1970 *Present :* Sirimane, J., Tennekoon, J., and Weeramantry, J.

TUCKERS LTD., Appellant, *and* THE CEYLON MERCANTILE UNION, Respondent

S. C. 17 of 1969 (with S. C. Certiorari Application 493 of 1969)—Labour Tribunal Case No. 5/11172

Industrial Disputes (Special Provisions) Act, No. 37 of 1968—Sections 6 and 7 nullifying certain identifiable decisions of the Supreme Court—Validity—Constitutional law—Principle of Separation of Powers—Applicability in Ceylon—Statute impugned as encroaching upon judicial sphere—Considerations applicable—Power of Court to scrutinise the background to legislation—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), s. 29 (1).

Section 6 of the Industrial Disputes (Special Provisions) Act, No. 37 of 1968 reads as follows :—

" Where any order of any labour tribunal was subsequently quashed by a relevant decision of the Supreme Court on appeal or on application by way of writ on the ground that the president of such tribunal, not having been validly appointed, had no jurisdiction to make such order, the following provisions shall apply in the case of such appeal or application by way of writ, as the case may be :—

(*a*) such decision of the Supreme Court shall be deemed to have been, and to be, null and void ;

(*b*) such appeal or application by way of writ shall be deemed to be an appeal or application which was not decided by the Supreme Court, but to be an appeal or application made *de novo* to such Court on the relevant date ;

(*c*) The Supreme Court is hereby empowered and authorised, and shall have jurisdiction, to entertain, hear and decide such appeal or application *de novo* ; and

(*d*) the practice and procedure to be followed by the Supreme Court in entertaining, hearing and deciding such appeal or application *de novo* shall be determined by order of the Chief Justice. "

Section 7 is in the same terms and applicable to awards of arbitrators of an Industrial Court on a reference made by the Minister under the principal Act.

It was contended that, by nullifying certain decisions of the Supreme Court by enacting sections 6 and 7 of Act No. 37 of 1968, the legislature exercised judicial power and that the statute was therefore *ultra vires* of the Constitution.

Held, (i) that the Ceylon (Constitution) Order in Council, 1946, recognises the principle of the separation of legislative, executive and judicial power. In order to ascertain whether an Act of Parliament encroaches on the judicial sphere it is necessary to look at the Act as a whole and not at a particular Section isolated from other provisions of the Act. Furthermore, when a statute is impugned as being unconstitutional, it is permissible to look at the background of the legislation, including White Papers and other matters extraneous to the legislation itself.

1°—J 17100 2,255 (10/70)

(ii) by SIRIMANE and TENNEKOON, JJ., that the provisions of sections 6 and 7 of the Industrial Disputes (Special Provisions) Act, No. 37 of 1968, were valid although they nullified expressly certain identifiable decisions of the Supreme Court. By enacting them the legislature did not make any encroachment on the judicial sphere. The Act was not directed to a particular case, but applied to a whole class of cases. It conferred no rights and imposed no liabilities on particular parties. In passing the Act in consequence of the decision of the Privy Council in *The United Engineering Workers' Union v. Devanayagam* (69 N. L. R. 289) regarding the validity of the appointment of labour tribunals and industrial courts, Parliament was only acting in aid of the judicial power vested in the courts; this was a legitimate function of the legislature.

Per WEERAMANTRY, J.—While there are many features in the impugned legislation which, considered by themselves, appear to encroach upon the substance of judicial power, still, when one has regard to the context and background of these provisions, one is left at least in a state of doubt as to whether this particular enactment was not aimed at conserving the jurisdiction of the courts rather than at nullifying court decrees. One cannot say with assurance that the only view reasonably possible is that the impugned legislation encroaches on the judicial power. In this resulting position of doubt there comes into play the principle that unless it becomes clear beyond reasonable doubt that the legislation in question encroaches on the judicial power, the presumption that Parliament did not intend to pass beyond constitutional bounds must prevail. Hence the legislation in question should be upheld.

Each case of alleged encroachment upon the judicial power must be considered in the light of its own particular facts and circumstances, and no general rule can be formulated for determining whether such encroachment has taken place.

ORDER in respect of a preliminary objection to the hearing of an appeal and a *certiorari* application.

In Appeal No. 19 of 1969—

H. W. Jayewardene, Q.C., with *Mark Fernando*, *D. C. Amerasinghe* and *Sepala Munasinghe*, for the employer-appellant.

N. Satyendra, with *Prins Rajasooriya*, for the applicant-respondent.

R. S. Wanasundera, Senior Crown Counsel, with *L. D. Guruswamy*, Crown Counsel, as *amicus curiae*.

In Application No. 493 of 1969—

Lakshman Kadirgamar, with *C. A. Amerasinghe*, for the petitioner.

N. Satyendra, with *M. Shanmuganathan* and *K. Vaikunthavasan*, for the respondent.

R. S. Wanasundera, Senior Crown Counsel, with *L. D. Guruswamy*, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

June 24, 1970. SIRIMANE, J.—

The appeal, No. 17 of 1969, and application No. 493 of 1969 were argued before us together as the identical question of law arises for decision in both matters.

The appeal had come up for hearing earlier before two Judges of this Court, and by an order dated 26.1.66, this Court quashed the order of the Labour Tribunal on the ground that the Tribunal was not properly constituted. In making that order, the Court followed the decision in *Walker Sons & Co. Ltd. v. Fry* [1], which is a decision by a majority of a Bench of five Judges. A similar order had been made on 21.1.66 in the application, which is one for a Writ of Certiorari to quash the order of the Labour Tribunal on the same ground.

Together with *Walkers* Case (supra) a number of other appeals and applications were also argued ; one of them being the case of *The United Engineering Workers' Union v. Devanayagam* [2], in which there was an appeal to the Privy Council. The orders in the two cases now under review were made pending that appeal.

The Privy Council by a majority judgment held that a President of a Labour Tribunal does not hold judicial office and therefore does not require to be appointed by the Judicial Service Commission.

Thereafter, the Logislature passed Act No. 37 of 1968, and the appeal and the application have been listed for hearing under the provisions of that Act. An objection is taken to the hearing of this appeal by the appellant, as it is contended that in passing Act 37 of 1968 the legislature exercisod judicial power, and the legislation is therefore *ultra vires*. The attack is on sections 6 and 7 of the Act, and incidentally on section 10.

Section 6 reads as follows :

" Where any order of any labour tribunal was subsequently quashed by a relevant decision of the Supreme Court on appeal or on application by way of writ on the ground that the president of such tribunal, not having been validly appointed, had no jurisdiction to mako such order, the following provisions shall apply in the case of such appeal or application by way of writ, as the case may be :—

(*a*) such decision of the Supreme Court shall be deemed to have been, and to be, null and void ;

(*b*) such appeal or application by way of writ shall be deemed to be an appeal or application which was not decided by the Supreme Court, but to be an appeal or application made *de novo* to such Court on the relevant date ;

[1] *(1965) 68 N. L. R. 73.*

[2] *(1967) 69 N. L. R. 289.*

(*c*) the Supreme Court is hereby empowered and authorised, and shall have jurisdiction, to entertain, hear and decide such appeal or application *de novo* ; and

(*d*) the practice and procedure to be followed by the Supreme Court in entertaining, hearing and deciding such appeal or application *de novo* shall be as determined by order of the Chief Justice."

Section 7 is in the same terms and applicable to awards of arbitrators of an Industrial Court on a reference made by the Minister under the principal Act.

Section 10 enacts that the provisions of the Act should be regarded as amendments to the Ceylon (Constitution) Order in Council, 1946.

We have examined the original copy of the Act which bears the Certificate of the speaker of the House of Representatives that it was passed by a two-third majority ; in fact, it was admitted at the argument that the Act had been passed unanimously.

In *Liyanage v. The Queen*,[1] the Privy Council held that under our Constitution there is a Separation of Powers, and that the judiciary alone can exercise the judicial power of the state. In *Kariapper v. Wijesinghe* [2] which upheld the legislation impugned in that case, the argument at the Privy Council proceeded on that footing. Sir Douglas Menzies said, at page 53 :

> "The second matter not in controversy before the Board was that the constitution of Ceylon embodies the doctrine of the separation of legislative, executive and judicial power, at least to the extent that it commits judicial power to the Courts to the exclusion of the Parliament. This was decided by the Privy Council in *Liyanage v. The Queen*."

At an earlier stage in the *Liyanage case* this Court also held that there was a Separation of Powers (See : *The Queen v. Liyanage* [3]).

So that the principle of Separation of Powers is now beyond controversy.

The first question that arises therefore is whether in the provisions of the impugned Act No. 37 of 1968, there is a usurpation of judicial power by the ligislature.

In dealing with this question one must bear in mind that a Court should be slow to strike down an Act of Parliament unless there is a clear encroachment on the judicial sphere.

[1] *(1965) 68 N. L. R. 265.*
[2] *(1962) 64 N. L. R. 313.*
[3] *(1967) 70 N. L. R. 49.*

In order to ascertain whether there has been such an enroachment one should, I think, look at the Act as a whole and not at a particular Section isolated from other provisions of the Act. I am also of the view that in determining this question it is permissible to look at the object and the true purpose of the legislature in passing the Act.

Lord Pearce in the *Liyanage Case* (supra) in examining the impugned legislation in that Case said, at page 283—

> "But such a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as *ad hominem* and *ex post facto* must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."

Let us examine the situation with which the legislature was faced.

With the growth of industry, the passing of new labour laws, and the growth of trade unionism labour Tribunals had to play a very important part in the settlement of industrial disputes. After the decision in *Walkers' Case* in pursuance of the law as laid down by this Court, the function of appointing Labour Tribunals was taken over by the Judicial Service Commission, and these Tribunals functioned thereafter on the authority of the appointments made by that body. But, before that administrative step was completed several orders which affected the rights of workmen and employees made by the Labour Tribunals appointed by the Public Service Commission were quashed (on appeals by the employers or on petitions by way of Writ) on the basis that the decision in *Walkers' Case* was right. When the Privy Council held that the decision was wrong, the Labour Tribunals had to be appointed once again by the Public Service Commission, and it was clear that the quashing of the orders on the authority of *Walkers' Case* was done on a wrong basis of the law.

It was in these circumstances that Act No. 37 of 1968 was passed, which according to the Act itself is—

> "An Act to provide for the removal of certain difficulties in the settlement of industrial disputes and other matters under the Industrial Disputes Act which have arisen in consequence of decisions made by the Supreme Court and decisions made on appeal to Her Majesty in Council, and to provide for matters connected therewith or incidental thereto."

Section 2 (1) of the Act validates those appointments of Presidents made by the Judicial Service Commission, and sub-section (2) enacts—

"Nothing in sub-section (1) shall be deemed or construed to validate any order of any labour tribunal which was subsequently quashed by any relevant decision of the Supreme Court on appeal or on application by way of writ :

Provided, however, that nothing in the preceding provisions of this sub-section shall be deemed or construed to preclude or prevent such appeal or application by way of writ from being entertained, heard and decided *de novo* by the Supreme Court, as hereafter provided in this Act."

Section 3 makes provisions applicable to applications rejected or dismissed by Labour Tribunals on the basis of the decision in *Walkers, Case.* Section 4 validates the appointments of Panels under the Industrial Disputes Act by the Governor-General, the constitution of Industrial Courts drawn from those Panels, references made to those Courts, and awards granted by such Courts. Sub-section 3 of Section (4) is in the same terms as sub-section 2 of Section (2). Section 5 makes special provisions relating to appointments and nominations of Arbitrators and references made to such Arbitrators, again with a sub-section (sub-section 3) in the same terms as sub-section 2 of Section 2.

There follow Sections 6 and 7 already referred to earlier. Section 8 makes similar provisions with reference to applications for execution of awards in the Magistrates' Courts. Section 9 provides that the provisions of the Act should prevail in the event of a conflict with the principal Act.

Section 10, as stated earlier, enacts that the provisions of the Act should be regarded as an amendment to the Constitution, and the last Section (Section 11) is the "Interpretation" Section.

It can be seen therefore that the Act is not directed to a particular case, but applies to a whole class of cases. It confers no rights and imposes no liabilities on particular parties. It is not directed to influence the Courts to make an order either against or in favour of any particular party or parties to a dispute. It does not seek to defy the authority of the Court. The provisions of sections 2 (2), 4 (3), and 5 (3) are directed to ensure that orders made by this Court on any ground other than the decision in *Walkers' Case* should remain undisturbed.

Sections 6 (*b*) and 6 (*c*) confer a jurisdiction on the Court to hear appeals and applications in the exercise of its judicial power, in accordance with the law as interpreted by the highest Appellate Tribunal, and the provisions of Section 6 (*a*) which at first sight appear to offend against the exclusive exercise of judicial power by the Court, when viewed in its proper context, operate only to remove a technical bar to the exercise of judicial power by the Court, on the jurisdiction conferred by Section 6 itself.

A somewhat similar situation arose in the case of *Anthony Naide v. The Ceylon Tea Plantations Co. Limited*.[1] In 1966, Parliament passed an amendment to the Rent Restriction Act in order to grant greater protection against eviction to tenants who occupied premises, the authorised rent of which was under Rs. 100 per month. The legislation was made retrospective from 1962, and actions pending in the original Courts, and appeals pending in the Supreme Court to which the provisions of the amendment applied, were declared null and void. The Act also prohibited the enforcement of judgments and decrees already entered in cases to which the Act applied. It ws held by a Bench of three Judges of this Court that the amending Act is only a case of the jurisdiction of the Court being altered both prospectively and retrospectively, and that the legislation did not constitute an exercise of judicial power by the legislature.

In the case of *The Federal Commissioner of Taxation v. Munro*[2] Isaacs J. said at page 180—

> "Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that the Parliament did not intend to pass beyond constitutional bounds; if the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail."

Read as a whole, both in form and substance, Act 37 of 1968 is, in my view, an Act of legislation. It does not (in the words of Sir Douglas Menzies in the *Kariapper Case*) "speak like a Court order". It is not a "legislative judgment" and when its provisions are closely examined, the Act in reality aids the exercise of judicial power by the Courts.

As I am of the view that there has been no encroachment on the judicial sphere by the legislature it is unnecessary to express an opinion on the many other important constitutional issues that were argued before us—e.g., as to what the effect of the passing of the Act by a two-third majority would be had there been such an encroachment.

The appeal and application will now be listed for hearing in due course. Costs will abide the event.

I thankfully acknowledge the assistance rendered at the argument by the learned Crown Counsel who appeared as *amicus* at the request of the Court.

[1] *(1966) 68 N. L. R. 553.* [2] *38 Commonwealth Law Reports 153.*

TENNEKOON, J.—

I have the advantage of having read the opinion of my brother Sirimane, J.

I agree that the preliminary objection taken by the appellants to the rehearing of appeal 17/de Novo/69 and S.C. (Certiorari) Application 493/de Novo/69 on the ground that the provisions contained in sections 6 and 7 of Act No. 37 of 1968 are *ultra vires* of the legislature, cannot be upheld and with his reasons for taking that view. I would like however to add some comment of my own.

The observations that follow are mainly concerned with section 6 of the impugned Act; but they apply in substance if not in detail to section 7 too.

At the time the decision of the Privy Council in the *United Engineering Works Union v. Devanayagam*[1] became known the position was as follows:–

I. According to that decision of the Privy Council made on or about 9th March 1967 the President of a Labour Tribunal does not hold judicial office within the meaning of section 55 (5) of the Ceylon Constitution and Independence Orders in Council.

II. According to well accepted theories of the declaratory nature of judicial pronouncements on the law, this has been the law from the time the office of President, Labour Tribunal, was first constituted in 1957 by Act No. 62 of that year.

III. In a number of appeals under section 31D of the Industrial Disputes Act and Certiorari Applications made in connection with orders and awards of Presidents of Labour Tribunals, this Court had in decisions made prior to the Privy Council decision in the *Devanayagam case,* quashed such order or award on the ground that the office of President of Labour Tribunal was a judicial office and the Presidents in question not having been appointed by the authority designated in the Order in Council for the appointment of judicial officers, their orders and awards were void and of no effect in law.

IV. These decisions of the Supreme Court were final and *res adjudicatae* between the parties: Neither party had a right as the law stood to re-agitate the questions involved in those appeals and applications.

V. The Supreme Court itself had no power under the law as it stood, even if it were so disposed, to rehear those appeals and applications or to revise the orders it had made although it was now apparent that they had been decided by the application of a wrong view of law.

Thus according to the law as it stood prior to the enactment of the impugned law, the position was that the parties had no right to a rehearing and the court had no power to grant one. This was the result of the law

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

derived from the statutes dealing with the constitution and powers of our courts and the binding effect of judgments. The general result of these provisions is that where the law is declared in one way and is subsequently overruled whether by the same tribunal or by a higher one and declared to be different, the overruling is retrospective *except as regards matters that are res judicatae.*

One of the submissions made by counsel for the petitioners is that paragraphs (*a*) and (*c*) of section 6 (as also paragraphs (*a*) and (*c*) of section 7) are *ultra vires* of the legislature for the reason that in these provisions the legislature is doing what only an appellate court can do : more specifically it is said that it would have needed an order of the Queen in Council acting in appeal from the decisions of the Supreme Court to set aside the decisions of the Supreme Court and to direct a rehearing ; and that the legislature in enacting those provisions was itself exercising the judicial power of the state ; this it is contended the legislature cannot do as the Constitution of Ceylon has committed the judicial power to the courts to the exclusion of Parliament. The attack on the provisions of the act is put in two ways ; firstly that it is not a law at all but a judgment ; and secondly, even if it is *ex facie* a law, it is void as offending against the separation of powers embedded in our Constitution ; but it seems to me that in whatever way the submission is put, the question for decision is whether the impugned provisions were an exercise of judicial power by the legislature or a legislative interference with the court in the exercise of its jurisdiction.

In the *Kariapper case* [1] the Privy Council in considering a similar submission made relative to the law impugned in that case, said, in regard to the contention that it was not a law, that a fundamental obstacle to such a contention was that the Act in question was in form a law altering the law as it stood ; here too we have what is *ex facie* an Act of Parliament and containing provisions altering rights of persons and conferring new powers on a court. But this approach cannot be conclusive and is of course not an answer to the contention that the law is void as offending against the separation of powers. In the *Kariapper case* their Lordships found an answer to this submission in the fact that the deprivation of the right which a member of Parliament enjoys to sit and vote in the House to which he is elected or appointed is not exclusively a power of the courts but is referable also to the Parliament's own disciplinary powers over its members.

What exactly has Parliament done by the legislation in question here? It has granted a power or jurisdiction to the Supreme Court which it did not have before. This is clearly an attribute of the legislative power. Secondly it has in effect and substance varied the operation of the rule of *res judicata*. This it has done in regard to a class of case and not by reference to particular cases picked without preference to any principle ; there is a general categorisation which brings within the law only cases in which, in reaching its decisions, the judicature had applied a view of the

[1] *(1967) 70 N. L. R. 49.*

law which was subsequently declared and acknowledged by the highest tribunal in our judicial system to be a wrong view of the law ; those decisions of the Supreme Court were plainly wrong ; and the legislature has acted on that basis not because the executive or legislative branches of the Government took a view of the law different from the Supreme Court's, but because the judicial branch itself had declared the law to be different. When in those circumstances Parliament steps in to remove the binding effect of those judgments and to provide for a rehearing by the Supreme Court, which will at such rehearing necessarily have to take into account the pronouncement of the Privy Council, I cannot see how it can be said that the legislature is, under the guise of legislation, exercising the judicial power of the State or interfering with the exercise of that power. The courts are now free to decide the cases involved in accordance with law. On the negative aspects, it is clear that the new law does not decide any case finally as courts do ; it gives no direction to the courts or seek to impose a view of the law subsequently declared by the legislature. It does not seek to secure, in the cases affected by the Act, a result predetermined by Parliament. As my brother Sirimane, J. has said Parliament is only acting in aid of the judicial power, which is a legitimate function of the legislature. Judicial power is an attribute of sovereignty that has necessarily to be exercised by some tribunal ; but it is for Parliament to say what jurisdiction each tribunal shall have ; equally it is for Parliament to say when a person may invoke the jurisdiction of a tribunal, when tribunal's jurisdiction in a particular case shall cease, when it may review and revise decisions of inferior tribunals or even its own decisions, and when it may rehear a case.

It has however been contended that when Parliament has occasion to declare the law retroactively, it ordinarily takes care to except from the retrospective operation of the law any specific cases in which the law has been applied differently. Illustrations of this are to be found in :

(*a*) Mortgage Ordinance, No. 21 of 1927

(*b*) Quazis (Validation of Appointment) Act, No. 11 of 1965

(*c*) Kandyan Succession Ordinance, No. 23 of 1917.

Relying on these examples of legislation and on what has come to be known as Dean Roscoe Pound's "historical criterion"[1] the submission is made that since the legislatures of this country have not in the past ventured, by legislation, to alter the binding effect of judgments on parties and their privies, such a power should be presumed not to be part of the legislative power. It seems to me that the "historical criterion" was intended for use in a somewhat different context. If the question here is whether the power of setting aside a judgment of a court is attributable to the judicial or to the legislative power, it would be unnecessary to resort to any historical tests, for there is no doubt that that is part of the judicial power. Parliament did not, in enacting Act No. 37 of 1968, pretend to act as an appellate court. What has been done by Parliament is not to

[1] *See* Queen v. Liyanage *(1962) 64 N. L. R. at 356.*

interfere in pending litigation or to reverse the decision of a court merely ; Parliament is in fact only making provisions to ensure that retrospective operation is given to a decision of the Privy Council, *with no exceptions in favour of decided cases.* The power of Parliament to legislate retroactively is not in doubt ; to what extent it will limit the retroactive effect of such legislation in order to avoid intolerable hardship to individuals and to preserve rights already vested is also a matter for Parliament. There are many cases in which the legislation has in the past so legislated and where the courts have applied the law to pending cases and even to completed cases. The legislative authority has on occasion altered the law retrospectively so as to affect the decision in a pending case, even requiring that the case " be dismissed and made void "[1] ; it has legislated (in general terms and retrospectively) so as to affect an appeal pending before the Privy Council[2] ; it has created a right of appeal after the decision of a case was known and had become final[3] ; in the United States, where the doctrine of separation has been considered as more or less fundamental, Congress has withdrawn the right of appeal even while an appeal was pending in the Supreme Court[4]. Chief Justice Chase delivering the opinion of the court said :

> " It is quite clear therefore that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal : and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the constitution and the laws confer. "

Remedial legislation is sometimes called for as a result of court decisions. The courts themselves are helpless to remove anomalies and absurdities that sometimes arise from the application of the principles of *res judicata* and precedent. These considerations no doubt do not help to enlarge the law making powers of a legislature that does not enjoy unlimited legislative power ; but in considering whether a particular piece of legislation is within the permitted field it is I think the duty of the courts to look at the substance of what has been done and not merely at the form which particular subsections have taken.

The legislation under attack in this case has granted to this court a jurisdiction to rehear certain cases. I can see no sufficient reason, under a supposed application of the doctrine of separation of powers to decline that jurisdiction.

Two further points were urged by counsel for the appellants : one was that the Parliament set up under the Order in Council could not even by means of legislation passed in compliance with section 29 (4) thereof, vest

[1] *See The Ceylon (Legislative Council) Amendment Order in Council 1928 and the case of* Abeysekera v. Jayatilleke, *(1930) 32 N. L. R. 1.*

[2] *See the Industrial Disputes (Amendment) Act 39 of 1968 and the judgment of the Privy Council in the* Colombo Apothecaries Co. Ltd. v. Wijesooriya, *(1970) 73 N. L. R. 5.*

[3] *See the Parliamentary Elections (Amendment) Act No. 19 of 1948 ;* Kulasingham v. Thambiayah, *(1948) 49 N. L. R. 505 and (1948) 50 N. L. R. 25.*

[4] Ex parte McCardle *19 L. Ed. 264.*

any kind of jurisdiction in itself involving the exercise of the judical power of the state; and the other that even if that were possible Parliament could not both vest a jurisdiction in itself and exercise it in one piece of legislation. Having regard to the view that I have formed on the main question that was argued before us, viz., that there is in Act No. 37 of 1968 no assumption or exercise by Parliament of judicial power, it becomes unnecessary to pronounce on these submissions.

I agree to the making of the order proposed by my brother Sirimane, J.

WEERAMANTRY, J.—

While agreeing with the conclusions of my brother Sirimane whose judgment I have had the advantage of perusing, I would wish to add a few words of my own.

The matter before us is of special importance and involves legislation of a type of which, as far as we are aware, there has been no previous instance in this country. This legislation has been attacked on the basis that it makes inroads into the sphere of judicial power which by law and tradition are committed to the courts.

It is true that on many an occasion in the past the legislature has intervened to set aright an incorrect view of the law taken by the courts or to lay down the law in a sense contrary to that which till then had been the view taken by the courts. Indeed the necessity for the legislature so to correct the law or to guide it in a new direction must necessarily be one that often arises. The question before us however is not one concerning the undoubted right of the legislature so to alter or redirect the law but one concerning the inviolability of judicial decisions already entered.

It is noteworthy that in the instances where the legislature has in the past sought to correct or remould the law, the legislature has been most particular, while correcting the law for the future, not to interfere with decisions already given on the faith of the pre-existing law or the law as it was supposed to be. For example the former Mortgage Ordinance No. 21 of 1927 [1] provides that chapter 3 thereof " applies to mortgage and transfers of land whether ereated executed or arising before or after the commencement of this Ordinance, but shall not affect the mutual rights of the parties in the case of *K. P. S. T. Sithambaram Chetty of Sea Street, Colombo v. Bentotage David Fernando, Colombo* [2] or any other case in which the decision of the Supreme Court in the said case shall have been followed prior to the twenty-fourth day of April One Thousand Nine Hundred and Eighteen ".

So also, arising from the decision of this Court in *Jainulabdeen v. Danina Umma* [3] the legislature enacted the Quazis (Validation of Appointment) Act No. 11 of 1965 validating the appointment of Quazis where such had been appointed by the Ministry but it took particular care to

[1] *Cap. 74 of the 1938 edition of the Legislative Enactments.*
[2] *Case No. 46630.*
[3] *(1962) 64 N. L. R. 419.*

provide by section 2 (2) that nothing in sub-section 1 shall be deemed to have affected the decision of the two Judges of the Supreme Court in the case of *Jainulabdeen v. Danina Umma* [1].

Again when the Kandyan Succession Ordinance No. 23 of 1917 was passed to provide for questions relating to the applicability of Kandyan law to the issue of certain marriages, the legislature provided in section 3 (1) that nothing in the Ordinance shall affect—

(*a*) the mutual rights of the parties in the case of *Mudiyanse v. Appuhamy et al.* (D. C. Kegalle, 3,236), as declared by the decision of the Supreme Court in that case, or of persons claiming through the said parties respectively ;

(*b*) the mutual rights of the parties in any other suit in which the said decision has been followed, or of persons claiming through the said parties respectively ;

(*c*) any disposition of property, or any transaction or family arrangement dealing with property which shall have been duly effected according to law between the date of the said decision and the date of the commencement of this Ordinance on the basis of the law as declared by the said decision.

This provision was necessary as the decision in *Mudiyanse v. Appuhamy* [2] laid down that the offspring of a Kandyan father by a low country Sinhalese woman cannot be regarded as a Kandyan and that domicile was not a test to be applied in the solution of questions relating to the applicability of Kandyan law. The Ordinance provided on the other hand that the issue of a marriage contracted between a man subject to the Kandyan law and domiciled in the Kandyan provinces and a woman not subject to the Kandyan law shall be deemed to be and at all times to have been persons subject to the Kandyan law.

Another illustration drawn from Kandyan law is the preservation by Ordinance No. 25 of 1944 of the decision in *Dunuweera v. Muttuwa* [3] and the decisions based thereon. The amending Ordinance was considered necessary in view of the departure in that decision from the law as earlier understood relating to the rights of succession of the husband of a Kandyan woman married in diga.

More instances can no doubt be collected upon a perusal of the enactments of our legislatures from time to time.

Another illustration that comes to mind concerns the numerous decisions of this Court rejecting petitions of appeal on the ground of non-compliance with certain procedural provisions. Such rejection, as the Privy Council observed in *Sameen v. Abeywickrema* [4] occurred in a number of cases cited in the judgment in *Thenuwara v. Thenuwara* [5]. When the legislature intervened to set the matter right by the Supreme Court

[1] *(1962) 64 N. L. R. 419.*
[2] *(1913) 16 N. L. R. 117.*
[3] *(1942) 43 N. L. R. 512.*
[4] *(1963) 64 N. L. R. 553 at 562.*
[5] *(1959) 61 N. L. R. 49.*

Appeals (Special Provisions) Act No. 4 of 1960 it only set the matter right prospectively but the numerous decisions of this Court which had already been entered were left untouched. It is also worthy of comment that although the decision in *Thenuwara v. Thenuwara* was disapproved by the Privy Council in *Sameen v. Abeywickrema* no legislative provision ensued seeking to confer a right of appeal on all those numerous litigants who were in effect denied it by reason of the technical view that had earlier prevailed.

It will be seen as a feature of all these provisions that the legislature preserved intact the prior decisions of the Courts on the specific point under legislation.

In the case of this Act, however, it so happens that sections 6 and 7 contain subsections by which the legislature seeks to nullify, and that expressly, certain decisions of this Court. Such particular subsections considered by themselves would have the appearance of being concerned not with the adjuncts or concomitants of judicial power but with the very substance thereof. It is for this reason that the present case is one attended with so much difficulty.

It is true the cases affected are described in general terms and that the legislation is not on its face directed at any specific decisions, but this ought in principle to make little difference, having regard to the fact that the cases affected are easily identifiable.

The impugned subsections provide that where any order of any Labour Tribunal was subsequently quashed by a relevant decision of the Supreme Court on appeal or on application by way of writ on the ground that the President of such Tribunal had no jurisdiction to make such order, such decisions of the Supreme Court shall be deemed to have been and to be null and void ; and that such appeal or application by way of writ shall be deemed to be an appeal or application which was not decided by the Supreme Court but to be an appeal or application made *de novo* to such court on the relevant date.

There are at the same time other portions of the impugned legislation which have been called in aid on behalf of the respondent as indicative of a desire on the part of the legislature to leave the eventual decision to be made upon such application entirely to the discretion of the Supreme Court and to place exclusively within the province of His Lordship The Chief Justice the practice and procedure to be followed in entertaining, hearing and deciding such matters. Apart from these express statutory provisions reference has also been made on behalf of the respondent to the background to this legislation which indicates in no uncertain manner the desire on the part of the legislature to conserve to the applicants for relief their right to relief which was in effect taken away from them in consequence of the view of the law which prevailed at the time their applications were dismissed.

The present legislation is attended with these and other mitigating features to which I shall presently refer in greater detail, but the question which has been pressed before us is the question whether those particular portions of the legislation which seek to nullify decisions that have passed the seal of this Court are not provisions which offend the principles relating to the exercise of judicial power.

Any examination of this question must necessarily commence with a reference to the principle of separation of powers which in view of more than one pronouncement of the Privy Council as well as of this Court must be taken to be a settled feature of our Constitution. It is not necessary for me in view of the reference thereto in the judgment of my brother Sirimane to make further reference to these decisions, suffice it to say that the principle underlying the decision of this Court in *Queen v. Liyanage* [1] received confirmation from the Privy Council not only in *Liyanage v. The Queen* [2] but also in *Kariapper v. Wijesinghe.* [3] So also in *Moosajees Ltd. v. P.O. Fernando* [4] a Bench of five Judges of this Court, in holding that the separate judicial power of the State which is vested in the judicature under the Constitution cannot be usurped or infringed by the executive or the legislature, proceeded on the basis that the principle of separation of powers was recognised in the Ceylon (Constitution) Order-in-Council. I need say no more on this matter than that I respectfully associate myself with the observations of my brother Sirimane that this question is now beyond controversy.

Our Constitution, as has been observed before,[5] commits legislative power to the legislature but does not itself commit judicial power to the judiciary. Rather, it recognises the judiciary as being a body already vested with judicial power, whose functions the Constitution leaves unimpaired and intact. These powers derive from the Charter of 1833 and succeeding documents, and whatever power was thereby committed to the Courts remains vested in them. As the Privy Council observed of certain sections of our Constitution, " they are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to, or be shared by, the executive or the legislature "[6]. The Privy Council thought fit to reiterate this statement of the law in *Kariapper v. Wijesinghe.*[7]

Since, then, an examination of judicial power as it lay vested at a time anterior to the Order in Council, assumes some relevance, it may not be out of place to refer to a significant indication of the care with which

[1] *(1962) 64 N. L. R. 313.*
[2] *(1965) 68 N. L. R. 265.*
[3] *(1967) 70 N. L. R. 49.*
[4] *(1966) 68 N. L. R. 414.*
[5] *Vide* Liyanage v. The Queen *(1965) 68 N. L. R. 265 P. C.*
[6] Liyanage v. The Queen *(1965) 68 N. L. R. at 282.*
[7] *(1967) 70 N. L. R. at 53.*

our courts were, even at the earliest stage of their history, kept separate from the other organs of government. Such an indication appears in the Instructions to Governor Sir Wilmot Horton accompanying the Charter of Justice of 1833, where the Governor is strictly enjoined both as head of the Executive Government and as exercising legislative authority in Ceylon to "rigidly adhere to the rules by which the Charter separates the functions of the Judges from your own.".[1]

It is in the context of a Constitution dealing separately with the executive, the legislative and the judicial powers, and of a judicial power antedating the Constitution and expressly preserved by it, that we must examine section 29 (1) of the Order-in-Council by which legislative power is granted to Parliament. It would not be correct to interpret this section in isolation as though it had existed independently, but it would be necessary to view it as being a section conferring legislative power on a department of Government in a Constitution recognising the principle of separation of powers and providing separately for the judicial and the executive branches. In this context section 29 would appear to confer on Parliament a power of a legislative nature as opposed to powers of a judicial and executive nature.

Now the doctrine of separation of powers is based on the general principle of separation of the executive, the judicial and the legislative limbs of State power, but beyond this general principle it is not possible to work out a set of details relating to its application which would be true of every Constitution. While the general theory of separation is no doubt settled, the exact content of the doctrine may vary in its application in different Constitutions, and there may be particular instances of exercise of power which are so finely poised on the border between the different departments of State power that they may in one Constitution be interpreted as belonging to one department and in another Constitution as belonging to another.

As Paton observes [2] "it is extraordinarily difficult to define precisely each particular power" and again [3] "the major juristic difficulty is to discover any clear definitions of the legislative, administrative, and judicial process which can be related to the functioning of actual states. Many of the suggested tests break down under critical analysis...."

Consequently where there arises for determination the question whether a particular exercise of State power is an exercise of legislative or judicial power, it may be unsafe to view as true of one Constitution what has been judicially interpreted as being true of another. It follows that many of the decisions of the American courts, tied up as they are with the particular features of the Constitution in respect of which they were decided, are not necessarily applicable to our Constitution. I would therefore be hesitant indeed before applying to our Constitution decisions

[1] *Colebrooke—Cameron Papers, ed. Dr. G. C. Mendis, vol. 1. p. 372.*
[2] *Jurisprudence, 2nd ed. p. 262.*
[3] *ibid.*

of the American Supreme Court relating to the question where a given exercise of power falls within the province of one department of State activity or another. Such decisions, except in so far as they serve to explain and underline the broad fundamentals of the doctrine of separation irrespective of the particular Constitution which is under examination are at best uncertain guides.

As Patanjali Sastri, J. observed of the Indian Constitution which in certain respects can in fact be said to have been based on the American model, " this is far from making the principle of separation of powers as interpreted by the American Courts an essential part of the Indian Constitution".[1]

It seems to me that this approach is all the more essential when the question relating to separation arises under a Constitution such as ours where there is no specific mention of separation of powers but the doctrine is a matter of inference from the framework and other features of the Constitution.

There seems no alternative therefore but to view this question upon an interpretation of our own Constitution itself together with such assistance as we may drive from any general observations on the separation of powers contained in decisions drawn from other jurisdictions.

Among the aids in determining the question whether a particular function is executive or judicial are the tests propounded by Dean Roscoe Pound and by Justice Holmes, both of which have been referred to by this Court in *The Queen v. Liyanage*[2]. Dean Roscoe Pound used the historical test in doubtful cases to ask whether at the time the Constitution was adopted the power in question was exercised by Parliament or by the Judges and "unless analysis compels us to say in a given case that there is a historical anomaly we are guided chiefly by the historical criterion". Holmes, J. in *Prentice v. Atlantic Coast Line Company*[3] observes that " the nature of the final Act determines the nature of the previous inquiry."

Adopting either of these tests in the context of our country, it would appear that had the provision nullifying decrees of this Court stood by itself, the reversal of court decrees is a function or power historically exercised by the judiciary alone and aimed at an end which is judicial in its very essence and nature. Historically the power of reversal of judicial decisions has always been in the Courts and functionally the particular portion of the impugned legislation to which I am now directing my attention, viewed by itself, has this same effect.

I shall, without examining this aspect of the matter further, proceed, on the assumption that the particular impugned provision, considered by itself constitutes an exercise of the judicial function, to examine

[1] *Gopalan's Case 1950 S. C. R. 88 ; see also Seervai Constitutional Law of India, pp. 147-8.*

[2] *(1962) 64 N. L. R. 313 at 356.*

[3] *(1908) 211 U. S. 210.*

the effect of the co-existence along with that provision of the mitigating features to which I have already referred. I have earlier briefly indicated what these features are and that there are no directions whatsoever by the legislature controlling in any way the full and complete discretion of this court in regard to the procedure to be followed and the actual content of its eventual order.

There is moreover the background to this legislation which, were it a matter which this court is entitled to take into consideration, would have a profound bearing on the question whether there is here a provision in fact aimed at an interference with the judicial power.

Now on this question the view has been expressed on more than one occasion that the reasons or motives which actuated the legislature in passing the impugned legislation are not for this court to scrutinise. As Sir Owen Dixon of the Australian High Court observed in a speech on his appointment, cited with approval by Sansoni C.J. in *Kariapper v. Wijesinghe* [1] " The Court's sole function is to interpret a Constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and it has nothing whatever to do with the merits and demerits of the measure....There is no safer guide to judicial decisions in great conflicts than a strict and complete legalism ". I should myself have been inclined to this view but that there are dicta of the highest authority which suggest at the same time that a court before which legislation is impugned would be entitled to look at the background to legislation, including White Papers and other matters extraneous to the legislation itself, or in other words to look at the general legislative scheme. To what extent this principle conflicts with the earlier principle to which I have referred, it is not necessary to examine, for the judicial pronouncements on the latter principle are of our highest tribunal and of so clear a nature that it would be legitimate for a court to have regard to such matters.

I refer in particular to the pronouncements of their Lordships of the Privy Council in *Liyanage v. The Queen* [2]. There the Privy Council having taken into account the contents of the White Paper which contained a detailed narrative of the events leading up to the Act in question, arrived at the conclusion that the pith and substance of the Acts was a particular legislative plan. Their Lordships went on to make their observations on " the true nature and purpose of these enactments " and to state what in their Lordships' view was the " aim " of the legislation. So also in *Kodakan Pillai v. Mudannayake* [3] it was observed by the Privy Council that it was common ground between the parties, and in their Lordships' opinion the correct view, that judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the Legislature when the Acts in question were passed. Lord Oaksey, in delivering the opinion of the Board, said that if there was a

[1] *(1966) 68 N. L. R. 529 at 537-8.* [2] *(1965) 68 N. L. R. at 284.*
[3] *(1953) 54 N. L. R. 433.*

legislative plan, the plan must be looked at as a whole, and that looking at the plan as a whole it was evident to their Lordships that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided they were sufficiently connected with the Island. He further observed that the question for decision in all these cases is in reality the same, "namely, what is the pith and substance as it has been called or what is the true character of the legislation which is challenged". To the same effect Isaacs J. in *Federal Commissioner of Taxation v. Munroe*[1] observed "the whole relevant legislation must, in such a case, be looked to in order to pronounce upon the question as to which category the particular function belongs to".

Since then it would appear to be legitimate to have regard to the entirety of the legislation as well as to the plan of the legislation concerned, and the combination of circumstances which gave rise to it, this Court would not be able to view the particular impugned provision in isolation. It would have to consider both the totality of the legislation in question and its background.

When once the view is taken that the background to the legislation may be considered, the whole complexion of the matter is considerably altered, for it was basically with a view to conserving the citizen's right of recourse to the courts and not to take it away that this legislation was enacted. It shows indeed a respect for the right of the citizen to approach the court for relief and a concern that by an unfortunate combination of circumstances this right has in effect been taken away in numerous cases. It was no fault of the litigants concerned that they found themselves without a right to recourse to this court upon the application of a view of the law which was later reversed. Though the particular portion of the enactment which nullifies the decisions of this court may appear to "speak like a Court order" the totality of the legislative provision does not have this quality, for there is no finality about the matter concerned, and no determination by the legislature of the eventual result, but a reopening of the matter without any of the finality which a "court order" would have. If I may quote as applicable here certain observations of this court in *Anthony Naide v. Ceylon Tea Plantations Co. Ltd.*[2] which are pertinent to this case "There was here no intention to legislate *ad hominem*; there was no White Paper enumerating the names of landlords or tenants involved in pending actions, against or in favour of whom Parliament was invited to exercise legislative power; there was no direction or restriction affecting 'the discretion or judgment of the Judiciary in specific proceedings.' — *68 N. L. R. at 284.* Whereas the Criminal Law Acts of 1962 were construed to be in substance provisions designed to dictate to the Court the manner of exercise of its discretion or the formation of its judgment, there is no such dictation involved in Section 4 of the Act of 1966 now under consideration". It may likewise be observed of the present legislation that it contains no direction to the courts to apply the law in a particular way nor any compulsion of any kind.

[1] *(1926) 38 C. L. R. at 176.*

[2] *(1966) 68 N. L. R. 558 at 569.*

In ascertaining the "pith and substance" of this legislation and also the "legislative plan" underlying it, it would also perhaps be helpful to take into account the long title of the Act which describes it as "An Act to provide for the removal of certain difficulties in the settlement of Industrial Disputes and other matters under the Industrial Disputes Act which have arisen in consequence of decisions made by the Supreme Court and decisions made on appeal to Her Majesty in Council, and to provide for matters connected therewith or incidental thereto."

All these considerations, no one of which is conclusive but all of which cumulatively are of considerable weight, tend to create doubt in regard to the view indicated earlier relating to the effect of the impugned provision taken in isolation. Viewing the legislation in this broader way, one is thus left at least in a state of doubt as to whether this particular enactment was not aimed at conserving the jurisdiction of the courts rather than at nullifying court decrees. It seems reasonably possible to view the legislation as being aimed at preserving to the citizen the right to obtain relief from the courts, of which right he was in consequence of a prevailing view of the law, deprived. One cannot say with assurance that the only view reasonably possible is that the impugned legislation encroaches on the judicial power.

In this resulting position of doubt there comes into play another principle of accepted authority in constitutional matters, where the constitutional validity of statutes is attacked. This principle has perhaps been best set out by Isaacs, J. in *Federal Commissioner of Taxation v. Munroe* [1]. Isaacs, J. there gave expression to the very great responsibility lying upon a court of law examining the validity of legislation impugned as offending the fundamental law of the Constitution. Isaacs, J. went on to observe: "It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency—as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us—the question is: 'Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers?'. It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim *Ut res magis valeat quam pereat.* Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament

[1] *(1926) 38 C. L. R. 153 at 180.*

did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in *Macleod v. Attorney-General for New South Wales*[1]. It is the principle which the Supreme Court of the United States has applied, in an unbroken line of decisions, from Marshall C.J. to the present day[2]. It is the rule of this Court[3]. These considerations I proceed to apply to the present case."

By the rule so formulated the answer to the problem before us is clear and whatever reasonable doubt one may feel in regard to this legislation must be resolved in its favour. I would therefore uphold the impugned legislation.

I would wish to stress finally that each case where legislation is impugned on grounds such as these must be considered upon its own particular facts and circumstances and that no general rule can be formulated by which to determine whether the context in which an offending provision appears reveals circumstances sufficiently compelling to act as a countervailing factor.

I express no views on the other interesting questions of law that were discussed.

For the reasons I have set out I concur in the order proposed by my brother Sirimane.

Preliminary objection overruled.