MIGULTENNE
V.
THE ATTORNEY-GENERAL

SUPREME COURT.
FERNANDO, J.
DHEERARATNE, J. AND
PERERA, J.
S.C. REFERENCE NO.3/94.
C.A. NO. 246/86 (F).
D.C. COLOMBO NO.3346/Z.
JUNE 21, 1995.

Constitutional Law - Interpretation of sections 106 and 107 of the 1972 Constitution - Rule 4(12) of the Court of Appeal (Appellate Procedure) Rules 1990 - Holding office at the pleasure of the executive - Ouster of jurisdiction of Court.

"Pleasure" implies discretion, and the question is whether sections 106 and 107 were intended to give the Executive an unfettered discretion unrestrained by judicial review.

Rules made under section 106(3) are subordinate legislation, and cannot be regarded as legislation within the meaning of section 107(1). Subordinate legislation, even where authorised by the Constitution, cannot prevail over (and thereby amend) the Constitution, unless the Constitution clearly authorises such a result. The authority to make rules is subject to the "pleasure principle".

Section 107(1) provides for only two restraints on the "pleasure principle" - the pleasure principle will not apply where the Constitution itself **expressly** provides otherwise, and where the legislature by **law** provides otherwise. It follows that exceptions to the "pleasure principle" cannot be created by **implication** from constitutional provisions (such as the fundamental rights) or by subordinate legislation (such as rules made under section 106(3) which are not "legislative" in character) and so cannot be treated as being "laws" within the meaning of section 107(1).

Section 107(1) makes the "pleasure principle" applicable to "state officers" appointed by the Cabinet (under section 107(1) as well as Presidential appointees (under section 108).

Section 107(1) provides that office is held at the pleasure of the **President.**

The President has no independent discretion, as he must act on advice (section 27); and if he has no real discretion, there can be no criteria by reference to which his exercise of discretion can be reviewed. There appears to be some anomaly in office being held at the pleasure of the President, although appointment and dismissal are by the Cabinet, but the fact remains that there are no criteria by which the exercise of discretion may be reviewed; even compliance with the fundamental rights is not required. This is suggestive of an unfettered discretion, not subject to review. Under the 1972 Constitution "state officers" held office at pleasure; there was no exception (save as otherwise expressly provided by the Constitution or by statute law). The plaintiff held office at pleasure.

(2) The ouster clause in the 1972 Constitution is consistent with a general intention to exclude judicial review. The ouster clause in section 106(3) was a bar to the plaintiff's action for a declaration.

***Per* Fernando, J.**

"Judgments of this Court show that, for that mischief (unrestricted pleasure principle) the fundamental rights jurisdiction (under the 1978 Constitution) is an antidote of growing efficacy though not a preventive."

Cases referred to:

1. *Abeywickrema v. Pathirana* [1986]1 Sri L.R. 120, 182.
2. *Chandrasiri v. A.G.*[1989]1 Sri L.R. 115.
3. *Vallipuram v. Postmaster-General* (1948) 50 N.L.R. 214.
4. *Santiapillai v. A.G.* (1953) 55 N.L.R. 83.
5. *De Silva Wijesundera v. P.S.C.* (1953) 55 N.L.R.94.
6. *Silva v. A.G.* (1958) 60 N.L.R. 145.
7. *De Zoysa v. P.S.C.* (1960) 62 N.L.R. 492 (S.C.).
8. *De Zoysa v. P.S.C.* (1963) 64 N.L.R. 505 (P.C.).
9. *Herat v. Nugawela* (1968) 70 N.L.R. 529.
10. *A.G. v. Kodeswaran* (1967) 70 N.L.R. 121.
11. *Pillai v. Fonseka* (1968) 71 N.L.R. 202.
12. *De Alwis v. De Silva* (1967) 71 N.L.R. 108.
13. *Bandara v. Premachandra S.C.* 213/93 S.C. Minutes of 16.8.93.
14. *P.S.U.N.U. v. Jayewickrema* [1988] 1 Sri L.R. 229, 235-6.
15. *Ramupillai v. Perera* [1991] 1 Sri L.R. 11.
16. *Wickremabandu v. Herath* [1990] 2 Sri L.R. 348.
17. *Wickremaratne v. Gunawardena S.C.* 5/95 S.C. Minutes of 29.5.95.
18. *Ridge v. Baldwin* (1964) AC 40,66.

APPEAL from judgment of the Court of Appeal.

R.K.W. Goonesekera for Plaintiff -Appellant - Appellant.

Mohan Peiris, S.S.C. for the Defendant - Respondent - Respondent.

Cur.adv,vult.

July 7, 1995.
FERNANDO, J.

This appeal involves the interpretation of sections 106 and 107 of the 1972 Constitution.

The facts are not in dispute. The Plaintiff-Appellant-Appellant ("the Plaintiff") was a "state officer" within the meaning of the 1972 Constitution, whose services were terminated on 30.6.78. He instituted action in the District Court of Colombo, averring that he was not holding office at pleasure, and that the termination was arbitrary and without lawful cause or reason, and sought a declaration that he continued to be a public servant. It was not contended at any stage that the termination was a nullity, because it was *ultra vires* or *mala fide.* In 1986, preliminary issues of jurisdiction were answered against the Plaintiff on the basis of section 106(5) of the 1972 Constitution.

On appeal both Counsel submitted that important questions of law, relevant to the public service, arose, and that these would ultimately have to be decided by this Court. Accordingly, on 4.7.94, acting under and in terms of Rule 4(12) of the Court of Appeal (Appellate Procedure) Rules, 1990, the Court of Appeal upheld the decision of the District Court that section 106(5) was a complete bar to the Plaintiff's action, dismissed the Plaintiff's appeal, and granted him leave to appeal to this Court upon the following question:

> "Whether the services of a public officer whose tenure is governed by the 1972 or 1978 Constitutions could be summarily terminated on the basis that he holds office at the pleasure of the Executive."

Although reference has been made to the 1978 Constitution as

well, the matter really involves the interpretation of only the 1972 Constitution, because it was while that Constitution was in force that the Plaintiff was dismissed. Therefore, even if it is correct that under the 1978 Constitution a public officer does not hold office at pleasure (namely, at the unfettered or absolute discretion) of the Executive, and hence cannot be summarily dismissed, yet it does not follow that the same position prevailed under the 1972 Constitution - because there are differences in the relevant provisions. However, some consideration of the corresponding provisions of the 1978 Constitution is useful in order to determine the true meaning and effect of the 1972 provisions.

Both Counsel dealt with the question under two heads:

1) Does the "pleasure principle " in section 107(1) confer an unfettered discretion on the Executive?

2) Does section 106(5) completely oust the jurisdiction of the Courts in respect of orders and decisions of the Cabinet of Ministers, Ministers, etc; regarding appointments, transfers and dismissals of "state officers"?

It was assumed, for the purpose of this appeal, that the ouster clause did not extend to an order or a decision which is a nullity because it was *ultra vires* or *mala fide*. That, however, was not the basis on which the Plaintiff contended that the District Court had jurisdiction.

Sections 106 to 108 of the 1972 Constitution and Articles 54 and 55 of the 1978 Constitution provide as follows:

106. (1) The Cabinet of Ministers shall be responsible for the appointment, transfer, dismissal and disciplinary control of state officers and shall be answerable therefor to the National State Assembly.

106. (2) Subject to the provisions of the Constitution, the Cabinet of Ministers shall have the power of appointment, transfer, dismissal and disciplinary control of all state officers.

106. (3) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to state officers including the constitution of state services, the formulation of schemes of recruitment and codes of conduct for state officers, the precedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of state officers.

106. (5) No institution administering justice shall have the power of jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of state officers.

107. (1) Save as otherwise expressly provided by the Constitution, every state officer shall hold office during the pleasure of the President. The National State Assembly may however in respect of a state officer holding office during the pleasure of the President provide otherwise by a law passed by a majority of those present and voting.

108. The following state officers shall be appointed by the President:-

(a) state officers required by the Constitution or by or under the authority of a written law to be appointed by the President;

(b) the Attorney-General; and

(c) heads of the Army, Navy and Air Force and of the Police Force.

54. The President shall appoint all public officers required by the Constitution or other written law to be appointed by the President, as well as the Attorney-General and the Heads of the Army, the Navy, the Air Force and the Police Force.

55. (1) 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.

55. (4) 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.

55. (5) 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.

Mr.Goonesekera's contentions can be summed up as follows. Immediately prior to 1972, the "pleasure principle" - whether recognized constitutionally or otherwise - did not give absolute and unfettered discretion to the Executive; over a period of time,the degree of discretion implicit in that principle had been gradually restricted or diluted by substantive and procedural safeguards contained in administrative rules and regulations governing the terms and conditions of service of public officers. The 1972 Constitution neither reversed nor halted that process of dilution of the "pleasure principle", but continued it. Sections 106 and 107 have to be "harmoniously interpreted", with due concern for civil liberties, with the result that the "pleasure principle" in section 107(1) was subject to safeguards contained in the rules made by the Cabinet under section 106(3); and so a "state officer" was not liable to summary termination if those rules had made contrary provision (e.g.as to cause for,or notice of, termination). To reinforce this submission, Mr.Goonesekera referred to the 1978 provisions; he claimed that the "pleasure principle" and the administrative rules made by the Cabinet were similar in status and effect, under both Constitutions; and the rules diluted the "pleasure principle". In that setting, although the ouster clause in Article 55(5) appeared to be narrower in scope - because it expressly preserved the fundamental rights jurisdiction of this Court - nevertheless, both section 106(5) and Article

55(5) must be liberally construed to permit judicial review by way of declaration in the District Court, even in cases not involving *ultra vires* or *mala fide* orders. These submissions required us to reconsider the decisions in *Abeywickrema v Pathirana*,[1] and *Chandrasiri v A.G.*,[2]

1. THE POSITION BEFORE 1972

Mr.Goonesekera referred to a series of decisions prior to 1972: *Vallipuram v. Postmaster-General*,[3] *Santia Pillai v A.G.*,[4] *de Silva Wijesundera v P.S.C.*,[5] *Silva v A.G.*,[6] *de Zoysa v. P.S.C.*,[7][8] *Herat v. Nugawela*,[9] *A.G. v Kodeswaran*,[10] *Pillai v. Fonseka*,[11] and *de Alwis v. de Silva*,[12] None of these decisions support his contention that the safeguards provided in administrative regulations governing the public service did displace or dilute the "pleasure principle". It seems to me that Gratiaen, J. stated the position, with clarity and precision, in *Vallipuram v Postmaster-General*,[3] that the Royal Instructions regulating the procedure for dismissal, were only directions for the guidance of the Governor, and did not constitute a contract between the Crown and its servants; that, although intended to assure that tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, yet they did not give rights enforceable by action, so that an officer could be dismissed notwithstanding the failure to observe the prescribed procedures; and that public servants held office during the pleasure of the Crown, subject to any specific law to the contrary. Gratiaen, J. further observed that the "pleasure principle" previously laid down in the Royal Instructions was thereafter expressly laid down in section 57 of the Soulbury Constitution. Silva v A.G. ,[6] dealt with rights flowing from a Constitutional provision (namely, section 61 of the Soulbury Constitution), which derogated from section 57 ; this is no authority for the proposition that rights conferred by administrative rules could likewise derogate from section 57.

2. THE "PLEASURE PRINCIPLE" UNDER THE 1972 CONSTITUTION

But even if I were to assume that Mr.Goonesekera was right in contending that administrative rules could derogate from the "pleasure principle" under the Soulbury Constitution, I cannot accept his further assumption that the 1972 Constitution intended to maintain that posi-

tion. There is no doubt whatever that the 1972 Constitution did intend to make drastic changes in respect of vital features of the Soulbury Constitution - such as an independent Public Service Commission, judicial review of executive action, judicial review of legislation, the constitutional entrenchment of the Supreme Court, and an independent Judicial Service Commission. The separation of powers which was perceived to exist under the Soulbury Constitution was replaced by a very different concept, of the Legislature being the supreme instrument of state power. The public service was brought under the direct control of the political Executive; and an ouster clause introduced. It is in that context that the "pleasure principle" and the ouster clause have to be considered.

In *Abeywickrema v Pathirana*,[1] Wanasundera, J. lucidly explained what was intended:

> "Every person acquainted with the post-independence period of our history, especially the constitutional and legal issues that cropped up during the 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."

I therefore propose to examine the relevant provisions free of the pressures of any pre - conceived notion, either way. "Pleasure" implies discretion, and the question is whether sections 106 and 107 were intended to give the Executive an unfettered discretion unrestrained by judicial review.

(a) **Constitutional restraints on the "pleasure principle"**. Section 107(1) provides for only two restraints - the "pleasure principle" will not apply where the Constitution itself **expressly** provides other-

wise, and where the Legislature **by law** provides otherwise. It follows that exceptions to the "pleasure principle" cannot be created by **implication** from Constitutional provisions (such as the fundamental rights) or by subordinate legislation (such as rules made under section 106(3), which are not "legislative" in character, for the reasons I have explained below, and so cannot be treated as being "laws" within the meaning of section 107(1)).

However, the "pleasure principle" in Article 55(1) is "subject to the provisions of the Constitution", and not only to express contrary provisions; accordingly, it may be diluted by implications arising from other provisions of the Constitution such as Chapter III (and possibly even Article 55(4)). Thus the "pleasure principle" would not sanction dismissal contrary to the fundamental rights, and may also be subject to other limitations found elsewhere in the Constitution: *Bandara v Premachandra.*[13]

Further section 107(1) makes the "pleasure principle" applicable to "state officers" appointed by the Cabinet (under section 107(1)) as well as Presidential appointees (under section 108). It is arguable, however, that under the 1978 provisions the "pleasure principle" contained in Article 55(1) applies only to officers appointed under that Article, and not to Presidential appointees under Article 54.

(b) **The nature of the discretion.** Section 107(1) provides that office is held at the pleasure **of the President.** The President has no independent discretion, as he must act on advice (section 27); and if he has no real discretion, there can be no criteria by reference to which his exercise of discretion can be reviewed. There appears to be some anomaly in office being held at the pleasure **of the President,** although appointment and dismissal is **by the Cabinet,** but the fact remains that there are no criteria by which the exercize of discretion may be reviewed; even compliance with the fundamental rights is not required. That is suggestive of an unfettered discretion, not subject to review.

On the other hand, as already observed, Article 55(1) provides criteria for review, and this points to a limited discretion.

(c) **The rules made by the Cabinet.** Mr.Goonesekera is right in contending that the rules made under section 106(3) have statutory force, to the same extent as those made under Article 55(4). However, this rule-making power is not a "legislative" power, as stated by Sharvananda, C.J. in *Abeywickrema v Pathirana*,[13] cited with approval by Wanasundera, J. in *P.S.U.N.U. v Jayawickrema*.[14] but "executive or administrative" (as held by a bench of seven Judges in *Ramupillai v Perera*,[15]), and is therefore subject to the fundamental rights jurisdiction, like other subordinate legislation (such as Emergency Regulations: *Wickramabandu v.Herath*,[16]). The recent decision in *Wickremaratne v Gunawardena*,[17] that the making of a regulation by the Minister is *per se* the exercise of legislative power delegated to him by Parliament, and therefore not subject to the fundamental rights jurisdiction, is inconsistent with *Ramupillai and Wickramabandu*, which do not appear to have been cited.

I am therefore of the view that rules made under section 106(3) are subordinate legislation, and cannot be regarded as legislation within the meaning of section 107(1). Subordinate legislation, even where authorised by the Constitution, cannot prevail over (and thereby amend) the Constitution, unless the Constitution clearly authorises such a result.

Mr.Goonesekera's contention was that the rules made under section 106(3) prevail over the "pleasure principle" contained in section 107(1). He urged that the two provisions should be harmoniously construed, so as to give effect to both, and submitted that justice and fairplay for the public service was paramount consideration. Upon such an approach, he said, the Court must conclude that the "pleasure principle" was diluted by the rules.

This contention can only succeed if we ignore the plain and unambiguous language of the Constitution. The power conferred by section 106(3) is expressly stated to be "subject to the provisions of the Constitution" - and therefore subordinate to the "pleasure principle" in section 107(1). Additionally, section 107(1) is not subject to any qualification, which in any way suggests that it is subject to section 106. That section is, as I have already observed, subject only to express

contrary (Constitutional or legislative) provision. Accordingly, the authority to make rules is subject to the "pleasure principle".

The 1978 position is quite different. The "pleasure principle" in Article 55(1) is not unqualified: Article 55(1) is subject to the provisions of the Constitution, and therefore to the fundamental rights Chapter. If rules are made under Article 55(4) in order to give effect to the fundamental rights, that is authorised by Article 55(1), and not repugnant to it; and such rules will prevail over the "pleasure principle". Article 55(4) is also "subject to the provisions of the Constitution", and hence there may well be restrictions as to the extent to which rules made under Article 55(4) can override Article 55(1). The question of harmonious construction of those two provisions of the Constitution, may certainly arise, although it does not have to be decided in this case. (It may be noted in passing, that it has been observed that rules made under Article 55(4) must not be inconsistent with the"pleasure principle": per Sharvananda, C.J. in *Abeywickrema v Pathirana*,[1] cited with approval by Wanasundera, J. in *P.S.U.N.U. v Jayewickrema*.[14] What is important, and sufficient, for present purposes, is that Article 55(4) is not wholly subordinate to Article 55(1), unlike section 106(3) *vis-a-vis* section 107(1).

Learned Senior State Counsel submitted that the unrestricted "pleasure principle" in the 1972 Constitution was intended to give the Executive full discretion to replace an unsatisfactory officer with one who was efficient; and even a good officer, with one who was better (citing *Ridge v Baldwin*.[18]) Whatever the intention, the effect of the words used was also to permit- without risk of judicial review - the substitution of an officer who was less efficient, subservient, or corrupt, in place of one who was not. Judgments of this Court show that, for that mischief, the fundamental rights jurisdiction is an antidote of growing efficacy, though not a preventive.

To sum up the position, then, although the rules made by the Cabinet are comparable in status under the two Constitutions, section 106 (3) does not authorise the making of rules which would in any way override section 107(1); however, Article 55(4) authorises rules which would dilute the "pleasure principle" in Article 55(1), at least to the

extent necessary to give effect to fundamental rights and other Constitutional provisions to which Article 55(1) may be subject. Under the 1972 Constitution, "state officers" held office at pleasure; there was no exception (save as otherwise expressly provided by the Constitution OR BY statute law); and the restrictions on the "pleasure principle" in the 1978 Constitution are not applicable to the 1972 Constitution. The Plaintiff therefore held office at pleasure.

3. THE OUSTER CLAUSE

Mr.Goonesekera's contention on this aspect must fail for several reasons. The comparison with Article 55 (5) is not valid, because that Article expressly preserves a significant area of judicial review, through the fundamental rights jurisdiction. From the fact that Article 55(5) permits review, in the exercise of that jurisdiction by the highest Court, it does not follow that section 106(5) permits review by way of declaration in the District Court. Secondly, the ouster clause in the 1972 Constitution is consistent with a general intention to exclude judicial review, whereas the 1978 Constitution does not manifest a general intention of that kind. It must be borne in mind that the Interpretation (Amendment) Act, No 18 of 1972, was enacted just eleven days before the 1972 Constitution was adopted. Finally, the contention that ouster clauses in the Constitution should be strictly interpreted, restricting the ambit of the ouster, can be far more readily accepted where the Constitution itself contains other indications of an intention to permit review: such as the entrenchment of the fundamental rights and other jurisdictions of this Court, and the writ jurisdiction of the Court of Appeal. It is difficult, however, to read an implied exception into an ouster clause in the Constitution by reference to general provisions in ordinary laws governing the jurisdictions of the courts; the maxim, *generalia specialibus non derogant*, would apply with much greater force when the special provisions are found in the Constitution itself.

I therefore hold that the ouster clause in section 106(3) was a bar to the Plaintiff's action for a declaration.

The Plaintiff's appeal is dismissed, but-as his termination is up-

held otherwise than on the ground of fault, and as important questions of law were involved - without costs.

DHEERARATNE, J. – I agree.

PERERA, J. – I agree.

Appeal dismissed.