

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

In the matter of an application under and in terms of Articles 120 & 121 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the Bill titled “**Judicature (Amendment), a Bill to amend the Judicature Act. No. 2 of 1978**”.

**S.C.S.D.No. 07/2018** Petitioner

Udaya Rohan de Silva PC  
President,  
Bar Association of Sri Lanka  
153, Mihindu Mawatha  
Colombo 12.

Counsel

Romesh de Silva, PC with Sudath Kaldera,  
Niran Anketell, Manjuka Fernandopulle &  
Harith de Mel instructed by Athula de  
Silva.

Intervient Petitioner

Ajith Pathmakantha Perera  
169/A/2, School Lane  
Bandaragama.

Counsel

J.C. Weliamuna, PC with Viran Korea, Sarita  
De Fonseka , Suren Fernando, Pulasthi  
Hewamanna, Senura Abeywardana, Ms.  
Khyati Wickremanayake, Ms. Subashini  
Samararachchi, Ms. Chathuri Wickremasinghe  
and Ms. Thilini Vidanagamage

Intervient Petitioner

Prof. Sarath Wijesuriya  
461/A, N.E. Perera Mawatha  
Mulleriyawa.

Counsel

Saliya Peiris, PC, with Thanuka Nandasiri,  
Anjana Ratnasiri and Danushka Rahubadda  
Instructed by S. Kaluarachchi

Intervient Petitioner	Harsha de Silva, MP No. 30/90T Malalasekera Mawatha Colombo 07
Counsel	Suren Fernando with Senura Abeywardana, Ms. Khyati Wickremanayake, Nabeela Raja and Shiloma David.
Intervient Petitioner	Mr. Jagath Hemachandra 1003,1/1, Sri Jayawardanapura Mawatha Rajagiriya
Counsel	Jayampathi Wickremarathne, PC with Ms. Pubudini Wickremarathne and Sandun Yapa Karunaratne.
Intervient Petitioner	Dr. Gamini Viyangoda 883/9, Floor Road, Ethul Kotte.
Counsel	M.A. Sumanthiran , PC with Pulasthi Hewamanne
Intervient Petitioner	K.W. Janaranjana 71/2, Jaya Mawatha, Mampe, Piliyandala
Counsel	Pulasthi Hewamanne with Ms. Thilini Vidanagamage
Intervient Petitioner	D.M.D. Abeyrathne 818, Yakkaduwa Ja-ela.
Counsel	Pulasthi Hewamanne with Ms. Thilini Vidanagamage



Intervient Petitioner      Aruna Laksiri Unawatuna  
No. 9, Padukka Road  
Handapangoda. appears in person

Intervient Petitioner      Nagananda Kodithuwakku  
No. 99, Subadrarama Road  
Nugegoda appears in person.

**S.C.S.D.No. 08/2018**      Petitioner

Professor G.L. Pieris  
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Colombo 05

Counsel      Gamini Marapana, PC with Navin  
Marapana.

Intervient Petitioner      Ajith P. Perera  
169/A/2, School Lane  
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Counsel      Viran Korea, Sarita De Fonseka , Ms.  
Subashini Samararachchi,

Intervient Petitioner      Hon. Patali Champika Ranawaka  
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Colombo 07.

Counsel      Mr. Panditharatne

Intervient Petitioner      Karunaratna Paravithana  
1/1141, Dharmodaya Mawatha  
Battaramulla

Counsel      J.C. Weliamuna, PC with Senura  
Abeywardana, Ms. Khyati Wickremanayake,  
Ms. Chathuri Wickremasinghe



**S.C.S.D.No. 09/2018** Petitioner

Mallika Arachchige Channa Sudath  
Jayasumana  
No. 21/1A, Upananada Road  
Attidia

Counsel

Sanjeewa Jayawarden, PC with Charitha  
Rupasinghe.

Intervenant Petitioner

Saman Rathnapriya  
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Colombo 10.

Counsel

Geoffrey Alagaratnam, PC with Luwie  
Ganeshathasan and T. Vidanagamage  
instructed by S. Kaluarachchi

**S.C.S.D.No. 10/2018** Petitioner

Dinesh Gunawardana  
Member of Parliament  
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Colombo 05.

Counsel

Manohara de Silva, PC with Canishka  
Witharana and Boopathy Kahathuduwa

**S.C.S.D.No. 11/2018** Petitioner

Kalyananda Tiranagama  
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Kalyananda Tiranagama appears in person

**S.C.S.D.No. 12/2018** Petitioner

Janitha Abewickrema Liyanage  
21/1, Nagahawatta Road  
Dalugama, Kelaniya

Counsel

Kushan D'Alwis, PC with Kaushalya  
Molligoda and Chamath Fernando.



Intervenant Petitioner      Eran Wickremaratne  
16/9, Avarihena Road  
Colombo 05.

Counsel      Shantha Jayawardena with Nirranjan  
Arulpragasam, Chamara  
Nanayakkarawasam and Hiranya  
Damunupola instructed by S. Kaluarachchi.

**S.C.S.D.No. 13/2018**      Petitioner      Walawe Durage Raja Dharmasiri  
Gunarathne  
150/5, Highlevel Road  
Maharagama

Counsel      Shavindra Fernando, PC

Vs.

Respondent      Hon. Attorney General  
Attorney General's Dept.  
Colombo 12.

Counsel      Yasantha Kodagoda, PC SASG with  
Priyantha Nawana, PC, ASG, Nerin Pulle,  
DSG, Ms. Yuresha de Silva, SSC.

Before:      Priyasath Dep, PC, Chief Justice  
B.P.Aluvihare, PC. J  
Nalin Perera, J

Court assembled for hearing on 16.03.2018, 19.03.2018, 20.03.2018 and 22.03.2018 at 10.30 am.



#### Determination:

A Bill in its short title referred to as “ Judicature (Amendment) Act No. of 2018. was published in the Government Gazette dated 02.02,2018 and placed on the order paper of the Parliament on 06.02.2018.

Seven Petitions numbered above were filed by citizens and associations invoking the jurisdiction of the Supreme Court in terms of Article 120 and 121 to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution.

Upon receipt of the Petitions the Court issued notice on the Attorney General as required by Article 134 (1) of the Constitution.

The Counsel representing the Petitioners, the Intervient Petitioners and the Attorney General were heard before this bench at the sittings held on 16<sup>th</sup>, 19. 20<sup>th</sup> and 22 of February 2018.

The Act cited as the Judicature (Amendment) Act No. of 2018 propose to amend the Judicature Act, No.2 of 1978(hereinafter referred to as the “principal enactment”) by the insertion immediately after section 12 thereof, of the following new sections which shall have effect as sections , 12A. 12B and 12C of that enactment.

#### Statement of Legal Effect

The statement of legal effect gives the scope and objects of the Act.

Clause 2: This clause amends the Judicature Act No. 2 of 1978 ( “principal enactment”) by the insertion immediately after section 12, of the new sections, 12A. 12B and 12C and the legal effect of the new sections is to-

- (a) Make provisions for the Permanent High Court at Bar to try, hear and determine the trials of the offences specified in the Sixth Schedule to the principal enactment and any other offence committed in the course of the same transaction of any such offence;
- (b) Specify the composition of the Permanent High Court at Bar
- (c) Enable the Minister to specify the location or locations of the Permanent High Court At Bar;
- (d) Enable the Attorney General and the Director General for the Prevention of Bribery and Corruption to institute criminal proceedings in the Permanent High Court at Bar.
- (e) Make certain other provisions which shall apply for the trials of the Permanent High Court at Bar.



(f) Make provisions for an appeal from the Permanent High Court at Bar to be heard by a Bench of not less than five judges of the Supreme Court; and

(g) Make provisions for the construction of other written law, in consistent with the provisions of this amendment.

Clause 3: This clause amends section 63 of the principal enactment by the insertion of the definition of the expression "Director General for the Prevention of Bribery and Corruption".

Clause 4: This clause amends the principal enactment by the addition of the Sixth Schedule immediately after the Fifth Schedule of that enactment.

The Petitioners challenged that the Bill is inconsistent with the provisions of Articles 10, 12, 13 and 14 of the Constitution, the doctrine of separation of powers as enshrined in Article 3 read with Article 4 of the Constitution and for that reason bill cannot become law unless passed by the special majority of two thirds of the whole number of Members of Parliament (including those not present) and being approved by the people at a Referendum, as provided for under Article 83 of the Constitution, in as much as inter alia:-

The Petitioners challenged the constitutionality of the bill on following grounds:

There is no provision in the Bill for the establishment of a Permanent High Court at Bar. Therefore in law there is no Court called and known as Permanent High Court at Bar, and thus this Bill cannot be enacted.

The proposed new sections 12A(1), (3) (clauses 2 and 4), confer jurisdiction on the Permanent High Courts at Bar to try several categories of offences referred to in the Sixth Schedules committed by any person [wholly or partly in Sri Lanka or by a citizen of Sri Lanka elsewhere] which are not mandatorily triable by the High Courts at Ba.;

The said Bill confers on the Attorney-General and the Director General for the Prevention of Bribery and Corruption, the sole discretion of selectively forwarding indictment, to the Permanent High Court at Bar in respect of offences amongst the categories of offences set out in the Sixth Schedule, taking into consideration certain criteria specified in the proposed new section 12A(7) and (8)(a).

As the law stands now under section 450 of the Code of Procedure Act 15 of 1979 the discretion is vested with the Chief Justice who may owing to the nature of the offence or the circumstances, direct that the trial of any person for an offence be held by three Judges without a Jury. The proposed amendment to the Judicature Act confers on officers who constitute part of the Executive, a discretion which was hitherto vested exclusively with



the Chief Justice thereby eroding and undermining the doctrine of separation of powers as enshrined in Article 3 read with Article 4 of the Constitution.

As the discretion will be conferred on the prosecutors, the Accused will be deprived of his right to a fair trial as enshrined in Article 13(3) of the constitution;

The discretion to be exercised based on criteria which is set out in 12 A (7) are arbitrary and discriminatory. 12A (7) empowers the Attorney General or the Director General for the Prevention of Bribery and Corruption, as the case may be, to forward indictments having taken into consideration (a) the nature and circumstances (b) the gravity, (c) the complexity, and the impact on the victim on the state. When the discretion is conferred on prosecuting agencies the power could be used arbitrarily and proceedings could be instituted against selected persons in the Permanent High Court at Bar, thus discriminating between persons accused of such offences.

The power hitherto granted to the Commission to Investigate Allegations of Bribery or Corruption by Act No. 19 of 1994, upon being satisfied that an offence is disclosed, to direct, the Director General, to institute proceedings including in the High Court by indictment is now directly conferred on the Director General thereby transferring a power from the said Commission which is recognized by Article 156A, of the Constitution, to a mere Public officer, the Director General of the Commission.

Section 12 (8) (c) of the amending bill which states unless exceptional circumstances require which shall be recorded, be heard from day to day, to ensure the expeditious disposal. The inability of a particular Attorney-at-Law to appear before the Permanent High Court at Bar on a particular day for any reason including engagement to appear on that date in any other court or tribunal, shall not be a ground for postponing the date of commencement of the trial or be regarded as an exceptional circumstance which requires the postponement of the trial which violates an accused right to a fair trial under article 13 (3) and the right of an attorney at law to engage in the profession which violates Article 14 1 (g) of the Constitution.

The said Bill provides for the expeditious conclusion of trials before the High Court at Bar in respect of offences specified in the Sixth Schedule. This schedule does not include more serious offences such as murder which attract capital punishment and Rape, trafficking in drugs etc. Therefore the bill is discriminatory, arbitrary, capricious and violative of Article 12 of the Constitution..

This Bill confers on the Minister, a member of the Executive, the sole authority to specify by order published in the Gazette the location or locations of Permanent High Court at Bar



and to increase (and in effect to determine) the number of such courts of the Permanent High Court at Bar after consulting the Chief Justice. Thus conferring powers to the Minister that belong to the Judiciary, erodes and undermines the doctrine of separation of powers as enshrined in Article 3 read with Article 4 of the Constitution.

These are the main issues raised by the Petitioners.

The main question that has to be determined is whether the Bill creates or establishes a Permanent High Court at Bar or makes provision for a division or Bench in the existing High Court. A new High Court at Bar could be established under Article 105 or 154 P of the Constitution. It is pertinent to trace the legislative history of the High Court.

#### Legislative History of the High Courts

The Supreme Court of Ceylon under section 19 (a) of the Courts Ordinance of 1889 exercised 'original criminal jurisdiction for the inquiry into all crimes and offences committed throughout Ceylon, and for the hearing, trying and determining all prosecutions and charges which shall be commenced, and all indictments and informations, which shall be presented therein against any person for or in respect of any such crimes or offences, or alleged crimes or offences'.

Under section 3 of the Courts Ordinance the courts for administration of justice were:

- (a) The Supreme Court
- (b) District Courts
- (c) Courts of Request
- (d) Magistrates' Courts

The Administration of Justice Law No.44 of 1973 repealed the Courts Ordinance and established a High Court and the original criminal jurisdiction hitherto exercised by the Supreme Court was vested in the High Court. Thus the High Court became the highest Court of original criminal jurisdiction. The Magistrates' Court continued to be a subordinate Court exercising criminal jurisdiction. The Supreme Court continued to exercise appellate jurisdiction in respect of civil and criminal matters.

1978 Constitution by Article 105 recognized the establishment of High Courts which is known as High Courts of the Republic of Sri Lanka. 105(1) reads as follows :

105. (1) Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the people shall be: -

- (a) the Supreme Court of the Republic of Sri Lanka,



- (b) the Court of Appeal of the Republic of Sri Lanka,
- (c) the High Court of the Republic of Sri Lanka and such other Courts of First instance, tribunals or such institutions as Parliament may from time to time ordain and establish.

This situation existed till the 13<sup>th</sup> Amendment which was enacted and certified on 14<sup>th</sup> November 1983. Under Article 154P(1) Provincial High Courts were established. Article 154 reads thus:

154P. (1) There shall be a High Court for each Province with effect from the date on which this Chapter comes into force. Each such High Court shall be designated as the High Court of the relevant Province.

(2) The Chief Justice shall nominate, from among judges of the High Court of Sri Lanka, such number of judges as may be necessary to each such High Court. Every such judge shall be transferable by the Chief Justice.

(3) Every such High Court shall:-

- (a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;
- (b) notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts Primary Courts within the Province;
- (c) exercise such other jurisdiction and powers as Parliament may, by law, provide.

After the 13<sup>th</sup> Amendment there came to exist two High Courts.. One is High Court of the Republic of Sri Lanka and the other is High Court of Provinces. The original criminal jurisdiction based on territorial jurisdiction is now exercised by the Provincial High Courts. High Court of Provinces (Special Provisions) Act No 19 of 1990 was enacted to make provisions regarding the procedure to be followed and the right to appeal to, and from the High Courts established under Article 154(P) of the Constitution.

High Court of the Provinces (Special Provisions) Act No. 10 of 1996 conferred jurisdiction on the Provincial High Courts to exercise civil jurisdiction in respect of actions, applications, proceedings specified on the 1<sup>st</sup> schedule to the Act and in respect of commercial matters where monetary value exceeds 1 million (subsequently it was increased to 5 million.).

High Court of the Provinces(Special Provisions )Amendment Act No. 54 of 2006 amended section 5 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 by introducing section 5A, 5B to hear Appeals from the District Courts and Family Courts and by 5C to appeal to the Supreme Court from the decision of the High Court.



Under Section 5B High Court of Provinces referred to in 5A shall be ordinary exercised at all times by not less than two judges of that court sitting together at High Court.

Act No 10 of 1996 and Act No.54 of 2006 conferred additional jurisdiction on the High Court of Provinces under Article 154 P (3) ( C ) but did not create or establish new Courts.

Under Article 154P (3) (a) the original criminal jurisdiction in respect of the offences committed within the Province is vested with the High Court of Provinces. The territorial jurisdiction exercised by the High Court of Sri Lanka is transferred to the High Court of Provinces by a constitutional amendment. The High Court of Sri Lanka exercises jurisdiction in respect of offences committed outside Sri Lanka such as:

- a) Any offence committed by any person on or over the territorial waters of Sri Lanka;
- b) Any offence committed by any person on the high seas where such offences is piracy by the law of nations;
- c) Any offence committed on the high seas on board any ship or upon any aircraft registered in Sri Lanka; or
- d) Any offence committed by any person who is a citizen of Sri Lanka on the high seas or upon any aircraft.

These offences are committed outside the territory of Sri Lanka and therefore does not fall within a Province. Some offences are extra territorial in nature, some are based on nationality of the accused and other attracts on universal jurisdiction. The High Court of Sri Lanka also exercises jurisdictions such as admiralty, extraditions etc.

Section 12A (1) of the Bill refers to a Permanent High Court at Bar. The section read thus: 'Notwithstanding anything to the contrary in this Act or any other written law, the Permanent High Court at Bar shall hear, try and determine in the manner provided for by written law, subject to the provisions of subsection (7), all prosecutions on indictment against any person, in respect of offences specified in the Sixth Schedule to this Act, and any other offence committed in the course of the same transaction of any such offence.

(2) Such Permanent High Court at Bar shall consist of three judges sitting together, nominated by the Judicial Service Commission from among the judges of the High Court of the Republic of Sri Lanka of which one Judge shall be nominated by the Judicial Service Commission as the Chairman of such Court'

This amending section is not clear as to whether it establishes a separate High Court or a separate division of the High Court of Sri Lanka, established under Article 105 of the Constitution. If the High Court is established under Article 105 of the Constitution the nomination of judges to the High Court are made by the Judicial Service Commission under Article 111[1] of the Constitution. However, the offences in the 6<sup>th</sup> schedule are offences committed within the jurisdiction of a Province and in view of Article 154(P) (3)(1) these cases are to be tried before



the High Court of the Province. If that jurisdiction is to be conferred on the High Court of Sri Lanka it is inconsistent with article 154P (3) (a) of the Constitution and an amendment is required to be made to the Constitution to give effect to the section 12(a) and (b) of the Bill. This requires the Bill to be passed by a two third majority. However, if a jurisdiction is conferred on the High Court of Provinces under article 154(P)(3)(c) like in Act No. 10 of 1996 and Act No. 54 of 2006 this inconsistency could be removed.

Under 154(P) (2) the Chief Justice shall nominate, from among judges of the High Court of Sri Lanka, such number of judges as may be necessary to each such High Court. Every such judge shall be transferable by the Chief Justice.

As proposed in the amending Act if the Judicial Service Commission is required to nominate judges to the Permanent High Court at Bar it requires a two third majority. If the article 154 (P) (2) remain as it is this inconsistency will not arise.

This section enables the Permanent High Court at Bar to hear, try and determine in the manner provided for by written law, subject to the provisions of subsection (7), all prosecutions on indictment against any person, in respect of offences specified in the Sixth Schedule to this Act, and any other offence committed in the course of the same transaction of any such offence.

This section enables the prosecution to institute action in respect of offences such as theft, misappropriation, criminal breach of trust, receiving stolen property, cheating, forgery and offences which could be ordinarily tried in the Magistrate's Court. The purpose of the establishment of Permanent High Court is to expeditiously dispose of cases referred to in the Schedule. This will be discriminatory of the victims and aggrieved parties who are seeking justice and accused facing serious charges awaiting trial not included in the Schedule. Learned Additional Solicitor General submitted that the purpose of the Amendment is to expeditiously dispose serious cases of economic and financial crimes as the delay in disposing such cases adversely affect the national economy and the investors confidence in the administration of Justice machinery. To justify this amendment the Learned Additional Solicitor General agreed to make reference in the text that the object of the amendment is to try serious cases of economic and financial crimes. However, the schedule should restrict to serious offences relating to economic crimes, thereby eliminating the possibility of discrimination.

The criteria to select offences in respect of which criminal proceedings that are to be instituted in the Permanent High Court at Bar is given in section 12A (7) of the amending Bill which reads thus

- (7) The Attorney General or the Director General for the Prevention of Bribery and Corruption, as the case, may be, shall, taking into consideration –
- (a) the nature and circumstances;
  - (b) the gravity;
  - (c) the complexity;
  - (d) the impact on the victim; or
  - (e) the impact on the state,



of the offence, referred to in subsection(1), in the interest of justice and the public and national interest, institute criminal proceedings in the Permanent High Court at Bar.

The learned Counsel for the Petitioners submitted that by giving the discretion to the Attorney General and Director General of Bribery and Corruption there is a possibility of the discretion not being properly exercised and exercised in a discriminatory manner. Under section 450 of the Criminal Procedure Code the discretion to decide whether a trial at Bar should be held or not is exercised by the Chief Justice. This will eliminate the risk of the arbitrary use of the discretion. The amending section 12(A) (7) is inconsistent with Article 12(1) of the Constitution. However, if the Chief Justice is given the power to decide whether to hold a trial at Bar or not, this inconsistency could be removed.

The power hitherto granted to the Commission to Investigate Allegations of Bribery or Corruption by Act No. 19 of 1994, to direct, the Director General, to institute proceedings including in the High Court by indictment is now directly conferred on the Director General and the proposed amendment (amending section 12 A) has the effect of transferring a power from the said Commission which is recognized by Article 156A, of the Constitution, to a mere Public officer, namely the Director General of the Commission. It will be prudent to give the power to the Commission to direct the Director General Bribery and Corruption to institute action.

It is to be noted that in Act No 10 of 1996, the commercial disputes over five million and an action filed under Acts specified in the schedule could be filed without any distinction subject to section 9 of the Civil Procedure Code dealing with jurisdiction. In terms of the provisions of Act No 54 of 2006 all civil appeals from the District Court are heard by two Judges of the High Court.

In the draft bill the prosecution has a discretion to select cases and file indictment in the Permanent High Court at Bar. The danger is that there is a possibility of wrongly exercising of the discretion although it may not happen. Therefore like in Section 450 of the Criminal Procedure Code Chief Justice should be given the power to decide whether a trial at bar should be held or not. This will remove the inconsistency in the Bill.

The Petitioners impugn clause 12A (8) (c) of the proposed bill on three grounds; **the clause erodes the Judge's discretion to allow a postponement, it violates an accused's right to retain a counsel of his choice under Article 13 (3) and it violates the Attorney at Law's right under Article 14 (g).**

In this regard, it must first be noted that clause 12A (8) (c) in no way violates Article 14 (g) of the Constitution

Clause 12A (8) (c) was challenged on the premise that the clause only takes cognizance of exceptional circumstances when allowing a postponement and this violates the accused's right to a fair trial under Article 13 (3) of the Constitution.



Whereas Section 450 (5) (b) of the Code of Criminal Procedure Act no 15 of 1979, by express language has ruled out a wide range of grounds for postponement *including* personal grounds, clause 12A (8) (c) of the bill is limited to exceptional circumstances and engagement to appear in any other court /tribunal.

The relevant provision in the Code of Criminal Procedure Act reads as follows:

*Section 263 (as amended by Act No. 14 of 2005:*

*“(1) If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the court may from time to time order a postponement or adjournment on such terms as it thinks fit for such time as it considers reasonable and may remand the accused if in custody or may commit him to custody or take bail in his own recognizance or with sureties for his appearance:*

*Provided however that every trial in the High Court, with a jury or without a jury, shall as far as practicable, be held day to day.”*

Although we are of the opinion that Clause 12A (8) (c) is not inconsistent with the Constitution, we are, however, of the view that the language should be imbued with sufficient laxity to allow the Judge to use his discretion when deciding what amounts to ‘exceptional circumstances’ under clause 12A (8) (c).

Clause 12A (6) (b) of the Bill is identical to paragraph (f) of Section 450 (5) of the Code of Criminal Procedure Act No 15 of 1979. The Clause stipulates that it shall not be necessary for any evidence taken prior to such nomination to be retaken and the Permanent High Court at Bar shall be entitled to continue the trial from the stage at which it was immediately prior to such nomination.

It is to be noted that this clause takes away the right given to an accused under section 48 of the Judicature Act to have a witness resummoned and reheard.

Given the permanent character of the trial at bar that is proposed to be established, taking away the right given to an accused to have a witness resummoned and reheard cannot be justified. Thus it is recommended that Clause 12 (6) (b) of the Bill be made operational subject to the proviso to section 48 of the Judicature Act.



### **Institution of prosecutions under the existing Law**

Criminal Procedure Code Act No. 15 of 1979 lays down the procedure in respect of institution of proceedings and the jurisdiction of the High Court and the Magistrate Court. Powers of criminal courts are laid down in section 10 of the Code of Criminal Procedure Act which states:

“subject to the other provisions of this Code any offence under the Penal Code whether committed before or after the appointed date may be tried save and otherwise specially provided for in any law:-

- a) by the High Court; or
- b) by the Magistrate's Court where that offence is shown in the eighth column of the first schedule to be triable by a Magistrate's Court.

The Magistrate's Court has jurisdiction to try offences such as misappropriation, criminal breach of trust, cheating, robbery, and several other serious offences. However, the sentencing power is restricted to two year term of imprisonment. The High Court, in addition to offences which are exclusively triable by the High Court, has jurisdiction to try any offence triable by the Magistrate's Court under the Penal Code and has the power and impose any sentence or other penalty prescribed by written law. The Attorney General has the discretion to forward indictments to the High Court in offences of serious nature which are triable by the Magistrate's Court and where no adequate sentence could be imposed by the Magistrate that commensurate with the gravity of the offence due to the limitation in the sentencing powers.

Under section 450 of the Code of Criminal Procedure Act where the Chief Justice is of the opinion that owing to the nature of the offence or the circumstances of and relating to the commission of the offence, in the interests of justice, a trial at Bar should be held, the Chief Justice may by order under his hand direct that the trial of any person for that offence shall be held before the High Court at Bar by three judges without a jury.

Therefore, in an appropriate case the Attorney-General can request the Chief Justice to order a Trial at Bar. Therefore several options are available to the prosecution to institute actions. The Parliament having considered the delay in the justice delivery system had amended the Judicature Act and had increased the number of High Court judges from 75 to 110. Once the additional Court houses are constructed and High Court judges are appointed, delays could be minimized.

The purpose of this amending Bill is to expeditiously dispose of cases involving economic and financial crimes as there is a severe delay in disposing cases. As there is a need to expeditiously try grave and complex cases of economic and financial crimes which have an impact on victims and state, it may be necessary that such cases to be tried by a Trial at Bar. However the discretion conferred on the prosecuting authority might lead to abuse of the process.

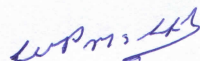


We determine that section 12A (1) of the Bill is inconsistent with the article 154P (3) (a) of the Constitution and an amendment is required to be made to the Constitution to give effect to the section 12 A (1) of the Bill. This requires the Bill to be passed by a two- third majority. However, if the jurisdiction is conferred on the High Court of Provinces under article 154(P)(3)(c) like in Act No. 10 of 1996 and Act No. 54 of 2006 this amending section will cease to be inconsistent.

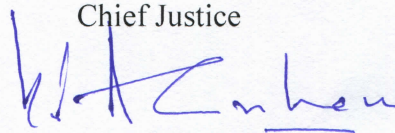
The amending section 12A (2) of the Bill requires the Judicial Service Commission to nominate judges to the Permanent High Court at Bar. This is inconsistent with the article 154 (P) 2 of the Constitution and an amendment is required to be made to the Constitution to give effect to the section 12A(2)) of the Bill which requires a two- third majority. However, if 12A (2) of the Bill is removed and Article 154P (2) remains as it is this inconsistency will cease.

The amending section 12(A) (7) is inconsistent with Article 12(1) of the Constitution. However, if the Chief Justice is given the power to decide whether to hold a trial at Bar or not this amending section will cease to be inconsistent.

We wish to place on record our deep appreciation of the assistance given by the Hon. Attorney General, Learned President's Counsel and Learned Counsel who appeared for the Petitioners and the Learned President Counsel who appeared for the Intervient Petitioners and made submissions in this matter.



Priyasath Dep  
Chief Justice



B.P. Aluwihare,  
Judge of the Supreme Court



H.N.J. Perera  
Judge of the Supreme Court