1966 *Present :* **H. N. G. Fernando, S.P.J., Sri Skanda Rajah, J., and G. P. A. Silva, J.**

A. G. GUNASEELA, Petitioner, *and* A. R. UDUGAMA (Major-General and Army Commander) and 4 others, Respondents

S. C. 414/64—Application for a Mandate in the nature of a Writ of Certiorari *in terms of Section 79 (1) of the Army Act (Cap. 357)*

Court Martial—Exercise of judicial power by such Court—Constitutional validity—Army Act (Cap. 357), ss. 79 (1), 129—Constitution Order in Council, s. 55— Certiorari.

The Constitution Order in Council does not have the effect of invalidating the provisions of any pre-existing Statute in virtue of which judicial power was exercisable by a person not holding a judicial office. This rule applies equally in a case like the Army Act where a Statute which was passed after the present Constitution came into operation merely re-enacts pre-existing law.

The trial by a District Court Martial of an offence punishable under section 129 of the Army Act does not constitute a usurpation or infringement of the judicial power vested in the Judicature.

" The exercise, by a Court Martial duly convened under the Army Act (Cap. 357), of the powers of trial and punishment conferred by that Act, is not in conflict with the Constitution for two reasons. Firstly, that the Constitution did not expressly or by implication render such exercise invalid or limit the right of the Legislature to re-enact the traditional provisions of law concerning the discipline, trial and punishment of members of the Armed Forces. Secondly, that the exercise of such powers by Courts Martial does not constitute usurpation or infringement of the powers of the judicature as contemplated in the Constitution. "

APPLICATION for a Writ of *certiorari* under section 79 (1) of the Army Act (Cap. 357).

C. Ranganathan, Q.C., with *M. T. M. Sivardeen* and *Nihal Jayawickrema*, for the Petitioners.

V. Tennekoon, Q.C., Solicitor-General, with *H. L. de Silva*, Crown Counsel, for the Respondents.

Cur. adv. vult.

July 22, 1966. H. N. G. FERNANDO, S.P.J.—

This is an application for a Writ of Certiorari to quash the conviction of the Petitioners entered by a District Court Martial of an offence punishable under section 129 of the Army Act (Cap. 357) and the sentence of detention imposed by the Court upon that conviction.

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The principal matter argued on behalf of the Petitioners has been that there was an exercise of judicial power by the officers constituting the Court Martial, who were persons not appointed thereto by the Judicial Service Commission, and that such exercise conflicts with the principle of the Separation of Powers, which principle has been declared in the recent judgment of the Privy Council in *Liyanage and others v. the Queen* [1] to be embodied in our Constitution.

The Crown has not contended, on the one hand, that the Court Martial has not exercised judicial power ; nor on the other hand has it been seriously argued on behalf of the Petitioners that membership of a Court Martial is " paid judicial office " within the meaning of section 55 of the Constitution. A Court Martial is not a paid office ; it is a body consisting of Service Officers convened *ad hoc* for the trial of particular cases, and the duty to serve as a member of such a Court is only one of the several kinds of duties which a Service Officer can under the relevant Statutes be called upon to perform. The office which entitled an Army officer to pay and other emoluments is his substantive office in the Army, and service as a member of a Court Martial is no more the basis of his entitlement to pay and emoluments than is his service in any other duty which the Army Act requires him to perform. A Court Martial bears no resemblance to a Labour Tribunal established under the Industrial Disputes Act.

The Army Act was passed by the Legislature of Ceylon after the present Constitution came into operation. At first sight therefore, there appears to be scope for the argument that Parliament cannot validly provide for the exercise of judicial power by a body consisting of Service Officers. But the reasons of this Court are being concurrently stated, in the case of *Panagoda v. Budenis Singho* [2] (arising under the Workmen's Compensation Ordinance), in support of the conclusion that the Constitution had not the effect of invalidating the provisions of any pre-existing Statute in virtue of which judicial power was exercisable by a person not holding a paid judicial office. Those reasons apply equally in a case where an Act of Parliament merely re-enacts pre-existing law.

The Army Act, 1881, of the United Kingdom was, like many other British enactments, part of the law of Ceylon long before the Independence of Ceylon. In discussing this matter, it is convenient to refer to the provisions of that Act as existing in 1930, and as reproduced in the 1930 edition of Halsbury's Statutes. Sections 4 to 41 of the Act declared a number of offences which, if committed " by persons subject to military law ", were punishable by Courts Martial. Included in the category of persons subject to military law were :—

(*a*) All officers on the active list of the regular forces, and all soldiers of the regular forces serving in any part of the world (sections 175 (1) and 176 (1), read with section 190 (8)).

[1] *(1965) 68 N. L. R. 265.* [2] *(1966) 68 N. L. R. 490.*

(*b*) All persons serving as officers or men of any troops raised in a Colony and serving under the command of an officer of the regular forces (sections 175 (4) and 176 (3)).

(*c*) All officers and men of any force raised in a Colony, when attached to or doing duty with United Kingdom forces; (sections 175 (11) and 176 (8A)).

(*d*) If the law of a colony so provided, all officers and men of any force raised in the Colony (sections 175 (12) and 176 (11)). The Ceylon Defence Force Ordinance 1910 accordingly provided that the Army Act, 1881, with specified modifications, would apply in specified circumstances to members of forces raised in Ceylon under the Ordinance.

For a long period therefore the law of Ceylon provided for the trial by Courts Martial of certain offences committed by " persons subject to military law " of the above and other categories. These Courts were convened under the Army Act, 1881, which in section 55 provided for the confirmation by a Colonial Governor of sentences imposed by such Courts, and in section 122 provided for the issue of Warrants by a Colonial Governor for convening Courts Martial. Indeed the law of Ceylon continued to be the same even after Independence, until the Army Act of the United Kingdom ceased to be in force with the enactment of our Army Act (Cap. 357). The constitution, powers and functions of Courts Martial under the present law are not substantially different from those of the Courts Martial constituted in Ceylon under British rule.

The Supreme Court of the United States held in the year 1858 (*Dynes v. Hoover*[1]) that Congress had the power to provide for the trial and punishment of military and naval officers " in the manner then and now practised by civilised nations ", and further that that power was entirely independent of the judicial power of the United States. Under the Constitution of the United States, which is a Federal Constitution, there is express provision for Congress to make laws for the Government of military and naval forces. Such express provision was not necessary in the Unitary Constitution of Ceylon under which there is only one Legislature. The power to make laws for peace, order and good government, which has been described as " the plenitude of legislative power ", must include the power to make laws for the government of the armed forces.

The reasoning in the American case was followed by the High Court of Australia in *R. v. Beven ex p. Elias and Gordon*[2], which decided that the power to make laws for the defence of the Commonwealth and the control of the Armed Forces is independent of the judicial power of the Commonwealth.

[1] *U. S. Reports 15, Lawyers Edition, p. 838.* [2] *66 Commonwealth L. R. 452.*

In the light of the requirements of the Constitution of Australia relating to the exercise of the judicial power of the Commonwealth, the effect of the decision was that Courts Martial were not affected by those requirements.

The conclusion, in the case of *Liyanage and Others* [1], that " there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature ", must be understood with reference to the reasons for that conclusion. The reasoning is in my opinion apparent from earlier observations in the judgment :—

" ..... no express mention is made (in the Constitution) of vesting in the judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance. "

" (Certain) provisions are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature."

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

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

I would hold that the exercise, by a Court Martial duly convened under the Army Act (Cap. 357), of the powers of trial and punishment conferred by that Act, is not in conflict with the Constitution for two reasons. Firstly, that the Constitution did not expressly or by implication render such exercise invalid or limit the right of the Legislature to re-enact the traditional provisions of law concerning the discipline, trial and punishment of members of the Armed Forces. Secondly, that the exercise of such powers by Courts Martial does not constitute usurpation or infringement of the powers of the judicature as contemplated in the Constitution.

For these reasons, this application is dismissed.

SRI SKANDA RAJAH, J.—I agree.

G. P. A. SILVA, J.—I agree.

Application dismissed.

[1] *(1965) 68 N. L. R. 265.*