1968 *Present :* **Weeramantry, J.**

K. RAM BANDA, Appellant, *and* THE RIVER VALLEYS DEVELOPMENT BOARD, Respondent

S. C. 31/1966—Labour Tribunal Case 8/24713

Labour Tribunals—Rule-making powers of Minister in regard to procedure—Scope—Regulation specifying a time limit for access to tribunal—Invalidity—Conflict between a Regulation and a provision of the parent Act—Provision in Act giving the Regulation the same efficacy "as if contained in the Act"—Power of Courts to declare the Regulation to be ultra vires*—Principles governing judicial review of administrative legislation—Termination of a workman's services prior to the creation of Labour Tribunals—Whether the workman can apply to a Labour Tribunal for relief—Retrospective operation of a statute—Contract—Distinction between existing rights and vested rights—Courts Ordinance, s. 49 (1) (2) (3)—Civil Appellate Rules 2, 4 (b)—Co-operative Societies Ordinance, s. 46 (3)—Interpretation Ordinance, ss. 6 (3), 17 (1) (e)—Industrial Disputes Regulations, 1958, Regulation 16—Industrial Disputes Act, as amended by Act 62 of 1957, ss. 31A (2), 31B (1), 31B (4), 31C (1), 31D (1), 31D (3), 39 (1) (a), 39 (1) (b), 39 (1) (ff), 39 (1) (h), 40 (1) (q).*

The Minister, purporting to act under the rule-making powers conferred on him by certain sections of the Industrial Disputes Act, made Regulation 16 of the Industrial Disputes Regulations, 1958. Regulation 16 provides that "every application under paragraph (a) or (b) of section 31B (1) of the Industrial Disputes Act in respect of any workman shall be made within three months of the date of termination of the services of that workman". The appellant, who was a workman whose services were terminated by his employer (the respondent) in the year 1957, filed an application before a Labour Tribunal on 14th August 1965, seeking relief against his dismissal. His application was rejected by the Labour Tribunal on the ground that the date of dismissal was more than three months anterior to the application.

In the present appeal, it was contended on behalf of the appellant that Regulation 16 was *ultra vires* the rule-making powers conferred on the Minister. On behalf of the respondent a new point was taken, namely, that at the date of termination of the appellant's services there was no Labour Tribunal in existence to which application could be made for relief.

Held, that Regulation 16 is *ultra vires* the rule-making powers conferred on the Minister by sections 31A (2), 39 (1) (a), 39 (1) (b), 39 (1) (ff) and 39 (1) (h) of the Industrial Disputes Act inasmuch as it in effect takes away from the workman, on the expiry of the stated period of three months, the right given to him by the legislature to apply to a Labour Tribunal for relief, and to that extent nullifies or repeals the principal enactment. The true nature of the Regulation is one of substantive law and not merely of procedure. Section 39 (2) of the Industrial Disputes Act which provides that every regulation made by the Minister should be placed before Parliament for approval and that, on such approval and publication in the *Gazette*, it shall be "as valid and effectual as though it were herein enacted" does not confer validity on a regulation which is outside the scope of the enabling powers. The mere passage of such regulation through Parliament does not give it the *imprimatur* of the legislature in such a way as

to remove it, through the operation of section 39 (2), from the purview of the courts. The duty of interpreting the regulation and the parent Act in order to see whether the former falls within the scope allowed by the latter devolves on the courts alone.

Held further, that the appellant had no right of access to a Labour Tribunal because his services were terminated prior in point of time to the date on which Part IVA of the Industrial Disputes Act creating Labour Tribunals came into operation. In such a case, there is no requirement of the existence of an industrial dispute as a pre-requisite to a workman's application. Part IVA of the Industrial Disputes Act, though nominally an amendment, in fact brought in for the first time a new scheme of tribunals empowered to grant relief of a kind not envisaged before. The Statute cannot apply retroactively to the termination of a contract of service which occurred prior to the introduction of the Act, for this would involve an interference with vested rights (as distinct from existing rights) for which there is neither express provision nor necessary implication in the Act.

APPEAL against an order of a Labour Tribunal.

Colvin R. de Silva, with *R. Weerakoon*, *M. de S. Boralessa* and *M. B. Jayasinghe*, for the Applicant-Appellant.

C. Ranganathan, *Q.C.*, with *S. J. Kadirgamar*, *Q.C.*, and *S. Sharvanand*a, for the Employer-Respondent.

Cur. adv. vult.

July 10, 1968. WEERAMANTRY, J.—

The appellant in this case filed an application before a Labour Tribunal on August 14th 1965 seeking relief against his dismissal by the respondent. He averred that his services were terminated in 1965, inasmuch as a final appeal made by him to his employer was rejected in that year.

It was admitted, however, that the employee had not been working for the employer after 1957 and upon the material placed before him the President of the Tribunal has found that the actual date of termination was in the year 1957 and not in the year 1965. The workman's application was hence rejected by the Labour Tribunal by its order dated 20th September 1966 for the reason that the date of dismissal was more than three months anterior to the application, which was therefore out of time. The time within which applications for relief or redress must be made to Labour Tribunals is fixed by Regulation 16 made by the Minister of Labour under section 39 of the Industrial Disputes Act as amended by Act 62 of 1957, and appearing in *Gazette* 11,688 of 2nd March 1959. From this order the workman appeals.

The only point taken in appeal by the appellant is that Regulation 16 already referred to is *ultra vires* the powers conferred on the Minister, the appellant's contention being that this regulation in effect takes away from the workman a right given to him by the legislature, and to that extent nullifies or repeals the principal enactment. It is urged that inasmuch as the workman is on the expiry of the stated period deprived by this rule of his right of access to the tribunal, the rule falls outside the limited ambit of the Minister's rule-making authority. Argument on this question of law was very exhaustive, extending over several days, and I must record my appreciation of the assistance I have derived from both Counsel on this most important question.

Learned Counsel for the respondent while strenuously maintaining that the rule is in fact *intra vires* has taken the further point, not taken before the Tribunal, that at the date of termination there was no tribunal in existence to which application could be made for relief.

I shall deal first with the question of *ultra vires* and thereafter consider the effect on this application of the circumstance that the Tribunal came into existence after the termination of the appellant's services.

In dealing with the question of *ultra vires,* we must first examine the terms in which the parent Act invests the Minister with his rule-making power.

The sections conferring these powers are sections 31A (2) and 39 (1) of the Act. Section 31A (2) states that regulations may be made prescribing the manner in which applications under section 31B may be made to a Labour Tribunal. Section 39 (1) enables the Minister to make regulations in respect of the several matters enumerated in its various subsections, those relevant for our consideration being the matters specified in sections 39 (1) (*a*), 39 (1) (*b*), 39 (1) (*ff*) and 39 (1) (*h*).

It is submitted for the appellant that a regulation specifying a time limit for access to the Tribunal does not come within the scope of any of these enabling provisions, while the respondent contends that more than one of these enabling provisions would clothe the Minister with authority to make such a rule.

It would appear that sections 39 (1) (*a*) and (*b*) do not amplify the area within which rules may be made but merely state that where matters are required by the Act to be prescribed or regulations are required or authorised to be made, the Minister may make them. The matters on which such regulations may be made must therefore be sought in other provisions of the Act. These are section 31A (2) on the one hand, and, on the other, the relevant subsections of section 39 (1), which are subsections 39 (1) (*ff*) and 39 (1) (*h*). These provisions may be divided into two broad groups—31A (2) and 39 (1) (*ff*) which deal with questions of 'manner' or 'procedure' and 39 (1) (*h*) which deals with matters necessary for carrying out the provisions of the Act or giving effect to its principles.

I shall deal first with the question whether the rule we are now considering is one relating to ' manner ' or ' procedure ' and so falling within the scope of sections 31A (2) or 39 (1) (*ff*).

This phraseology necessitates an examination of the distinction between matters procedural and matters substantive, a distinction which must first be examined in the light of legal theory.

The distinction between substantive and procedural law is one of the traditional classifications of jurisprudence but it is well recognised that a given rule may, depending on its context and its application, move over from one department to the other or stand somewhat uncertainly on the border between them. Indeed legal history shows that important rules of purely substantive law have taken their origin in matters procedural.

There is no general principle which affords a test for deciding whether a given rule belongs to the realm of substantive law or to the realm of procedure, but it is important to look to substance and real effect rather than to form in determining this question. The fact that a rule appears in form to be procedural does not necessarily make it so, for what may be procedural in appearance may well be substantive in effect. Thus Salmond [1] observes that " although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure, which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. " Rules relating to limitation are among the categories cited by the same authority as being wholly or substantially equivalent to rules of substantive law.

We must therefore examine this particular rule in its actual operation with a view to determining its true nature and whether even if it should appear to be procedural as contended for by the appellant, it is in fact substantive.

It must be observed preliminarily that limitation in respect of a workman's rights of access to Labour Tribunals for relief or redress is somewhat different in its juristic nature from limitation operating in bar of a litigant's right to approach a court of law for a remedy. A litigant who is barred by a rule of limitation from seeking redress in a court of law is not left merely with an empty shell of right in his hands. Though debarred from his normal remedy in a court of law there is real content in the residue of his rights and these can assume substance in a variety of ways as for example when a prescribed debt is looked upon as good consideration for a fresh contract in English Law or when under Roman-Dutch Law a prescribed debt which is paid cannot be claimed back on the ground of unjust enrichment.

On the other hand the imposition of a time bar upon the workman's right of access to a tribunal operates so as to strike at the foundation of the statutory benefits accruing to him from that portion of the Industrial

[1] *Jurisprudence, 12th ed., p. 462.*

Disputes Act relating to Labour Tribunals. In other words, unlike the litigant barred by limitation from an ordinary court of law, he retains not even the empty shell of those special rights which the Legislature has given him but sees them vanish away in their totality the moment the time bar springs into effect. Left with no access to the special tribunal created for him, he is destitute of all benefits conferred on him by the statute and is thrown back simply upon the common law contract as administered by the common law courts—that self-same subjection to the letter of his covenant which these legislative provisions were designed to mitigate and soften.

The total deprivation of right which results bears more resemblance to the operation of a rule of acquisitive prescription than of extinctive prescription or limitation, for what is destroyed is the right itself and not the remedy alone. In this sense the workman denuded of his right to relief stands in much the same position as a person against whom a rule of acquisitive prescription has run. It would ill accord with reality to describe such a rule destroying the total content of a right as one of ' manner ' or ' procedure '.

In support of the contention that these rules are procedural, the analogy of the Civil Appellate Rules has been called in aid. The Civil Appellate Rules were made by the judges under a rule-making power conferred on them by section 49 (1) of the Courts Ordinance. This provision empowered the judges of the Supreme Court to frame, constitute and establish such general rules and orders of Court as to them should seem meet for regulating *inter alia* the form and manner of proceedings to be observed in the Supreme Court, the pleading practice and procedure not specially provided for by the Civil Procedure Code, and in particular the mode of prosecuting appeals.

In terms of this rule-making power the Civil Appellate Rules were framed containing certain provisions specifying limits of time, as for example Rule 2 specifying the time for application for typewritten copies and Rule (4) (*b*) specifying the time within which additional fees should be paid for typewritten copies. Such limitations of time imposed under the authority of enabling provisions relating to procedure are cited in support of the time limit imposed by the Minister under his enabling powers relating to procedure.

I consider that the analogy of the Civil Appellate Rules does not hold for the reason that there is no taking away thereby of any right given to an appellant but only the imposition of certain procedural requisites to be complied with by a person choosing to assert the right of appeal given to him. This right of appeal, it must be remembered, is itself not an unqualified right but is limited as to time and hedged in by various requisites laid down by the legislature itself. Such a right will by the very terms of its creation automatically die if not asserted within the life-span set for it by the legislature. A regulation in regard to the manner of its

assertion, in default of compliance with which it will not have been properly asserted, is a notion far removed from that of the imposition of a guillotine by Ministerial act upon the very right itself. There is no question therefore in regard to the Civil Appellate Rules, as there is in the present case, of the total deprivation of a right—far less of one so unlimited in time and so original in content as that we are now considering.

It is also pertinent to observe in regard to the right to appeal that although the legislature itself has specified a limit of time for its exercise, it has also provided safeguards in the form of leave to appeal notwithstanding lapse of time and relief by way of revision, to avoid hardship in its operation. Safeguards of this type are totally denied to a workman deprived by the Minister of access to the Tribunal. There is unmistakably in the latter case the extinction of a right and not a regulation of the manner of its exercise.

All these considerations point conclusively to the rule being one of substantive law rather than of procedure.

It is also possible to examine these provisions in a narrower way. Thus when section 31A (2) prescribes the manner in which an application may be made to a tribunal, this provision may perhaps be interpreted in the narrower sense that the manner therein referred to is the actual way in which rather than the time within which the application should be made. Again when section 39 (1) (*ff*) speaks of procedure to be observed by a Labour Tribunal in proceedings *before that tribunal* it can be construed to exclude procedure relating to those ' pre-trial ' stages when the matter is not yet before the Tribunal.

These constructions are of course not the only possible ones and it is perhaps permissible to read each of these subsections more liberally so as to avoid the restricted meaning indicated in the preceding paragraph, and contended for by the appellant.

However in case of doubt that construction should prevail which will conserve rather than take away the rights which the legislature has conferred in terms of the Act, and the restricted meaning referred to above should be favoured, limiting as it does the scope of the power to whittle down those rights by regulation. It is also desirable in the interpretation of the terms in which delegated powers are conferred, to lean in favour of that construction which lessens rather than widens the ambit of the delegated law-making power.

It is not of course necessary in the present case to rest the exclusion of these rules from those which the Minister is empowered to make, on the basis merely of such rules of construction, for the larger consideration that the rule appears to be substantive rather than adjectival in its effect would appear to exclude it from the ambit of the subsections we are now considering.

If, for the foregoing reasons, the rule we are considering pertains to substantive law rather than procedure, there would be difficulty in bringing it within the scope of sections 31A (2) and 39 (1) (*ff*).

Furthermore, a practical view of the scope of such a rule of limitation points strongly to the necessity for its enactment by the legislature itself. If, in the language of Viscount Dilhorne in *United Engineering Workers' Union v. Devanayagam*[1], the circumstances set out in section 31B (1) of the Act, form " the gateway through which a workman must pass to get his application before a tribunal ", the Minister would by mere regulation be narrowing the gateway which the legislature has so created, or, to be more apposite, be closing it altogether, within such time as he may specify. A closure of the gateway so opened should be by act of the Legislature itself, and cannot be effected under the guise of a rule relating to mere procedure.

It may further be observed that the group of sections relating to Labour Tribunals is not altogether silent on questions of limitation of time for the performance of particular acts, as where section 31D (3) lays down a time limit of fourteen days for the purpose of an appeal. Had it been the intention of the Legislature to limit the time within which a workman should apply to the Tribunal for relief or redress, the Legislature may well be expected in this context to have imposed such a time limit as well. Indeed the latter type of time limit is, as is observed in the next succeeding paragraphs, of a more fundamental nature than the mere specification of a time limit for appeal and if the one were deserving of regulation by the Legislature itself so would appear to be the other.

We must next consider whether the rule is necessary in terms of section 39 (1) (*h*) for carrying out the provisions of the Act or giving effect to its principles. It may perhaps in this as in other fields of law be desirable to have rules of limitation but it is doubtful that the imposition of such a rule is a *sine qua non* for carrying out such provisions or giving effect to such principles. There is in regard to the right of access to a tribunal no such compelling necessity for limiting time, as there is, for example, in regard to the performance of procedural steps in prosecuting a time limited right of appeal. Rules regarding the latter have their justification both in good sense and in practical necessity for it is essential to the proper functioning of any tribunal however humble or exalted its place in the hierarchy of courts, that finality should attach to its orders. If these are sought to be questioned the steps involved in so doing must be expeditiously taken, lest the authority and effectiveness of such orders should suffer from lack of finality.

Different considerations apply in regard to the limitation of access to a Tribunal for its authority remains unaffected by the absence of such a rule. Tribunals are in no way disabled from carrying out the provisions of the Act and giving effect to its principles if employees are not debarred in this way, and in no view will these objects be rendered

[1] (1967) 69 *N. L. R.* 289 at 298.

impossible of attainment. Stale claims must of course under any system be discouraged but the Act is not devoid of means within itself for giving effect to this desirable principle for it may well be that lapse of time would be a factor taken into account by the President in deciding what is 'just and equitable' in the circumstances of a particular case.

Indeed the legislature has thought it fit not to curtail the discretion of the Tribunal in any way in making an award which it considers just and equitable. There is no compelling need against this background to tie the hands of the Tribunal in regard to a matter which it is at liberty to take into account in its overall assessment of that which is just and equitable in the circumstances of the particular case.

The concession once made that the power exists to impose such a time bar, must lead also to a concession to the Minister of a wide and in effect uncontrolled discretion to determine the length of time which he considers most appropriate for this purpose. If a situation should ensue of the right being taken away from the workman after the lapse of a period such as a month or a week, the workman may well be without a means of redress against what is in effect his deprivation by mere Ministerial decree of a right which the supreme law-making authority has thought fit to give him.

It is not indeed the province of this Court, nor is it necessary for the determination of the legal question I am now considering, to express any view on the adequacy of the three-month period the Minister has chosen to impose. It may however well be contended that this period is all too short having regard in particular to the involved nature of the negotiation that often ensues upon termination of services, a process in which the workman and the employer are by no means the only parties involved. In the context of a tribunal freed to so large an extent of the shackles of ordinary law and procedure there is room for a plea that so stringent a rule of limitation seems strangely out of place. On the other hand, justification for such a rule may be sought in the very amplitude of the Tribunal's powers, from subjection to which the employer should be free after the lapse of a period of time. This result should however ensue from an Act of the legislature and not from the will of the Minister.

The provisions of section 39 (1) (*h*) do not therefore in my view bring the rule within the scope of the authority delegated to the Minister.

It has been sought to attract validity to these regulations through an application of the provisions of the Interpretation Ordinance. Section 17 (1) (*e*) of that Statute states that where any enactment confers power on any authority to make rules, unless the contrary intention appears, all rules shall be published in the *Gazette* and shall have the force of law as fully as if they had been enacted in an Ordinance or Act of Parliament. This provision cannot however confer validity on rules not made within the rule making power.

I must now deal with the submission that, even if the regulation lie outside the scope of sections 31A (2), 39 (1) (*a*), 39 (1) (*b*), 39 (1) (*ff*) or 39 (1) (*h*), it becomes clothed with legal validity through the operation of section 39 (2). This subsection provides that any regulation made by the Minister shall not have effect until it has been approved by the Senate and the House of Representatives and notification of such approval is published in the *Gazette*, and that every regulation so approved shall be 'as valid and effectual as though it were herein enacted'.

It is submitted on behalf of the respondent that the requirement of approval by Parliament renders the regulations so approved tantamount to an Act of Parliament itself, the validity of which is not justiciable by the Courts. Learned Counsel for the respondent submits that such regulations are law because Parliament says they are law and that they draw their validity not from the law-making power of the authority which made them but from the fact of Parliamentary approval. I shall now proceed to deal with these submissions.

A provision similar to section 39 (2) appears in section 49 (2) of the Courts Ordinance which requires rules made by the Judges to be laid before the Senate and the House of Representatives. If within 40 days of being so laid, any such rules are objected to by either House this subsection provides that they may be annulled. If, however, they are not so annulled and are published in the *Gazette*, they are to come into force on publication in the *Gazette*, by virtue of subsection 3. The case of *Abdul Cader v. Sittinisa* [1] would at first sight appear to lend support to the view that in terms of the Interpretation Ordinance submission to the Legislature would afford a sufficient answer to the challenge of *ultra vires*. In that case the Court observed [2] in regard to the argument of *ultra vires* which was there put forward, that the "provisions of section 14 (1) (*e*) of the Interpretation Ordinance that all rules that have been submitted to the Legislature and have not been annulled have upon publication in the *Gazette* 'the force of law as fully as if they had been enacted in the Ordinance' under which they are made is a sufficient answer to the argument of *ultra vires*".

It will be seen that the reason there given based on the Interpretation Ordinance is incorrect. Reference to submission to the legislature and the absence of annulment would appear to have been taken not from the section therein referred to of the Interpretation Ordinance but from section 49 of the Courts Ordinance. The Interpretation Ordinance by itself does not therefore clothe such rules with validity and does not carry any further the proposition that approval by Parliament renders the regulations valid and effectual. In the present case therefore the provisions of the Interpretation Ordinance do not stand in the way of an argument of *ultra vires*, and such an argument must turn on the construction to be placed on section 39 (2) of the Industrial Disputes Act read by itself.

[1] *(1951) 52 N. L. R. 536.*

[2] *ibid. at p. 546.*

It is submitted for the respondent that in any event the word 'regulation' in section 39 (2) refers to any regulation made in the purported exercise of powers under the Act whether such regulation be in fact within or without the terms of the power under which it is made. It seems to me however that the word ' regulation ' in section 39 (2) necessarily refers back to the regulations already mentioned in section 39 (1).

Another reason urged for contending that Parliamentary approval confers validity even on regulations outside the scope of the enabling powers was that Parliament, in so conferring its approval, would be interpreting such regulation as being within the enabling powers which it had conferred. However, I have elsewhere in this judgment referred to a principle which militates against this submission, namely that interpretation of the law is exclusively the province and function of the Courts and never that of Parliament, whose proper province and function is not the interpretation of the laws but the making of them. Furthermore, even if it be permissible in case of ambiguity in the construction of the main statute, to look at rules made under its provisions, as an aid to an understanding of the statute, still, as Craies observes [1], too much stress cannot be rested upon the rules, inasmuch as they may be questioned as being in excess of the powers of the subordinate body to which Parliament has delegated authority to make them. Indeed it is doubtful whether such legislation can be referred to at all for the purpose of construing an expression in the Statute even in case of ambiguity [2].

Reverting now to the main argument that the regulation is " as valid and effectual " as though contained in the main Act, because the Legislature says so, we must turn at the very outset to the observations of the House of Lords in the celebrated case of *Institute of Patent Agents v. Lockwood* [3].

There were in this case certain very strong expressions of opinion by Lord Herschell on the question whether such a provision rendered a regulation so passed not subject to the scrutiny of the courts. Lord Herschell observed [4]: " 'They are to be 'of the same effect as if they were contained in this Act'. My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the courts. . . I own I feel very great difficulty in giving to this provision, that they 'shall be of the same effect as if they were contained in this Act', any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot,

[1] *Statute Law 6th ed., p. 158.*
[2] *Halsbury, 3rd ed., vol. 36, p. 401.*
[3] *1894 A. C. 347.*
[4] *ibid. at p. 359.*

you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it." This strong expression of opinion gives such words in the Act their literal meaning and endeavours to reconcile any inconsistency between regulations and the parent Act on the basis of a conflict which must be resolved in favour of the parent Act, a notion quite apart from the notion of *ultra vires*.

Lord Herschell's view was shared by Lord Watson and Lord Russell of Killowen. Lord Morris however differed so strongly as to express the view that it was not merely within the competence of courts of justice to consider whether the rules were *ultra vires* but that it was also their duty to do so. He considered the question of the rules being laid before both Houses to be a matter of mere precaution, not conferring any imprimatur upon them. It was only a provision affording an opportunity to a person choosing to take advantage of it, of moving that they be annulled.

Whether the expressions of opinion by Lord Herschell and those who concurred in his view were necessary to the decision in *Lockwood's case* is questionable, for the decision in fact rested on a point of procedure. Moreover, the case is one where the rules sought to be imposed were in fact held not only by Lord Herschell but also by Lord Morris, who dissented, to be *intra vires* the general rules made by the Board of Trade. It cannot therefore be authority for the proposition—and indeed no authority was in fact cited for the proposition—that a rule which is in fact *ultra vires* the parent statute is given validity by the fact of a clause in the Act giving it the same efficacy "as if contained in the Act"; nor has a single instance been cited of a refusal by the Courts to apply the *vires* test to rules made in such circumstances and falling outside the scope of the enabling power.

A clause to the effect that "the order of the Minister when made shall have effect as if enacted in this Act" was indeed held in *Minister of Health v. the King (on the prosecution of Yaffe)*[1] not to preclude the courts from calling in question an order of the Minister inconsistent with the provisions of the Act. It must of course be observed that the *Yaffe* case does not in principle contradict the rule enunciated in *Lockwood's case* for the reason that the statute in the *Yaffe* case did not require the order of the Minister to be placed before Parliament. In *Yaffe's* case there was no parliamentary manner of dealing with the confirmation of a scheme proposed by the Minister while in *Lockwood's* case Parliament itself was in control of the rules for forty days after they were passed and could have annulled them by motion to that effect. There has hence been no decisive rejection of the dicta in *Lockwood's case*, while at the same time it has never been held that such a clause would prevail over a rule which is in fact *ultra vires*.

[1] *(1931) A. C. 494 (H. L.).*

It is somewhat strange that so important a question should have passed without affirmative judicial decision but this would indeed appear to be the position. To quote Halsbury, " it was not uncommon in the past for a statute conferring legislative powers to provide that legislation made under those powers should have effect or be of the same force or effect, as if enacted in the Statute itself; and it was much canvassed though never decided whether such a provision precluded the courts from inquiring into the validity of legislation purporting to be made under the powers in question "[1]. So also Craies[2] describes the actual position as being uncertain.

The case of *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath*[3] presented an opportunity for the examination by court of a rule made by the Minister of Food and Co-operative Undertakings in terms of section 46 (3) of the Co-operative Societies Ordinance.

That statute too provided by section 46 (3) that no rule shall have effect unless approved by the Senate and the House of Representatives and notification of such approval was published in the Gazette, and it further provided that every rule shall upon publication in the Gazette "be as valid and effectual as though it were herein enacted".

In this case the majority of the Court held that the rule in question was *intra vires* the rule-making powers granted by section 46 (3). Basnayake, C.J., however in a dissenting judgment took the view that the rule in question was *ultra vires* and proceeded to consider the applicability to an *ultra vires* rule of the subsection giving rules the same force as if they had been contained in the Act, upon their passage through Parliament and the necessary publication in the Gazette. He observed, after referring to *Lockwood's case* and *Yaffe's case* that *Lockwood's case* cannot be regarded as deciding that rules which are outside the scope of the rule making power cannot be questioned in a court of law merely because the enabling statute has words to the effect that such rules shall be valid and effectual. He also drew attention to the absence of any decision of the English Courts holding that a rule outside the scope of the enabling power gains validity when the Act declares that they shall be as valid and effectual as if contained in the Act, and expressed the view that the court had power to declare a rule *ultra vires* despite such a clause. The view of Basnayake, C.J., has much to commend it both for its logical approach and for its clear assertion of judicial power in a sphere appropriate to its exercise.

In the absence then of authority on the subject, we must turn for guidance to the general principles and considerations governing Judicial review of administrative legislation, a problem which in modern times has assumed much importance in the context of the growing danger both here and elsewhere of an exercise by administrative authorities of powers in excess of those specifically conferred on them by Parliament.

[1] *Halsbury, 3rd. ed., vol. 36, p. 492.* [2] *Statute Law, 6th. ed., pp. 309-10.*
[3] *(1957) 59 N. L. R. 125.*

It becomes necessary to see firstly what practical considerations necessitate judicial vigilance in this matter, and secondly what juridical basis exists for the exercise by the courts of such a power of scrutiny.

There has in Ceylon been, in particular during the period subsequent to the 1938 Revision of the Legislative Enactments, a large increase in the volume of subsidiary legislation, the bulk of which has during the period 1938 to 1956 alone, exceeded the total volume of such legislation in the years before. The three volumes which sufficed in 1938 to contain such legislation have had in 1956 to be replaced by seven of greater bulk; and these will assuredly prove insufficient in volume to accommodate what has been formulated since.

Maitland's observation nearly a hundred years ago[1] that England was "becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes" seems therefore apposite also to this country and to this time; and in this context all inroads made by such delegated authorities upon the province of the supreme law-making authority must be most closely watched. Any trespass on this preserve is fraught with attendant danger to the doctrine of parliamentary supremacy, however well intentioned in its origin and well regulated in its exercise.

It is true parliamentary control is sought to be retained over this type of legislation through a variety of means which include both negative regulation (subjecting them to annulment by Parliament within a specified period) and affirmative resolution (requiring the instrument to be laid before the House for a stated period and delaying its operation until expressly approved by resolution). But it becomes pertinent to inquire, if this be the sole ground of validity alleged, how effective such clauses are as an instrument of control in cases where the authority granted by the enabling statute is exceeded by the functionary who so acts.

Parliament can scarcely be expected to have the time or the inclination to give its detailed attention to the mass of rules so placed before it, and even in cases where affirmative approval is required, parliamentary scrutiny of such provisions cannot in any way be likened to the attention a bill receives from both Houses.

It is indeed the undoubted right of a member to voice his opposition to any regulation proposed, but it is doubtful that such a regulation can obtain the same full consideration as that given to a bill. Hence while in theory Parliament still reigns the supreme law giver, a large volume of the law by which the subject is governed can well be pressed into form not by the power of Parliament's considered will but by the drive of executive urgency.

[1] *Constitutional History of England, p. 412.*

Against such a background, to view section 39 (2) as a cloak of validity which may be thrown around rules which in fact are *ultra vires* would be to erode rather than protect the supreme authority of Parliament. Regulations clearly outside the scope of the enabling powers and passing unnoticed in the heat and pressure of parliamentary business may then survive unquestioned and unquestionable ; and functionaries manifestly exceeding their powers would thereby be able to arrogate to themselves a *de facto* legislative authority which *de jure* belongs to parliament alone.

For the foregoing reasons I cannot subscribe to the view that the mere passage of a regulation through Parliament gives it the *imprimatur* of the legislature in such a way as to remove it from the purview of the courts through the operation of section 39 (2).

The duty of interpreting the regulation and the parent Act in order to see whether the former falls within the scope allowed by the latter devolves on the courts alone. It is a principle that has often been asserted, and bears reassertion, that just as the making of the laws is exclusively the province and function of Parliament, so is their interpretation the province and function exclusively of the courts. In the total and exclusive commitment of this function to the care of the courts, tradition, law and reason all combine ; nor is any organ of the State so well equipped in fact[1] or so amply authorised by law to discharge this function. It is self-evident that Parliament is not nor ever can be the authority for the interpretation of the laws which it enacts.

In the view stated above, the courts as the sole interpreters of the law are committed to the duty, despite section 39 (2), to consider whether a regulation travels beyond the powers conferred on its maker. Any other view of the law seems fraught with danger to the subject for it would free the acts of creatures of the legislature from the checks and scrutinies which alone are effective in ensuring that the delegated authority while operating to the uttermost limits of its powers does not travel beyond.

I thus reach the conclusion that it is within the competence of this court to subject such regulations to the *ultra vires* test despite section 39 (2) and for the reasons earlier set out, I hold the rule in question to be *ultra vires*.

I turn now to the question whether despite the rule being *ultra vires* and the workman therefore having a right of access to the Tribunal even after the lapse of three months, he has no right to relief inasmuch as the termination of his services was prior in point of time to the date on which the Act came into operation. The termination was in the year 1957

[1] *S. A. de Smith, Judicial Review of Adm. Action, p. 7.*

whereas Part IVA of the Statute was enacted in its entirety on 31st December 1957, that is in any event after the termination of the workman's services.

Mr. Ranganathan for the respondent submits that this is an alternative ground on which the President of the Tribunal could have rejected the application, for the Statute cannot be given a retrospective effect enabling workmen whose services were terminated prior to 31st December 1957, to have recourse to Labour Tribunals. Inasmuch as all legislation must be presumed to be prospective rather than retrospective in its operation, Part IV A of the Industrial Disputes Act cannot, in the respondent's submission, compel an employer whose liability at the time of termination was confined within the four corners of the contract to submit to a new tribunal exercising a new jurisdiction and using a new yardstick of liability—that which is "just and equitable" as opposed to that which the contract determines.

The question for consideration, then, is whether on a termination of a workman's services there is a vesting of the rights of parties upon the basis of the contract in such a sense that no questions connected with or flowing from the contract can thereafter except by express enactment or necessary implication be made justiciable by other Tribunals than the courts or by other standards than those afforded by the contract itself.

The appellant submits that questions of retrospective operation do not arise in the present case on the basis that the requisite for access to the Tribunal is an industrial dispute and not termination simpliciter and it is submitted that although the termination may have preceded the Act the industrial dispute resulting from it arose subsequently.

I shall deal first with this submission and in the light of my conclusions on this matter consider the applicability to this case of the principles relating to retrospective operation of statutes.

If termination simpliciter be the requisite for access to the tribunal then such requisite would on the facts of this case have occurred prior to the enactment of Section 31A (2) and could therefore only be caught up retrospectively whereas if an industrial dispute be the requisite, such industrial dispute may well have occurred subsequent to 31st December 1957, the day on which Part IVA came into operation, although the actual date of termination preceded this date. In the latter event these provisions could, operating prospectively, take in such a dispute.

As already observed, the provision of law under which the workman has sought relief in this case is section 31B (1). This section provides that "a workman or a trade union on behalf of a workman who is a

member of that union may make an application in writing to a labour tribunal for relief or redress in respect of any of the following matters:—

(*a*) the termination of his services by his employer ;

(*b*) the question whether any gratuity or other benefits are due from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits ;

(*c*) such other matters relating to the terms of employment, or the conditions of labour, of a workman as may be prescribed."

Sub-section (*c*) is inapplicable to the present application and in any event no matters have been prescribed in terms of this sub-section. The application therefore hinges on the interpretation to be given to sub-sections (*a*) and (*b*).

Both these sub-sections appear to require or pre-suppose a termination of services. Is that, however, the only requisite, or should there further be an industrial dispute in existence in order to open the doors of the tribunal to a workman ?

Dr. de Silva's submission is that although the word "termination" occurs in sections 31B (1) (*a*) and (*b*), it is nevertheless only a dispute, that is to say an industrial dispute, which can bring a workman before the tribunal for redress. He contends that a dispute may emerge even years after the termination, for a continuous process of negotiation ensues between employer and employee, the latter perhaps acting in consultation with his trade union.

In other words it is submitted that such a dispute is a live and continuous thing ever altering in scope and content till it comes to a head at the moment of making application to the tribunal. Inasmuch as one cannot therefore fix the point of time at which a matter crystallises into a dispute, termination does not, to summarise this submission, furnish a test of the time of accrual of the right to invoke the powers of a Labour Tribunal. So long as such dispute is established it matters little that the factual basis on which it rests stretches out into the past.

In support of this view reliance is placed on the explanation by the Privy Council of the scope and functions of Labour Tribunals in the recent case of *United Engineering Workers' Union v. Devanayagam*[1]. It was there observed that it would be wrong to search for a cause of action before a Labour Tribunal in the sense in which one looks for such a pre-requisite to action in a Court of Law. No doubt, one does not have to search for a cause of action in the sense in which such a requirement exists as a pre-requisite to access to a Court of Law ; and no doubt also these tribunals operate, as the appellant points out, in a

[1] *(1967) 69 N. L. R. 289.*

setting entirely different from that in which courts of law function, for the tribunal's powers are not confined within the framework of the contract. But this does not justify us in reading into the plain terms of section 31B, provisions which are not in fact contained therein. It seems to me upon a plain reading of that section, that the peg upon which the workman must hang his claim to approach the Tribunal is not an industrial dispute but whatever is specified in the respective sub-sections of section 31B (1). In so far as sub-sections (*a*) and (*b*) are concerned, this peg would appear to be the termination of services ; and immediately upon such termination there would accrue to the workman a right of access to the Tribunal. The section does not upon any reading require that the termination should as a condition of access to the Tribunal mature into an industrial dispute if indeed that were possible in law.

I am unable therefore to read into section 31B (1) anything more than the legislature has put into it and nowhere do I find either in the scheme of the Act or in the terms of that section, any requirement of the existence of an industrial dispute as a pre-requisite to a workman's application. Having thus reached the conclusion that the event entitling the workman to approach the Tribunal has on the facts of the present case occurred prior to the creation of Labour Tribunals, I must next examine whether the Statute can operate retrospectively in regard to this termination without violence to the principle that vested rights should not be interfered with by later legislation.

Before I do so I must deal with a preliminary submission by learned counsel for the appellant who contends that we are here not concerned with the question whether rights are prospective or retrospective but only with the conciliatory functions of a settling or mediating institution. The functions of these institutions, according to the preamble to the Statute, are the prevention, investigation and settlement of industrial disputes and the decision of disputes is not among these functions. This mediating institution it is submitted is not circumscribed in its powers of mediation by the circumstance that at the time of termination it was not in being. It is its duty, unfettered by traditional concepts of legal rights and liabilities, to give effect to those concepts of social justice which must weigh in equity and fairness, though not in strict law, in all decisions between employer and employee. Legal rights and duties in the strict sense are according to this submission left unaffected.

It would seem however that whatever be the true conception of the functions of these tribunals, the relief or redress which they may grant takes the shape of orders binding on the employer. The Labour Tribunal is empowered by section 31C (1) to make an order which appears to it to be just and equitable and this order becomes final and not questionable by any court in terms of section 31 (1). Furthermore, there is a duty of compliance with this order imposed upon the employer in terms *inter alia* of section 40 (1) (*q*) which makes it a punishable offence for an employer to fail to comply with any order made in respect of him by a Labour

Tribunal. Such orders may in the result affect adversely that legal position stemming from the contract alone, in which the employer would but for these provisions have found himself at the date of termination. It would be incorrect to say therefore that legal rights and duties as between employers and employees are left unaffected. The matter cannot be more clearly put than to refer to the phraseology of section 31 B (4) which expressly permits a tribunal to grant relief or redress to an applicant " notwithstanding anything to the contrary in any contract of service between him and the employer ".

The extent to which the creation of Labour Tribunals makes an impact on the legal position of the employer is best understood in the light of the legislation which had till then been enacted in respect of disputes between employers and employees.

The forerunner of the present legislation relating to the conciliation between employer and employee was the Industrial Disputes Ordinance, No. 3 of 1931, an Ordinance providing for the investigation and settlement of industrial disputes. This Ordinance provided for the appointment by the Governor of commissions to inquire into matters relating to industry which might be referred to it by the Governor. The Controller of Labour could also take certain steps towards effecting a settlement and it was the duty of Conciliation Boards to bring about a settlement of disputes referred to them. Where settlements were so arrived at, the settlements were binding, but if not arrived at, the proposals for settlement recommended by the Board were published in the Gazette and any party failing to make a statement rejecting the settlement was deemed to have accepted such settlement. However a right of repudiation was expressly conferred, and there was thus no imposition of such terms upon an unwilling party.

There thereafter came upon the statute book the Industrial Disputes Act, No. 43 of 1950, which was " an Act to provide for the prevention, investigation and settlement of industrial disputes, and for matters connected therewith or incidental thereto ". This Act provided for voluntary and compulsory arbitration in regard to industrial disputes. Reference to an Industrial Court was not a right given to an aggrieved workman but an act performable by the Minister in the exercise of a discretion expressly conferred on him. Reference to arbitration was entirely dependent on the consent of parties.[1]

The resulting position then was that subject only to the Minister's right, in his discretion, to refer a matter to an Industrial Court, the employer was entitled to stand upon the terms of the contract.

His right so to insist upon the common law incidents of the contract remained unaffected until the amending Act No. 62 of 1957 brought about the creation of Labour Tribunals. Section 31B (1) of this Act for the

[1] *Section 3 (1) (d).*

first time entitled an individual workman to approach a tribunal other than the normal courts of law for relief or redress. These tribunals were, as already observed, empowered to make orders binding upon the employer, and exercise a power over him irrespective of his consent, thus subjecting him even against his will to liabilities not taking their origin in the contract.

We must therefore approach the problem of retrospective operation on the basis that the provision of law we are considering is one which had a real impact on legal rights and duties. Could this legislation which confers new rights on a workman upon the termination of his services operate retrospectively in respect of a past termination ?

In *Akilandanayaki v. Sothinagaratnam* [1] the court was considering an amendment of the Matrimonial Rights and Inheritance Ordinance changing the definition of thediathettam prevailing under Ordinance No. 9 of 1911. It was held that no retrospective effect could in the absence of express words or necessary implication be given to new laws which affect rights acquired under the former law. These latter were held therefore to remain undisturbed by the amendment.

Section 6 (3) of the Interpretation Ordinance was there described by Gratiaen J. as giving statutory recognition to the rule of judicial interpretation adopted in all civilised countries that the courts should not lightly assume an intent on the part of Parliament to introduce legislation prejudicially affecting vested rights which have already been acquired.

This and other judgments of this court were cited in support of the principle that there is a presumption against an interference with vested rights, but I would prefer not to base this judgment on them as they are cases of amending legislation and thus fall within the scope of section 6 (3) of the Interpretation Ordinance.

Part IVA of the Industrial Disputes Act, though nominally an amendment, in fact brought in for the first time a new scheme of tribunals empowered to grant relief of a kind not envisaged before. It would therefore be preferable to rest a discussion of this matter on the general principles of interpretation rather than on Section 6 (3) of the Interpretation Ordinance.

The general principle is of course that statutes are presumed not to operate retrospectively so as to affect vested rights, and that courts would always lean in favour of that interpretation which leaves vested rights unaffected [2].

[1] *(1952) 53 N. L. R. 385 (D. B.).* [2] *Craies Statute Law, 6th ed., p. 397.*

While this proposition is not disputed on behalf of the appellant the point is taken that a distinction must be drawn between vested rights and existing rights. It is only in respect of vested rights that there is no presumption that statutes are not retrospective[1]. It is correctly submitted that most pieces of legislation in fact do interfere with existing rights and that it is not the policy of the law to lean against such interference.

This submission necessitates an examination of the distinction between existing rights and vested rights for the purpose of the rule against retrospective operation.

The word 'vested' would appear to have a legal meaning which is primarily understood as being " free from all contingencies"[2] and the distinction between such a right and an existing right has been well explained by Buckley L.J. in *West v. Gwynne*[3] in these terms: " Suppose that by contract between A and B there is in an event to arise a debt from B to A, and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective.... but if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's right in an event to become a creditor of B ". It was held that there was nothing in the language of the new enactment excluding from its scope contracts entered into prior to its date of operation. The rights affected were merely existing rights and there was no presumption against interference with existing rights.

Where then prior to the enactment of the statute the transaction is done with and finished, where the contract no longer subsists, can it be said that the Statute merely affects existing rights or does it not rather strike at vested rights which have crystallised on the basis that the contractual nexus is no more ? In other words, where the termination of the contract has already taken place, is an employer whose rights against and liabilities towards his employee are at that moment of time

[1] *Craies Statute Law, 6th ed. pp. 397-8; Halsbury, 3rd ed., vol. 36, p. 423.*

[2] *Re Edmondson's Estates 1868 L. R. 5 Eq. 389 at 396-7.*

[3] *(1911) 2 Ch. 1 at 12.*

justiciable purely upon the basis of the contract, to be subjected to further claims upon him arising from that self-same employer-employee relationship which has come to an end ?

I think not, for his rights are vested in him at the moment of termination, as are those of the employee, and in regard to such rights an Act is always presumed to speak as to the future. In the absence of express provision or necessary implication rights and obligations in any sense cannot be engrafted upon this dead relationship any more than the Rent Restriction Act or the Debt Conciliation Ordinance can without express provision or necessary implication apply to contracts terminated and done with when they came into operation.

There would appear to be no provision in the Act which expressly, or by necessary implication leads to the conclusion that the Act is retrospective in its operation. It is true that the definition of "workman" in section 48 expressly includes any person whose services have been terminated but this is only for the purposes of proceedings under the Act in relation to any industrial dispute. It is not therefore applicable to Part IVA of the Act which is what concerns us here. Moreover, even in regard to industrial disputes there is room for a difference of view on the question whether a workman includes a past workman[1].

The person given the right to ask a Labour Tribunal for relief or redress is a workman and in the absence of any necessary indication to the contrary I read this term as referring to a person who is a workman under the relevant contract of employment at or after the coming into operation of Part IVA.

We thus arrive at the conclusion that although the rule in question is *ultra vires*, the Statute does not apply retroactively to a termination which has occurred prior to the introduction of the Act inasmuch as this would involve an interference with vested rights for which there is neither express provision nor necessary implication in the Act.

The President has arrived at a finding of fact in the present case that the termination was prior in time to the statute creating Labour Tribunals and in the light of this finding I hold that the workman in the present case has no right of access to a Labour Tribunal.

This appeal cannot therefore succeed and is dismissed with costs.

Appeal dismissed.

[1] *See the dissenting judgment in Colombo Apothecaries Ltd. v. Wijesooriya (1968) 70 N. L. R. 481.*