**1966** *Present :* **Sansoni, C.J.**

**S. WEERASINGHE, Petitioner, and G. V. P. SAMARASINGHE (Permanent Secretary to the Ministry of Defence and External Affairs)** and 2 others, Respondents

*S. C. 17711966-In the matter of an Application for a Mandate in the nature of a Writ of Habeas Corpus to produce the body of Captain Duleepsingh Upawansa Weerasinghe and/or a Writ of Mandamus against the Second Respondent*

*Constitutional law-Governor-General-Emergency Regulations made by him- Constitutional validity of such delegated legislation-Departure from the principle of separation of powers in matters legislative and executive-Legality-Permanent Secretaries to Ministries-Validity of additional powers conferred on them-Public Security Ordinance (Cap. 40), ss. 2, 5-Emergency (Miscellaneous Provisions and Powers) Regulations, Regulation 26 (1) (3) (4) (6) (10)- Ceylon (Constitution) Order in Council (Cap. 370), ss. 15 (5), 45, 51 (2)- Habeas Corpus.*

Section 5 of the Public Security Ordinance which confers upon the Governor-General the power to make Emergency Regulations at a time of public emergency is not an illegal delegation of the legislative power of Parliament as laid down in the Constitution.

In an application for a writ of habeas corpus in respect of the 3rd respondent who was taken into custody by the Permanent Secretary to the Ministry of Defence and External Affairs (the 1st respondent) in exercise of the powers vested in him by Regulation 26 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations made by the Governor-General under section 5 of the Public Security Ordinance-

**Held**, that the Public Security Ordinance is constitutionally valid, and the Regulations, as well as the orders and rules made under the authority of such Regulations, are also valid. Consequently the order made by the 1st respondent that the 3rd respondent should be taken into custody and detained was valid. Nor could the manner and conditions of the detention be questioned if they fell within the sole province of the authorities who were empowered by Regulation 26 (3) to impose them.

***Held further***, that section 51 (2) of the Constitution was not a bar to the passing of a law which gives the Permanent Secretary to a Ministry additional powers, provided that they do not in any way come into conflict with section 51 (2).

**APPLICATION** for writs of habeas corpus and mandamus.

*G. D. C. Weerasinghe, with (Miss) Maureen Seneviratne and P. Karunaratne*, for Petitioner.

*V. Tennekoon, Q.C., Solicitor-General, with H. L. de Silva, Crown Counsel,* for 1st and 2nd Respondents.

*Cur. adv. vult.*

May 13, 1966. **SANSONI, C.J.-**

The petitioner in this application moves for writs of Habeas Corpus and Mandamus. He is a brother of the 3rd respondent, a Captain in the Regular Army. The 1st respondent is the Permanent Secretary to the Ministry of Defence and External Affairs, and the 2nd respondent is the Chairman of the Advisory Committee appointed by the Governor-General under Regulation 26 (4) of the Emergency (Miscellaneous Provisions and Powers) Regulations made by the Governor-General under s. 5 of the Public Security Ordinance, Cap. 40.

By reason of the existence of a state of public emergency, the Governor-General under s. 2 of that Ordinance declared by a Proclamation that the provisions of Part 2 of the Ordinance should come into operation throughout Ceylon on 8th January, 1966. In each succeeding month a similar Proclamation was made, and the state of emergency still continues. The 3rd respondent was taken into custody on 17th March, upon an order made by the 1st respondent in exercise of the powers vested in him by Regulation 26 (1), as he was of the opinion that it was necessary to make such an order on the grounds set out in that Regulation.

The main argument of Mr. Weerasinghe is that the Governor-General has no right to make any Regulations, as s. 5 of the Public Security Act which purports to give him the power to make Emergency Regulations is beyond the power of Parliament as laid down in the Constitution. If this objection fails, I think there is little or nothing that can be said in support of the other objections he has taken.

On the main objection, that the Emergency Regulations are invalid, the argument is the familiar one that the Constitution entrusts the power to make laws to Parliament and to nobody else : therefore no other authority has a law-making power. As against this, the Solicitor-General's position is that Parliament can delegate its power to make laws to the Executive as it did in this case, even though there is nothing said about it in the Constitution.

Section 5 of the Public Security Ordinance certainly purports to vest legislative authority in the Governor-General to " make such regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community." Two conditions are laid down by the Ordinance for the exercise of this authority by the Governor-General. One is " the existence or imminence of a state of public emergency " of which the Governor-General is the sole judge and the other is that the Regulations he makes must be such as appear to him to be necessary or expedient. In passing I may mention that the petitioner relied on statements by the Minister of State made on 11th March 1966 to the effect that he thought the emergency can be lifted, and that the Regulations were used because the emergency was on Neither of these statements shows that the Governor-General's powers



were not being properly exercised or that the Regulations were being improperly used. The Ordinance gives prominence to the part which Parliament has to play at this time. Under s. 5 (3) any Emergency Regulation may be added to, altered or revoked by resolution of the House of Representatives. Under s. 2 (3) a Proclamation of a state of emergency must be forthwith communicated to Parliament; and if Parliament is at the time separated by adjournment or prorogation for more than ten days it must be summoned to meet within ten days. It is relevant to refer here to s. 15 (5) of the Ceylon (Constitution) Order in Council, Cap. 379, which states that even after a dissolution of Parliament the Governor-General may summon it by Proclamation if he is satisfied that an emergency has arisen of such a nature that an earlier meeting of Parliament

is necessary. All these provisions ensure that Parliament retains its powers and its control over the Executive even during a state of emergency. One thing is essential for the validity of a delegation of its law-making power, and that is that it should not abandon its legal authority or its control over the executive authority to which it has delegated that power. It must not try to transform the executive into a parallel legislature, and abdicate its function. There is nothing in the Public Security Ordinance to indicate that Parliament has abdicated its legislative authority. In my view, the power to make laws for the peace, order and good government of the country include the power to make such a law as the Public Security Ordinance which, and I emphasise this, makes provision for delegation of legislative power only at a time of public emergency.

The important question that has been argued, whether the delegation of legislative power is ultra vires the Constitution, has been discussed and decided in many cases, but I intend to refer only to a very few of them. The Solicitor-General cited the Supreme Court of Canada decision of the Reference as to the validity of the Regulations in relation to chemicals (1943) S. C. R. 1.,where the validity of regulations and orders made under powers conferred by the War Measures Act, 1914 was considered and upheld. Rinfret J. there said : " Parliament retains its power intact and can, whenever it pleases, take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them in existence, are matters for Parliament and not for courts of law to decide. Parliament has not abdicated its general legislative powers. ..... The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence." Duff, C.J. pointed out that every regulation, rule and order made under the Act derives its legal force solely from that Act, for as the Privy Council decided in The Zamora1, all suchinstruments " derive their validity from the statute which creates the power, and not from the executive body by which they are made." The argument that there was the risk that extensive and drastic powers of control may thus be given to persons

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who were not responsive to the will of the electorate was met by Davis, J. who said, " the safety valve of our constitutional system of government remains intact. Parliament has not effaced itself ..... as representative of the people (it) has, in a practical sense, full power to amend or repeal the War Measures Act or to make ineffective any of the Orders in Council in pursuance of its provisions." It should not be forgotten, however, that this case and In re George Edwin Gray [(1918) 57 S. C. R. 150.] which it approved dealt with regulations framed during national emergencies when the safety of the country was in peril.

In Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v.Dignan [(1931) 46 C. L. R. 73] the High Court of Australia had to consider asimilar question of delegation of legislative power where the Commonwealth Parliament conferred upon the Governor-General the power to make regulations. It was held to be intra vires, even though it was not an instance of emergency legislation. Dixoii J. used words to describe the delegated power which equally well describe the power conferred by s. 5 of the Public Security Ordinance. Hesaid : " s. 3 of the Transport Workers Act, 1928-1929, cannot be regarded as doing less than authorizing the Executive to perform a function which, if not subordinate, would be essentially legislative. It gives the Governor-General in Council a complete, although, of course, a subordinate power, over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be pursued as well as the means to be adopted. Within the limits of the subject matter, his will is unregulated and his discretion unguided. Moreover, the power may be exercised in disregard of other existing statutes, the provisions of which concerning the same subject matter may be overridden."

His conclusion was that " a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law

with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain, the power of the Parliament to make such a law." He sounded a note of warning, however, when he added that the subject matter dealt with by the law may be so extensive or vague, so wide and uncertain, that the attempt to hand over legislative authority would be invalid. I wish to add that, it having been decided that the Legislature is competent to delegate its power, whether there is a limit beyond which that power must not travel, or whether the power is unconfined, is a difficult question to answer. But even if there is a limit, it could only be found when the circumstances of a particular case have been examined. Certainly a threat to the safety of the nation would entitle the legislature to delegate its powers to make laws to an authority in whom it can have the utmost confidence. Parliamentary debates on the details of necessary legislation at a time when speedy action is essential would seem to be out of place.

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The Privy Council, in Attorney-General for Australia v. The Queen [1 (79.57) A. C. 288. ] referred to Dignan's case and said this: " The other matter to which their Lordships must refer has already been mentioned. It is the departure from the principle of separation of powers in matters legislative and executive. They refer to this matter again lest it should be thought that in anything they have said in relation to the judicial power they intended to cast any doubt upon the line of authorities where the union of legislative and executive power has been considered. Reference has already been made to Dignan's case, and a salient passage from it cited. From the same case in exhaustive judgments of Dixon, J. and Evatt, J. many other passages will be found which illustrate how different are the measures which have been and ought to be meted out to the union of legislative and executive powers on the one hand and the union of such powers and judicial power on the other." Evatt, J. has pointed out in that case that judicial power occupies a special place because of its special nature, and that there is a great cleavage between legislative and executive power on the one hand, and judicial power on the other. He also pointed to the British tradition that judicial functionaries are or should be free from any interference on the part of the Legislature or the Executive, and this has resulted in a special tendency to resist any serious encroachment upon the field of judicial action by agencies of the Executive Government. This is the answer to the argument of Mr. Weerasinghe that because of the recent pronouncements of the Privy Council about the judicial power in our Constitution, it must also be held that there was a strict separation of all the three powers of Government.

Before I conclude this part of my judgment I should also refer to in re Art. 143, Constitution of India and Delhi Laws Act[2 A. I. R. (1951) S. C. 332.]decided by seven judges of the Supreme Court of India. The judgments in that case dealt exhaustively with the subject of delegated legislation, and numerous cases, including those to which I have referred, were discussed. There was a sharp conflict of views as to the constitutional validity of such legislation, and my impression is that the judges were divided four to three, the majority holding the view that the Indian Parliament had no power to delegate its legislative authority to the extent, say, that our Parliament has done in the Public Security Ordinance, though it can validly delegate the power to make subsidiary or ancillary legislation, and conditional legislation.

After considering the matter as carefully as I can, I hold that the Public Security Ordinance is intra vires, and the Regulations, as well as the orders and rules made under the authority of such Regulations, are also valid. Consequently the order made by the 1st respondent that the 3rd respondent should be taken into custody and detained in valid. Regulation 26 (10) takes away the power of this Court to issue a writ of habeas corpus during the emergency, and that is the final answer to the application for that writ.

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Another argument put forward for the petitioner was that, under s. 51 (2) of the Constitution, each Permanent Secretary could only" exercise supervision over the department or departments of Government in the charge of his Minister", and that no other duties could be imposed, even by a law, on a Permanent Secretary. I do not think that s. 51 (2) was intended to be exhaustive of everything that a Permanent Secretary can do while he holds that office. The wording of the section does not suggest that. I see no objection to the passing of a law which gives the Permanent Secretary additional powers, provided that they do not in any way come into conflict with s. 51 (2). If this argument were to be upheld, it could be argued that the exercise of legislative power by the Governor-General when he makes Regulations under the Public Security Ordinance would also be contrary to the constitution, because s. 45 of the Constitution speaks only of the Governor-General exercising executive power, and says nothing about his exercising legislative power. It seems to me that it is perfectly constitutional for the Governor-General to make Emergency Regulations when he is empowered to do so by an Act of Parliament, for such a power does not conflict with his exercise of executive power.

There only remains the question as to whether any relief should be granted on the application for Mandamus against the 2nd respondent. Under Regulation 26 (6) the 2nd respondent presides over meetings of the Advisory Committee appointed by the Governor-General to hear any objections which the 3rd respondent might make against his order of detention. The Solicitor-General stated that objections had been filed by the 3rd respondent. In due course the Advisory Committee will consider those objections if it has not already done so, and the 2nd respondent will inform the 3rd respondent of the grounds on which he is detained and furnish him with such particulars as the 2nd respondent considers sufficient to enable him to present his case. There is no need for a Mandamus, because there is nothing to suggest that the 2nd respondent has failed or will fail to do his duty at the appropriate time. In point of law the petitioner has no status to make the application for a Mandamus, because no duty is owed to him by the 2nd respondent, and the petition should fail on this ground also, though I have not dismissed it for this reason.

Other matters mentioned in the petition are the denial of visits by relations and friends of the 3rd respondent, the deprivation of privileges to which he was entitled under the Prisons Ordinance (Cap. 54), and the imposition of solitary confinement. The 1st respondent has made orders which he was entitled to make under Regulation 26 (3) suspending the operation of certain provisions of that Ordinance. Regulation 26 (3) empowers the Inspector-General of Police to issueinstructions with regard to the conditions under which persons are held in detention. The 3rd

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respondent is detained under conditions covered by such orders and instructions. It is not for the Court to judge the necessity for such measures, since that is within the sole province of the authorities who are empowered to impose them.

For these reasons the application is dismissed with costs.

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***Application dismissed.***

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