RATNASIRI PERERA
v.
DISSANAYAKE, ASSISTANT COMMISSIONER OF CO-OPERATIVE DEVELOPMENT AND OTHERS

SUPREME COURT,
BANDARANAYAKE, J.,
M. D. H. FERNANDO, J. AND
AMERASINGHE, J.
S.C. REFERENCES 1 to 17/91 (Consolidated)
C.A. APPLICATIONS 1060/85, 713/83, 1528/83, 1373/82, 1069/84, 27/84, 32/84, 1006/84, 1068/84, 1267/84, 1666/84, 1623/84, 32/85, 62/85, 559/85, 344/85, 976/85
31 JULY AND 01 AUGUST, 1991.

Judicial Power – Does arbitrator appointed by the Registrar of Co-operative Societies under Section 58(2) of the Co-operative Societies Law, No. 5 of 1972 exercise judicial power ? – Has appointment to be made by the Judicial Service Commission in terms of Article 114(1) of the Constitution ? – Are the words "Judicial Officer" appearing in Article 170 applicable in construing the provisions of Article 114(1) ? – Can an appointment and/or order of an arbitrator appointed under the Co-operative Societies Law be questioned in a court of law ? – Constitution, Articles 4(c), 114, 168(1) and 170 – Interpretation Ordinance, Section 16(1) – Co-operative Societies Law, Section 58(2) – Rule 49(v) of the Co-operative Societies (Special Provisions) Act, No. 34 of 1970.

Acting under section 58(2) of the Co-operative Societies Law, No. 5 of 1972, the Registrar of Co-operative Societies referred certain disputes falling within S. 58(1) (c) of the said Law for arbitration. Parties aggrieved by the awards of such arbitrators or by the decisions of the Registrar on appeal, made applications to the Court of Appeal for orders in the nature of writs of certiorari. The following questions which arose in the course of the hearing of those applications were referred by the Court of Appeal to the Supreme Court, under Article 125 of the Constitution.

1. Does an arbitrator appointed by the Registrar of Co-operative Societies in terms of Section 58(2) of the Co-operative Societies Law, No. 5 of 1972 fall into the category of court, tribunal or other institution exercising judicial power under Article 4(c) of the Constitution ?

2. Has the appointment of the said arbitrator to be made by the Judicial Service Commission in terms of Article 114(1) of the Constitution ?

3. Is the interpretation of the words "Judicial Officer" appearing in Article 170 applicable for the purpose of construing the provisions of Article 114(1) of the Constitution ?

4. In any event, can the appointment and/or the order of an arbitrator appointed under the Co-operative Societies Law be questioned in those proceedings in as much as the said Law constitutes an existing law in terms of Article 168 of the Constitution ?

Held:

(1) The Registrar is an institution exercising judicial power within the meaning of Article 4(c) and an arbitrator appointed by the Registrar is a part of such institution.

(2) No.

(3) Article 170 cannot apply in its entirety to Article 114, because the appointment and dismissal of Judges of the Superior Courts and the High Courts is (by virtue of Articles 107 and 111) outside the purview of the Judicial Service Commission. The words "other than in Article 114" occurring in Article 114 could mean **either** that the definition is totally inapplicable to Article 114 or that it is inapplicable only to the extent that the contrary provision is made to Article 114(5). Clearly the latter is the correct position.

To hold otherwise would mean that "Judicial Officer" in Article 114 is undefined; it would open the door to the argument that this phrase should be limited to those who hold office as District Judges, Magistrates and other Judges traditionally so regarded, which was decisively rejected both in *Senadhira* (6), by Sansoni J., (as he then was) who held that that phrase included not only the officers of the established courts but also those akin to them and in *Ranasinghe* (3), by the Privy Council. The definition of "judicial officer" in Article 170 applies to Article 114(1) save as otherwise expressly provided in Article 114(6) : in relation to Article 114(1) that definition will apply with the omission of the words "a Judge of the Supreme Court or a Judge of the Court of Appeal or any Judge of the High Court".

4. No.

Cases referred to:

1. *Karunatillake v. Abeyweera* (1966) 68 NLR 503, 504-5.

2. *Jayasekera v. Minuwangoda Co-operative Society* (1970) 73 NLR 354, 355, 356.

3. *Bribery Commissioner v. Ranasinghe* (1962) 64 NLR 449; (1964) 66 NLR 73, 74 (PC).

4. *R. v. Liyanage* (1962) 64 NLR 313, 359.

5. *Liyanage v. The Queen* (1965) 68 NLR 265, 281, 283, (PC).

6. *Senadhira* (1961) 63 NLR 313.

7. *Don Anthony* (1962) 64 NLR 93.

8. *Piyadasa* (1962) 64 NLR 385.

9. *Jailabdeen v. Danina Umma* (1962) 64 NLR 419, 420, 421.

10. *Ibrahim v. G. A. Vavuniya* (1966) 69 NLR 217.

11. *Anthony Naide* (1966) 68 NLR 558, 570.

12. *Walker Sons & Co. Ltd. v. Fry* (1965) 68 NLR 73, 101.

13. *Moosajees v. Fernando* (1966) 68 NLR 414, 418, 424.

14. *Panagoda v. Budinis Singho* (1966) 68 NLR 490.

15. *Xavier v. Wijeyekoon* (1966) 69 NLR 197.

16. *Ranaweera v. Wickramasinghe* (1961) 72 NLR 553, 558.

17. *Visuvalingam v. Liyanage* (1983) 1 Sri L R 203, 216, 217.

18. *Shanmugam v. Commissioner of Registration of Indian and Pakistani Residents* (1962) 64 NLR 29, 33.

19. *Gunaseela v. Udugama* (1966) 69 NLR 193.

REFERENCE to the Supreme Court under Article 125 of the Constitution by the Court of Appeal.

Sanath Jayatilleke for the petitioner in No. 1/91.

Kithsiri Gunaratne with *Miss S. M. Senaratne* and *Saliya Mathew* for the petitioners in Nos. 2/91 and 3/91.

J. C. Boange for the petitioner in Nos. 5/91 to 15/91 and 17/91.

Rohan Sahabandu for the petitioner in No. 16/91.

K. C. Kamalasebayson, SSC with *K. Siripavan, SSC* and *K. Indatissa, SC* for the Deputy/Assistant Commissioner of Co-operative Development in Nos. 1/91 to 17/91.

Bimal Rajapakse for the Respondent Societies in Nos. 1/91, 8/91, 14/91 and 15/91.

H. D. Gomes for the Respondent Societies in Nos. 2/91 and 3/91.

T. M. S. Nanayakkara for the Respondent Society in Nos. 13/91, 16/91 and 17/91

Cur adv vult.

27th March, 1992.
M. D. H. FERNANDO, J.

Section 58 of the Co-operative Societies Law, No. 5 of 1972, provides:

"58 (1) If any dispute touching the business of a registered society arises ...

(c) between the society or its committee and any officer or employee of the society, whether past or present, or any heir or legal representative of any deceased officer or employee; or

.....

.....

such disputes shall be referred to the Registrar for decision.

(2) The Registrar may, on receipt of a reference under subsection (1) –

(a) decide the dispute himself, or

(b) refer it for disposal to an arbitrator or arbitrators.

(3) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar ..."

Rule 49(v) of the Co-operative Societies Rules, 1974, requires an arbitrator to be appointed by the Registrar.

Acting under section 58(2), the Registrar of Co-operative Societies referred certain disputes for disposal to arbitrators. It was agreed, for the purpose of these references, that these disputes fell within paragraph (c) of section 58(1). Parties aggrieved by the awards of such arbitrators, or by the decisions of the Registrar on appeal, made applications to the Court of Appeal for orders in the nature of writs of certiorari. The following questions which arose in the course of the hearing of those applications were referred by the Court of Appeal to this Court under Article 125 of the Constitution:

"1. Does an Arbitrator appointed by the Registrar of Co-operative Societies in terms of Section 58(2) of the Co-operative Societies Law No. 5 of 1972 fall into the category of Court, Tribunal or other Institution exercising judicial power under Article 4(c) of the Constitution ?

2. Has the appointment of the said Arbitrator to be made by the Judicial Service Commission in terms of Article 114(1) of the Constitution ?

3. Is the interpretation of the words "judicial officer" appearing in Article 170 applicable for the purpose of construing the provisions of Article 114(1) of the Constitution ?

4. In any event can the appointment and/or the order of an arbitrator appointed under the Co-operative Societies Law be questioned in these proceedings in as much as the said Law constitutes an existing law in terms of Article 168 of the Constitution ?

The following constitutional provisions are relevant:

Art. 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 . . .

Art. 114: (1) The appointment, transfer, dismissal and disciplinary control of judicial officers, and (notwithstanding anything to the contrary in Chapter IX) of scheduled public officers, is vested in the (Judicial Service) Commission.

(6) In this Article ... judicial officer does not include a Judge of the Supreme Court or of the Court of Appeal or of the High Court.

Art. 168(1) 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.

Art. 170: "judicial officer", other than in Article 114, means any person who holds office as –

(a) a Judge of the Supreme Court or a Judge of the Court of Appeal:

(b) any Judge of the High Court or any judge, presiding officer or member of any other Court of First Instance, tribunal or institution created and established for the administration of justice or for the adjudication of any labour or other dispute but does not include a person who performs arbitral functions or a public officer whose principal duty or duties is or are not the performance of functions of a judicial nature ...

Section 58 corresponds to section 53 of the Co-operative Societies Ordinance (Cap. 124) which was considered by H. N. G. Fernando, S.P.J., (as he then was), in *Karunatillake v. Abeyweera* [1]:

"... As between a society and its members, disputes can well arise as to the construction and effect of the rules governing relations between members *inter se* and the relations between a society and its members, as to whether a society or a member

had acted in breach of the rules, as to the qualification of members to hold office in the society (etc) ... It was clearly the intention of the Legislature that such disputes should be finally decided by the Registrar, in the exercise of his supervisory functions, or by arbitrators appointed by him. Disputed claims by a society against its members, in their capacity as such, were also in contemplation, although it is arguable whether Section 45 applied also to other claims against members, not arising by reason of their membership of a society, but arising instead upon transactions involving ordinary contractual rights and obligations, or else arising in delict. Except in regard to claims of the nature lastly mentioned, I have no doubt that the determination by the Registrar or an arbitrator of a dispute affecting any of the matters just mentioned does not involve the exercise of the judicial power of the State.

An "officer" of a co-operative society is not necessarily in a contractual relationship with the society ... But if in addition an officer has custody or control of goods or funds of the society, or has power to negotiate contracts on behalf of the society, then contractual relationships, such as that between principal and agent, can exist between a society and its manager. In this way disputes can arise as to the due performance of contractual rights and obligations. In the instant case ... the liability of the manager arises at the least upon an implied contract, in the nature of agency. The dispute concerning the existence of this liability and the duty to perform it is an ordinary civil dispute within the traditional jurisdiction of the Courts. It is not such a dispute as might, prior to the passing of the Act No. 21 of 1949, have been determined under the special procedure provided by the Co-operative Societies Ordinance. The amending Act purported to oust the jurisdiction of the Courts over disputes which at the time when the Constitution came into force were exclusively within that jurisdiction. In the language of recent judgments, there has thus been a clear encroachment of the powers exclusively vested in the Courts."

This decision was sought to be distinguished in *Jayasekera v. Minuwangoda Co-operative Society* [2], on the basis that it applied

only to claims against an *officer*, and not to claims against a *member*; that such claims could have been referred to arbitration prior to the 1947 Constitution; and that the reference of such claims to arbitrators, not appointed by the Judicial Service Commission ("the J.S.C."), continued to be valid. H. N. G. Fernando, C.J., held that adjudication upon such claims against members did involve the exercise of judicial power:

> When the Ceylon (Constitution) Order in Council of 1946 was enacted there clearly was contemplation that pre-existing Ordinances did contain provisions which would conflict with provisions of the Order in Council. Accordingly, s.88 of the Order in Council authorised the Governor to make Proclamations amending, repealing or modifying written law in order to bring such law into conformity with the provisions of the Constitution. Numerous amendments were in fact made in pursuance of this authority; but the fact that a particular written law was not thus amended cannot in reason have the consequence that the law does not conflict with the Constitution or that it must be regarded as valid despite such conflict.
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> A single instance suffices to make the position clear. Section 54 of the Courts Ordinance, which formerly provided for the appointment of District Judges and Magistrates *by the Governor* was altered by deleting the reference to the Governor's power of appointment. That alteration was made for the quite obvious reason that the power of appointment of judicial officers was vested by the Constitution in the Judicial Service Commission, and that the alteration was necessary to avoid conflict between s. 54 and the Constitution. But even if (by accident or deliberately) no such alteration had been made in s.54, the Governor would have ceased to be vested with that power when the Constitution came into operation. Thus the mere fact that s.45 of the Co-operative Societies Ordinance was not amended by a Proclamation under s.88 of the Constitution does not justify an argument that all its provisions continued to be valid despite the fact that some of them were not in conformity with overriding provisions of the Constitution."

It is common ground that here the disputes referred to arbitrators arose from transactions with officers or members involving ordinary contractual rights and obligations.

The cumulative effect of the contentions of learned Counsel who challenged the validity of the appointment and the orders of the Registrar and the arbitrators may be summarised thus:

1. In view of the aforesaid decisions, the resolution of the disputes involved the exercise of judicial power;

2. Article 4(c) precluded the conferment of judicial power on the Registrar and on arbitrators, who were not "institutions" created, established or recognised by the Constitution or by Parliament;

3. Although Section 58(2) and Rule 49(v) were "existing law", within the meaning of the Constitution,

   (a) they had to be read *mutatis mutandis* (in terms of Article 168(1)), necessitating the substitution of "Judicial Service Commission" for "Registrar" in Rule 49(v); and

   (b) Articles 114 and 170 "expressly provided" (within the meaning of Article 168(1)) for judicial officers to be appointed by the Judicial Service Commission, so that the Registrar or an arbitrator could determine a dispute only if appointed by that Commission under and in terms of Article 114.

Learned Senior State Counsel did not contend that the resolution of the disputes did not involve the exercise of judicial power. His principal contention was that subsequent to the aforesaid decisions, Parliament had enacted the Co-operative Societies (Special Provisions) Act, No. 34 1970, with a two-thirds majority. That Act expressly provided that it shall be as valid and effectual as though it was a Constitutional amendment; that every power, duty and function conferred and imposed on, and assigned to, the Registrar under section 53 of the Co-operative Societies Ordinance, as amended from time to time, was deemed to have been, and to be, validly

conferred, imposed and assigned; and that every arbitrator appointed by the Registrar, was deemed to have been, and to be, validly appointed. Therefore, he submitted, the exercise of judic al power by the Registrar and arbitrators under section 53 of the Ordinance, despite want of appointment by the J.S.C., was made Constitutionally proper. Thereafter the Co-operative Societies Law, No. 5 of 1972, repealed the earlier Ordinance and other statutes (see section 73), but did not repeal Act No. 34 of 1970. Section 16(1) of the Interpretation Ordinance (Cap. 6) provides that where in any written law reference is made to any written law which is subsequently repealed, such reference shall be deemed to be made to the written law by which such repeal is effected. Accordingly, the provisions of Act No. 34 of 1970 applied to the 1972 enactment. Thus when Article 168(1) was enacted, it had been the law at least for the preceding 8 years that the Registrar and arbitrators could exercise judicial power when acting under section 58 (or its predecessor). Section 58(2), Rule 49(v) and Act No. 34 of 1970 were thus "existing written law", kept in force by Article 168; the application of the *mutatis mutandis* principle did not require appointment by the J.S.C.; and there was no "express provision" in the Constitution which repealed or modified those provisions. Alternatively, he submitted that the Registrar was a public officer "whose principal duty or duties is or are not the performance of functions of a judicial nature", and accordingly was not included in the definition of "judicial officer" in Article 170; appointment by the J.S.C. was not required.

Following *Karunatilleke*[1] and *Jayasekera*,[2] I hold that the determination by the Registrar or an arbitrator of disputes arising from transactions involving ordinary contractual rights and obligations involves the exercise of the judicial power of the People. The other contentions arising in this case require this Court to consider (a) what institutions created, established or recognised by the Constitution or by Parliament may exercise judicial power, (b) how the officers and members of such institutions should be appointed, (c) how such appointments should be made when such institutions (or their officers or members) have mixed judicial and non-judicial functions, and (d) whether the position is different in regard to institutions established by laws enacted prior to the Constitution.

The relevant provisions of the 1978 Constitution were not enacted *in vacuo,* but in the background of the Constitutional provisions, judicial decisions and unsettled problems of the preceding three decades, to which a brief reference is necessary. The Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, (the "1947 Constitution"), were interpreted in a series of decisions.

The 1947 Constitution did not expressly provide for a separation of powers and functions; "no express mention is made of vesting in the judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance"; however "there was no compelling need ... to make any specific reference to the judicial power of the Courts when the legislative and executive powers changed hands" (i.e. in consequence of the change of sovereignty effected by the 1947 Constitution); "but the importance of securing the independence of judges, and maintaining the dividing line between the judiciary and the executive" (and also, one should add, the legislature) "was appreciated by those who framed the Constitution". The structure of the Constitution and in particular the provisions for the independence of Judges of the Superior Courts and for the appointment of other judges by an independent Judicial Service Commission "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," (i.e. under the Charter of Justice, 1833, and the Courts Ordinance, 1889) "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", "there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature." (*Bribery Commissioner v. Ranasinghe.* [3] *R. v. Liyanage,* [4]; *Liyanage v. The Queen* [5]).

After some initial uncertainty, the nature of "judicial power" was clarified: a historical test was also applied and judicial power was

held to include powers which, though administrative in nature, have traditionally been ancillary to the judicial power, such as the power to nominate a Bench to hear a case (*Liyanage,* [4]).

In regard to Bribery Tribunals, whose members were not appointed by the J.S.C., in *Senadhira,*[6] it was not contested that the power to try, and to reach findings of guilt or innocence, could lawfully be conferred on such Tribunals; the only objection was that such tribunals could not convict and sentence an accused, and this objection Sansoni, J. (as he then was), and T. S. Fernando, J. upheld. This was followed in *Don Anthony,*[7] though attracted by the contention that in ascertaining and declaring the liabilities of an accused such tribunals were in fact exercising judicial power, the Court upheld a technical procedural objection and refrained from deciding that matter. In *Piyadasa,*[8] Tambiah, J., swept aside the procedural objection, and went on to hold that no judicial power can be conferred on Bribery Tribunals except by constitutional amendment. The matter was finally resolved in two judgments of H. N. G. Fernando, J., (as he then was). He held in *Jailabdeen v. Danina Umma*[9].

> "There is nothing illegal, in the sense of conflict with the Constitution, in a statute which establishes a new judicial tribunal with jurisdiction (whether exclusive or not) over particular charges or causes. Indeed the legislature might well consider it necessary in the public interest to constitute such tribunals, and one can think of many reasons for the adoption of such a course ...
>
> There is no provision in the Constitution restricting the *establishment* of judicial offices and it follows that a Bribery Tribunal *to which persons are duly appointed in accordance with the proper law* can legally exercise all the powers which the Act confers upon such a tribunal. But since a tribunal having such powers is a judicial office, all that I find unconstitutional in the Bribery Act is the power given to the Governor-General to appoint the panel from which members of such a tribunal have to be constituted. The objection thus goes not to legal validity of the tribunal itself, or to the exercise of judicial power by it, but

> rather to the right and authority of the persons constituting the tribunal to exercise the powers conferred by the Act";

and in *Ranasinghe*,[3]

> "... there is no question of a wholesale challenge of the entire Act, that the Legislature can validly confer judicial power on specially created tribunals, and that the objection which lies against a conviction by a particular Bribery Tribunal is that the judicial power validly vested in the special tribunals cannot be lawfully exercised by persons who are appointed to the Tribunal by the Governor-General, and not by the Judicial Service Commission."

On appeal, the Privy Council – although dealing principally with the duty of the Court to look for the Speaker's certificate to ascertain whether the Constitution has been validly amended – was "in accord with the view so clearly expressed by the Supreme Court that the orders made against the respondent are null and inoperative on the ground that the persons composing the Bribery Tribunal which tried him were not lawfully appointed to the Tribunal".

These decisions recognised that the creation and establishment by Parliament of courts, tribunals and institutions for the exercise of the judicial power of the State was not inconsistent with the Constitution or the principle of the separation of powers; all that was constitutionally necessary was compliance with constitutional provisions as to the manner of appointment of the officers and members thereof. These principles are now expressly entrenched in Articles 4(c), 114 and 170.

It is necessary to consider whether the Registrar is an "institution" within the meaning of Article 4(c). This expression occurs in several other provisions of the Constitution; e.g. Articles 105 and 156. It is not confined to a body of persons, and will include an "institution" consisting of a single officer or member. Thus the Ombudsman, the Commissioner of Elections, and the Public Trustee are "institutions". The Registrar is also an "institution". The numerous powers, duties and functions statutorily entrusted to the Registrar cannot be

exercised and performed by him single-handed. Hence section 2 enables certain other public officers to exercise all or any of the powers of the Registrar. Section 58 also permits the Registrar to refer a dispute to an arbitrator (appointed by him in terms of Rule 49(v)). But since an appeal lies from the award of an arbitrator to the Registrar himself, the scheme of that enactment is that the ultimate decision of a dispute is by the Registrar. It is true that such an arbitrator may be appointed *ad hoc*, but he is nevertheless part of the institution created by that law. Article 4(c) does not preclude the creation and establishment, or the recognition, of such an institution. Since the Co-operative Societies Law was enacted prior to the Constitution, the question also arises whether the Registrar is an institution "created and established", or "recognised", by the Constitution or by law, within the meaning of Article 4(c). Article 105(2) provides that all institutions created and established by existing written law for, *inter alia*, the adjudication of industrial and other disputes shall be deemed to be institutions created and established by Parliament. The Registrar is thus an "institution" deemed to be created and established by Parliament; and is also, by virtue of Articles 105(2) and 168(1), "recognised" by the Constitution.

If created by a statute enacted after the Constitution, the question would arise whether an officer or member of that institution (a) falls within the definition of "judicial officer", within the meaning of Article 170, and, if so, (b) must be appointed by the J.S.C. This would have had to be determined solely by reference to Article 170. *Prima facie*, the Registrar would be an institution created and established "for the adjudication of any labour or, other dispute" within the meaning of Article 170, and would therefore be a "judicial officer". However, having regard to the extent of the non-judicial statutory duties and functions of the Registrar under the 1972 Law, it is also clear that his "principal duty or duties is or are not the performance of functions of a judicial nature", for his judicial functions under section 58 form only a small part of the duties of his office. The Registrar would therefore be excluded from the definition. This confirms that there is no inconsistency between Article 170, and the pre-Constitution legislation which established the institution of the Registrar. In coming to this conclusion, I have also had regard to judicial decisions in the background of which Article 170 was enacted.

The usurpation or infringement of the judicial power was struck down – in the Bribery Tribunal cases; in relation to Quazis (in *Jailabdeen*); and in regard to the imposition of fines under the Licensing of Traders Act for contravention of the Price Control Act (in *Ibrahim v. G. A. Vavuniya*[10]). However, it was held in *Anthony Naide*,[11] that the "Legislature has power to abolish the jurisdiction of the Civil Courts of original jurisdiction and thus indirectly to abolish the appellate jurisdiction of the Supreme Court, provided of course that the legislature does not attempt to arrogate such jurisdiction to itself or to transfer such jurisdiction to some authority not holding judicial office." H. N. G. Fernando, S.P.J., continued to entertain doubts as to whether an ordinary law could abolish the jurisdiction of the Supreme Court in regard to the prerogative writs, for "it may well be that the Constitution has, in section 52, recognised and adopted, and thus incorporated, some provisions of the Courts Ordinance which confer jurisdiction on the Supreme Court". The Constitution now entrenches some of the jurisdictions of the Supreme Court and of the Court of Appeal, precluding an erosion of such jurisdictions by ordinary law. Other jurisdictions, however, can be taken away by ordinary law, provided of course that if they are transferred to other bodies, the officers or members thereof must be appointed in terms of Articles 114 and 170. Although it was held in *Karunatilleke* and *Jayasekera* that the power to determine disputes under section 58 was at one time a jurisdiction vested in the civil courts, and that the transfer of that jurisdiction to persons not appointed by the J.S.C. constituted an usurpation of jurisdiction. Act No. 34 of 1970 constitutionally validated that transfer of jurisdiction. In the result, when the Constitution was enacted in 1978, no question arose of the usurpation of a jurisdiction previously vested in the civil courts.

The question of mixed functions was considered in several decisions. In *Walker Sons & Co. Ltd v. Fry*,[12] H. N. G. Fernando, S.P.J., observed that –

> "Section 55 of the Constitution . . . failed to preclude the possibility of the entrustment of judicial power to some authority *bona fide* established for administrative purposes. If administrative officials, the majority of whose powers and functions are administrative, are in addition entrusted on

grounds of expediency with judicial power, there would not in my opinion be conflict with section 55. But if, under cover of expediency, judicial powers are vested in an office administrative only in name, then the principle that you cannot do indirectly that which you cannot do directly will apply. That principle will also apply if there is frequent entrustment of judicial power to unpaid functionaries".

However, after the Privy Council decision in *Liyanage v. The Queen*,[5] he modified this view (see *Moosajees v. Fernando*,[13]) 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*,[14] 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 administering the income tax laws in *Xavier v. Wijeyekoon*,[15] 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*,[16] 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 public 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. Even if Article 170 is so construed, the power conferred on the Registrar satisfies this test.

But this may not necessarily suffice to exclude an arbitrator from the definition of "judicial officer". If the Registrar appoints as arbitrator a private individual, such arbitrator would not be a "public officer" as defined in Article 170, for a public officer is one appointed in terms of Chapter IX of the Constitution; appointment by the Registrar would be inconsistent with those provisions. In any event, since such an arbitrator would perform no other function, he would be a presiding officer or member of an institution created and established for the adjudication of disputes, but would not be excluded from the definition of "judicial officer" on the ground that he has mixed functions. If the Registrar appoints a person who is already a duly appointed "public officer", yet the question whether such person is excluded from the definition would depend on whether his executive functions exceed his judicial functions. However, Article 170 is primarily prospective, and we have to turn to Article 168(1) to ascertain what effect Article 170 has on the continuance in force of existing law authorising the appointment of an arbitrator by the Registrar. "Written Law" includes subordinate legislation, and hence section 58, Act No 34 of 1970, and Rule 49(v), constitute written laws in force immediately before the commencement of the Constitution. They continue in force despite inconsistency with the Constitution, except in three specified situations. The first exception does not arise for consideration as Parliament has made no provision contrary to such "existing written law". The modification of statutory provisions *mutatis mutandis* is where the circumstances demand it; where change is essential or necessary, and not merely useful (see *Visuvalingam v. Liyanage*[17]. Section 2 of the Co-operative Societies Law provides that "there may be appointed a Registrar of Co-operative Societies", but does not stipulate the appointing authority; if he is not a "judicial officer", appointment by the J.S.C. is not required; there is nothing in section 2 to be modified. Rule 49(v) is undoubtedly inconsistent with Article 170, but the *mutatis mutandis* rule does not require the removal of every inconsistency. It is relevant to mention that Article 16(1) makes all existing written law valid and operative

notwithstanding inconsistency with fundamental rights;since inconsistency of such a serious nature does not invalidate existing written law, I cannot regard Article 168(1) as requiring the elimination of less serious inconsistencies. Finally, it is necessary to consider whether it has been "otherwise expressly provided in the Constitution" (i.e. in Articles 114 and 170) that the Registrar and/or arbitrators should be appointed by the J.S.C. An example of "express provision" is to be found in Article 169(1) which deems any inconsistent provisions of the Administration of Justice Law to be repealed. Here there is no "express provision" of that kind. However, to be "express provision" in relation to some matter, specific mention of that matter is not essential; for "express provision" is provision the applicability of which does not arise by inference, and even if there is no specific mention, it is sufficient if it is directly covered by the language used: *Shanmugam v. Commissioner for Registration of Indian & Pakistani Residents* [18]. While Articles 114 and 170 are inconsistent with the existing written law, and while the necessary *implication* of those Articles, in the case of arbitrators, is that appointment by the J.S.C. is required, they cannot be regarded as "express provision" to that effect, for they do not make specific mention or directly cover the appointment of the Registrar and arbitrators. Had Article 168(1) been omitted, there would have been a conflict between pre-existing written law and a constitutional provision; as in the example given in *Jayasekera*,[2] it could have been argued that the statutory provisions ceased to be valid as they did not conform to overriding provisions of the Constitution; or as in *Gunaseela v. Udugama*[19], *Panagoda v. Budinis Singho*, and *Ranaweera v. Wickramasinghe*, that the Constitution did not affect pre-existing jurisdictions. Article 168(1) precluded such controversies: mere inconsistency between existing written law and the Constitution did not invalidate the former; that result would happen only if there was "express provision" in the Constitution.

I therefore determine the questions referred to this Court as follows:

1. The Registrar is an institution exercising judicial power, within the meaning of Article 4 (c), and an arbitrator appointed by the Registrar is a part of such institution.

2. No.

3. Article 170 cannot apply in its entirety to Article 114, because the appointment and dismissal of Judges of the Superior Courts and the High Court is (by virtue of Articles 107 and 111) outside the purview of the Judicial Service Commission. The words "other than in Article 114" occurring in Article 114 could mean *either* that the definition is totally inapplicable to Article 114 *or* that it is inapplicable only to the extent that contrary provision is made in Article 114(6). Clearly the latter is the correct position. To hold otherwise would mean that "judicial officer" in Article 114 is undefined; it would open the door to the argument that this phrase should be limited to those who hold office as District Judges, Magistrates and other judges traditionally so regarded, which was decisively rejected both in *Senadhira* [6] at p.320-1), by Sansoni, J., (as he then was), who held that that phrase included not only the officers of the established Courts but also those akin to them; and in *Ranasinghe*,[3] by the Privy Council. The definition of "judicial officer" in Article 170 applies to Article 114(1), save as otherwise expressly provided in Article 114(6): in relation to Article 114(1) that definition will apply with the omission of the words "a Judge of the supreme Court or a Judge of the Court of Appeal or any Judge of the High Court,"

4. No.

BANDARANAYAKE, J. – *I agree.*

AMERASINGHE, J. – *I agree.*

References determined.