the judiciary noted above, was considered by the Supreme Court in *Gunaseela v. Udugama* (1966) 69 NLR 193. The question arose in the context of an application for *certiorari* filed with view to quash a conviction and sentence entered by *a* District Court Martial for an offence punishable under Section 129 of the Army Act. H.N.G. Fernando, S.P.J., (with whom Sri Skanda Rajah, J. and G.P.A. Silva, J. concurred) in the course of his judgement, made a thorough survey of British, United States and Australian law as well as the provisions of law that applied in Ceylon prior to independence, and concluded that the power to try and punish military officers was entirely independent of judicial power, and that they did not offend the Order in Council in any manner.

In arriving at this conclusion, H.N.G. Fernando, S.P.J., noted in particular that a Court Martial is not a paid office but is a body consisting of Service Officers convened *ad hoc* for the trial of particular cases, and the duty to serve as a member of such a Court is only one of the several binds of duties which a Service Officer can under the relevant statutes be called upon to perform. After pointing out that the office which entitled an Army officer to pay and other emoluments is his substantive office in the Army, and service as a member of a Court Martial is no more the basis of his entitlement to pay and emoluments than is his service in any other duty which the Army Act requires him to perform, His Lordship referred to the decision of the Supreme Court in *Panagoda v. Bandenis Singho* (1965) 68 NLR 265 and went on to observe at page 194 of his judgement that the Ceylon (Constitution) Order in Council-

> "did not have the effect of invalidating the provisions of any pre-existing statute in virtue of which judicial power was exercisable by a person not holding a paid judicial office. Those reasons apply equally in a case where an Act of Parliament merely re-enacts pre-existing law."

Adverting to the decision in *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC), in which Lord Pearce, in delivering the decision of the Privy Council, had emphasized at page 283 that the separate power vested by the Order in Council of 1946 on the judiciary "cannot be usurped or infringed by the executive or the legislature", H.N.G. Fernando, S.P.J., at page 196 of his judgement proceeded to explain the rationale for that assertion by reference to the earlier passage occurring in pages 281 to 282 of the opinion of Lord Pearce, which I quote below:-

> ".....although no express mention is made [in the Ceylon (Constitution) Order in Council] of vesting in the Judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance..... (certain) provisions are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature.....

> The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for, more than a century, in the hands of the judicature."

Thereafter, H.N.G. Fernando, S.P.J. went on to explain at page 196 of his judgment in *Gunaseela v. Udugama* (*supra*) that, the rationale for his own conclusion in that case that the provisions of the Army Act of 1949 did not offend any provisions of the Ceylon (Constitution) Order in Council, in the following passage:-

> "These observations lay emphasis on the continuance of the exclusive exercise by the judicature of the judicial power formerly committed to it. The opinions, expressed in the American and Australian Courts, that the traditional powers of Courts Martial are independent of the "Judicial Power of the State" referred to in their Constitutions, can properly be followed in Ceylon with the adaptation that Courts Martial in Ceylon were traditionally distinct from the judicature of Ceylon. Our Constitution does not contemplate the *transfer* of the judicature of power, howbeit judicial, which it did not formerly exercise, or which it exercised only concurrently with Courts Martial. The principle, that the power of the judicature of Ceylon must remain in the same hands in which it had lain before, is therefore not infringed by the continued exercise by Courts Martial of their exclusive or concurrent powers."

The decision of this Court in *Gunaseela v. Udugama* (*supra*) is important for the reason that it is the only post-independence decision on courts martial, and the Supreme Court in that case did not avail itself of the opportunity it had to pronounce that the Court Martial provisions of the Army Act of 1949 were inconsistent with the Ceylon (Constitution) Order in Council of 1946, and for very good reasons. In the light of this decision, I have no difficulty in concluding that the provisions of the Army Act relating to courts martial did not offend the provisions of the said Order in Council, and were *in force* at the commencement of the Republican Constitution of 1972.

It is now convenient to examine the constitutional and legal status of courts martial in the context of the provisions of the present Constitution of 1978. The provisions of the Army Act of 1949, which was enacted soon after Ceylon gained independence, has to be now read subject to the qualification that the powers of the Governor-General were vested in the President of the Republic, who is the Head of State as well as the Commander in Chief of the Armed Forces. For the purpose of the determination of the question referred to this Court by the Court of Appeal, it is necessary to consider whether a Court Martial fell within the ambit of Article 4(b) of the Constitution of 1978 dealing with the executive power of the People as suggested by the learned President's Counsel for the 7th Respondent, or whether it came within the purview of Article 4(c) of the Constitution dealing with the judicial power of the People, as contended by the learned President's Counsel for the Petitioner, with which contention the learned Attorney General also agreed. The analysis of the provisions of the Army Act relating to the constitution and powers of courts martial, no doubt reveals the hybrid character of these courts, which were described by De Sampayo, A.J. in the *Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334, at page 339 as "extraordinary Courts". It is important to note that traditionally courts martial have been considered in Britain as well as elsewhere in the civilized world as an arm of the executive, despite the jurisdiction of these courts to try military officers for civil offences, concurrently with regular

courts. I am of the opinion that the Court Martial, as presently structured, falls within Article 4(b) of the Constitution, which deals with the executive power of the People.

It is however, important to note that a fundamental feature of the Ceylon (Constitution) Order in Council of 1946, namely, the said "Constitution's silence as to the vesting of judicial power" which was noted by the Privy Council in *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC) at page 282, and which was stressed by the Supreme Court in the course of its decision in *Gunaseela v. Udugama* (1966) 69 NLR 193, is not shared by the Constitution of 1978. Article 4 of the present Constitution clearly defines the organs in which the power of the People is vested thereby, in the following terms:-

> "4. The Sovereignty of the People shall be exercised and enjoyed in the following manner:-
>
> (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;
>
> (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;
>
> (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law....."

A Bench of Seven Judges of this Court, in the course of its determination in *Re the Nineteenth Amendment to the Constitution* [2002] 3 SLR 85, had no hesitation in characterizing Article 4, when read with Article 3, as enshrining the doctrine of separation of powers, and at pages 96 to 97 went on to elaborate that-

> "The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub-paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub-paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise

by the particular organ of government being its custodian for the time being, is for the People."

Further clarifying our constitutional provisions, this Court also observed at page 98 of its determination that-

> "This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of powers is sustained by certain checks whereby power is attributed to one organ of government in relation to another."

It is in this backdrop that this Court has to view Article 89(d) of the Constitution which comes up for interpretation in this determination in the context of the question as to whether the words "any court", as used in the said article, include a Court Martial. In my considered opinion, the institution of Court Martial, being an emanation of executive power, is not a court, tribunal or institution set up for "the administration of justice which protect, vindicate, and enforce the rights of the People" as described in Article 105 of the Constitution, and has no place in Chapter XV of the Constitution. In my view, none of the provisions of that chapter, including the provisions enshrining the independence of the judiciary (Articles 107 to 117), have any relevance with respect to a Court Martial. Any member of the Armed Forces who sits on a Court Martial does not hold paid office as such, nor does he fall within the definition of "judicial officer" found in Article 170 of the Constitution, although he is bound to act judicially when called upon to sit on a Court Martial.

However, this does not conclude the matter, as the question posed to this Court has to be understood in the light of the other sub-paragraphs of Article 89, which seek to disqualify a person from being an "elector", and when read in conjunction with Articles 66(d) and 91, from sitting and voting in Parliament. First and foremost, it is relevant to note that Article 89(d) contemplates a person who is currently *serving or has completed serving a sentence of imprisonment* (by whatever name called) for a term not less than six months within a period of seven years immediately preceding, and includes a person who is or has served such a sentence of imprisonment awaiting the execution of a sentence of death. Obviously, the question of disqualification would not arise once the death sentence is executed, but the reference to the "death sentence" is made to catch up a person who is on death row for a period exceeding six months awaiting the execution of the sentence of death. In my opinion, the disqualification set out in Article 89(d) arises from the physical or moral inability to sit in Parliament and perform the functions of a Member of Parliament efficaciously. It is relevant to note that all the other sub-paragraphs of Article 89 also contemplate disqualifications of a similar nature. If one excludes from the analysis sub-paragraphs (a), (b) and (c) of Article 89, which respectively deal with persons who are not citizens of Sri Lanka, persons below eighteen years of age, and persons of unsound mind, all the other sub-paragraphs of Article 89 contemplate findings involving moral turpitude, but in none of them are the words "any court" used.

It is in this context necessary to note the important fundamental right enshrined in Article 13(4) of the Constitution which provides that-

> "No person shall be punished with death or imprisonment except by order of a *competent court*, made in accordance with procedure established by law."

It is obvious that notwithstanding the provisions of the Constitutions we have had since independence, particularly the provisions enshrining the doctrine of separation of powers and the concept of the independence of the judiciary, courts martial have survived by reason of the enactment of the Army Act of 1949 and its continuance as "existing law". The concept of continuance of existing law, which was enunciated by a Full Bench of the Supreme Court in the *Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334, is now embodied in Article 168(1) of the Constitution, which was quoted earlier in this determination.

In this connection, it is also necessary to consider the provisions of Article 16 of the Constitution, which provides as follows:-

> (1) All existing written law and unwritten law shall be valid and operative *notwithstanding any inconsistency* with the preceding provisions of this Chapter.
>
> (2) The subjection of any person on the order of a *competent court* to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter. (*emphasis added*)

Article 16 occurs in Chapter III of the Constitution dealing with fundamental rights, and the effect of sub-article (1), particularly the words *"notwithstanding any inconsistency* with the preceding provisions of this Chapter", is to shield "existing law" from any scrutiny for any inconsistency with the fundamental rights contained in Chapter III. Sub-article (2) of the said article also has an important bearing on the question whether a courts martial can legitimately be regarded as a "competent court" within the meaning of that phrase contained in Article 13(4) of the Constitution, which provides that no "person shall be punished with death or imprisonment except by order of a *competent court* made in accordance with procedure established by the law." It is clear that by reason of the express provision of Article 16(2) that provisions of "existing written law" such as the Army Act which empowers a Court Martial to impose various punishments including death "shall not be a contravention of the provisions of this Chapter" and is therefore a court that is competent to impose punishment. In fact, in the course of oral submission before this Court, learned President's Counsel for the Petitioner and the 7th Respondent quite rightly conceded that a Court Martial is a competent court within the meaning of the phrase in Article 13(4) of the Constitution.

It is manifest from the various provisions of the Constitution noted above, that it is envisaged that there can be courts competent to impose punishments, including the death sentence, which are not part of the regular judicial hierarchy. When understood in this light, the phrase "competent court" includes not only a regular court but even an "extraordinary Court" such as the Court Martial (*per* De Sampayo, AJ. in *Re Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334 at page 339).

It is in my opinion, unimaginable that a person who has been convicted or found guilty of any of the offences contemplated by Article 89(e) to Article 89(j) or who currently serves, or has within seven years immediately preceding served, a sentence imposed by any court in circumstances contemplated by Article 89(d), including those on death row, should be free to participate with honorable members of Parliament in the affairs of State. It is both irrational and illogical to distinguish between a person

merely serving a sentence of imprisonment exceeding six months, and a person who is awaiting the execution of a death sentence. I am therefore of the opinion that the words "any court" in Article 89(d) should be construed in a manner so as to include all courts which are created and established or otherwise recognized by the Constitution as being competent to impose the punishments envisaged by that Article, including a Court Martial.

For all these reasons, I agree with the conclusion reached by My Lord the Chief Justice that the words "any court" used in Article 89(d) of the Constitution include a Court Martial.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF CANADA

Michel Généreux *Appellant*

v.

Her Majesty the Queen *Respondent*

Indexed as: R. *v.* Généreux

File No.: 22103.

1991: June 5; 1992: February 13.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

On appeal from the court martial appeal court of Canada

Constitutional law -- Charter of Rights -- Application -- Courts martial -- Member of Canadian Armed Forces tried by General Court Martial on narcotics and desertion charges -- Whether s. 11 of Canadian Charter of Rights and Freedoms applicable to General Court Martial proceedings -- National Defence Act, R.S.C., 1985, c. N-5, ss. 166 to 170.

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- General Court Martial -- Member of Canadian Armed Forces tried by General Court Martial on narcotics and desertion charges -- Whether structure of General Court Martial infringes s. 11(d) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- National Defence Act, R.S.C., 1985, c. N-5, ss. 166 to 170.

Constitutional law -- Charter of Rights -- Fundamental justice -- Right to be tried by independent and impartial tribunal -- Member of Canadian Armed Forces tried by General Court Martial on narcotics and desertion charges -- Whether General Court Martial an independent and impartial tribunal -- Whether s. 7 of Canadian Charter of Rights and Freedoms offers greater protection than s. 11(d) of Charter -- National Defence Act, R.S.C., 1985, c. N-5, ss. 166 to 170.

Constitutional law -- Charter of Rights -- Equality before the law -- Military personnel -- Member of Canadian Armed Forces charged with narcotics offences and tried before military tribunal under National Defence Act -- Civilian charged with same offences entitled to trial before ordinary criminal court -- Whether trial by military tribunal infringed s. 15 of Canadian Charter of Rights and Freedoms -- National Defence Act, R.S.C., 1985, c. N-5, s. 130.

Constitutional law -- Charter of Rights -- Admissibility of evidence -- Bringing administration of justice into disrepute -- Narcotics found following search of accused's home -- Procedure for obtaining

search warrant unacceptable -- Accused's right against unreasonable search infringed -- Whether narcotics evidence should be excluded -- Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

The accused, a corporal with the Canadian Armed Forces, was charged with possession of narcotics for the purpose of trafficking contrary to s. 4 of the Narcotic Control Act and with desertion contrary to s. 88(1) of the National Defence Act. He was tried by a General Court Martial and convicted. His appeal to the Court Martial Appeal Court was dismissed. The main issue raised in this appeal is whether a General Court Martial is an independent and impartial tribunal for the purposes of s. 11(d) of the Canadian Charter of Rights and Freedoms. Both the judge advocate and the majority of the Court Martial Appeal Court found that the General Court Martial met the standard of independence required by s. 11(d) of the Charter.

Held (L'Heureux-Dubé J. dissenting): The appeal should be allowed and a new trial ordered. The structure of the General Court Martial at the time of the accused's trial infringed his right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Charter. The infringement was not justifiable under s. 1 of the Charter.

(1) *Application of s. 11 of Charter*

An accused who is charged with offences under the Code of Service Discipline and is subject to the jurisdiction of a General Court Martial may invoke the protection of s. 11 of the Charter. Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it also serves a public function by punishing specific conduct which threatens public order and welfare, including any act or omission punishable under the Criminal Code or any other Act of Parliament. In any event, since the accused faced a possible penalty of imprisonment in this case, even if the matter dealt with was not of a public nature, s. 11 would nonetheless apply by virtue of the potential imposition of true penal consequences.

(2) *Section 11(d)*

Per Lamer C.J. and Sopinka, Gonthier, Cory and Iacobucci JJ.: A parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns, is not, by its very nature, inconsistent with s. 11(*d*). The existence of such a system, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by compelling principles. The accused's right to be tried by an independent and impartial tribunal must thus be interpreted in this context and in the context of s. 11(f) of the Charter, which contemplates the existence of a system of military tribunals with jurisdiction over cases governed by military law. In view of s. 11(f), the content of the constitutional guarantee of an independent and impartial tribunal may well be different in the military context than it would be in the context of a regular criminal trial. An individual who challenges the independence of a tribunal under s. 11(d) need not prove an actual lack of independence. The question is whether a reasonable person, familiar with the constitution and structure of the General Court Martial, would perceive that tribunal as independent. The independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator.

The structure and constitution of the General Court Martial, as it existed at the time of the accused's trial, did not comply with the requirements of s. 11(d) of the *Charter*. The essential conditions of judicial independence described in *Valente* were not met. First, the judge advocate at the General Court Martial did not enjoy sufficient security of tenure. The National Defence Act and regulations fail to protect a judge advocate against the discretionary or arbitrary interference of the executive. The Judge Advocate General, who had the legal authority to appoint a judge advocate at a General Court Martial, is not independent of but is rather a part of the executive. The Judge Advocate General serves as the agent of the executive in supervising prosecutions. Furthermore, under the regulations in force at the time of the trial, the judge advocate was appointed solely on a case by case basis. As a result, there was no objective guarantee that his career as military judge would not be affected by decisions tending to favour an accused rather than the prosecution. A reasonable person might well have entertained an apprehension that the person chosen as judge advocate had been selected because he had satisfied the interests of the executive, or at least not seriously disappointed executive expectations, in previous proceedings. Although a General Court Martial is convened on an *ad hoc* basis, it is not a "specific adjudicative task".

The General Court Martial is a recurring affair. Military judges who act periodically as judge advocates must therefore have a tenure that is beyond the interference of the executive for a fixed period of time. Security of tenure during the period of a specific General Court Martial is not adequate protection for the purposes of s. 11(d). It would not be reasonable, however, in this context, to require a system in which military judges are appointed until the age of retirement. The requirements of s. 11(d) are sensitive to the context in which an adjudicative task is performed. The Charter does not require uniform institutional standards for all tribunals subject to s. 11(d).

Second, the judge advocate and members of the General Court Martial did not enjoy sufficient financial security. A military legal officer's salary is determined in part according to a performance evaluation. There were no formal prohibitions at the time against evaluating an officer on the basis of his performance at a General Court Martial. The executive thus had the ability to interfere with the salaries and promotional opportunities of officers serving as judge advocates and members at a court martial. Although the practice of the executive may very well have been to respect the independence of the participants at the court martial in this respect, this was not sufficient to correct the weaknesses in the tribunal's status. A reasonable person would perceive that financial security was not present in this case.

Third, certain characteristics of the General Court Martial system were likely to cast doubt on the institutional independence of the tribunal in the mind of a reasonable and informed person. While the idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system, the principle of institutional independence requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function. An examination of the legislation governing the General Court Martial reveals that military officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. In particular, it is unacceptable that the authority that convenes the court martial, i.e. the executive, which is responsible for appointing the prosecutor, should also have the authority to appoint members of the court martial, who serve as the triers of fact. The appointment of the judge advocate by the Judge Advocate General also undermines the institutional independence of the General Court Martial. The close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the executive, are obvious. To comply with

s. 11(*d*) of the Charter, the appointment of a military judge to sit as judge advocate at a particular General Court Martial should be in the hands of an independent and impartial judicial officer.

Per La Forest, McLachlin and Stevenson JJ.: Section 11(*d*) of the *Charter* imports a flexible standard which must take into account the nature of the tribunal under consideration. The difficulty in applying the concepts in *Valente* to assess military tribunals is largely attributable to the difficulty in defining the concept of the "executive" from which there must be independence. If the executive is defined to include the entire hierarchy, military tribunals will always be subject to executive influence.

A General Court Martial is convened for a single adjudicative task and, given the requirement of flexibility, a tenure for that "specific adjudicative task" could be a sufficient guarantee of security of tenure. A tenure beyond executive interference for a judge advocate could only be achieved by tenured appointments roughly equivalent to those given to the professional judiciary. This aspect of a military judgeship should not, however, be so institutionalized.

To meet the requirement of "institutional independence" under s. 11(d), an *ad hoc* military tribunal, composed of military personnel, operating within a military hierarchy, must be free to make its decisions on the merits. No one who has an interest in seeing that the prosecution succeeds or fails should be in a position of influence. The accused, the "complainants", the prosecutor and the military personnel engaged in the investigation of, or in formulating or approving the charges clearly have such an interest. There must be found some point within the military hierarchy where an officer or official has no real or apparent concern about the outcome of a case. There is, at that point, sufficient independence in the setting of military tribunals.

While the convening authority is sufficiently far removed from the investigative and complaint stages to convene the court martial and appoint its members, it also appoints, with the concurrence of the Judge Advocate General, the prosecutor. The convergence of responsibilities in appointing the prosecutor and judge advocate is objectionable as it fails to meet the requirement that those appointing the tribunal have no apparent concern in the outcome. Further, under the scheme in force when these proceedings took place, there was nothing to prevent those who made decisions in relation to salaries and promotions from taking into consideration the outcome of a court martial. This could well include persons with an interest in that outcome and thus be perceived as an apparent infringement of the "financial security" requirement under s. 11(d).

L'Heureux-Dubé J. (dissenting): This case arises in the context of a military tribunal and, in interpreting s. 11(d) of the Charter, sufficient weight must be given to that context. The contextual approach is a tenet of constitutional interpretation which is of paramount importance. While the virtues of this approach have been discussed principally with respect to s. 1 of the Charter, context is also important at the initial stage of deciding whether or not a breach of a given right or freedom has occurred. A right or freedom may have different meanings in different circumstances. Where military tribunals are at issue, the contextual approach is not merely advantageous but clearly required. The wording of s. 11(f) illustrates that the Charter contemplates a separate system of military justice. So, when measuring the General Court Martial against the requirements of the Charter, certain considerations must be kept in mind. Among those considerations are that the Armed Forces depend upon the strictest discipline in order to

function effectively and that alleged instances of non-adherence to rules of the military need to be tried within the chain of command.

The three criteria of judicial independence described in *Valente* were not meant to apply to each and every form of tribunal. *Valente* exhibits a concern for flexibility and a recognition that differences in tribunals form an acceptable and even desirable part of the Canadian legal landscape. It would thus be an error to adopt a uniform formula for all the tribunals subject to s. 11(d). In this case, given the transitory nature of a General Court Martial and peculiar circumstances surrounding the financial remuneration (or lack thereof) of its members, the criteria of security of tenure and financial security are especially ill-suited to the task of assessing the constitutionality of that tribunal. Nonetheless, even if these criteria are accurate indicia of its constitutionality, they were amply satisfied by the structure of the General Court Martial as it existed at the time of the accused's trial.

The judge advocate at the General Court Martial enjoyed sufficient security of tenure. The performance of a judge advocate can pass constitutional muster even though he is appointed by the executive. The framers of the Charter could not have intended s. 11(d) to prevent the executive from appointing members of the judiciary when other sections of the Constitution explicitly give the executive authority to do so. A General Court Martial is a "specific adjudicative task" as contemplated in *Valente* and is not part of a "recurring affair". The National Defence Act and its regulations contemplate each court as an entirely distinct entity. Further, while the General Court Martial is taking place, there are sufficient guarantees of the tenure of the persons involved from the executive. Under the regulations, only if the judge advocate is, for some reason, unable to attend the General Court Martial, may the convening authority appoint a replacement judge advocate. Otherwise, once appointed, the judge advocate is at complete liberty to proceed with the undertaking with which he has been entrusted. This provides sufficient insulation to the judge advocate to perform his duty.

The judge advocate and the members of the General Court Martial also enjoyed sufficient financial security. While it may be desirable that certain discretionary benefits or advantages should not be under the control of the executive, such potential discretion is not sufficient to constitute arbitrary interference by the executive in a manner that could affect judicial independence and hence to give rise to a reasonable apprehension that the essential condition of financial security was not met. As stated in *Valente*, executive control over certain discretionary benefits or advantages does not go to the heart of s. 11(*d*).

The criterion of institutional independence was satisfied. Section 11(d) of the Charter permits a sufficient degree of connection between the executive and the participants in a General Court Martial. It is unrealistic under s. 11(d) to demand the absolute separation of the judiciary from the other branches of government. While s. 11(d) might not condone a civilian system of justice where the same body which appointed the prosecutor also appoints the triers of fact, or where the executive and the presiding judge maintain close ties, in the context of the Armed Forces these characteristics may well be a necessary part of the chain of command which, when followed link by link, ultimately leads to the same destination no matter where one begins. The constitutional standard applicable in the civilian system of justice is wholly inapplicable to measuring a trial by General Court Martial.

(3) *Section 1*

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.: The infringement of s. 11(d) cannot be justified under s. 1 of the Charter. While the goal of maintaining order and discipline within the Armed Forces is of sufficient importance to warrant overriding a constitutional right, the scheme of the General Court Martial, as it existed at the time of the accused's trial, failed to meet the proportionality test. There may well exist a rational connection between the challenged structure of the General Court Martial and the goal of the maintenance of military discipline, but this structure did not impair the accused's s. 11(d) rights "as little as possible". The structure incorporated features which were not necessary to attain either military discipline or military justice. Under normal circumstances, it is not necessary to try alleged military offenders before a tribunal in which the judge, the prosecutor, and the triers of fact are all chosen by the executive. As well, it is not necessary that promotional opportunities, and hence the financial prospects within the military establishment, for officers serving on such tribunals should be capable of being affected by senior officers' assessments of their performance in the course of the trial.

(4) *Section 7*

The accused's challenge to the independence of the General Court Martial falls squarely within s. 11(d). The accused's argument is thus not strengthened by pleading the more open language of s. 7 of the *Charter*. Section 7 does not, in this case, provide a more comprehensive protection than s. 11(d).

(5) *Section 15*

The General Court Martial proceedings did not violate the accused's equality rights under s. 15 of the Charter. In the context of this appeal, the accused cannot claim to be a member of a "discrete and insular minority" so as to bring himself within the meaning of s. 15(1) of the Charter.

(6) *Section 24(2)*

The evidence of the illegal drugs discovered in the accused's home was obtained in breach of his right under s. 8 of the Charter. The alleged "reasonable and probable grounds" for the issuance of the search warrant were revealed by the police officer only to the Crown Attorney and not to the justice of the peace. The procedure followed by the police was unacceptable and constituted an infringement of the accused's right against unreasonable search and seizure. The evidence of the illegal drugs, however, should not be excluded under s. 24(2) of the Charter. The evidence is real evidence, which pre-existed the violation of s. 8. The evidence was essential to substantiate a very serious criminal charge. Moreover, while the procedure followed by the police was unacceptable, there was a good faith attempt to comply with a procedure which was evidently believed to be correct. The exclusion, rather than the admission, of the evidence would have brought the administration of justice into disrepute.

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