ABEYWICKREMA

v.

PATHIRANA AND OTHERS

SUPREME COURT.
SHARVANANDA, C.J., WANASUNDERA, J., RANASINGHE, J., ATUKORALA, J. AND L. H. DE ALWIS, J.
ELECTION PETITION No. 5/83.
ELECTION PETITION APPEAL No. 1/85.
ELECTORAL DISTRICT No. 66–AKMEEMANA.
DECEMBER 2, 3, 4, 5, 9, 11, 17, 18, 19 AND 20, 1985.

Election Petition – Disqualification of candidate in terms of Article 91 (1) (d) (vii) of the Constitution – Public Office, carrying initial salary of more than Rs. 6,720 per annum – Resignation – Resignation submitted to wrong authority – Is acceptance of resignation necessary? Expressio unius exclusio alterius – Accredited agent – Vacation of post – De facto cessation of tenure of office – Estoppel – Waiver – Practice – Article 55 (5) of the Constitution – Fundamental right of equality – Article 12 of the Constitution.

Where the question was whether the 1st respondent who was a Grade III principal on a salary scale of which the initial salary was not less than Rs. 6,720 per annum in the Department of Education had by tendering his resignation from the service of the State to the Regional Director of Education of the area where he was serving and getting such resignation accepted by the Regional Director who relieved him from his duties, had effectively terminated his services as a public officer so as to qualify himself as a candidate at a Parliamentary election–

Held (Wanasundera, J. dissenting):

The letter of resignation did not bring about a valid termination of the 1st respondent's contract of service because it was not addressed to nor accepted by the Appointing Authority that is the Educational Services Committee. The Regional Director, Galle is not the proper authority to accept the resignation.

The rule in respect of a public officer's resignation is that it can take effect only when it is accepted by his appointing authority. A line must be drawn between an office which gives its holder a status which the law will protect on the one hand and on the other hand a mere employment under a contract of service. The rule that wrongful repudiation or wrongful purported termination of a contract terminates the contract does not apply to an employee whose employment is in some sense public employment or involves the tenure of an office, or whose employment takes place under the authority of a statute or regulation having statutory force or other constituent instrument giving it a public nature. It is only in origin that Government service is contracted. Once appointed, the public officer requires a status to which the rights and duties imposed by public law attaches.

The Constitution of 1978 has given a statutory dimension to the Establishment Code. The 1st respondent was bound by section 4 of the Establishment Code to obtain proper acceptance of his resignation. The maxim *expressio unius exclusio alterius* does not apply although certain statutes make acceptance of resignation imperative in certain other categories of employment. The Regional Director of Education is not the accredited agent of the State for the purpose of accepting the 1st respondent's resignation from office.

Section 7:1 of the Establishment Code in regard to the service of notice of vacation of post is intended to safeguard the interests of the State and it does not confer a right to the public officer to repudiate the contract of employment unilaterally. A public officer cannot plead his own breach of duty as *proprio vigore* terminating his employment. Until the State chooses to serve notice of vacation of post the official continues in the eye of the law in employment.

The de facto ceasing to be a public officer even where de jure the office is continued to be held is insufficient to avoid the disqualification under Article 91(1)(*d*)(vii) of the Constitution.

The doctrine of estoppel is not applicable against the State in its governmental, public or sovereign capacity.

A waiver must be an intentional act of surrender of rights with knowledge of what those rights are.

The doctrine of estoppel or waiver cannot be employed to give a public authority powers it does not possess. By waiver one cannot convert nullity into validity.

The practice of Regional Directors accepting resignations is bad in law as it involves giving them power which they do not possess where there has been no delegation to them of the power of appointment, transfer or dismissal.

Article 55(5) of the Constitution does not protect orders or decisions of a public officer which are nullities or ultra vires from judicial review.

Article 12 of the Constitution cannot be invoked against discrimination made by the Constitution itself as the Constitution is the basic supreme law and generates its own validity and therefore there is no violation of the Fundamental Right of equality.

Cases referred to:

(1) *Abeywickrema v. Pathirana [1984] 1 Sri L.R. 215.*
(2) *Ganesh Ramchandra v. G.I.P. Railway Co. 2 Bomb. L.R. 740.*
(3) *Howard v. Pickford Tool Co. [1951] 1KB 417, 421.*
(4) *Vine v. National Dock Labour Board [1956] 3 All ER 939.*
(5) *Barbar v. Manchester Regional Hospital Board [1958] 1 All ER 322.*
(6) *Francis v. Municipal Council of Kuala Lumpur [1962] 3 All ER 633.*
(7) *Vidyodaya University v. Linus Silva [1964] 66 NLR 505.*
(8) *Mallock v. Abdeen Corporation [1971] 2 All ER 1278.*
(9) *Executive Committee of U.P. State Warehousing Corporation v. Chandrakiran Tyagi AIR 1970 SC 1244.*
(10) *Gunton v. Richmond LBC [1980] 3 All ER 577.*
(11) *Decro-Wall International v. Practitioners in Marketing Ltd. [1971] 2 All ER 216.*
(12) *Marshall (Thomas) Exports Ltd. t. Guinle [1978] 3 All ER 193.*
(13) *Hill v. Parsons & Co., Ltd. [1971] 3 All ER 1345.*
(14) *Roshenlal t. Union of Ildia AIR 1967 SC 1889.*
(15) *Dinesh Chandra v. State of Assam AIR 1978 SC 17.*
(16) *De Zoysa v. Public Service Commission [1960] 62 NLR 492.*
(17) *De Alwis v. De Silva [1967] 71 NLR 108.*
(18) *Venkatarao v. Secretary of State AIR 1937 PC 31.*
(19) *Rangachari v. Secretary of State AIR 1937 PC 27.*
(20) *High Commissioner of India v. Lall AIR 1948 PC 121.*
(21) *Fletcher v. Nott 60 CLR 55, 97.*
(22) *State of U.P. v. Babu Ram AIR 1961 SC 751.*
(23) *State of Mysore v. Sellary AIR 1965 SC 868.*
(24) *Shukla v. State of Gujarat [1970] 1 SCC 419.*
(25) *Raj Kumar v. Union of India AIR 1969 SC 180, 182.*
(26) *Raj Narayan v. Indira Gandhi AIR 1972 SC 1302.*
(27) *Union of India v. Gopal Chandra AIR 1978 SC 694.*
(28) *A.G. v. A. D. Silva (1953) 54 NLR 529 (P.C.); [1953] AC 461.*

(29) *Fernando v. Samaraweera (1951) 52 NLR 278, 285.*
(30) *Rhyl Urban District Council v. Rhyl Amusements Ltd. [1959] TLR 465.*
(31) *Barnard v. National Dock Labour Board [1953] 1 All ER 1113.*
(32) *Mayes v. Mayes [1971] 2 All ER 397, 402.*
(33) *Anisminic Ltd. v. Foreign Compensation Commission [1969] 1 All ER 208; [1969] 2 WLR 763.*
(34) *S. E. Asia Fire Bricks v. Non-Metallic Union [1980] 2 All ER 689.*
(35) *Harford v. Lynskey [1899] 1 QB 852.*
(36) *Royal British Bank v. Turquand (1856) 6 E & E 327.*
(37) *Holy-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549 affd. [1967] 3 All ER 98 (C.A.).*
(38) *Houghton & Co. v. Northard Lowe and Wills Ltd. [1927] 1 KB 246.*
(39) *Kreditbank Cassel v. Schenkens Ltd. [1927] 1 KB 826.*
(40) *British Thomson-Houston Co., Ltd. v. Federated European Bank Ltd. [1932] 2 KB 176.*
(41) *Mahony v. East Holyford Mining Co. [1875] LR. M. 869.*
(42) *Re County Life Assurance Co. Ltd. [1870] 5 Ch. App. 288.*
(43) *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd. [1964] 1 All ER 630.*
(44) *Western Fish Products Ltd. v. Penwith D.C. (1978) 77 LQR 185, 200-203.*
(45) *R. v. Home Secretary ex p. Choudhary [1978] 1 WLR 1177.*
(46) *R. v. Home Secretary ex p. Ram [1979] 3 WLR 89.*
(47) *Robertson v. Minister of Pensions [1949] 1 KB 227.*
(48) *Falmouth Boat Construction Co. v. Howell [1950] 1 KB 16.*
(49) *Satish Chandra Anand v. Union of India AIR 1953 SC 250.*
(50) *Purshotam Lal Dhingra v. Union of India AIR 1958 SC 36.*
(51) *Shyam Lal v. State of U.P. AIR 1954 S.C. 369.*
(52) *Marrikissoon v. Attorney-General [1979] 3 WLR 62 (P.C.).*

APPEAL from the judgment of the Election Judge.

K. N. Choksy, P.C. with *Neville de Jacolyn Seneviratne, Daya Pelpola, D. H. M. Jayamaha, Lakshman Perera* and *Miss I. R. Rajepakse* and *Herman Perera* for petitioner-appellant.

H. L. de Silva, P.C. with *E. D. Wikramanayake, Gomin Dayasiri, Nimal S. de Silva, Senaka Weeraratne* and *Chitralal Fernando* for 1st respondent.

M. S. Aziz, D. S. G. with *Tony Fernando, S.C.* as amicus cureae.

Cur. adv. vult.

January 31, 1986.

SHARVANANDA, C.J.

The petitioner-appellant challenges the election of the 1st respondent as Member of Parliament for the Akmeemana Electorate at the election held on 18th May, 1983. He seeks a declaration that the election of the 1st respondent is void in law on the ground that he was a public officer who was disqualified for election as a Member of Parliament in terms of Article 91 (1) (*d*) (vii) of the Constitution. The public office held by him was that of a Principal (Grade III) of Galaboda Aturuwella Maha Vidyalaya, Induruwe, under the Department of Education of the Government of Sri Lanka. The initial of the salary of the office of Principal (Grade III) was more than Rs. 6,720 per annum.

The petitioner further averred in his petition that the 1st respondent has purported to resign from the said public office by a purported letter of resignation dated 12th April, 1983 which had not been submitted to the authority authorised to accept the resignation of the 1st respondent nor had the purported resignation been accepted by the Competent Authority. The petitioner further pleaded that the due procedures were not fulfilled and "accordingly there has been no valid resignation in fact or in law by the 1st respondent of the said public office held by him".

The petition was heard on several dates, and the learned Election Judge delivered judgment on the 25th February, 1985, dismissing the election petition. He held that the 1st respondent had ceased to be a public officer with effect from 21.4.1983.

The petitioner-appellant has preferred this appeal from that judgment to this court. This appeal raises some important questions of law.

The documentary evidence produced on behalf of the petitioner established the fact and the election judge has found that the 1st respondent was a principal (Grade III) in the Department of Education and that the initial of his salary scale was more than Rs. 6,720 per annum—vide documents marked P 16, P 18, P 19, P 21, P23, P24 and P27. Indeed these facts were not disputed by the 1st respondent. It is also not disputed that since October 1979 the power of appointment of teachers and principals (Grade III) of schools was vested in the Education Services Committee which had been appointed in terms of Article 57(1) of the Constitution, vide P1, P1A and P2.

The principal question which arises for decision on this election petition is whether the 1st respondent was a public officer of the category specified in Article 19(1)(d)(vii) of the Constitution at the time of his nomination on 22nd April, 1983, and on the date of his election as Member of Parliament (18th May, 1983). Counsel for the 1st respondent contended that his client had ceased to be a public officer on the relevant dates, in the first place by tendering his resignation from the post of Principal (Grade III) in the Department of Education with effect from 21st April, 1983. The letter of resignation, relied on by the 1st respondent, is marked P32, dated 12.4.1983 and *addressed to the Regional Director of Education, Galle.* The date stamp on it shows that it was received at the office of the Regional Director of Education, Galle on 12.4.1983. This letter refers to the fact that he intends to be a candidate at the election for the electoral district of Akmeemana and specifically informs the Regional Director, Galle, that he is resigning from service with effect from 21.4.83. The letter concludes with a request that his resignation be accepted. The then acting Regional Director of Education, Galle, Wijesiri Perera, has on P32 made the minute 'approved' (P32a) dated 21.4.83 and by letter P41 dated 21.4.83 written to the 1st respondent accepting his resignation from the public service with effect from 21.4.83. A copy of P41 has been sent to the Secretary, Ministry of Education and to the acting Principal of Galaboda Aturuwella Maha Vidyalaya.

The findings of the election judge are: the evidence on record established that the 1st respondent never reported for work on and after 21.04.1983; that the last salary he drew was for March 1983; that he had handed over the keys, records and equipment of the school in which he last served to the acting principal of that school; that one Janananda had been appointed to act as Principal in that school; that the Regional Director, Rupasinghe, who assumed duties at Galle on 1st May 1983 was aware that the 1st respondent was engaged in an election campaign. Apart from the terms of P32 which evinced a clear intention on the part of the 1st respondent to relinquish all the rights and obligations under his contract of service with the State, his subsequent conduct confirmed the position that there was a de facto termination of his employment under the State; in short, he never functioned as a teacher or a principal of a school or held himself out as a public officer on and after 21.04.83.

The Regional Director of Education who is the Head of the Department in terms of the Establishment Code, both Wijesiri Perera and his successor in office Rupasinghe acted on the basis that the 1st respondent had resigned from service. By letter dated 2.6.1983, the Regional Director of Education, Galle has requested the 1st respondent to pay a sum of Rs. 2,395 due to the Credit Council on the basis that he has resigned from service. Further no disciplinary charges were framed against 1st respondent for engaging in political activities contrary to the provisions of the Establishment Code. Though the 1st respondent was not on leave from 21.04.1983, no notice of vacation of post as provided for in section 7 of Chap. V of the Establishment Code was served on him. The State has at no stage called upon the 1st respondent to perform his functions as Principal nor called for his explanation for failure to do so: these items of evidence are relied on by the 1st respondent to show that the State acted on the basis that the 1st respondent had resigned from service.

Counsel for the 1st respondent further submitted that the Head of the Department who is the immediate superior officer of the 1st respondent functioning in Galle has acquiesced in and accepted the position that the 1st respondent had ceased to be a public officer from 21.04.1983.

Article 90 of the Constitution provides:

"every person who is qualified to be an elector shall be qualified to be elected as a Member of Parliament unless he is disqualified under the provisions of Article 91."

Article 91 (1) provides–

"No person shall be qualified to be elected as a Member of Parliament or to sit and vote in Parliament:–

(*a*) .....
(*b*) .....
(*c*) .....
(*d*) if he is–

(i) .. ....
(ii) .. ..,.
(iii) a public officer holding any office the initial of the salary scale of which is not less than Rs. 6,720 per annum."

One decisive question arising for determination is whether by tendering letter of resignation (P32) to the Regional Director of Education, Galle and getting it accepted by him the 1st respondent had effectively terminated his contract of service and ceased to be a public officer with effect from 21.04.1983.

Counsel for the appellant contended that letter of resignation (P32) is not valid in terms of the relevant provisions of the Establishment Code which regulate a public officer's contract of service. P32 not being a valid resignation in law the contractual bond "vinculum juris" between 1st respondent and the State has not been severed. According to the Deputy Solicitor General who appeared as amicus curiae, the letter of resignation does not comply with the said provisions and is a nullity.

The burden of counsel's submissions was that the 1st respondent remained a public officer on the material dates, i.e. both on the date of nomination and on the date of election.

Section 4 of Chap. V of the Establishment Code deals with the subject of resignation. It reads thus–

"4. **RESIGNATION**

4:1 An officer may resign his appointment with one month's notice to the appointing authority through the Head of his Department or on payment of one month's salary in lieu thereof.

4:2 *If the appointing authority refuses to accept his resignation,* and the officer ceases to report for duty, he shall be deemed to have vacated his post as from the date of such cessation (vide section 7).

4:3 On receipt of the resignation of a pensionable officer, the Head of his Department should inform the officer in writing that if he resigns his appointment, he will forfeit all claims to pension or gratuity and all other benefits of his service prior to resignation should he afterwards succeed in obtaining employment under Government.

4:3:1 He should also be informed that if his resignation is accepted any application to withdraw it later, will not be considered.

4:3:2 An acknowledgment to the effect that he has been informed in these terms should be obtained from him in writing.

4:4 *When forwarding a resignation for acceptance by the Appointing Authority,* the Head of Department should state that he has complied with the requirements of sub-section 4:3:

4:5 Acceptance of resignation should be notified in writing to the officer concerned.

4:6 An officer who resigns forfeits all claims to any benefits arising from his services prior to resignation, and he will not be entitled to any such benefits if he is subsequently re-employed."

The 1st respondent's letter of appointment dated 31st July, 1974 (P19) specifically provided that–

"you are subject to regulations of the Public Service Commission and Financial Regulations, Rules of the Establishment Code, Department Regulations and other Regulations issued by the Government from time to time."

It is not disputed that the letter of resignation has not been accepted by the "Appointing Authority" as required by the aforesaid section 4(1) of the Establishment Code. P32 is addressed to the Director of Education and not to the Appointing Authority, which according to the delegation of authority made by the Cabinet of Ministers and the Public Service Commission (P1 – Minutes of the Meeting of Cabinet held on 10.10.1979 and P2 dated 15.10.79 appointing a Committee under Article 57(1) of the Constitution) is the *Educational Services Committee*. By letter dated 26.10.79, marked P62, the Regional Directors were informed that all their subsisting powers of appointment, transfers etc., were withdrawn and that according to the decisions of the Cabinet, the *Educational Services Committee* was vested with the powers of appointment, transfer etc., Thus it is clear that the Educational Services Committee was the "Appointing Authority" for the purposes of the aforesaid section 4 of the Establishment Code. The letter of resignation (P32) is flawed by the fact that it was not addressed to the Committee nor was it accepted by the said Committee. The evidence shows that it was never forwarded by the Head of Department to the Committee. It is to be

noted that by circular dated 24.12.81 (P45) Regional Directors of Education had been informed that the approval of the Committee was necessary to complete the resignation of officers of the 1st respondent's category. But the necessary step of acceptance of resignation by the authority competent to do so, in terms of the aforesaid section 4, had not been taken to give effect to 1st respondent's resignation. Thus, the purported resignation referable to P32, is not complete and effective.

In the preliminary objection of the 1st respondent filed on the 22nd August 1983, he has stated that his resignation has been submitted to and accepted by the Regional Director of Education, Galle "who is the authority by whom all Grade III Principals of Government schools are appointed, transferred and dismissed". In view of the Cabinet decision set out in P2 of 15.10.79 and letter P62 of 26.10.79 the stance that the Regional Director of Education is the proper authority to accept the resignation is untenable. There has been no express delegation of the power of appointment, transfer etc., in terms of Article 58(1) of the Constitution, to the Regional Director, Galle. Though at one stage of the election petition proceedings (see *Abeywickrema v. Pathirana* (1)). Counsel for the 1st respondent suggested that there was implied delegation of such power to the Director, he categorically declared before us that he was not relying on any implied delegation.

Thus the 1st respondent's letter of resignation P32 is vitiated by the fact that it has not been duly accepted by the proper authority. Had it been accepted, by the Educational Services Committee, the other flaws, namely one month's notice not being given, nor one month's salary in lieu thereof paid nor it being addressed to the proper authority might be overlooked as not being fundamental defects, curable by proper acceptance. Thus counsel's contention that there had been no resignation, in terms of the provisions of the Establishment Code, on the part of the 1st respondent, has to be upheld. The appeal then turns on the question of the impact of this conclusion on the issue whether the 1st respondent had ceased to be a public officer to qualify himself for the election in question?

A resignation to become effective does not need acceptance by the employer at all in the absence of any stipulations to that effect, reserved in the contract of employment or service rules. The giving of a notice terminating a contractual employment is the exercise of a right in the field of employment. The law does recognise the concept

of a unilateral resignation from office which takes effect proprio vigore irrespective of its acceptance by the other contracting party. But employment is generally a contract between parties and the general principles of contract law apply to the contract of service and it is open to an employee to agree to the fettering or regulating of his right of unilateral resignation. Hence any question as to the duration of the employment, its terminability by notice, the length of the notice required to determine it, whether the notice should be accepted or not, are all matters the subject of the express or implied terms of the contract of employment. In the case of a government servant, in regard to the terms relevant to these issues one has to look to his service Rules. The termination of services of a Public Officer can be brought about in accordance with the rules governing the conditions of service or by the terms of his employment or by acceptance of his resignation. The Establishment Code which governs the conditions of service of a Public Officer provides for the termination of service of such an officer by the resignation of the officer. Section 4 spells out the mode of such termination. In terms of section 4 of the Code the services of a public officer do not stand terminated merely by his tendering of resignation, to a superior officer. The rule in respect of a public officer's resignation is that it can take effect only when it is accepted by his appointing authority. Tender of resignation by the officer merely amounts to an offer to quit the services and unless the offer is accepted by the proper authority it cannot bring about the termination of services of the resigning employee.

> "A contract of service is continuing in its nature and its continuance and the obligations under it can be terminable in certain defined modes. Mere resignation obviously is not enough unless it be assented to or unless it complies with those terms which the law implies or prior agreement of the parties may permit." – Per Jenkins, C.J., in *Ganesh Ramchandra v. G. I. P. Railway Co.* (2).

If an authority is not competent to pass an order which can be only passed by a superior authority, then the order passed by him will amount to a nullity and is void. The resigner has a right to resign but the resignation can be effective only after it is accepted by the "Appointing Authority." Unless the two acts are completed, the transaction remains in inchoate form and termination of service is not brought about. Hence the resignation sent by a public officer is no resignation in the eye of the Law untill its acceptance by the proper authority in terms of section 4 of the Code.

It was urged that in any event though the letter of resignation was not properly accepted by the State, the 1st respondent's conduct at the relevant time manifested a unilateral repudiation of his contract of service and that such a repudiation, whether accepted or not, was sufficient to bring to an end the relationship of employer and employee; thus the 1st respondent has ceased to be a public officer. Repudiation occurs where a party intimates to the other by words or conduct that he does not intend to perform the contract. As a matter of general contract principle, the wrongful repudiation or wrongful purported termination of a contract cannot in itself terminate the contract. If one of the parties wrongfully repudiates all further liability the contract will not automatically come to an end. The innocent party may either affirm the contract by treating it as still in force or on the other hand he may treat it as finally and conclusively discharged. Where the innocent party wishes to treat himself as discharged he must accept the repudiation. Unless and until this is done the contract continues in existence, for an unaccepted repudiation is a thing writ in water. *Howard v. Pickford Tool Co.* (3).

Mr. H. L. de Silva; submitted that there is however a body of authority which treats wrongful dismissal as an exception to the general principle, so that the contract of employment is said to be terminated by wrongful dismissal even where the employee refuses to accept the dismissal as a termination of the contract. This conclusion is based on the fact that common law and equitable remedy will not normally be so applied as to keep a contract of employment in being following a wrongful dismissal. If a contract of employment is wrongfully terminated the remedy of the aggrieved party lies in an action for damages, and the court will not grant a declaration that the contract of service still subsists. That declaration will amount to an order for specific performance of personal service, which the court will not decree.

In the case of *Vine v. National Dock Labour Board (4)* Viscount Kilmuir, L.C., observed at page 944 as follows:

"This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here the removal of the plaintiff's name from the register being, in law, a nullity, he

continued to have the right to be treated as a registered dock worker with all benefits which, by statute the status has conferred on him. It is therefore, right that, with the background of this scheme, the court should declare his rights."

It was also observed by Lord Keith at page 948 that –

"Normally, and apart from the intervention of statute there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful, but it could only sound in damages."

The above was a case where the plaintiff's employment as a registered dock worker, employed in the Reserve Pool under a stautory scheme by the National Dock Labour Board, was terminated by a disciplinary committee of a local board. It was held that the local board, under the statutory scheme set up under the Dock Workers Regulation of Employment Order 1947, had no power to delegate its functions to a disciplinary committee and that the order of dismissal accordingly was a nullity, and that in such a case the plaintiff was entitled to a declaration that his name was never validly removed from the register as he would otherwise be disabled to work as a dock-worker and he continued to be an employee of the National Board.

As enunciated in the above case the position will however be different when a statute intervenes in the relationship of master and servant and the employee is given a statutory status. If there is a violation of the provisions of the statute in terminating the services of such an employee, he will be eligible for a declaration that the order terminating the services is a nullity and that he continues to be in service

In *Barbar v. Manchester Regional Hospital Board* (5) the hospital board determined the employment of plaintiff who made an appeal under clause 16 of the terms and conditions of service of hospital medical staff which had a statutory force. The plaintiff claimed that his service was never validly determined. It was held that the plaintiff's contract with the board was between master and servant, the termination of which could not be a nullity and the plaintiff was not therefore entitled to a declaration that his employment had never been

validly determined but he was entitled to recover damages for breach of the contract. This case was not equated to *Vine's case (supra)*. Here, the court was of the opinion that despite the strong statutory flavour attaching to plaintiff's contract, it was in essence an ordinary contract between master and servant and nothing more.

In *Francis v. Municipal Council of Kuala Lumpur* (6) the plaintiff was employed by the Defendant Municipal Council as a clerk. The council purported to dismiss him. This dismissal was held to be ultra vires, because by the terms of the Ordinance establishing the council the only power to dismiss the plaintiff was vested, not in the council, but in its President. The plaintiff asked for a declaration that he was still employed by the Municipality, his dismissal having been a nullity. The Privy Council said at p. 637:

"Their Lordships consider that it is beyond doubt that on October 1, 1957, there was a de facto dismissal of the appellant by his employer the respondent. On that date he was excluded from the councils premises. Since then he has not done any work for the council. In these circumstances it seems to Your Lordships that the appellant must be treated as having been wrongfully dismissed on October 1, 1957, and that his remedy lies in a claim for damages. It would be wholly unreal to accede to the contention that since October 1, 1957, he had continued and that he still continues to be in the employment of the respondents...."

It went on to say at page 637:

"In Their Lordships' view, when there has been a purported termination of a contract of service, a declaration to that effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of a contract of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to make such a declaration."

In *Vidyodaya University v. Linus Silva* (7) it was held by the Privy Council again that although the university was established and regulated by statute that did not involve that contracts of employment made with teachers and subject to section 18(*e*) of the University Act

No. 45 of 1958, were other than ordinary contracts between master and servant. In this case the respondent was not shown to have any other status than that of a servant and proceedings by certiorari were not available where a master summarily terminates a servant's employment. It is to be noted that Lord Wilberforce doubted the correctness of this judgment in *Mallock v. Abdeen Corporation* (8) where he observed at page 1295:

> "I must confess that I could not follow it in this country, insofar as it involves a denial of any remedy of administrative law to analogous employments. Statutory provisions similar to those on which the employment rested would tend to show, to my mind in England and Scotland that it was sufficiently one of a public character, or one partaking sufficiently of the nature of an office, to attract the appropriate remedy of administrative law."

A distinction is to be drawn between a pure master and servant case in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection and the tenure of a public office.

A line has to be drawn between an office which gives its holder a status *which the law will protect specifically*, on the one hand and, on the other hand a mere employment under a contract of service.– Wade Administrative Law–5th Ed. at page 497.

In the case of the *Executive Committee of U.P. State Warehousing Corporation v. Chandrakiran Tyagi* (9), after review of the case on the subject, the Supreme Court of India, observed:

> From a review of the English decisions the position emerges as follows: The law relating to master and servant is clear. A contract for personal services will not be enforced by an order for specific performance nor will it be open for a servant to refuse to accept the repudiation of a contract of service by his master and say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or for breach of contract. This is the normal rule and that was applied in *Barbar's case* (*supra*) and *Francis' case* (*supra*). But when a statutory status is given to an employee, the latter will be eligible to get the relief of a declaration that the order is a nullity and void and that he continues to be in service, as it will not then be a mere case of a master terminating the services of a servant. This was the position in *Vine's case* (*supra*)."

The above was a case of a wrongful dismissal of a corporation employee by a corporation and it was held that the order of dismissal was in breach of the regulations made under the powers reserved to corporations under section 54 of the Agricultural Produce Corporation Act of 1956. In deciding the issue the court observed at pages 1254 1255:

"The regulations are made under the power reserved to the corporation under section 54 of the Act. No doubt they lay down the terms and conditions of relationship between the corporation and the employees. An order made in breach of these regulations could be contrary to such terms and conditions but would not be in breach of any statutory obligation, as was the position which this court had to deal with in the *Life Insurance Corporation case,* A.I.R. 1964 – S.C. 847. In the instant case.....the Act does not guarantee any statutory status to respondents (employees), nor does it impose any obligation on the appellant in such matters. Under these circumstances a violation of regulation 16 (3) as established in this case can only result in the order of dismissal being held to be wrongful and in consequence making the appellant liable for damages. But the said order cannot be held to be one which has not terminated the service wrongfully or which entitled the respondent to ignore it and ask for being treated as still in service."

The contrary view is that the contract of employment is not necessarily in principle terminated by wrongful dismissal even though no remedy may lie to maintain the contract in being (see *Gunton v. Richmond LBC* (10), *Decro-Wall International v. Practitioners in Marketing Ltd.* (11), *Marshall (Thomas) (Exports) Ltd. v. Guinle* (12) and *Hill v. Parsons & Co., Ltd.* (13)).

In Chitty on Contract, Vol. II, paragraph 3515 at page 732 (1983) 25th Ed., the position is summarised as follows:

"The ultimate answer is that the termination of the contract of employment is not really a concept with a single clear meaning; but with that qualification the better view now seems to be in favour of regarding wrongful dismissal as in principle terminatory of the contract. On the other hand the elective view of termination of contract of employment has recently been followed in granting a declaration that wrongful dismissal was ineffective to determine the contract. *Gunton v. Richmond LBC* (*supra*). (Shaw, L.J. dissenting on this point)."

However, the rule that wrongful repudiation or wrongful purported termination of a contract, terminates the contract does not apply to an employee whose employment is in some sense public employment or involves the tenure of an office, or whose employment takes place under the authority of a statute or regulation having statutory force or other constituent instrument giving it a public nature.

In Halsbury (4th Ed.) Vol. I, para 10, it is stated:

> "It would appear that, in the absence of contrary intention, resignation from an office held under the Crown is ineffective till accepted."

Employment generally is a contract between parties and therefore the general rule is that the contract cannot be unilaterally changed by any party to the contract. The position is different in Government employment in which Government derives its powers from the Constitution, to make rules laying down the conditions of service. By virtue of such power the government can prescribe the conditions of service without any reference to the other party and similarly such rules can be changed unilaterally without reference to employees. It is only the origin of the government service which is contractual. Once appointed, the public officer acquires a status; thereafter his relations are governed by status and not by contract. "The legal position of a Government Servant is more one of status than of contract and his rights and obligations are no longer determined by consent of both parties, but by rules which are framed and altered unilaterally by the State in terms of Article 55(4) of the Constitution. The hallmark of the status is the attachment to the legal relationship of rights and duties imposed by public law and not by agreement of the parties." *Roshenlal v. Union of India* (14), *Dinesh Chandra v. State of Assam* (15). Further the emoluments of a government servant and his terms of office are governed by rules, which may be unilaterally altered by the government without the consent of the employee. The conditions in Government Service are governed by a complex code, consisting of constitutional provisions, rules framed under Article 55(4) of the Constitution and a large mass of other rules and circulars.

The duties of status are fixed by the law. In the language of jurisprudence, status is a condition of membership of a group whose powers and duties are exclusively determined by law and not by agreement between the parties concerned.

"Status signifies a man's personal condition, so far only as it is imposed upon him by the law without his own consent, as opposed to the condition which he has acquired for himself by agreement. The position of a slave is a matter of status, the position of a free servant is a matter of contract. Marriage creates a status in this sense, for although it is entered into by way of consent, it cannot be dissolved in that way and the legal condition created by it is determined by the law and cannot be modified by the agreement of the parties. A business partnership on the other hand pertains to the law of contract and not to that of status" – *Salmond Jurisprudence* (12th Ed.) pp. 240–241.

"A servant under a mere contract of service whatever his contractual rights be, can always be dismissed and remedy lies in damages for breach of contract. In other words there is always a power to dismiss him even though under the contract there is no right to do so. The principle is that one man will not be compelled to employ another against his will. By contrast, the law will give specific protection to status, such as membership or office in a trade union, association or group even though it is merely contractual; this is a less personal relationship and an injunction or declaration may be granted so as to preserve the status. A statutory status such as that of a registered Dock Worker, will be protected similarly." – *Wade Administrative Law,* 5th Ed., p. 498.

Article 55(1) of the Constitution provides:

"Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, *and all public officers shall* hold office at pleasure" and

Article 55(4) provides:

"Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to public officers including the formulation of schemes of recruitment and codes of conduct for public officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers."

"Public Officer" is defined in Article 170 of the Constitution to mean a person who holds any paid office under the Republic, other than a judicial officer but does not include certain persons specified therein.

Article 55(4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers, without impinging upon the overriding powers of pleasure recognised under Article 55(1). Matters relating to "public officer" comprehends all matters relating to employment, which are incidental to employment and form part of the terms and conditions of such employment, such as, provisions as to salary, increments, leave, gratuity, pension, and of superannuity, promotion and every termination of employment and removal from service. The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation, though they may be applied to a particular class of public officers. This power is a legislative power and this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative, not executive or judicial in character.

A rule made in exercise of this power by the Cabinet has all the binding force of a statute, or regulation. The relevant Establishment Code of the Democratic Socialist Republic of Sri Lanka (P6) has been issued by the Secretary to the Ministry of Public Administration under the authority and with the approval of the Cabinet of Ministers. It is in the exercise of the legislative power vested in the Cabinet of Ministers under Article 55(4), that this Code has been issued. Though the position might have been otherwise prior to the Constitution, the code relating to Public Officers acquires by virtue of its Constitutional origin, statutory force, provided of course it is not inconsistent with any provisions of the Constitution, including the articles relating to fundamental rights and Article 55(1), which enshrines the doctrine of pleasure or the provision of any statute. In a case of breach of any of the mandatory rules in the code, the aggrieved public officer has, *subject to the provision of Article 55(5) of the Constitution*, a remedy in a court of law. The enforceability of a service rule is a question different from that of its character as to whether it is statutory or otherwise. All statutory rules are not necessarily enforceable in a court of law. It is only the breach of a mandatory rule which is justiciable. Once a rule is held to be mandatory and not inconsistent with the Constitution, there is no reason why it should not be enforced, like any other statutory rule but should be considered to be mere administrative instructions, simply because it relates to matters

relating to government service. The service-rules in the Code embody the contract of service between a public officer and the Government. It is a convenient figure of speech for applying by analogy principles of the law of contract. It does not mean that the code derives its force from the contract or that the rights and obligations of the public officer are duties of contract so that they cannot be varied without his consent.

The general principle in public service is that a public officer holds office at pleasure. The constitutional doctrine that public officers hold office during pleasure has two important consequences:

1. The Government has a right to regulate or determine the tenure of its employees at pleasure not withstanding anything in their contract to the contrary.
2. Secondly the Government has no power to restrict or fetter its prerogative power of terminating the services of the employee at pleasure by any contract made with the employee.

Counsel for the 1st respondent referred us to the case of *De Zoysa v. Public Service Commission* (16) and *De Alwis v. De Silva* (17) which followed it in support of his contention that the Establishment Code did not have the force of law.

In *De Zoysa v. Public Service Commission (supra)* H. N. G. Fernando, J. relied on the Privy Council decisions of *Venkatarao v. Secretary of State* (18), *Rangachari v. Secretary of State* (19) to reach his conclusion that the Public Service Commission rules relating to the procedure to be followed prior to the retirement of a public officer did not have the same legal effect as a statutory provision.

In *Venkatarao's case (supra)* section 96(B) of the Government of India Act 1919 provided in express terms that appointments to Civil Service of the Crown in India are appointments during His Majesty's pleasure. The statute also provided that rules could be made regulating discipline and conduct of civil servants. Rules were made which contained provisions for proper departmental inquiry for dismissal and appeal against dismissal. It was held by the Privy Council that the rules could not limit in any way the legal right of the Crown to dismiss at pleasure. The rules gave the members of the civil service a solemn assurance that the right to dismiss would not be exercised in a capricious or arbitrary manner, but they did not confer any legal right.

On a construction of the relevant provisions, the Privy Council held that His Majesty's pleasure was paramount and could not legally be controlled or limited by the rules. Two reasons were given for the conclusion, namely (1) section 96(B) in express terms stated that the office was held during pleasure and there was no room for the implication of a contractual term that the rules were to be observed and (2) sub-section (2) of section 96(B) and the rules made careful provision or redress of grievances in the administrative process. It held that there is no right in the public servant enforceable by action to hold his office in accordance with the rules and he could therefore be dismissed notwithstanding the failure to observe the procedure prescribed by them. The main point that was urged in *Venkatarao's case (supra)* was that under the relevant civil service rules no public servant could be dismissed except after a properly recorded disciplinary inquiry; the departmental inquiry prescribed by the rules was found not to have been held. Even so the Privy Council held that that His Majesty's pleasure was paramount and could not legally be controlled or limited by the Rules.

In *Rangachari's case (supra),* a police officer was dismissed by an authority subordinate to that, by which he had been appointed. The Privy Council referred to the following proviso in section 96(B) – "But no person in that service (the Civil Service of the Crown) may be dismissed by any authority subordinate to that by which he was appointed" and distinguished *Venkatarao's case (supra)* with the following observation:

> "It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule. . . . which are of infinite variety and can be changed from time to time."

It was held that the proviso was a mandatory provision and qualified the pleasure tenure and provided conditions precedent to the exercise of powers by His Majesty.

In *Rengachari's case (supra)* Their Lordships drew a distinction between the legal effect of the statutory provision which had been breached in that case and of a mere rule, framed under the statute which was inconsistent with the main provisions of the statute. This distinction between the rules and the provisions of the Act is well emphasised in the *High Commissioner of India v. Lall* (20).

The relevant statute in that case was Government of India Act 1935. The Privy Council (in an action by the dismissed officer for a declaration that the order of dismissal was ultra vires and that he was still a member of Indian Civil Service) was satisfied that subsection 3 of section 240 which provided for reasonable opportunity being given of showing cause against the action purported to be taken in regard to him had not been complied with. The Privy Council made a distinction between the rules and the provisions of the Act and ruled that subsection 2 & 3 of section 240 indicated a qualification or exception to the antecedent provision in subsection 1 of section 240. It observed:

> "that provision as to reasonable opportunity of showing cause against the action proposed, i.e. subsection 3 is now put on the same footing as the provisions now in subsection 2 and that it is no longer resting on rules alterable from time to time but is mandatory and necessarily qualifies the right of the Crown recognised in subsection 1".

The rules which were not incorporated in the statute thus do not impose any legal restriction upon the right of the Crown to dismiss its servant at pleasure. The rules could not override or abrogate the statute and the ptrotection of the rules could not be enforced by an action so as to qualify the statute, where the statute expressly and clearly laid down that the tenure was at pleasure. The rules framed under the Act must be consistent with the Act and not in derogation of it. The decision of the Privy Council on the provisions of the Government of India Act 1915 and of 1935, can be sustained on the ground that the rules made in the excercise of powers conferred under the Act cannot override or modify the tenure at pleasure provided by section 96 (B) or 240 of the respective Acts, as the case may be. The ultra vires nature of a rule made under the main Act was commented on by Latham, C.J. in *Fletcher v. Nott* (21):

> "It is contended that these rules create legal rights so that members of the force can be dismissed only if the procedure set forth in the rules is followed. In my opinion the rules do not confer upon the plaintiff the right which he contends, namely, the right to hold his office unless and until he is dismissed in accordance with the rules set forth. If according to the true construction of the Act a constable holds his office only during pleasure, no rule made under the Act can alter the conditions of his tenure of office so as to prevent him from being dismissed at the will of the Crown."

In my view the rules framed by the Cabinet of Ministers in the exercise of their power under Article 55(4) cannot be placed on the same legal footing as the Public Service Regulations referred to in *Zoysa's case (supra), De Alwis v. De Silva (supra).*

The Establishment Code is a code of conduct for public officers and has been issued by the Cabinet of Ministers in the exercise of their powers under Article 55(4). The exercise of the power is subject to the provisions of the Constitution. One of the provisions being all Public Officers shall hold office at pleasure (Article 55 (1)). No rule framed under this Article can supersede the pleasure tenure of the public officers. The Cabinet of Ministers cannot make any rule abrogating or modifying this tenure. If a rule or code had been made by the Cabinet within this limit, the rule made by that authority in the exercise of the powers conferred by the Constitution would be efficacious within the said limitation. Thus rules framed under Article 55(4) have a statutory force provided of course they are not inconsistent with any provision of the Constitution. In case of breach of any of those rules therefore the aggrieved person has a remedy in a court of law depending on the nature of the rule whether mandatory or directory.

It is to be borne in mind that a provision like Article 55(4) of the Constitution was not there in the earlier Constitution and hence the ruling and reasoning in *De Zoysa's case (supra)* and *De Alwis' case (supra)* in any event, will not apply to rules framed under Article 55(4). The Article has given a new dimension to the statutory nature of the Establishment Code.

The provision of the Indian Constitution which corresponds to Article 55(4) of our Constitution is Article 309. It provides as follows:

> "Subject to the provisions of this Constitution Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or of any State.
>
> Provided that it shall be competent for the President ..... or such person as he may direct in the case of service and posts in connection with the affairs of the Union and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service, of persons appointed to such services and posts until provision in that behalf is

made by or under an Act of the appropriate legislature under this Article, and any rule so made shall have effect subject to the provisions of such Act."

Basu in his "Shorter Constitution of India" 9th Ed. at page 697, set out the law on this article as follows:

"though the position was otherwise prior to the Constitution *(Venkatarao v. Secretary of State (supra), Rangachari v. Secretary of State (supra)* it is now settled (*State of U.P. v. Babu Ram* (22)) the rules framed under 309 or under the provisions of the Constituent Acts which are contained under Article 313 *(State of Mysore v. Sellary* (23)) have a statutory force provided, of course, they are not inconsistent with any provision of the Constitution, including Article 310 itself, which enshrines the doctrine of pleasure; or the provisions of any statute" – (*Shukla v. State of Gujarat* (24)).

The law in India is that the rules framed under Article 309 of the Indian Constitution, by the President – Governor, as the case may be, are justiciable and enforceable in a court of law and cannot be ragarded as mere administrative directions. If there is a breach of the statutory rules framed under Article 309, the aggrieved government servant could have recourse to the court for redress.

If rules made under Article 309 of the Indian Constitution attract statutory force, in my view by parity of argument, the rules made under Article 55 (4) also should be held to have statutory force.

In *Raj Kumar v. Union of India* (25) the Supreme Court stated that:

"where a public servant has invited, by his letter of resignation, termination of his employment, his services normally terminate from the date on which the letter of resignation is accepted by the appropriate authority and in the absence of any law or rule governing the conditions of his service to the contrary, it will not be open to the public servant to withdraw his resignation, after it is accepted by the appropriate authority. Till the resignation is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has *locus poenitentiae*, but not thereafter."

The judgment of the High Court of Punjab, appealed from in the above case is reported in A.I.R. (Punjab) 1966, p. 221. It sets out valid and persuasive reasons why acceptance of his resignation in the case of a government servant is necessary for the termination of his services. The court said:

> "We are of the opinion that acceptance of resignation is necessary before the service of an employee can come to an end. Such an acceptance is a necessary step in giving effect to the resignation and until that step has been taken the resignation cannot be said to be complete and effective. In the case of a civil servant it is not a matter affecting the two parties, namely, the employee and the Government. The public has also the right to the service of all the citizens and may demand them in all Departments, Civil as well as in military. We cannot lose sight of the fact that civil servants are appointed for the purposes of exercising the functions and carrying on the operations of the Goverment. They have to discharge all sorts of duties, judicial as well as administrative, and it would result in complete chaos if it were held that the resignation would become effective as soon as a civil servant tendered it. The exigencies of the public office may demand that the civil servant must carry on the operation of the Government and continue to discharge the functions till the Government is able to make alternative arrangements. A political organisation would seem to be imperfect which should allow the repositories of its powers to throw off the responsibility at their own pleasure. Even if the matter be treated as a contract between the parties the same result would follow. A person who has agreed to serve till his services are terminated must first make an offer communicating his intention to terminate and that offer must be accepted."

In *Raj Narayan v. Indira Gandhi* (26) the Supreme Court quoted with the approval the rulings in *Raj Kumar v. Union of India* (supra), that when a public servant has invited by his letter of resignation determination of his employment, his services normally stand terminated from the date on which letter of resignation is accepted by the appropriate authority and said –

> "the question as to when Yasapal-Kapur's (the civil servant in question) resignation became effective will have to be determined with reference to his conditions of service."

In *Union of India v. Gopal Chandra* (27) the Supreme Court said:

"in the case of a government servant/or functionary, who cannot, under the conditions of his service/or office, by his own unilateral act of tendering resignation give up his service or office, normally, the tender of resignation becomes effective and his service/or office tenure terminated when it is accepted by the competent authority."

I am of the view that the 1st Respondent is bound by section 4 of the Establishment Code to obtain proper acceptance and that his tenure of office would stand terminated only from the date on which his letter of resignation P32 was accepted by the appointing authority, who is the appropriate authority and that the unilateral repudiation of his office by him was not sufficient to sever his connexion with the service.

Mr. de Silva submitted in support of his contention that it was because under the common law acts of unilateral resignation are legally sufficient to terminate the contract of public employment, that the legislature provides that in certain categories of employment unilateral resignation or repudiation is legally ineffective to terminate the contract. He referred us to section (11) of the Army Act No. 17 of 1949 (Cap. 357) which reads as follows:

"11(1). An officer of the Regular Force or Regular Reserve shall not have the right to resign his commission, but may be allowed by the Governor-General to do so.

11(2). An officer of the Regular Force or Regular Reserve who tenders the resignation of his commission to the Governor-General shall not be relieved of the duties of his appointment until the acceptance of the resignation is notified in the Gazette."

Similar provision is found in section 11 of the Navy Act No. 34 of 1950 (Cap. 358), section 11 of the Air Force Act No. 41 of 1949 as amended by Act No. 21 of 1954 (Cap. 359) and section 27 of the Police Ordinance No. 16 of 1865, as amended from time to time up to Act No. 32 of 1956 (Cap. 53). The violation of these provisions is an offence. Our attention was drawn also to the Compulsory Public Service Act No. 70 of 1961 where graduates to whom the Act applies are subject to compulsory public service in terms of section 4 of the Act (here by implication, the right of resignation is taken away). Under these statutes the right to unilateral resignation from office is taken away in a limited category of employment.

It is to be noted that all the statutes, referred to above were enacted prior to the coming into operation of the present Constitution of 1978. As I stated earlier the Constitution of 1978 has given a statutory dimension or base for the Establishment Code, framed under Article 55(4) of the Constitution. In any event the fact that statutory law makes a specific provision that resignation in certain specific instances is inoperative until it is accepted does not necessarily mean that under the common law unilateral resignation was legally effective to terminate the contract of public employment. The contention that an intention to alter the general law is to be inferred from partial or limited enactment rests on the maxim *"expressio unius, exclusio alterius"* – In Maxwell Interpretation of Statutes, 11th Ed., p. 306 – 307, it is stated that –

> "... that maxim is inapplicable in such cases. The only inference which a court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts) is that the legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution. If the law be different from what the legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence and any legislation founded on such a mistake has not the effect of making that law which the legislature erroneously assumed to be so."

It is not safe to conclude from the aforesaid statutory provisions referred to above that the legislature assumed correctly that unilateral resignation or repudiation is sufficient to bring to an end a contract of public employment.

Mr. de Silva contended as an alternative to his earlier submission, that the evidence showed that: 1st respondent by his conduct had repudiated his contract of employment and that such repudiation has been accepted by the State. He urged that an unaccepted resignation followed by absence from duty without leave and taken with his subsequent conduct, namely his failure to perform his duty as a teacher and principal, his handing over all his equipment and records of the school to Jananandā, the acting Principal, his nomination as a candidate for the election and his participation in a political campaign in violation of the provisions of the Establishment Code manifested unequivocally his disposition not to be bound any longer by the terms

of the contract. Mr. de Silva maintained that P32 (letter of resignation) coupled with its attendant circumstances are sufficient to establish the fact of repudiation of the contract by the 1st respondent.

On the assumption that 1st respondent had unilaterally repudiated the contract, the next question arises whether the evidence showed that there has been acceptance of the repudiation by the State and the release of the 1st respondent from his service. The evidence shows that the 1st respondent was absent from duty without leave from 21.4.83. The Regional Director of Education has stated that he did not send any notice of vacation of post although he had the authority to do so in terms of the relevant circular – vide para 12 of P45 marked 1B11. He admitted that if a Grade III Principal does not report for work he would issue a letter of vacation of post and report the matter to the Director of Education and the Secretary, Educational Services Committee, but he had not served any notice of vacation of post on the 1st respondent at any time and that he had not called for any explanation from him for contesting a parliamentary election, while being Principal of a Maha Vidyalaya, in breach of section 1 of Chap. XXXII of the Establishment Code.

The evidence of Wijesiri Perera the Regional Director was that he was never questioned by the Ministry of Education regarding his acceptance of 1st respondent's resignation P32 and that he had called upon the 1st respondent by letter P42 dated 2.6.83, to pay " on account of his resignation from service with effect from 21.4.83 a sum of Rs. 2,395 due from him to the Council."

Mr. de Silva submitted that despite all his aforesaid infraction of duty no steps whatever were taken by the State to indicate to the 1st respondent that the State was still holding him on to his contract of service and was not accepting his repudiation of the contract.

Mr. Choksy's rejoinder was that there is no evidence that the Educational Services Committee, which is the competent authority under Article 58(1) of the Constitution had accepted or was aware of the repudiation of his contract by the 1st respondent and had released him from service by 18th May, the day of election. The learned election Judge has held that –

> "the Educational Services Committee is a body which met and functioned in Colombo. It seems to me that in this regard it was the Regional Director of Education, the head of the Department who was the accredited agent of the State. By the failure on the part of

the State's agent to take appropriate action in a situation which clearly called for action. I am satisfied that the State elected to accept the repudiation of the contract by the 1st respondent. The State's silence or inaction in the proved circumstances of this case is evidence of its election to accept the repudiation of the contract of service by the 1st respondent. Accordingly I hold that the 1st respondent ceased to be a public officer with effect from 21.4.83."

I cannot agree with the process of reasoning of the Election Judge. In my view his conclusion is flawed by his assumption that the Regional Director of Education, the head of the department was the accredited agent of the State for the purpose in issue. In terms of Article 58(1) of the Constitution, on the delegation of powers evidenced by P 1 and P 2 it is the Educational Services Committee that would be the agent of the State in regard to appointment, transfer and termination of services of a public officer employed by the Ministry of Education. The Regional Director of Education did not have authority, actual or ostensible as would bind the State "Ostensible authority" involves a respresentation by the Principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a holding out by the principal. (*A. G. v. A. D. Silva* (28)). Nothing done or omitted to be done by the Regional Director could bind the Educational Services Committee in the matter of termination of the service of the 1st respondent. Hence the impugned acts and omissions of a Regional Director of Education will not affect the State and cannot be treated as evidence of acceptance of the 1st respondent's repudiation by the State. The 1st respondent has failed to establish – the burden being on him – any act of the State releasing him from his service by the election date.

Mr. de Silva submitted that in any event the 1st respondent had vacated his post in terms of section 7 of Cap. V of the Establishment Code. This section reads thus:

"7. Vacation of Post

7 : 1 – An officer who absents himself from duty without leave will be deemed to have vacated his post from the date of such absence; and he should be informed accordingly at once by registered post or by personal delivery on him.

7:2 – Charges should not be framed against him nor should he be called upon to submit an explanation for his absence without leave.

7:3 – If he volunteers an explanation within a reasonable time it should be considered by the authority who holds delegated authority under the Public Service Commission Rules to impose disciplinary punishments on him and permission to resume duties may be allowed or refused by that authority."

It cannot be controverted that the 1st respondent had been absent from duty without leave from 21.4.83. It was argued by Mr. de Silva that according to the aforesaid section 7:1 the 1st respondent should be deemed to have vacated his post form 21.4.83 and had thus vacated his post. I cannot accept counsel's construction of section 7:1. In my view what the section means is not that a person who gets himself absent from duty without leave automatically vacates his post and that his employment comes to an end; but that if he absents himself without leave, he will be deemed to have vacated his post, for the purpose of further action, such as termination of his services, being taken against him. That is why the section requires the officer to be informed that he is considered to have vacated his post. Section 7:3 provides that if he volunteers an explanation he will be permitted to resume duty. The vacation of post under section 7(1) is only provisional and not final. A further step confirming the vacation has to be taken by the proper authority to finalise the termination of service. An officer may absent himself from office without leave for unavoidable reasons such as sudden illness or some other misfortune. If the construction contended for by Mr. de Silva that an officer, ipso facto vacates his post, if he is absent without leave, is accepted, the section will work great hardship and injustice to public officers. It is to be noted that the Deputy Solicitor General disowned that construction.

I agree with Mr. Choksy, that section 7(1) is intended to safeguard the interests of the State and that it does not confer a right on the public officer to repudiate the contract of employment unilaterally. It is the State which alone has the right to treat a public officer, who absents himself without leave as having vacated his post. A public officer cannot plead his own breach of duty as *proprio vigore*,

terminating his employment. It is for the other party to the contract viz: the State to treat that breach as a ground for terminating the employment, and until the State chooses to do so, the official continues in the eye of the law, in employment. The State, in this case has not served any vacation of post notice.

Mr. de Silva went on to submit that the evidence showed that the 1st respondent had de facto ceased to be a public officer on the relevant dates. He argued that the disqualification under Article 91(1)(*d*)(vii) of the Constitution applied only to a public officer who is in fact holding an office, the initial of the salary scale of which is not less than Rs. 6,720 per annum. According to him the de jure holding of such an office is not sufficient. There should be a de facto holding. He submitted that all the evidence pointed to the 1st respondent having de facto ceased to hold the office of Principal of the Maha Vidyalaya. He drew a distinction between de facto holding and de jure holding and contended that, though in law the 1st respondent may not have ceased to hold the impugned office, but if in fact he had ceased to hold that office, he would not suffer the disqualification under Article 91 of the Constitution. In my view this construction of Article 91 (1) (*d*) (vii) is not tenable. This Article disqualifies a particular category of public officers, viz. those whose office attracted an initial salary scale which was not less than Rs. 6,720 per annum. That Article does not consist of three components such as (*a*) a public officer (*b*) holding an office (*c*) an office the initial of the salary scale of which is not less than Rs. 6,720 per annum. The words "holding any office ..... Rs. 6,720 per annum" are descriptive of the category of public officers who are disqualified. These public officers holding an office the initial of the salary scale of which is less than Rs. 6,720 per annum are excluded from the disqualification and are entitled to political rights. Section 13 of the Ceylon Constitutional Order-in-Council 1946 (Soulbury Constitution) (Cap. 379) stipulated that –

> "a person shall be disqualified from being elected or appointed as a Senator or member of the House of Representatives, if he is a public officer."

Under this section all public officers of whatever rank and drawing whatever salary were disqualified. The disqualification applied to the entire class of public officers.

The Constitution of Sri Lanka (1972) which replaced the Soulbury Constitution, modified this disqualification by granting political rights to a certain class of public or State Officers. It disqualified only a "state

officer" holding any office initial of the salary scale of which is not less than Rs. 6,720 per annum vide section 70(*c*)(v) of the 1972 Constitution. The present 1978 Constitution has adopted this distinction. Thus the 1972 and 1978 Constitutions do not contain a general disqualification of all public officers. They disqualify only a class of public officers, viz. whose office entitles them to a salary not less than Rs. 6,720 per annum. A person acquires a status of a public officer because he holds a paid office under the Republic. There is no question of a public officer not holding an office. There can be a de jure holding and a de facto holding of an office without being entitled de jure to it. Any officer holding de jure or de facto an office of the description referred to in Article 91(1)(*d*)(vii) suffers the disqualification. The only distinction is that a de jure public officer continues to bear the stamp of public officer until the legal termination of his services. While de facto a public officer ceases to be such when he in fact ceases so to function, I do not agree with the contention of Mr. de Silva that for the purpose of Article 91(1)(*d*)(vii), the officer should hold the office in the sense of in fact functioning as such officer.

The question arises whether the Educational Services Committee or the State is estopped from questioning the validity of the acceptance of 1st respondent's resignation by the Regional Director.

For a plea of estoppel to succeed the 1st respondent should establish that (*a*) a representation was made to him by the Educational Services Committee or the State that acceptance of such resignation by the Regional Director was sufficient to give efficacy to his resignation and (*b*) that he was induced by such representation to act upon it, and he therefore refrained from obtaining the acceptance of his resignation by the Committee; that the representation was the cause of his so acting erroneously, that he had been led to act differently from what he would otherwise have done. The 1st respondent did not give evidence to substantiate any such inducement and its impact on him. Hence evidence that the 1st respondent relied on the representation is wanting. On the other hand in his preliminary objection dated 22nd of August 1983, the 1st respondent states:

> "The respondent's resignation has been submitted to and accepted by the Regional Director of Education, who is the authority by whom all Grade III Principals of Government Schools are appointed, transferred and dismissed."

This statement militates against any suggestion that the 1st respondent's conduct was influenced by any representation made by the Educational Services Committee. It was the result of his own erroneous view of the legal position.

The State is not subject to estoppel to the same extent as an individual or a private corporation. Otherwise it will be rendered helpless to assert its powers of government and therefore the doctrine of estoppel is not applicable against the State in its govenmental, public or sovereign capacity.

A waiver would debar a person from raising a particular defence to a claim against him arising when either he agrees with the particular claiment not to raise that particular defence or so conducts himself as to be estopped from raising it.

A waiver must be an intentional act with knowledge. It necessarily implies knowledge of one's rights vis a vis the other party's infraction and an election to abandon those rights. Accepting of rent with knowledge of the breach constitutes waiver whether the landlord intended to waive or not.

An intention to waive a right or benefit to which a person is entitled is never presumed.

> "The presumption is against waiver, for though everyone is under our law at liberty to renounce any benefit to which he is entitled, the intention to waive a right or benefit to which a person is entitled cannot be lightly inferred, but must clearly appear from his words or conduct." Per Basnayake, J. in *Fernando* v. *Samaraweera* (29).

The waiver must be clearly proved.

In order that a waiver be implied from conduct there must be evidence of unequivocal act on the part of the creditor showing that he knew what his rights are and that he intended to surrender them.

> "A waiver may be implied if such conduct consists of some unequivocal act on the part of the creditor showing that he knew what his rights were and that he intended to surrender them." *Wille–Principles of South African Law*, 5th Ed., p. 356.

The 1st respondent's plea of waiver cannot survive the application of the above tests. The evidence does not show that the Educational Services Committee was at any material time aware of the 1st respondent's abortive resignation.

The doctrine of estoppel or waiver cannot in any event be employed to enlarge the powers of a public authority. In Public Law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority power which it does not in law possess. In other words no estoppel can legitimate action which is ultra vires. *Wade–Administrative Law,* 5th Ed., p. 233.

Accordingly in *Rhyl Urban District Council v. Rhyl Amusements Ltd.* (30) it was held that the local authority were at liberty to deny the validity of their own lease contrary to the rules which govern private lettings. No arrangement between the parties could prevent either of them from asserting the fact the lease was ultra vires and void. The court cited with approval the dictum of Lord Greene, M.R., that–

> "The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of ultra vires if it is possible for the donee of statutory power to extend his power by creating an estoppel."–page 475.

Waiver is closely akin to an estoppel. The primary rule is that no waiver of rights can give a public authority more power than it legitimately possesses. No amount of waiver can extend a public authority's power or validate action which is ultra vires. The principle here is that law which exists for the general public's benefit may not be waived with the same freedom as the rights of a private person.

> "The employees of public authority may often be asked to advise or rule upon some question which only their employing authority can decide. Expenses may reasonably be incurred in reliance on the advice given but if it turns out to be wrong there is usually no legal remedy. The authority's freedom to decide as it thinks the public interest requires must be on no account be compromised, hard though the result may be" *Wade*–5th Ed., p. 341.

In *Attorney-General v. A. D. Silva, (supra)* the Privy Council observed at page 537–

> "It may be said that it causes hardship to a purchaser at a sale under the Customs Ordinance, if the burden of ascertaining whether or not the Principal Collector has authority to enter into the sale is placed upon him. This undoubtedly is true. But where as in the case of the Customs Ordinance the Ordinance does not dispense with that necessity, to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorised acts nullify or extend the provisions of the Ordinance. Of the two evils, this would be the greater one."

The evidence of witnesses called on behalf of the 1st respondent supported by the documents 1R17, 1R18, 1R22–34 establish that the Regional Directors of Education in different parts of the country as Heads of Department have been accepting letters of resignation and no query has been raised by the Ministry of Education or by the Educational Services Committee. It is true that the Ministry had in the case of the resignation of one Stanislaus, a training master questioned the propriety. But no query was raised regarding the propriety of the acceptance of 1st respondent's resignation, by the Regional Director, Galle, although a copy of P41 was sent to the Ministry. The election Judge concludes–

"It would therefore appear that a fairly widespread practice had grown up of Heads of Department accepting the resignation of assistant teachers in contravention of the provisions of the Establishment Code."

But wrong practice does not make good law as it involves giving the Regional Directors power which they do not possess and no estoppel can give the authorities power which they do not possess. Admittedly in the delegation of powers the Regional Director is not the functionary vested with the power of accepting the resignations of officers of the category of the 1st respondent.

"An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agent, sub-committee or delegates, however expressly authorised by the authority endowed with the power" *Wade* at page 319.

In *Barnard v. National Dock Labour Board* (31) registered dock workers were suspended from their employment after a strike. The power to suspend dockers under the statutory dock labour scheme was vested in the local Dock Labour Board. The suspensions were made by the Port Manager to whom the Board has purported to delegate its disciplinary powers. The dockers obtained declarations that their suspensions were invalid since the Board had no power to delegate its functions and should have made the decision itself. This case was approved by the House of Lords in the *Vine's case (supra)*.

I have held supra that there was no delegation of the power of appointment, transfer or dismissal, referred to in Article 58(1) of the Constitution, to the Regional Directors of Education. The plea of 'waiver' will involve assumption by the Regional Director of Education of powers which he does not in law possess and the legitimation action which is ultra vires and void. Hence the plea cannot be sustained. "One cannot by waiver convert a nullity into validity."—Per Simon, J., in *Mayes v. Mayes* (32).

Mr. de Silva mounted an argument based on Article 55(5) of the Constitution which provides—

"Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no Court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer."

He vehemently contended that the validity of the order of the Regional Director of Education, Galle, accepting the 1st respondent's resignation, accepting P32 cannot be inquired into or called in question by any court. He said that the preclusive clause shut out any review of the validity or legality of any order or decision of a public officer, even if it was ultra vires or incompetent for him to make that order or decision. If it was intra vires for a particular public officer to make the order or decision then it cannot be disputed that the order or decision is immune in a court of law from any challenge on whatever ground. But if the particular officer had no legal authority under section 58 to make that order Article 55(5) does not bar a challenge of that order, but if the order/decision of the public officer, acting ultra vires has been adopted by the "Cabinet of Ministers", a Minister, Public Service Commission, a Committee of the Public Service Commission or of a public officer to whom the Public Service Commission has made the necessary delegation under Article 58(1), then, of course, such decision or order becomes the order of that constitutional functionary and certainly its validity cannot be inquired into. But as was held by this court in its order, between the present appellant and the 1st respondent in *Abeyawickrema v. Pathirana (supra)*:

"The provisions of Article 55(5) may be invoked or applied only when the order or decision, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer is made, inter alia, by a 'Public Officer' to whom the Public Service Commission or any Committee thereof has delegated in terms of Article 58(1) of the Constitution, the powers of appointment, transfer, dismissal or disciplinary control of any category of Public Officers."

An order or decision by an official who had no legal authority to make that order/decision is in law a nullity and is non-existent in the eye of the law; such an order/decision is inoperative and void and it is open to a court to declare that it is a nullity.

"If one seeks to show that a determination is a nullity, one is not questioning the purported determination – one is maintaining that it does not exist as a determination." Per Lord Reid in the *Anisminic Ltd v. Foreign Compensation Commission* (33).

For the purpose of declaring it a nullity, the court has jurisdiction to inquire into and pronounce upon the invalidity and non-existence of such order/decision. This view of the law is implicit in the following observation of Latham, C.J., in *Fletcher v. Nott (supra)*.

"If the Commissioner's action can be attributed to the Crown, as having been adopted or ratified by the Crown, then the foregoing reasoning will apply to show, that the dismissal, even if, without cause, can give no right of action. If, on the other hand, the Commissioner had no power to dismiss and his action was not so adopted or ratified, then the position is that the plaintiff has not been dismissed at all. The dismissal is 'by reason of its origin bad and inoperative'."

Ouster clauses do not prevent the court from intervening in the case of excess of jurisdiction; unreviewable administrative action is just as much a contradiction as is unfettered discretion – *Wade* at page 357.

In *S. E. Asia Fire Bricks v. Non-Metallic Union* (34) the Privy Council when construing an exclusive provision of the nature of Article 55(5) drew the distinction between an error of law, which affects the jurisdiction and one which does not and held that since the award in question in that case contained errors of law, which did not affect the

jurisdiction of the industrial court, the award could not be challenged in a court. Implicit in that ruling is the view that if the error of the law related to the jurisdiction of the arbitrator to make that award, the exclusive clause would not immunise it from attack in a court.

The decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission (supra)* shows that when words in a statute oust the powers of the court to review a decision of an inferior tribunal, they will be construed strictly and they will not have the effect of ousting that power, if the inferior tribunal has acted without jurisdiction – as the decision is a nullity.

I have held earlier that it was not competent for the Regional Director of Education, Galle to make an order accepting the resignation of the 1st respondent. Such an order does not attract finality or unreviewability under Article 55(5). The order has not been adopted by the Committee or Cabinet of Ministers, for it to acquire legal validity.

Accordingly I hold against Mr. De Silva's submission on the question of jurisdiction of this court to question the validity of the order of the Regional Director, Galle. I hold that the said order is null and void in law.

Mr. Choksy submitted that it will be sufficient for the petitioner to establish that the 1st respondent suffered the disqualification on the nomination day 22.4.83. On the other hand Mr. de Silva contended that the crucial day is the day of Election – 18.5.83.

Mr. Choksy submitted that nomination is an integral part of the election process and that if the 1st respondent was not qualified on the nomination day, his election is void.

He cited the case *Harford v. Lynskey* (35) wherein it was held that a candidate who was disqualified for election at the time of nomination by reason of his interest in a contract with a local authority, cannot be nominated as a candidate, notwithstanding the fact that the disqualification could have been removed by the date of the poll.

In Parkers "Conduct of Parliamentary Elections" 1985 Ed. it is stated at page 45, with reference to *Harford v. Lynskey (supra)* that–

> "the same conclusion would follow if the disqualification was based on the office or employment held by the candidate."

Mr. Choksy drew our attention to section 28(1) of the Ceylon Parliamentary Elections, Order-in-Council, 1946, which reads as follows:

"Any person eligible for election as a Member of Parliament may be nominated as a candidate for election."

Mr. de Silva referred to section 77(*a*) of the Ceylon Parliamentary Elections, Order-in-Council, and stated under that the election of a candidate can be declared void on a election petition only if the candidate was at the time of the election a person disqualified from election as a Member.

In view of my conclusion that the 1st respondent had not ceased to be a public officer even on the election day, namely 18.5.83, and that he suffered the disqualification in terms of Article 91(1)(*d*)(vii) of the Constitution, it is not necessary to decide this controversial point.

Finally it was submitted for the 1st respondent that the appellant's contention that unless his resignation is accepted by his appointing authority the public officer stands disqualified inevitably leads to violation of the fundamental right to equality. His counsel has urged that to interpret the relevant provision of the Establishment Code in such a manner so as to make the right of candidacy (which is an integral part of the franchise) dependent on the grant of permission by the Executive to a section of the public service while other public officers are not so fettered is to violate the equality principle. Counsel drew our attention to certain provisions of the Constitution which countenance the right of unilateral resignation from office. He referred to Articles 38(1); 47; 66(*b*); 103(3); 114(3); 153(3) and 156(4)(*b*) which provide that the office of the functionaries such as the President, Prime Minister, Ministers and Deputy Ministers, Members of Parliament, Commissioner of Elections; any judicial officer or scheduled public officer; the Auditor-General and Parliamentary Commissioner respectively shall become vacant if the said functionary resigns his office by a writing under his hand. Counsel argued that there are no intelligible differentia as between the case of the officers who are given the right of unilateral resignation from office by the Constitution and the case of other public officers concerning

whom no express provision is made in the Constitution. He said that to deny to a large number of public officers whose right of resignation is not referred to in the Constitution, such a right of terminating their relationship to enable them to stand for election while permitting the functionaries referred to in the Constitution that right of freedom is to make an invidious distinction that constitutes unlawful discrimination. I cannot agree with the assumption on which the argument is based that there are no intelligible differentia or that invidious distinction is drawn between the constitutional functionaries referred to in the above Articles of the Constitution and the residue public officers who are not granted the concession of unilateral resignation. Article 170 of the Constitution defines a 'Public Officer' to mean a person who holds any paid office under the Republic other than a judicial officer, but does not include--

(*a*) the President,

(*b*) the Speaker,

(*c*) a Minister,

(*d*) a Member of the Judicial Service Commission,

(*e*) a Member of the Public Service Commission,

(*f*) a Deputy Minister,

(*g*) a Member of Parliament,

(*h*) the Secretary-General of Parliament,

(*i*) a Member of the President's Staff,

(*j*) a member of the staff of the Secretary-General of Parliament.

The definition of 'Public Officer' in the Constitution is identical with that in the Establishment Code (vide section 1, Cap. I of the Code) with the addition that it does not include an employee of a Public Corporation, a Statutory Board or an institution vested in the Government.

It is to be noted that the definition of 'Public Officer' both in the Constitution and in the Code excludes the President, Minister, Deputy Minister, Member of Parliament and Judicial Officer pointed to by counsel as officers entitled to resign unilaterally under the Constitution.

On the question of resignation, the Code contains a general rule applicable to all public officers without any distinction, that acceptance is necessary to complete a resignation. But as pointed out by Mr. de Silva, certain public officers such as "scheduled public officer" under Article 114(3), Auditor-General, Commissioner of Elections and Parliamentary Commissioner out of the larger fraternity of public officers are permitted by the Constitution to have their services terminated on their unilateral resignation. The Constitution thus provides an advantage or benefit to these officers which that advantage of benefit is not available to the general run of public officers. In that view, there appears to be discrimination and unequal treatment of public officers. If there are no intelligible differentia which distinguish the public officers who are given the special treatment from those who are left out, and thus the fundamental right of equality has been there by infringed that discrimination results from the provisions of the Constitution. Article 12 of the Constitution dealing with equality before the law cannot be invoked against discrimination made by the Constitution. The Constitution is the basic supreme law and generates its own validity. The provisions of the Constitution are binding, because they form part of the Constitution. Assuming all public officers are similarly circumstanced there is no violation of the Fundamental Right of equality when the Constitution bestows a special treatment to certain officers.

I hold that the election of the 1st respondent-respondent on 18.5.63 as Member of Parliament for the Akmeemana Electorate was void in law on the ground that at the time of his election he was a person disqualified for election as a Member. I allow the appeal and set aside the judgment of the Election Judge and make determination that the Election was void.

The 1st respondent-respondent shall pay the petitioner-appellant the costs of this appeal and of the proceedings before the Election Judge.

RANASINGHE, J.—I agree.

ATUKORALE, J.—I agree.

DE ALWIS, J.—I agree.

WANASUNDERA, J.

This is an appeal from the order of the Election Judge dismissing the election petition challenging the 1st respondent's election as a Member of Parliament for the Akmeemana Electorate (No. 66). The only matter argued before us was whether the 1st respondent was in law qualified to be elected as a Member of Parliament. Article 91.(1)(*d*)(vii) of the Constitution disqualifies a person from being elected as a Member of Parliament or to sit and vote in Parliament if he is–

> "a public officer holding any office the initial of the salary scale of which is not less than Rs. 6,720 per annum."

It is not disputed that the 1st respondent held the office of Principal (Grade III) of the Galaboda Aturuwella Maha Vidyalaya, Induruwa, under the Department of Education and that his initial salary was more than Rs. 6,720 per annum. It is however the 1st respondent's position that he had ceased to be a public officer at all material dates. The petition against the 1st respondent however is based wholly on the ground that notwithstanding the circumstances relied on by the 1st respondent, the 1st respondent continued to be a public officer and held that office at the time of nomination and/or election and is therefore disqualified from being elected to Parliament.

It seems that the 1st respondent had not been properly advised about his position as a public officer and about his disqualification for election. His conduct and acts appear to be indecisive and confused and not one which we would have ordinarily expected from one embarking on such an important venture. By P28 dated 11th April 1983 he had first applied for no pay leave to contest the election. On the next day, after realising that that may not be adequate, by P32 of 12th April 1983 he indicated that he was resigning from his office with effect from 21st April 1983. The nomination date was fixed for 22nd April 1983 and the date of the election was 18th May 1983. All these letters are addressed to his Head of Department, the Director of Education, Galle, who is also described as the Regional Director. Probably these two letters had got into two different files. The Education authorities had notwithstanding P32 attended to the matter of leave (P28 B, C, D & E) and by P31 of 21st April 1983 leave was approved from 15th April under 2:2:3 of section 2 of chapter XXXVI of the Establishment Code on the basis that the 1st respondent was not a staff grade officer.

His letter of resignation too had been processed (P33 & P34) and by P41, which was apparently issued when the 1st respondent interviewed the Regional Director, the 1st respondent was notified of the acceptance of his resignation. This acceptance was by the Regional Director. The letter granting leave was accordingly cancelled. Copies of the letter accepting the resignation had been sent to the Auditor-General, the Accountant, S/Education, C.E.O., and the Acting Principal of the school.

Now Mr. Choksy's submission before us is that the letter of resignation had not been accepted by the proper authority, namely the Education Services Committee and that the Regional Director was not competent to deal with the matter. Hence the 1st respondent did not cease to be a public officer. Implicit in this submission and a matter that was argued at great length is the petitioner's further contention that a resignation cannot be effected unilaterally but, for it to be effective, it has to be accepted by the other contracting party.

Let me first turn to the applicable legal provisions. The Public Service has been considered important enough to be dealt with in the present Constitution in a separate chapter, namely chapter IX. The 1978 Constitution like the 1972 Constitution intended that the public officers and the public service should be placed within the exclusive domain of the Executive. This constitutes a radical change and a break with tradition. Except for certain types of public officers, who have to be appointed by the President (Article 54), the appointment, transfer, dismissal and disciplinary control of all other public officers is now vested in the Cabinet of Ministers – Article 55(1). The Cabinet cannot delegate this power in respect of Heads of Departments, but must itself exercise it. Article 55(2). The Cabinet is empowered to delegate all or any of the rest of the powers to the Public Service Commission – Article 55(3). However, the Cabinet can delegate the power of transfer within a Ministry over certain categories of public officers to a Minister. Upon such a delegation the Public Service Commission would be denuded of its power. Article 57(1) empowers the Cabinet to direct the Chairman of the Public Service Commission to appoint a Committee of the Public Service Commission to exercise the powers of the Commission in respect of specified categories of public officers. Such a direction by the Cabinet has to be complied with and would again denude the Public Service Commission of its powers over such categories of officers. Further sub-delegation both by the Public Service Commission and such Committee is also permitted.

Since the coming into operation of the present Constitution in 1978, a series of directions, delegations and notifications have been made regarding the exercise of authority over these public officers. In this connection Mr. Choksy referred us to the documents P7, P7A, P8, P4, 1R12, P1, P1A, P9, P2, P3, P6, P43, P44 and P45. This abundance of material has not been gazetted or published and presumably not available even to most members of the public service, so much so that probably only a very experienced public officer would be able to find his way through this material to arrive at what may be the correct position on a matter at any given point of time.

By Cabinet decision of the 4th October 1978 (P7), the Cabinet delegated its powers over public officers, except for four defined categories, to the Public Service Commission. The Public Service Commission was also authorised to sub-delegate its powers in the following manner. Regarding staff grade posts, the proper authority for the purpose of delegation was to be the Secretary to the Ministry. In respect of the Combined Services, it should be the Secretary to the Ministry of Public Administration. It should be the Head of the Department in case of Departments not falling within a Ministry. In regard to non-staff grade public officers, the proper authority should be the Head of Department. For the purpose of this Cabinet decision a staff grade officer is defined as one whose initial consolidated salary is Rs. 6,720 per annum or above and whose annual increments are Rs. 360 and above.

This Cabinet decision had been communicated to the Public Service Commission by P7A of 5th October 1978. By P8 dated 11th October 1978, the Public Service Commission informed the various Regional Directors of Education of the Cabinet delegation and that Regional Directors could only deal with non-staff grade public officers. Probably this may have been necessitated by the Regional Director having earlier exercised power over staff grade officers or due to some confusion in the matter. Letter dated 2nd February 1979 (P4) from the Public Service Commission to the Secretary, Ministry of Education, states that the Public Service Commission had delegated the concurrent powers over new staff grade posts to the Secretary, the Additional Secretary, and the Senior Assistant Secretary of the Ministry of Education. Letter dated 8th March 1979 (1R12) is a communication by the Secretary, Ministry of Education to "all officers in charge of Establishment matters of the Ministry of Education". This

has not been issued either by the Cabinet or by the Public Service Commission. It is issued apparently consequent on P4, but seems to go much beyond it. This notification is titled "Deleg.ation of Powers" and intended to deal with all staff officers in the Ministry of Education and is worded as follows:

> "It is informed hereby the Powers in respect of appointments, transfers, dismissal from service and the disciplinary control of officers other than the officers of the combined services of the Departments of the Ministry of Education had to be vested in the following manner by the Public Service Commission under section (1) of Article 58 of the Constitution of the Democratic Socialist Republic of Sri Lanka."

It then proceeds to set out the instruction on the following tabulated form:

"Category	*Authority*
(1) Government servants of the Staff Grade in the Ministry of Education and in the Departments of the Ministry	Secretary, Ministry of Education.
(2) Government officers of the Ministry of Education who are not of the Staff Grade	Secretary to the Ministry of Education, Additional Secretary, Senior Assistant Secretary."

A few months later the Cabinet decided on the establishment of an Educational Services Committee which brought about a complete change in the supervisory and managerial structure over officers in the Education Department. By Cabinet Decision dated 10th October 1979 (P1A), the Cabinet acting in terms of Article 57, directed the Public Service Commission to appoint a Committee for Education Services. This was notified to the Public Service Commission (P1). Once this Committee was appointed on 15th October 1979 (P2), the Public Service Commission became denuded of the powers it had previously exercised over these officers. The previous delegation contained in documents P7 and P4 mentioned earlier was also formally rescinded. This new arrangement has been brought to the notice of the Ministry Officials and Heads of Departments who had previously exercised delegated powers of the Public Service Commission.

Three documents P43, P44, and P45 have been produced by the petitioner to show the delegation of authority by the Educational Services Committee. For the purpose of this case it is of the utmost significance that Article 58(1) permits the Committee to delegate its powers to any public officer including a Regional Director. P43 dated 18th November 1980 contains a delegation of powers in respect of two categories – staff grades on the one hand and non-staff grades on the other. As far as it is material for this case, the two following items may be noted:

Officers	*Powers delegated*	*To whom*
(*a*) Officers of the staff grades	(*g*) Vacation of posts	Secretary/Addl. Secretary
(*b*) Officers in Schools/ Educational Institutes not falling into the category of staff officers	(*f*) Issue of notices regarding vacation of posts	Secretary/Addl. Secretary, Heads of Departments and Regional Director of Education.

Mr. H. L. de Silva submitted that P43 should now be read in conjunction with 1R13, which is a circular dated 26.3.1982 issued by the Secretary, Public Administration. The expression "Staff officer" is re-defined here to mean a public officer whose salary is Rs. 13,800 or over and entitled to yearly increments of Rs. 480 and over. The evidence of Mr. Rupasinghe, Regional Director called by the petitioner to the effect that having regard to this circular the 1st respondent could not be regarded as a Staff Officer (vide p. 99, Evidence). If this position is correct, a Regional Director could have dealt with a case of vacation of post of an officer like the 1st respondent. Vacation of post as we know is one way in which the relationship between the public officer and the State can be determined. It certainly has affinities with a case of resignation and repudiation of the contract of service and the factual situation giving rise to it may include both the above circumstances. These circumstances are inextricably mixed and are often dealt with together. The relevant provisions would be referred to later.

Item (*b*) in P43 was amended by P44 dated 8th June 1981 to read that it is only the Secretary and not the Additional Secretary who should exercise that power. Then comes P45 dated 24th December 1981, which is an interesting document. It has not been issued by the Education Services Committee but by the Ministry of Education,

although with the concurrence of the Education Services Committee. In fact it has been signed not even by the Secretary, Education, but on his behalf by the Additional Secretary for Secretary, Education. As far as one could gather, there had been a great deal of doubt and uncertainty relating to the administration and disciplinary control over public officers, and more particularly as to the proper authority who should exercise those powers. P45 itself, after referring to the delegations in P43 and P44, frankly mentions this confusion and doubt as follows:

> "As it is not specifically stated who the proper authorities are regarding the other establishment matters relating to the aforesaid categories of employees, it is likely that a confused state may arise and as such I wish to state as follows the due position regarding that for your information."

Among the matters dealt with in P45 are retirements and resignations – the very matter with which we are concerned. It states–

> "(1.1) *Retirements/Resignations*: Will be on the recommendation of the Ministry. Approval is by the Committee.
>
> (1.2) *Interdiction/Sending on compulsory leave/Issue of notice re vacation of post, withdrawal of notice of vacation of posts*: These powers have been delegated to the Ministry/Departments/Regional Offices (vide circular No. ESC 1/34 of 18.11.80). However an appeal may be made to the Committee."

To go back to the constitutional provisions, it would be noted that the provision of Article 55 under which the Public Service Commission and the Education Services Committee derive their authority relates to "the appointment, transfer, dismissal and disciplinary control of public officers". Neither retirement nor resignation is specifically dealt with here. When Mr. Choksy was questioned on this, he said that those items could come under the words "disciplinary control". Let us assume for the purpose of argument that this be so.

P45 highlights the state of uncertainty as to the proper authority who could deal with a letter of resignation. P45 which has sought to clarify this matter is as already noted not a rule, regulation, order, directive or notification of the Cabinet or of the Public Service

Commission or even of the Educational Services Committee. It is just a letter of information issued from the Ministry of Education and signed by the Additional Secretary for the Secretary, Education. If it is indicative of anything, it certainly shows that resignation and retirement have not been dealt with in the previous directions on which Mr. Choksy had also relied, or the position about it has not been clear.

At this stage it is also necessary to look at the Establishment Code to which Mr. Choksy invited our attention. The material portion is section 4 of Chapter V and is as follows

"4. *Resignation*

4:1. *an officer may submit his resignation from his* appointment with one month's notice to the Appointing Authority through the Head of his Department or on payment of a month's salary in lieu thereof

4:2 If the Appointing Authority refuses to accept his resignation and the officer ceases to report for duty, he should be deemed to have vacated his post as from the date of such cessation.

4:3 On receipt of the resignation of a pensionable officer, the Head of his Department should inform the officer in writing, that if he resigns from his appointment he will forfeit all claims to a pension, gratuity and all other benefits arising from his service prior to resignation, should he afterwards succeed in obtaining re-employment under Government.

4:3:1 He should also be informed that if resignation is accepted, any application to withdraw it later, will not be considered.

4:3:2 An acknowledgement to the effect that he has been informed in these terms should be obtained from him in writing.

4:4 When forwarding a resignation for acceptance by the Appointing Authority where the Head of Department is not the Appointing Authority, the Head of Department should state that he has complied with the requirements of sub-section 4:3.

4:5 Acceptance of resignation should be notified in writing to the officer concerned.

4:6 An officer who resigns, forfeits all claims and benefits arising from his services prior to resignation. However, if an officer who resigned, rejoined service, the period of service prior to resignation will be considered for pension purposes only, provided his work and conduct have been satisfactory."

These provisions may be accepted as being made under Article 55(4) of the Constitution, but nevertheless I shall show later that they do not qualify to be regarded as statute law, whether as primary or subordinate legislation. In spite of what Mr. Choksy said and though section 4:4 may be in his favour, the contents of sections 4:1, 4:2 and 4:3 may be noted. First, this permits a public officer to resign his appointment with one month's notice to the Appointing Authority through the Head of his Department. Alternatively he can resign by the payment of a month's salary in lieu of the above notice. In the present case the required notice was not given. As regards the payment of a month's salary, the 1st respondent agreed to forego the salary he had earned for the period of 21 days in April, and for reasons best known to the Regional Director he waived the required month's salary. Now it seems to me that the acceptance of a payment on behalf of the State is a revenue and a routine administrative matter. There is nothing in my view, to prevent a Head of Department like the Regional Director from dealing with it. Such an act would fall within the ambit of his functions. If he had made a mistake and the State had suffered by his negligence, the Regional Director would be personally liable for the loss for which he could be surcharged. This would not affect the validity of his act. In fact both sections 4:1 and 4:2 and also 4:3 show that the Head of Department has been brought in as a major element in the administrative process relating to the resignation of office by an officer and he has full authority to process it. In fact section 4:3 shows that the Regional Director acts as the mouthpiece of the Government in respect of certain matters in this regard.

Section 4:2 read with section 7 deals with vacation of post. In the context it provides for certain developments in the resignation process. There could be no doubt that the power of ordering a vacation of office notice would be with the Head of the Department. Notwithstanding the provisions of section 4.4 which states that the acceptance of the letter of resignation should be by the appointing authority, the provisions I have referred to show that when the resignation process is short circuited by certain circumstances dealt

under sections 4:1 or 4:2 the Regional Director is vested with actual authority to take decisions and make orders. Even outside these circumstances he is generally regarded by these provisions as the public officer who processes the resignation and through whom the appointing authority would be dealing. The Regional Director is an important officer and plays a pivotal role in the process. These considerations are of vital importance when we have to consider the questions whether the Regional Director had ostensible authority in this matter or regarding acquiescence or ratification of his acts by the appointing authority or the State.

The amount of confusion and doubt about the proper authority who could exercise these various functions and powers is best seen in the practices and acts of the Education Services Commission, the Ministry of Education, and by the Regional Directors when dealing with resignations. Unfortunately up to date the State has avoided making any definitive pronouncement about the practices that had hitherto prevailed or about the status of the 1st respondent apart from the legal submissions made by Attorney-General's representative who appeared as amicus.

There is clearest evidence that at least in seven or eight instances – that is the entire evidence pro and contra on this matter – Regional Directors have accepted letters of resignation of teachers. This would have been clearly wrong according to the submissions of the petitioner. An attempt was made by the petitioner to show that those were irregular acts on the part of some errant public officials and that the Education Services Committee had not been negligent about its rights, for when it had become aware of such a transgression it had sought to check the irregularity and had even sharply pulled up by the officer concerned. Mr. Choksy points to the correspondence between the Regional Director and the Ministry of Education in regard to the resignation of T. D. Stanislaus, a training teacher, as evidence of this. This of course is an isolated instance and the only one. And I find that even Stanislaus' case does not advance Mr. Choksy's contention. As Mr. H. L. de Silva pointed out, the contention in Stanislaus' case was not whether or not the Regional Director was the proper authority to accept the resignation but whether it was proper for him to have accepted the resignation of Stanislaus without the approval of the higher authorities when Stanislaus had certain outstanding obligations which should have been secured by a bond. The authorities had however failed to obtain such a

bond from him. This correspondence is as follows. By 1R14 dated 19.03.1980 the Regional Director, Galle, had accepted the resignation of Mr Stanislaus. The Secretary, Education had been informed of this. The Secretary, Education, by P48 dated 8th September 1980 to the Regional Director has stated, "Please submit a report regarding this immediately." Then there is a gap on the correspondence and one year later, by P47 dated 05.08.81, the Secretary, Education, writes again to the Regional Director on this matter. It refers to the bond. The material portion of the letter is as follows:

"On applying for study leave he is required to sign a Bond to serve the Government for five years. Before his resignation is accepted please inform whether the conditions of the bond have been fulfilled. Please send me a copy of the Bond.

2. *It has been pointed out earlier that these are duties of the Education Services Committee.*"

One wonders what Secretary, Education, meant by the ambiguous statement, "Before his resignation is accepted please inform whether the conditions of the bond have been fulfilled." Does not this statement imply that the Regional Director could have accepted such a resignation but for the special circumstances attending this case.

By letter P49 dated 12.8.81, the Regional Director sent his explanation that due to some oversight or negligence in his office or in the Ministry, the Bond had not been obtained. The Secretary, Education's reply is contained in P46 dated 30.12.81. The material portion of the letter reads as follows:

"As you have accepted the resignation of Mr. Stanislaus I wish to inform you to submit full particulars regarding that to Secretary E.S.C. and obtain the covering approval of E.S.C. regarding the acceptance of the resignation

2. You are hereby informed to explain as to why the amount recoverable from Mr. Stanislaus on account of his Bond should not be recovered from you."

The Regional Director's explanation is contained in P54 dated 29.3.82 where he once again reiterated certain circumstances in extenuation.

The tenor of this correspondence appears to me to support Mr. de Silva's contention that it does not highlight the issue as to the incompetence of a Regional Director accepting a letter of resignation but that he should not have accepted the resignation in that case as there was an outstanding bond. Further, this is fortified by the view that even in the circumstances of this case the Regional Director's

acceptance of the resignation could have been ratified by the Education Services Committee. One knows that in law the relation of principal and agent could be created *ex post facto* by ratification. If on the other hand the authorities were taking a hard line on this matter, then logically they should have disowned the Regional Director's act, declared that act null and void and punished him for arrogating to himself powers of higher authorities. This correspondence however did not affect Mr. Stanislaus' resignation which as to be expected continued to be operative with everyone accepting it as an accomplished fact.

As against this we have at least seven or eight clear instances spanning a period from August 1980 to January 1984 from widely different areas such as Colombo, Kandy, Galle, Kalutara and Tangalle, where the Regional Directors have considered it proper to accept the resignations of teachers without demur from either the Education Services Committee or the Ministry. These acts of the Regional Directors according to the submissions of petitioner are again both void and illegal and they are subsequent to the establishment of the Education Services Committee. But neither the Education Services Committee nor the Ministry or the Government has at any time thought it necessary to raise any question about the validity of the acts of those Regional Directors or to take action against them. In August 1980 the Acting Regional Director, Galle, accepted the resignation of Mr. Ginige, an Assistant Teacher–1R16. In August 1982 the Regional Director, Tangalle, accepted the resignation of Liyanapathirana, a teacher–1R32. In September 1982 again the Regional Director, Tangalle, accepted the resignation of Weerawardhana, an Assistant Teacher–1R30. In October 1982 the Regional Director, Colombo, accepted the resignation of Nanayakkara, an Assistant Graduate Teacher–1R34. In November 1982 the Regional Director, Kalutara, Mr. Rupasinghe accepted the resignation of Divitotahena, a Graduate Assistant Teacher–1R26. Strangely enough it is this gentleman who was called as a witness by the petitioner to establish the wrongfulness of such an act and to speak to the non-existence of such a practice. In July 1983 the Regional Director, Kalutara, accepted the resignation of S. K. Ranjith Ananda, an Assistant Teacher–1R23. In December 1983 the Regional Director, Galle, had accepted the resignation of Upasena, an Assistant Teacher–1R18. And in January 1984 the Regional Director, Kandy, had accepted the resignation of Kandana Arachchi, an Assistant Teacher–1R28.

As against this incontrovertible evidence no counter material has been placed by the petitioner to establish a different course of practice. The evidence of the witness called on behalf of the petitioner on this aspect of the case is more unsatisfactory. In fact there seems to be some justification in Mr. H. L. de Silva's statement that no material whatsoever has been placed before the Election Judge to show that the Education Services Committee had at any time exercised this power even in a single instance. Even in the present case, as stated earlier, a copy of the Regional Director's letter accepting the resignation had been sent to the Ministry of Education, so that the authorities were fully aware of what was happening.

I have earlier referred to the petitioner's letter of resignation dated 12th April 1983 and its acceptance by the Regional Director, Galle. There are also a number of other circumstances surrounding this act of resignation indicating the conduct of the 1st respondent on the one hand and the State on the other, which helps to throw light on the present status of the 1st respondent which is the matter in issue in this case.

The letter of resignation P32 of 12th April 1983 clearly indicated that the 1st respondent was resigning to contest the election of the vacant Akmeemana seat. When the 1st respondent met the Regional Director, Galle, in the office on the 21st April, i.e. the day before the nomination date, he had again indicated that he was leaving public office in order to be eligible to contest the Parliamentary election. His intention of leaving the public service was left in no doubt; a little prior to this, he had handed over his duties, the keys and all equipment to Mr. Jananada, the Acting Principal, who by letter P39 of 12th April 1983 had informed the Regional Director of this. A copy of the acceptance of his resignation had also been sent to the Acting Principal. The 1st respondent, as we all know, found his way to Parliament and never went back to the school. He carried on a very active and public political campaign to win his election. Such activity could not have been countenanced if he remained a teacher. Sometime later a permanent Principal as successor to the 1st respondent had been appointed.

If the position is that the 1st respondent's resignation was invalid and he was not on leave, action should have been taken against him for vacation of office as a public servant due to his non attendance at the place of work. The Establishment Code requires this to be done

and every public officer knows that it is usually done as a matter of routine. If a Principal of a school absents himself, it would be strange if his absence is not noticed and felt as it is bound to lead to a disruption in the running of the school. No disciplinary action has been taken against him for taking part in politics. The 1st respondent had not been paid his salary since March 1983, but on the other hand the authorities had demanded and recovered from the 1st respondent the repayment of a sum of Rs. 2,395 as Credit Council dues consequent on his resignation – P42. All the circumstances detailed above pertaining to the 1st respondent's resignation, some contemporaneous and others surrounding it, are in their totality relevant to show the nature, character and the legal effect of the 1st respondent's action in seeking to resign from the public service prior to the nomination day.

The Attorney-General was apparently given notice of this petition of appeal in terms of the provisions of section 82A(3) of the Elections Order in Council. But he was not present when this appeal first came up for hearing. Then in the course of the hearing we found that important questions of public law, particularly those relating to the status of public officers and the nature of the reliefs they could obtain under the present Constitution and the interpretation of certain provisions of the Establishment Code relating to resignation and vacation of office seemed to be in issue; we decided that the matter should go before a collective court and we ourselves noticed the Attorney-General to appear as *amicus*. While the Deputy Solicitor-General addressed us as *amicus* and made representations on the law, he declined to deal with the facts and up to now neither the Education Services Committee nor the State has been prepared to make a categorical pronouncement regarding the status and position of the 1st respondent at the material times. They have certainly not claimed him as a public officer. In view of this situation what indeed is the use of an outsider trying to establish a relationship between two parties in which the only party who can make a pronouncement is not prepared to commit itself? No court can be justified in shutting its eyes to the course of conduct of the State and the 1st respondent in this matter where the 1st respondent had been regarded for all purposes as no longer a public officer. These are matters of general public knowledge. Our decision therefore should not be a flight from reality. It should be wedded to facts. Based on some academic theory if we were to hold that the 1st respondent, in spite of the separation from

his office in every practical way, continued to be a public officer after the 21st April, we would surely be flying in the face of both facts and commonsense.

I now turn to what I consider to be the first of the two main issues in this appeal. Even assuming that acceptance is necessary to make a resignation effective – it is unnecessary to decide this question now – has there been in this case in the eye of the law a sufficient acceptance of the letter of resignation by the State? Mr. H. L. de Silva's position is succinctly recorded by us in the order we had made resignation. Elaborating this he stated that the acceptance of the resignation by the Regional Director was lawful and valid. Mr. de Silva's position is succinctly recorded by us in the order we had made when this matter first came before us. He contended–

> "... that the delegation of the powers referred to in Article 58(1) may either be express or implied and that in the absense of express delegation where the Regional Director had under colour of office, been in the habit of accepting letters of resignation from Public Officers working under him and where such acceptance had not been rejected or disowned by the Ministry of the Department of Education, but had been acquiesced in, then the conclusion may, in the circumstances be drawn, that there had been implied delegation of the powers to the Regional Director and that the Regional Director had implied authority to accept the letter of resignation.
>
> In our judgment the burden of establishing that the powers referred to in Article 58(1) of the Constitution had not been expressly delegated to the Regional Director of Education, Galle, rests on the petitioner and if he established that there was no express delegation of the relevant powers to the Regional Director, then the 1st respondent may lead evidence to establish that there had been an implied delegation of the powers referred to in Article 58(1) by the Public Service Commission or the Committee thereof to the Regional Director, so as to make the exercise of such power by the Regional Director, valid and binding."
>
> (Vide 1984 (1) S.L.R. at p. 218.)

Mr. Choksy submitted that the Regional Director had not been vested with authority to accept a resignation and this power lay only with the Education Services Committee. Accordingly the purported acceptance of the resignation by the Regional Director was without

effect and a nullity. The parties were locked in issue on this among other matters. I find that the evidence of a practice of letters being accepted by Regional Directors has been introduced into the record before the Election Judge and was argued before us. Mr. de Silva took us painstakingly through this oral and documentary material. As far as I could gather, there was no deviation from this position in Mr. de Silva's address to us. The legal issues then that arise from this material lie directly in the path leading to a decision in this case and it is not possible to by-pass them in reaching a just decision. Incidentally the fact that a person who has performed an act does not have actual authority does not foreclose further dicussion of this matter. There are a number of intricate legal principles that will have to be considered in this regard.

The main issue in this regard is the question of *ultra vires* in the Regional Director purporting to accept the resignation. An examination of the relevant law on this point is now called for. Let me begin with an authoritative text, Professor S. A. de Smith's "Judicial Review of Administrative Action" (4th Edn.), where in Chapter 3 he had analysed the topic of *ultra vires* in public law with particular reference to the kind of problem we are dealing with. He begins by saying that the term *'ultra vires'* first came to be used in relation to municipal corporations, then to the other new types of local government authorities, and finally to the Crown and its servants and even to inferior judicial bodies. In relation to Crown servants, he gives examples, which are set out below, of cases of implied, apparent and ostensible authority of such persons or agents. He asks the question whether the *ultra vires* doctrine can be modified by conduct or inertia of a public body or the acts of its servants or agents and by way of answer states that the private law analogies are potentially relevant in dealing with this matter. The private law analogies are obviously those of agency whose terminology he adopts and may include the developments that have taken place in Company law in relation to agency. A brief reference to such developments will also be made later.

These matters are discussed by Professor de Smith under the heading "Vires, Agency and Estoppel" at page 100. It is as follows:–

> "Can the operation of the *ultra vires* doctrine be modified by the conduct or inertia of a public body, or the acts of its servants or agents? Private law analogies are potentially relevant.

(1) X may bind himself by deed or by contract to take a particular course of action, or not to do something which he would otherwise be entitled to do.

(2) X's agent, Z, may bind X to perform a contract with Y although Z has acted without express authority from X. It is enough that Z has implied or apparent (ostensible) authority, or possibly that Z was acting in the course of his 'usual' authority.

(3) X permits Y to do something (or X refrains from objecting to something done by Y) which Y is not legally entitled to do. Because of waiver, acquiescence or delay, X may have forfeited his right to assert that Y is not legally entitled so to act.

(4) X, or X's servant or agent, makes a representation of fact or gives an undertaking or assurance to Y on which Y is intended to rely and on which Y does rely to his detriment. X may then be estopped from denying the truth of the statement or from going back on the undertaking.

It is by no means clear how far some of these principles are applicable to public law situations. Several relevant cases are inadequately reasoned or appear to conflict with one another – in particular, hard cases have been allowed to make dubious law – and any short statement of the existing legal position is bound to be tentative. Authoritative clarification from the House of Lords is awaited.

(1) A public body with limited powers cannot bind itself to act *ultra vires*: and if it purports to do so it can repudiate its undertaking, for it cannot extend its powers by creating an estoppel. Nor, in general, can a body entrusted with duties and discretionary powers for the public benefit effectively fetter itself in the discharge of its duties (including duties to exercise its powers free from extraneous impediments).

(2) It is thought that the general rules of agency apply in public law, except that an agent (*a*) cannot bind his principal to do what is *ultra vires* and probably (*b*) cannot bind his principal by exceeding his own authority if that authority is circumscribed by statute, but the existing case law on agency in public law is equivocal."

As stated earlier, problems of *ultra vires* and agency are presented in a similar manner in the realm of agency and Company law. Principles analogous to what de Smith has stated have been developed in the law of agency and company law, especially under the well known rule in *Royal British Bank v. Turquand,* (36) Garner-Administrative Law (4th Edn.)–states at page 302, that the effect of the rule in *Turquand's case* (supra) applies equally to local authorities. It is therefore not surprising that Professor de Smith's analysis reflects some of these principles.

Accordingly the main principles that can be gathered from judicial decision in these branches of comparative law may be noted now. The principles relating to agency in regard to companies and corporate institutions (as against individuals) had seen great development beginning with *Turquand's case (supra). The basic principles which by analogy have relevance to the present situation are as follows:– The rule of "indoor management" or the rule in Turquand's case* (supra) is to the effect that a person dealing in good faith with a company may assume that acts within its constitution and rules have been duly performed and he is not bound to inquire whether or not such internal management has been regular. As the case law shows, the rule need not be confined to outsiders or third parties. Vide *Holy-Hutchinson v. Brayhead Ltd.* (37) affirmed by the Court of Appeal. Also see Pennington's Company Law (3rd Ed.) p. 123. The full scope of the rule is that a company or corporation would be bound by the acts of fits "agents" provided that the transaction, consistent with the articles, comes within the scope of the authority which they could or might have had. Sometimes the area concerned has been described as "potential" authority. Basically it includes two main types of situations, namely (1) where authority might have been conferred though in fact it has not been so conferred, and (2) where authority had been conferred but subject to conditions which relate to indoor management and such conditions remain unfulfilled.

Every officer and person associated with the activities of a company has the ostensible authority to exercise all the powers necessary for the due performance of his primary functions. This is commonly described as the usual authority. when one deals with such a person on this basis and he sues the company he could succeed on the basis of "usual authority" unless it is negatived by the articles and it is not negatived if under the articles power could have been so conferred.

What is the position when we deal with a case concerning the exercise of functions other than primary functions? There are passages in *Houghton & Co. v. Northward Lowe and Wills Ltd.* (38), *Kreditbank Cassel v. Schenkens Ltd.* (39) and *British Thomson-Houston Co., Ltd. v. Federated European Bank Ltd.* (40) which support the view that the *Turquand* principle would apply even to such situations, provided there is actual knowledge of the Articles. That is to say that he was aware that such authority could have been delegated under the Articles. In the present case it would be noted that such an exercise was possible and such authority had in fact been exercised. When we consider the case of a supposed exercise of a power of delegation in such situations, it would also be necessary to find out whether the supposed exercise of the delegation would have been normal and regular in the circumstances of the particular case.

There is also a third situation, namely the exercise of authority by a *de facto* officer. If a company represents that a person holds office in the company, it cannot escape liability by appealing to the doctrine of constructive notice and showing that he could not have been appointed. It is one thing for the company to say that the powers of a *de facto* officer are limited just as in the case of *de jure* directors, but it is another thing to say that they have no powers at all. The doctrine of constructive notice as modified by the *Turquand* rule restricts the power of a *de facto* officer to bind the company in the same way as it restricts the power of persons duly appointed but no further. The appointment or its absence is really irrelevant. *Vide Mahony v. East Holyford Mining Co.* (41) where the judges proceeded on the basis that it is unnecessary to invoke the rule in *Turquand's case (supra)* in regard to the appointment, though it was applicable in deciding the scope of the powers of the directors concerned. The doctrine of constructive notice as modified by the Turquand rule applies both to the possibility of appointment and the possibility of having the necessary powers, if appointed. In *Mahony's case (supra)* Lord Penzance said that although the directors and the secretary had usurped those offices, the bank was entitled to assume they were validly appointed if in conformity with the memorandum and articles they could have been validly appointed. In *Re County Life Assurance Co., Ltd.* (42), Gifford, L. J. stated that a company is bound by what

takes place in the usual course of business with a third party, *where the third party deals bona fide with persons who are de facto* directors and who, so far as they could tell, might have been *de jure* directors.

The extent to which the *Turquand* principle has been pushed forward can be seen from the Court of Appeal decision in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* (43). Diplock L.J. said:

> "If in the case of a company the board of directors who have actual authority under the memorandum and articles of association to manage the company's business permit an agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the 'actual' authority of the board of trustees and unless its memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such 'apparent' authority that the agent had authority to contract on behalf of the company."

This case was followed in *Hely-Hutchinson v. Brayhead Ltd. (supra)* mentioned earlier.

The examination of the legal position in other branches of the law not wholly unconnected with the situation we are dealing with may by way of analogy be of some help in analysing the case before us. Professor Wade has said in a chapter under "Delegation" –

> "An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, *except in cases where it may reasonably be inferred that the power was intended to be delegable.*" (Emphasis by me) Wade Administrative Law (5th Ed.) P. 319.

De Smith is prepared to concede that the general rules of agency could apply in this situation. He has made two reservations. First, he states that an agent cannot bind his principal to do what is *ultra vires*. Second, he states with some hesitation that an agent cannot bind his principal by exceeding his own authority if that authority is circumscribed by statute. Two matters stated by de Smith may have particular relevance to the problem we are faced with. In a foot note to the last item (2) of the quotation at page 100 of his work, de Smith has stated:

> "The important leading case, *Att. Gen for Ceylon v. Silva (supra)* involved an erroneous representation by a Crown servant as to the scope of his *own* authority. It is not clear from the Privy Council's judgment whether the Crown had held him out as possessing the necessary authority (which was, however, limited by statute); or indeed whether the doctrine of 'usual' authority has any application at all in public law, see *Western Fish Products Ltd. v. Penwith D.C.* (44). And see *R. v. Home Secretary, ex p. Choudhary* (45) (Home Secretary not bound by leave to enter granted by immigration officer inconsistently with the Act or immigration rules; but see *R. v. Home Secretary ex p. Ram* (46) (leave invalid when immigrant ought to have disclosed to officer material change of circumstances)."

De Smith also refers to another development in this branch of the law. He states:

> "However, there is a growing body of authority, attributable in large part to the efforts of Lord Denning, to the effect that in some circumstances when public bodies and officers, in their dealings with a citizen, take it upon themselves to assume authority on a matter concerning him, the citizen is entitled to rely on their having the authority that they have asserted if he cannot reasonably be expected to know the limits of that authority; and he should not be required to suffer for his reliance if they lack the necessary authority.

In this connection de Smith refers to Lord Denning's judgments in *Robertson v. Minister of Pensions* (47) and *Falmouth Boat Construction Co. v. Howell* (48).

Let me therefore approach this matter then in terms of the careful and cautious statements enunciated by de Smith without resort to any wider principles. The first principle is that a public body with limited powers cannot bind itself to act *ultra vires* and an agent cannot bind his principal by doing anything *ultra vires* the principal. In so far as the present case is concerned, there is no such problem. It is the petitioner's whole case that the Education Services Committee has been vested with the power of accepting letters of resignation, so that both the issues of the principal acting *ultra vires* and the agent trying to exceed the authority of the principal does not arise for consideration here.

The second principle enunciated by de Smith has two aspects. First, an agent of a public institution cannot bind his principal by exceeding his own authority if that authority is circumscribed by statute. This is the principle in *Attorney-General v. Silva (supra)*. Second, he asks the question whether the principal would have been bound even in such a case if he held him out as possessing the necessary authority. This is apparently the principle of "ostensible authority" referred to earlier in this report in the law of agency.

Let me even assume that we are here dealing with the case of a *de facto* agent to whom a delegation could have been made. To reiterate, the Education Services Committee was empowered to delegate its powers to any public officer. The next question is whether there are any provisions of a "statutory nature" which imposes limitations on the delegated authority. Undoubtedly there are a number of orders and directives relevant to this matter, but they would be relevant only if they are statutory provisions and such provisions impose limitations. Administrative instructions and orders would not suffice for this purpose.

To answer this second question we have to determine the nature and character of the material that regulate and govern the affairs of the public service and public officers. In *de Zoysa v. The Public Services Commission (supra)* the Supreme Court dealt with this identical question, namely the status of rules made by the Public Service Commission, under the Soulbury Constitution. Justice H. N. G. Fernando in a closely reasoned judgment held that the rules made by the Public Service Commission could not be dignified to the status of subordinate legislation and that they were in effect merely

Administrative Directions and Instructions. This case was followed with approval by the Supreme Court in *De Alwis v. De Silva, (supra)* where it was held that the Manual of Procedure did not have the status and character of a law, primary or subordinate.

Mr. Chosky sought to distinguish these cases by relying on the provisions of Article 55(4), which he stated did not have a counterpart in the earlier Constitutions. Mr. Azeez on the other hand hesitated to claim statutory status for the Establishment Code, but nevertheless argued that it had a statutory base or had the underpinnings of statutory provisions. It may however be pointed out that the principal documents we have to consider. P 43, P 44 and P 45 are not documents made or issued by the Public Service Commission under Article 55(4). Only the Establishment Code at the most may qualify to come within those provisions.

The provisions of Chapter IX of the present Constitution, following the thinking of the 1972 Constitution, displays a radical departure in many respects from what obtained prior to 1972. Chapter IX could be properly understood only in the light of the historical background to these provisions and the mischief it has sought to remedy.

Every person acquainted with the post-independence period of our history, especially the constitutional and legal issues that cropped up during that period, would know how the actions of the Government and the Public Service Commission dealing with practically every aspect of their control over public officers were challenged and taken to the courts. A stage came when the Government found itself practically hamstrung by injunctions and court orders and not given a free hand to run the public service and thereby the administration as efficiently as it would wish. The 1972 reforms came undoubtedly as a reaction to this. The thinking behind the framers of the Constitution was that the public service must be made the exclusive domain of the Executive without interference from the courts. Vide section 106.

The present Constitution has only given refinement to that thinking. The present Article 55(5), which is in effect a preclusive clause of the greatest coverage, appears to shut the courts out from this domain except for a violation of a fundamental right. While it is true that Article 55(4) is a new provision, it dovetails into the scheme and is intended to give the Cabinet the widest authority and flexibility in regulating the

public service. Such provisions have to be flexible and less formal than legislation. They also do not lend themselves to formal regulation because they, as the Privy Council said, "are matters of rule which are of infinite variety and can be changed from time to time".

If the provisions and procedures formulated by the Cabinet had the dignity of legislation, whether primary or subordinate, then it would have been difficult to justify the preclusive provision contained in Article 55(5) and further it is doubtful whether that preclusive provision could have achieved the desired result, since it may not have been adequate to shut out the courts when the violation of statutory provisions are in issue.

The reasoning of Justice H. N. G. Fernando in *de Zoysa's case (supra)*, which is unexceptional, seems also to be equally valid in the present context. A distinction has to be borne in mind between subordinate legislation, which may consist in the form of rules and regulations, and mere administrative instructions and directions. If we examine the provisions of the Constitution we find that it has by a careful use of the language maintained this distinction. For example, under Article 136 the Rule Making Committee of the Supreme Court is empowered to make rules. Similarly the Judicial Service Commission is empowered to make rules under Article 112(8). But Article 55(4) does not speak of rules. What the Cabinet is empowered to do under this provision is to "provide for and determine all matters relating to public officers". Such matters are itemised as–

(*a*) the formulation of schemes of recruitment;
(*b*) Code of Conduct for public officers;
(*c*) principles to be followed in making promotions and transfers;
(*d*) procedure for the exercise and delegation of the powers of appointment, transfer, etc.

All these matters have the characteristics of guide lines rather than of rules or regulations. We do find sometimes certain provisions which may not fall within the category of primary or subordinate legislation being given the legal effect of rules or regulations by express statement to that effect. There is no such provision in respect of Article 55(4). Further rules and regulations are required by law to be Gazetted. Many rules and regulations have to be tabled in Parliament for Parliamentary sanction. There are no such requirements in this case. All this is indicative of the fact they were intended to be

administrative procedures in the nature of mere internal rules and guidelines giving the executive the necessary latitude and flexibility to administer the public service and to adjust them to the dynamic needs of the administration. As a corollary to this, they have to be non-justiciable and placed beyond the reach of the courts.

The position in India under the corresponding provisions in that Constitution is most interesting. The relevant Articles in the Indian Constitution are Articles 309 and 313. Article 309 enables the Legislature to legislate in regard to recruitment and conditions of service of persons appointed to the public services in connection with the affairs of the Union of any State. The proviso states that until provision is made by an appropriate Legislature, rules on those matters may be laid down by the Executive. The rule-making power of Government is identical with that of the Legislature. Article 313 is a transitional provision and is to the effect that until provision is made under the Constitution, all laws in force immediately before the commencement of the constitution and applicable to any public service or any post shall continue in force in so far as consistent with the Constitution. Laws in force in this context would include all rules and regulations and all Government notifications. These were given statutory force by section 96B(4) of the Government of India Act 1919. While such provisions are expressly given statutory force by these constitutional provisions, they are however not made justiciable. They are in fact regarded as Execution Instructions. *Sambandan v. R. T. S.*, 1958 A.I.R. Madras 243. The scope of these provisions were discussed by the Privy Council before Independence in the trilogy of cases – *R. Venkata Rao v. Secretary of State for India (supra) (18) Rangachari v. Secretary of State for India (supra)* and *I. M. Lall's case (supra)*.

In *Venkata Rao's case (supra)* the Privy Council gave the following reasons for their view:-

"1 The rules were manifold in number and most minute in particularity and were all capable of change. To uphold the contention of the appellant that an action would lie for any breach of any of those rules would involve a control by the courts over Government in the most detailed work of managing its services and such control would cause not merely inconvenience but confusion, and

2. Section 96B makes careful provision for redress of grievances by administrative processes."

The subsequent Indian cases have followed the above cases and taken the view that the courts will only intervene when the conditions specifically set out in the Constitution in Articles 310 and 311 are violated and not otherwise. Vide *Satish Chandra Anand v. Union of India.* (49) *Purshotam Lal Dhingra v. Union of India,* (50) and *Shyam Lal v. State of U. P.* (51)

As far as our provisions are concerned, we too have adequate administrative procedures for the redress of grievances. But what is most significant about the Indian provisions is that notwithstanding that they can claim to enjoy a statutory status, all those provisions (except the specific conditions mentioned in the constitution itself) have been regarded as purely administrative rules falling within the domain of the Executive and are regarded as being beyond the reach of the courts. Therefore to say that the Indian provisions are statutory provisions – they are actually enacted by the Legislature and expressed to be so – is not to the point. What matters is that they are still treated as pure administrative instructions and procedures and beyond the peach of the courts.

In my view the provisions of Article 55 (4) are non-statutory in nature and Article 55(4) and Article 55(5) are complimentary and support each other. Article 55(5) makes the provisions made by the cabinet and executive action consequent thereon also non justiciable. Compared with this, the power of sub-delegation contained in Article 58 is even of lesser importance and can in no quality be regarded as statutory provisions. In the result I hold that there are no statutory limitations on the power of delegation contained in Article 58 and that the Regional Director's act meets the second requirement enunciated by de Smith to establish valid agency With this conclusion it necessarily follows that the acceptance of the resignation by the Regional Director is valid. On this ground alone the petition would fail.

But one of the main issues in the case and the principle objection taken by the 1st respondent from the outset to this election petition, is the preclusive nature of Article 55(5) as a bar to the petitioner's case. Considering that it was a matter argued before us, having regard to its constitutional importance and the fact that it buttresses the finding I have just made, some pronouncement on it is called for here.

There is no doubt – and it has been conceded by all counsel that Article 55(5) is a preclusive clause. The parties are however divided on the extent of its coverage. Mr. Chosky's contention is that it cannot shut out the court when a question of *vires* is involved. Mr. Azeez was again hesitant to engage in any general discussion of this provision – though we had decided to send this appeal before a collective court mainly on this matter. To a pointed question by me he conceded that in view of this provision it would not be open to a third party to canvass a decision of the administration. Any other answer would have serious repercussions on the administration of the public service and would put the clock back to the position that prevailed prior to 1972, opening the internal administration of the public service to the full scrutiny of the courts once again.

Even a cursory look at Article 55(5) shows that it goes well beyond the usual kind of preclusive clause. Article 55(5) states that no court or tribunal shall have power or jurisdiction over any order or decision of the Cabinet of Ministers, the Public Service Commission, a Committee of the Public Service commission, or of a public officer in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer. It goes on to state specifically that a court or tribunal cannot "inquire into, pronounce upon, or in any manner call in question any such order or decision."

But it is not only in width and range that this preclusive provision is of an exceptional kind. The wording is undoubtedly cast extensively going well beyond the usual type of preclusive clauses which have come up for decision, but this is also a provision embodied in the Constitution constituting a part of the fundamental law of the country and relating to the administrative structure of government. In *Marrikissoon v. Attorney-General,* (52), the Privy Council referred to this aspect of the matter, but left the matter undecided.

In the U.K. law, the courts have grappled with the problem of preclusive clauses and of the vesting of uncontrolled power in a tribunal. But this is in ordinary legislation.

The leading case on the subject is the well known *Anisminic case* (supra). The U.K. more than most countries is wedded to the concept of the rule of law which they feel is protected primarily by the courts. Ouster clauses are naturally abhorrent to the court system which obtains there. Such clauses are looked at with disfavour and the need for them is not very much appreciated. There has also been a large

measure of public support and Parliamentary acquiescence for such decision until the reaction to the *Anisminic* ruling. In the result the U.K. courts have found it possible to virtually entrench in the law the principle that an executive body or tribunal should not be allowed to be the final judge of the extent of its own power notwithstanding any preclusive clauses.

While such a principle has the persuasiveness and simplicity of a fundamental principle, it is one-sided and does not seek to reach any kind of compromise with what may have been the actual intentions of Parliament. Parliament had also persisted in enacting preclusive clauses with the intention of withdrawing certain administrative acts and decisions from the jurisdiction of the court in the interests of good administration. The cleverness and wisdom of the judicial pronouncements lie in their avoiding any confrontation with the Legislature and providing a reason which can be passed off as self-evident and making it appear that the courts are actually acting in conformity with the intentions of Parliament rather than defying them.

Professor Wade in his work "Administrative Law" (5th Edn.), at page 604, states that as a result of the *Anisminic* judgment:

> ". . . The policy of the courts thus becomes one of total disobedience to Parliament. Under the basic distinction which formerly obtained, and which the House of Lords supposed that they were upholding in the *Anisminic* case, judges could at least say that they were obeying Parliament in some situations, while construing ouster clauses as not applicable in others. But now they seem to have lost sight of the reasons which justified their attitude originally."

By way of contrast Professor Wade speaks of the different approach in the Australian cases at page 609. He says:

> "The High Court of Australia has made interesting attempts to steer a middle course. Its solution is to retain power to quash for plain excess of jurisdiction, but not to intervene 'where the tribunal has made a bona fide attempt to exercise its authority in a matter relating to the subject with which the legislation deals and capable reasonably of being referred to the power possessed by the tribunal.'"

This Australian approach merits consideration in its own right, but has great appeal when we have to deal with a constitutional provision of that nature which embodies the will of a sovereign People. It ought not to be brushed aside except for good and weighty reasons.

There is therefore much to be said for a literal interpretation of Article 55(5), which would have the effect of shutting out the courts completely from this sphere. First, this is a constitutional provision. The wording of Article 55(5), excluding matters of fundamental rights, suggests the inclusion of everything else. Further this administrative sphere is regulated by a hierarchy of self regulating and self correcting processes with no less than the Cabinet of Ministers itself at the head.

Let us however assume that there is substance in Mr. Choksy's submissions and a literal interpretation would be too drastic. Could we discover a less rigorous test which can accommodate the examples given by Mr. Choksy?

Some of the examples that were given or come to one's mind in this connection may be extreme or even fanciful like the General Manager of Railways purporting to make an appointment to the medical services or the Ayurvedic Commissioner making appointments to the Fisheries Department. Such examples, if not extreme, are more often than not seen to be unreal and illusory when analysed. Professor I. D. Campbell in a learned article disposed of such an example – the office boy exercising the power of a director – in the following vein:

> "To take the fantastic but over popular instance of the office boy, it would be unusual (to use no stronger word) for the directors to have power to delegate to the office boy power to conclude important contracts; but if such a power of delegation *were* included in the articles, a delegation to the office boy would be a perfectly normal exercise of the power of delegation. Had it been a power to delegate authority to such person or persons as the directors may think fit delegation to the office boy would be an unusual exercise of the power. It would be so unusual that the outsider would be put on inquiry."

This of course is not the only way of dealing with the matter. There are usually, in our law, adequate administrative procedures and appeals to rectify errors and dishonest acts, and it would be remarkable if the outrageous examples that were given could have actually happened or remained unremedied.

Such examples go to highlight the problem: They may indicate one extreme. At the other there is the perfectly lawful act for which no preclusive clause is needed – even though validity may have to be finally determined in judicial proceedings. Leaving these extremes out, there is middle ground where an act, to use terminology from another branch of law may be voidable rather than void as these terms are used strictly. They would include to borrow the wording of the Australian case the instance where the power that had been exercised is capable reasonably of being referred to the power possessed by that authority and a bona fide attempt had been made to exercise that power. As the earlier discussions relating to Professor de Smith's issues show, this would include cases of implied ostensible or apparent authority. The present case falls well within this category: In my view the preclusive provision should be given effect to at least in this third category and I can see no apter instance for its application than the present case. This case involves a matter of what is essentially indoor management and the exercise of potential powers by the Regional Director and where in fact there has been a practice of his exercising such functions.

To sum up, if we seek to apply the rigorous principles enunciated by de Smith, stated earlier, and take the petitioner's case at its highest, I find that we have here a case where the Education Services Committee has been duly vested with authority to accept resignations. It was fully authorised by Article 58 to sub-delegate this power to any public officer. So that a Regional Director of Education, a Head of a Department, and who ordinarily constituted the channel of communication between teachers in the region and the Education Services Committee, could have constituted a proper authority in law for vesting this authority. The procedures for such delegation were also non-statutory and there were no statutory procedures imposing limitations on the agent.

Stated in negative terms enunciated by de Smith, we find that the Regional Director did not purport to exercise a power which the Education Services Committee did not possess, nor did the Regional Director exercise a power which he was potentially incapable of being delegated. There were also no statutory powers trammelling the exercise of powers of both these authorities. Further, we find that the conduct of the Education Services Committee, the Ministry of Education, and the Government has been such that by their acts of

commission or omission they had held out or represented the Regional Director as an officer who was capable of or was entitled to exercise his power. The Education Services Committee also appears to have acquiesced in the exercise of power by the Regional Director or had itself neglected to exercise that power and remained idle and permitted the Regional Director to exercise the power

In the result I hold that in virtue of Article 55(5), this court cannot inquire into the validity of the acceptance of the 1st respondent's letter of appointment.

The effect of Article 55(5) in this case is to screen and shut out any inquiry into the validity of the acceptance of the letter of resignation. This ruling reinforces my earlier ruling on the other issue and their conjoint effect is that the 1st respondent was duly qualified to be nominated and elected for this seat.

In view of this conclusion I find it unnecessary to consider the other matters raised by both counsel. I would accordingly dismiss this appeal with costs both here and before the Election Judge

Appeal allowed.

Election of 1st respondent declared void.