SALEEM MARSOOF, J.

I have had the benefit of perusing the draft judgement prepared by My Lord the Chief Justice, and agree with the conclusion reached by him. I set out my reasons in a separate judgement.

The Court of Appeal has, in terms of Article 125 of the Constitution, referred for the determination of the Supreme Court, the question whether the words "any court" in Article 89(d) of the Constitution refer only to the Supreme Court, Court of Appeal, the High Court of the Republic of Sri Lanka and the other Courts of First Instance, to the exclusion of other tribunals or institutions administering justice, or alternatively, whether the words "any court" include a Court Martial constituted under the Army Act No. 17 of 1949 (Cap. 357 of LEC 1956).

The question has been posed in the factual context that the Petitioner, who was elected as a Member of Parliament at the General Election held on 8th and 20th April 2010 for the Colombo District, having contested the said election as a candidate of the Democratic National Alliance (DNA), was while he was so holding office as a Member of Parliament, tried by a Court Martial constituted under the Army Act on several charges, and was convicted and sentenced on 17th September 2010 to an aggregate of 30 months rigorous imprisonment on several counts. The said sentence having been confirmed by the President of Sri Lanka on 29th September 2010, action was initiated by the 1st Respondent Secretary-General of Parliament to declare that the seat held by the Respondent has been vacant, and that the 7th Respondent, Lakshman Nipunarachchi, who "secured the next highest number of preferences" as contemplated by Article 99(13)(b) of the Constitution, as amended by the Fourteenth Amendment to the Constitution, as being "elected to fill such vacancy". The said declaration was made and it was duly published in the Gazette dated 8th October 2010 (P19). The Petitioner has in his writ application dated 12th October 2010 filed in the Court of Appeal, in the course of which the reference under Article 125 has been made, sought mandates in the nature of *certiorari* to quash the several decisions made to declare that the Petitioner's seat as a Member of Parliament has fallen vacant, as well as to quash the declaration contained in the Gazette Notification P19 that the 7th Respondent was elected to Parliament to fill the ensuing vacancy. The Petitioner has also sought a mandate in the nature of *mandamus* directing the relevant

respondents to take all necessary steps according to law to enable the Petitioner to sit and vote in Parliament and to exercise his powers, privileges and immunities as a Member of Parliament.

In this context, it is important to note that the Petitioner, who was sworn in as a Member of Parliament on 24th April 2010, commenced serving his sentence of rigorous imprisonment, which exceeded six months, with effect from 17th September 2010. The learned Attorney General has submitted that the Petitioner's seat became vacant by operation of law in terms of Article 66(d) read with Article 89(d) of the Constitution, and the vacancy has been filled as provided in Article 99(13)(b) of the Constitution. Although the Petitioner has on several grounds, which need not be adverted to in detail in this determination, challenged the position that his seat had thus become vacant, what is important for this determination is that the Petitioner has submitted in the Court of Appeal as well as in this Court that, a Court Martial constituted under the Army Act is not a "court" within the meaning of Article 89(d) of the Constitution, and that a conviction and sentence imposed by a Court Martial does not activate the disqualification set out in that article.

For the purposes of this determination, it is necessary to have a closer look at Articles 66(d) and 89(d) of the Constitution. Article 66(d) is fairly straight forward and provides that the "seat of a member (of Parliament) shall become vacant if he becomes subject to any disqualification specified in Article 89 or 91". Article 89(d) provides as follows:-

> "89. No person shall be qualified to be an elector at an election of the President, or of the Members of Parliament or to vote at any Referendum, if he is subject to any of the following disqualifications, namely -
>
> (d) If he is *serving* or has during the period of seven years immediately preceding *completed serving* of a sentence of imprisonment (by whatever name called) *for a term not less than six months* imposed after conviction by *any court* for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving, or has during the period of seven years immediately preceding completed the serving, of a sentence of imprisonment for a term not less than six months awarded in lieu of execution of such sentence….." (*emphasis added*)

It is important to note that there is no definition of "court" in Article 170 of the Constitution, and the wide definition found in Article 24(5) of the Constitution which defines a "court" to mean "any court or tribunal created and established for the administration of justice", admittedly covering within its ambit even a Court Martial, is expressly confined in its application only to Article 24 that deals with language of the courts and other tribunals.

Eminent Counsel appearing for the Petitioner and the 7th Respondent have argued with great force, both before the Court of Appeal as well as before this Court that, insofar as a Court Martial is not a "court" that has been created and established as contemplated by Article 4(c) read with Article 105 of the Constitution, a person who is serving a sentence of imprisonment exceeding 6 months imposed by a Court Martial, does not become disqualified from sitting and voting in Parliament by reason of Article 89(d) of the Constitution.

A point of divergence between the submissions of the two eminent Counsel was that, while learned President's Counsel for the 7th Respondent contended that a Court Martial is an emanation of the "executive power of the People" referred to in Article 4(b) of the Constitution and was not a court established to "protect, vindicate and enforce the rights of the People" as contemplated by Article 105 of the Constitution, learned President's Counsel for the Petitioner submitted that a Court Martial was a tribunal or institution, but not a court, exercising the "judicial power of the People" within the meaning of Article 4(c) of the Constitution. I shall revert to this divergence later on in this determination.

The learned Attorney General, however, submitted that a Court Martial is a court "created and established, or recognized, by the Constitution" within the meaning of Article 4(c) of the Constitution, and that it was therefore a "court" competent to impose punishment, including the death sentence. He stressed that a Court Martial having been in existence even during the pre-independence period, its continued existence was "recognized" by the Constitution as envisaged by Article 4(c), by both Article 16(1) and Article 168(1) which ensured the continuance in force of all "existing written law" including the Army Act, under which the Court Martial in question was convened.

At this stage, it will be useful to recount that Sri Lanka, or "Ceylon" as it was then named, gained independence from the British on 4th February, 1948, a date which is still commemorated as our independence day, despite the fact that since then we have had two new constitutions, by the first of which Sri Lanka was proclaimed as a "Republic" in 1972. The Constitution that is now in force was promulgated on 7th September 1978, as the Constitution of the Democratic Socialist Republic of Sri Lanka, and has undergone eighteen amendments since then.

The Army Act was enacted in 1949, soon after independence, with the view to replacing the United Kingdom Army Act of 1881, which applied in Ceylon at the time she gained independence. Under British rule, courts martial had been constituted from time to time upon warrants issued by the colonial Governor under Section 122 of the Army Act of 1881 to try certain offences committed by "persons subject to military law". Section 55 of the said Act required that all sentences imposed by the Court Martial should be confirmed by the Governor.

Although the Army Act of 1881 was an enactment of the British Parliament which applied to Ceylon, and despite the early decision in *Grant v. Gould* [1792] 2 H. Black 100, which clarified that under the English common law the writ of prohibition lay against even a Court Martial as much as against a subordinate regular court, in 1915 a Full Bench of the Supreme Court of Sri Lanka took a different approach in the case reported as *Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334, in refusing to issue a writ of prohibition against the Field General Court Martial to try one Edmund Hewavitharatna on charges of treason and treason-felony. Learned President's Counsel appearing for the 7th Respondent, has strenuously contended that the said decision fortifies his position that a Court Martial was not a subordinate court but simply an arm of the executive, and that being a decision of a Full Bench of the Supreme Court, it is binding on this Court. However, it is clear from the judgements of Woodrenton, C.J. (with whom Shaw, J. and De Sampayo, A.J. concurred) that the decision turned on a consideration of the structure and provisions of the Courts Ordinance No. 1 of 1889 (Cap. 6 of LEC 1956), especially Section 46 of that Ordinance. There was no express reference to a Court Martial in that section, and De Sampayo, A.J. observed at page 339 of his judgement that "it is inconceivable that, if such extraordinary Courts as Courts Martial were intended to be affected, they would not have been mentioned specifically by name." The decision is only of persuasive authority, being a decision of

the Supreme Court made at a time that it was not the apex court of the country, and it cannot be regarded as binding on this Court.

It is necessary to stress that what was sought to be achieved by the enactment of the Army Act No. 17 of 1949 (Cap. 357 of LEC 1956), was to continue in Ceylon after independence, substantially the traditional British system relating to the discipline, trial and punishment of members of the armed forces embodied in the United Kingdom Army Act of 1881. An important question that arises in this context is whether Articles 16(1) and 168(1) of the Constitution, relied upon by the learned Attorney General, have preserved the provisions of the Army Act enacted in 1949, and subsequently amended from time to time. It is remarkable that Article 168(1) of the Constitution is couched in language similar to, and reminiscent of, Section 12(1) of the first Republican Constitution of Sri Lanka proclaimed in 1972, which read thus:-

> "Unless the National State Assembly otherwise provides, all laws, written and unwritten, *in force* immediately before the commencement of the Constitution, except such as are specified in Schedule 'A' shall, *mutatis mutandis,* and except as otherwise expressly provided in the Constitution, continue in force. The laws so continuing in force are referred to in the Constitution as 'existing law'." (*emphasis added*)

In the same lines, Article 168(1) of the present Constitution enacted in 1978, provides that-

> "Unless Parliament otherwise provides, all laws, written laws and unwritten laws, *in force* immediately before the commencement of the Constitution, shall, *mutatis mutandis*, and except as otherwise expressly provided in the Constitution, continue in force." (*emphasis added*)

A singular feature of both these provisions was that they sought to keep alive only the laws that were *in force* at the time these constitutions were enacted, in 1972 and 1978 respectively, and logically, it is necessary to go back to 1972 to examine whether at the time of the proclamation of the first Republican Constitution, the provisions of the Army Act of 1949 relating to Court Martial were *in force*. In this context, a question of considerable difficulty that could arise is whether the provisions of any legislation enacted by Parliament purportedly in terms of the the Ceylon (Constitution) Order in Council of 1946 (Cap. 377 of LEC 1956), may be considered to be

in force notwithstanding any inconsistency with the said Order in Council, until and unless the provision is set aside or quashed by a court of law. The Republican Constitution of Sri Lanka of 1972 introduced a system of pre-enactment judicial review, which has been also embodied in the present Constitution of 1978, which prevents any court or tribunal from inquiring into, pronouncing upon or in any manner calling in question the validity of any legislation enacted under those Constitutions. Did these Constitutions fetter the power of any court or tribunal to review pre-1972 legislation on the ground of inconsistency with the provisions of the Ceylon (Constitution) Order in Council of 1946?

Prior to 1972, there were a large number of cases in which legislation enacted under the said Order in Council were reviewed by our courts and when found to be *ultra vires* the powers of Parliament conferred by the Ceylon (Constitution) Order in Council of 1946, whether in whole or in part, declared to be void. I see no reason in principle to hold that this Court cannot similarly review any Act of Parliament enacted under the said Order in Council even after the Order in Council itself was replaced by an autochthonous constitution in 1972, as these legislation derive their legal force from the parent Order in Council. In *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC) at page 280, Lord Pearce, after noting that the Ceylon (Constitution) Order in Council of 1946 and the Independence Act of 1947 had the combined effect of giving "the Ceylon Parliament the full legislative powers of a sovereign independent State", went on to observe that-

> Those powers, however, as in the case of all countries with written constitutions, *must be exercised in accordance with the terms of the constitution from which the power derives*" (*emphasis added*)

In my considered opinion, Acts such as the Army Act of 1949, which were enacted without the benefit of pre-enactment judicial review for constitutional inconsistency, could be challenged on the ground that any of their provisions are *ultra vires* the Order in Council under which they themselves derived their legal force, and the ouster clauses found in Section 49(3) of the 1972 Constitution and Article 80(3) of the present Constitution, will have no application.

Learned President's Counsel for the Petitioner and the 7th Respondent have not been able to refer to any decision of our courts which had declared any provision of the Army Act to be *ultra vires* the provisions of the Ceylon (Constitution) Order in Council of 1946. However, they have invited the attention of Court to several celebrated pre-1972 decisions of our courts, such as *Sendahira v. Bribery Commissioner* (1961) 63 NLR 313, *Queen v. Liyanage* (1962) 64 NLR 313 (SC) which was affirmed in *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC), *Piyadasa v. Bribery Commissioner* (1962) 64 NLR 385; *Jailabdeen v. Danina Umma* (1962) 64 NLR 419, *Bribery Commissioner v. Ranasinghe* (1964) 66 NLR 73(PC), *Walker Sons Co Ltd v. Fry* (1965) 68 NLR 73 and *United Engineering Workers Union v. Devanayagam* (1967) 69 NLR 289 (PC) in support of the proposition that the exercise of judicial power by courts martial violated the doctrine of separation of powers, and in particular, the cherished concept of the independence of the judiciary, which have been recognised and given effect to by our courts in those decisions.

In *Sendahira v. Bribery Commissioner,* Sansoni, J. at page 318 of his judgement, echoing the words of Lord Atkin in *Toronto Corporation v. York Corporation* [1938] AC 415, referred to the "three principal pillars in the temple of justice", namely, the appointment of the superior court judges by the Governor-General, the holding of judicial office during "good behavior" and the principle that the salaries of judges shall be charged on the consolidated fund and cannot be reduced during their tenure, and proceeded to refer to Section 55 of the Ceylon (Constitution) Order in Council adding that "the framers of our Constitution erected a fourth pillar in that temple when the power of appointment, transfer, dismissal and disciplinary control of judicial officers was vested in the Judicial Service Commission."

In *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC), Lord Pearce at page 282 of his judgement, after subjecting the Ceylon (Constitution) Order in Council to close analysis, observed that-

> "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall only be vested in the judicature. They would be inappropriate in a Constitution by which it was intended that 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 it 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 legislature."

The question therefore is whether the provisions of the Army Act of 1949 under which courts martial were constituted and convened, interferes with the judicial power that was exclusively vested in the judiciary under the Ceylon (Constitution) Order in Council. For the purpose of answering this question, it is necessary to examine the provisions of the Army Act pertaining to courts martial. A Court Martial may be constituted under the provisions of the Army Act to try any person subject to military law, who is charged with any military or civil offence, and comprises of officers of the Army of appropriate rank. Section 45 of the Army act, classifies courts martial as general, field general and district courts martial, which defer from each other in regard to the process by which they are convened, their jurisdiction as well as the type of punishment that can be meted out by each such courts martial. According to Section 46(1) of the Army Act, a General Court Martial may be convened by the Governor-General or such officer of a rank not below that of field officer as may be authorized by the Governor-General.

A fundamental characteristic of a Court Martial is that it has jurisdiction, only with respect to a "person subject to military law", which phraseology has been defined in Section 34 of the Army Act. It is important to observe that under the said Act it is only a Court Martial that is competent to try a person subject to military law for a *military offence*, although Section 77(1) of the Act provides for sharing of jurisdiction between a Court Martial and a regular court by enabling a person subject to military law to be tried for any *civil offence* by either a Court Martial or by a civil court which is not a Court Martial. A civil offence has been defined in section 162 of the Army Act to mean "an offence against any law of Sri Lanka, which is not a military offence". It is noteworthy that military offences are defined, and punishments prescribed, under Part XII of the Act, and in Part XV thereof the Act also seeks to define certain offences which are not military offences for which any person other than a person subject to military law may be tried in a civil court, and any punishment prescribed by the Army Act may be imposed.

The principle of double jeopardy is recognised by Section 58 of the Army Act to the extent that it provides that a Court Martial shall not try a person for any offence if he has been already

acquitted or convicted of that offence by a Court Martial or by a competent civil court or the charge against him has been dismissed by his commanding officer, or he has been dealt with summarily for that offence by his commanding officer or other commander or officer of superior rank. However, if a person subject to military law, has been convicted of an offence and sentenced to punishment by a Court Martial and he is afterwards tried for, and convicted of an offence by a civil court, then in awarding punishment, the civil court is required by Section 77(2) to "have due regard to such punishment imposed by the Court Martial as that person may have already undergone". It is important to note that the exception to the principle of double jeopardy created by Section 77(2) only applies with respect to a civil offence.

A significant feature of the Army Act is that where a person subject to military law is convicted of a military offence by a Court Martial, the punishment that maybe imposed have been prescribed in Part XII of the Army Act, but where the conviction is for a civil offence the scale of punishment is prescribed in Sections 131 and 132 of the Act. Such punishment could include the death sentence for offences such as treason and murder, and it is expressly provided in Section 132(b) that where the Act does not specify a punishment for an offence, the convicted person shall "suffer the punishment prescribed for such offence by any law of Sri Lanka" other than the Army Act. It is expressly provided in Section 63(1) of the Act that a conviction of, and the sentence passed on, an accused by a Court Martial shall not be valid until confirmed by the authority having power under Section 64 to confirm the same, and according to Section 64(a), if the Court Martial is a General Court Martial, the authority empowered to confirm the conviction and sentence is the Governor-General or such officer of a rank not below that of field officer as may be authorized by the Governor-General.

From this examination of the provisions of the Army Act relating to the institution of Court Martial, it becomes clear that while the jurisdiction of a Court Martial is confined to a special category of persons, namely, members of the armed forces, who are "subject to military law", a duality in its constitution is also discernible in that, while it functions primarily as a disciplinary authority for the Armed Forces as an arm of the executive, it is also vested concurrently with regular courts with judicial power to try such persons for civil offences committed by them. The question whether these provisions of the Army Act were inconsistent with the provisions of the Ceylon (Constitution) Order in Council of 1946 in the light of the celebrated decisions relating to

judicial power and the independence of the judiciary noted above, was considered by the Supreme Court in *Gunaseela v. Udugama* (1966) 69 NLR 193. The question arose in the context of an application for *certiorari* filed with view to quash a conviction and sentence entered by *a* District Court Martial for an offence punishable under section 129 of the Army Act. H.N.G. Fernando, S.P.J., (with whom Sri Skanda Rajah, J. and G.P.A. Silva, J. concurred) in the course of his judgement, made a thorough survey of British, United States and Australian law as well as the provisions of law that applied in Ceylon prior to independence, and concluded that the power to try and punish military officers was entirely independent of judicial power, and that they did not offend the Order in Council in any manner.

In arriving at this conclusion, H.N.G. Fernando, S.P.J., noted in particular that a Court Martial is not a paid office but 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 binds of duties which a Service Officer can under the relevant statutes be called upon to perform. After pointing out that 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, His Lordship referred to the decision of the Supreme Court in *Panagoda v. Bandenis Singho* (1965) 68 NLR 265 and went on to observe at page 194 of his judgement that the Ceylon (Constitution) Order in Council-

> "did 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 paid judicial office. Those reasons apply equally in a case where an Act of Parliament merely re-enacts pre-existing law."

Adverting to the decision in *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC), in which Lord Pearce, in delivering the decision of the Privy Council, had emphasized at page 283 that the separate power vested by the Order in Council of 1946 on the judiciary "cannot be usurped or infringed by the executive or the legislature", H.N.G. Fernando, S.P.J., at page 196 of his judgement proceeded to explain the rationale for that assertion by reference to the earlier passage occurring in pages 281 to 282 of the opinion of Lord Pearce, which I quote below:-

"…..although no express mention is made [in the Ceylon (Constitution) Order in Council] 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."

Thereafter, H.N.G. Fernando, S.P.J. went on to explain at page 196 of his judgement in *Gunaseela v. Udugama* (*supra*) that, the rationale for his own conclusion in that case that the provisions of the Army Act of 1949 did not offend any provisions of the Ceylon (Constitution) Order in Council, in the following passage:-

"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* of 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."

The decision of this Court in *Gunaseela v. Udugama* (*supra*) is important for the reason that it is the only post-independence decision on courts martial, and the Supreme Court in that case did not avail itself of the opportunity it had to pronounce that the Court Martial provisions of the Army Act of 1949 were inconsistent with the Ceylon (Constitution) Order in Council of 1946, and for very good reasons. In the light of this decision, I have no difficulty in concluding that the

provisions of the Army Act relating to courts martial did not offend the provisions of the said Order in Council, and were *in force* at the commencement of the Republican Constitution of 1972.

It is now convenient to examine the constitutional and legal status of courts martial in the context of the provisions of the present Constitution of 1978. The provisions of the Army Act of 1949, which was enacted soon after Ceylon gained independence, has to be now read subject to the qualification that the powers of the Governor-General were vested in the President of the Republic, who is the Head of State as well as the Commander in Chief of the Armed Forces. For the purpose of the determination of the question referred to this Court by the Court of Appeal, it is necessary to consider whether a Court Martial fell within the ambit of Article 4(b) of the Constitution of 1978 dealing with the executive power of the People as suggested by the learned President's Counsel for the 7th Respondent, or whether it came within the purview of Article 4(c) of the Constitution dealing with the judicial power of the People, as contended by the learned President's Counsel for the Petitioner, with which contention the learned Attorney General also agreed. The analysis of the provisions of the Army Act relating to the constitution and powers of courts martial, no doubt reveals the hybrid character of these courts, which were described by De Sampayo, A.J. in the *Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334, at page 339 as "extraordinary Courts". It is important to note that traditionally courts martial have been considered in Britain as well as elsewhere in the civilized world as an arm of the executive, despite the jurisdiction of these courts to try military officers for civil offences, concurrently with regular courts. I am of the opinion that the Court Martial, as presently structured, falls within Article 4(b) of the Constitution, which deals with the executive power of the People.

It is however, important to note that a fundamental feature of the Ceylon (Constitution) Order in Council of 1946, namely, the said "Constitution's silence as to the vesting of judicial power" which was noted by the Privy Council in *Liyanage and others v. the Queen* (1965) 68 NLR 265 (PC) at page 282, and which was stressed by the Supreme Court in the course of its decision in *Gunaseela v. Udugama* (1966) 69 NLR 193, is not shared by the Constitution of 1978. Article 4 of the present Constitution clearly defines the organs in which the power of the People is vested thereby, in the following terms:-

"4. The Sovereignty of the People shall be exercised and enjoyed in the following manner:-

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law….."

A Bench of Seven Judges of this Court, in the course of its determination in *Re the Nineteenth Amendment to the Constitution* [2002] 3 SLR 85, had no hesitation in characterizing Article 4, when read with Article 3, as enshrining the doctrine of separation of powers, and at pages 96 to 97 went on to elaborate that-

"The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub-paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub-paragraph which relates to

the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People."

Further clarifying our constitutional provisions, this Court also observed at page 98 of its determination that-

"This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of powers is sustained by certain checks whereby power is attributed to one organ of government in relation to another."

It is in this backdrop that this Court has to view Article 89(d) of the Constitution which comes up for interpretation in this determination in the context of the question as to whether the words "any court", as used in the said article, include a Court Martial. In my considered opinion, the institution of Court Martial, being an emanation of executive power, is not a court, tribunal or institution set up for "the administration of justice which protect, vindicate, and enforce the rights of the People" as described in Article 105 of the Constitution, and has no place in Chapter XV of the Constitution. In my view, none of the provisions of that chapter, including the provisions enshrining the independence of the judiciary (Articles 107 to 117), have any relevance with respect to a Court Martial. Any member of the Armed Forces who sits on a Court Martial does not hold paid office as such, nor does he fall within the definition of "judicial officer" found in Article 170 of the Constitution, although he is bound to act judicially when called upon to sit on a Court Martial.

However, this does not conclude the matter, as the question posed to this Court has to be understood in the light of the other sub-paragraphs of Article 89, which seek to disqualify a person from being an "elector", and when read in conjunction with Articles 66(d) and 91, from sitting and voting in Parliament. First and foremost, it is relevant to note that Article 89(d) contemplates a person who is currently *serving or has completed serving a sentence of imprisonment* (by whatever name called) for a term not less than six months within a period of seven years immediately preceding, and includes a person who is or has served such a sentence of imprisonment awaiting the execution of a sentence of death. Obviously, the question of

disqualification would not arise once the death sentence is executed, but the reference to the "death sentence" is made to catch up a person who is on death row for a period exceeding six months awaiting the execution of the sentence of death. In my opinion, the disqualification set out in Article 89(d) arises from the physical or moral inability to sit in Parliament and perform the functions of a Member of Parliament efficaciously. It is relevant to note that all the other sub-paragraphs of Article 89 also contemplate disqualifications of a similar nature. If one excludes from the analysis sub-paragraphs (a), (b) and (c) of Article 89, which respectively deal with persons who are not citizens of Sri Lanka, persons below eighteen years of age, and persons of unsound mind, all the other sub-paragraphs of Article 89 contemplate findings involving moral turpitude, but in none of them are the words "any court" used.

It is in this context necessary to note the important fundamental right enshrined in Article 13(4) of the Constitution which provides that-

> "No person shall be punished with death or imprisonment except by order of a *competent court*, made in accordance with procedure established by law."

It is obvious that notwithstanding the provisions of the Constitutions we have had since independence, particularly the provisions enshrining the doctrine of separation of powers and the concept of the independence of the judiciary, courts martial have survived by reason of the enactment of the Army Act of 1949 and its continuance as "existing law". The concept of continuance of existing law, which was enunciated by a Full Bench of the Supreme Court in the *Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334, is now embodied in Article 168(1) of the Constitution, which was quoted earlier in this determination.

In this connection, it is also necessary to consider the provisions of Article 16 of the Constitution, which provides as follows:-

> (1) All existing written law and unwritten law shall be valid and operative *notwithstanding any inconsistency* with the preceding provisions of this Chapter.

(2) The subjection of any person on the order of a *competent court* to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter. (*emphasis added*)

Article 16 occurs in Chapter III of the Constitution dealing with fundamental rights, and the effect of sub-article (1), particularly the words *"notwithstanding any inconsistency* with the preceding provisions of this Chapter", is to shield "existing law" from any scrutiny for any inconsistency with the fundamental rights contained in Chapter III. Sub-article (2) of the said article also has an important bearing on the question whether a courts martial can legitimately be regarded as a "competent court" within the meaning of that phrase contained in Article 13(4) of the Constitution, which provides that no "person shall be punished with death or imprisonment except by order of a *competent court* made in accordance with procedure established by the law." It is clear that by reason of the express provision of Article 16(2) that provisions of "existing written law" such as the Army Act which empowers a Court Martial to impose various punishments including death "shall not be a contravention of the provisions of this Chapter" and is therefore a court that is competent to impose punishment. In fact, in the course of oral submission before this Court, learned President's Counsel for the Petitioner and the 7th Respondent quite rightly conceded that a Court Martial is a competent court within the meaning of the phrase in Article 13(4) of the Constitution.

It is manifest from the various provisions of the Constitution noted above, that it is envisaged that there can be courts competent to impose punishments, including the death sentence, which are not part of the regular judicial hierarchy. When understood in this light, the phrase "competent court" includes not only a regular court but even an "extraordinary Court" such as the Court Martial (*per* De Sampayo, AJ. in *Re Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334 at page 339).

It is in my opinion, unimaginable that a person who has been convicted or found guilty of any of the offences contemplated by Article 89(e) to Article 89(j) or who currently serves, or has within seven years immediately preceding served, a sentence imposed by any court in circumstances contemplated by Article 89(d), including those on death row, should be free to participate with honorable members of Parliament in the affairs of State. It is both irrational and illogical to

distinguish between a person merely serving a sentence of imprisonment exceeding six months, and a person who is awaiting the execution of a death sentence. I am therefore of the opinion that the words "any court" in Article 89(d) should be construed in a manner so as to include all courts which are created and established or otherwise recognized by the Constitution as being competent to impose the punishments envisaged by that Article, including a Court Martial.

For all these reasons, I agree with the conclusion reached by My Lord the Chief Justice that the words "any court" used in Article 89(d) of the Constitution include a Court Martial.

JUDGE OF THE SUPREME COURT