DECISIONS
OF
THE SUPREME COURT
ON
PARLIAMENTARY BILLS

2014 - 2015

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DECISIONS OF THE SUPREME COURT OF THE REPUBLIC OF SRI LANKA UNDER ARTICLES 120, 121 AND 122 OF THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA FOR THE YEARS 2014 AND 2015

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D I G E S T

to provide for the setting out of rights and entitlements of victims of crime and witnesses and the protection and promotion of such rights and entitlements; to give effect to appropriate international norms, standards and best practices relating to the protection of victims of crime and witnesses; the establishment of the national authority for the protection of victims of crime and witnesses; constitution of a board of management; the victims of crime and witnesses assistance and protection division of the Sri Lanka Police Department; payment of compensation to victims of crime; establishment of the victims of crime and witnesses assistance and protection fund and for matters connected therewith or incidental thereto.

- *referred to the Supreme Court under Article 121 (1).*

- determined that provisions of the Bill are not inconsistent with the Constitution.

S.C. (SD) No. 01/2014 to S.C. (SD) No. 06/2014

"ASSISTANCE TO AND PROTECTION OF VICTIMS OF CRIME AND WITNESSES BILL"

BEFORE :

K. Sripavan	-	Judge of the Supreme Court
S. E. Wanasundera, P.C	-	Judge of the Supreme Court
Sarath De Abrew	-	Judge of the Supreme Court

S.C. (SD) No. 01/2014

Petitioner : Hikkadukoralage Don Chandrasoma

Counsel : Gomin Dayasiri with Jayantha Gunasekera, Manoli Jinadasa and Sulakshana Senanayake for the Petitioner

: Yasantha Kodagoda Deputy Solicitor General with Dr. Avanti Perera Senior State Counsel for the Attorney - General

S.C. (SD) No. 02/2014

Petitioner : Shamali Dayasri

Counsel : Gomin Dayasiri with Jayantha Gunasekera, Manoli Jinadasa and Sulakshana Senanayake for the Petitioner

: Yasantha Kodagoda Deputy Solicitor General with Dr. Avanti Perera Senior State Counsel for the Attorney - General

S.C. (SD) No. 03/2014

Petitioner : Gallage Punnawardana

Counsel : Canishka Witharana with Tushara Palliyage for the Petitioner

: Yasantha Kodagoda Deputy Solicitor General with Dr. Avanti Perera Senior State Counsel for the Attorney - General

S.C. (SD) No. 04/2014

Petitioner : Kapila Gamage

Counsel : J. P. Gamage with Canishka Witharana and Sumudhu Liyanarachchi for the Petitioner

Respondent : Hon. Attorney - General

: Yasantha Kodagoda Deputy Solicitor General with Dr. Avanti Perera Senior State Counsel for the Attorney - General

S.C. (SD) No. 05/2014

Petitioner	:	Nanayakkaravasam Carijjawatthage Vijitha
Counsel	:	Gomin Dayasiri with Jayantha Gunasekara, Manoli Jinadasa and Sulakshana Senanayake for the Petitioner
	:	Yasantha Kodagoda Deputy Solicitor General with Dr. Avanti Perera Senior State Counsel for the Attorney - General

S.C. (SD) No. 06/2014

Petitioner	:	Herath Disanayakege Jayantha Kulathunga
Counsel	:	Manohara de Silva, P. C. with Irosha Munasinghe and Palitha Gamage
Respondent	:	Hon. Attorney - General
	:	Yasantha Kodagoda Deputy Solicitor General with Dr. Avanti Perera Senior State Counsel for the Attorney - General

A Bill bearing the title " Assistance to and Protection of Victims of Crime and Witnesses" was published on the *Gazette* of the Republic of Sri Lanka on 08th August 2014 and placed on the Order Paper of Parliament on 10th September 2014. Six Petitions were filed challenging the constitutionality of this Bill by invoking the jurisdiction of this Court in terms of Article 121(1) of the Constitution.

Due notices were given to the Hon. Attorney General in respect of all six Petitions and was heard in terms of Article 134 (1) of the Constitution on 17th September 2014. The long title to the said Bill provides for the setting out of Rights and Entitlements of Victims of Crime and Witnesses and the Protection and Promotion of such Right and Entitlements to give effect to appropriate International Norms, Standards and best practices relating to the Protection of Victims of Crime and Witnesses; the Establishment of the National Authority for the Protection of Victims of Crime and Witnesses; Constitution of a Board of Management, the Victims of Crime and Witnesses Assistance and Protection Division of the Sri Lanka Police Department; Payment of Compensation to Victims of Crime and for the establishment of a Fund known as "Victims of Crime and Witnesses Assistance and Protection Fund".

Learned Counsel for the Petitioner contended that the provision contained in Clause 3 (a) which provides that a victim be treated with equality and fairness with regard to "his dignity and privacy" is inconsistent with Article 12(1) of the Constitution. Article 12 (1) portulates that there shall be equal treatment in equal circumstances and there shall not be any discrimination among victims based on their dignity and privacy. Learned Deputy Solicitor General agreed to omit the word "his" in the said Clause and reword the said Clause to avoid any discrimination amongst victims. In a similar manner, Learned Deputy Solicitor General agreed to omit the word "his" appearing in Clause 5.

Clause 3 (c) of the Bill is silent as to the person who would prescribe the procedure referred to therein. One does not know whether the procedure will be prescribed by the Authority or by the Minister. This uncertainty leads to the violation of Article 12 (1) of the

Constitution. When considering the exercise of statutory power certain fundamental principles can never be overlooked. The first is that our Constitution and System of Courts are founded on the rule of law; secondly statutory power conferred for public purposes is conferred as if it were upon trust and not absolutely.

It is noted that the words "relevant authorities" referred to in Clause 3(f) has to be defined in order to avoid any vagueness. Failure to do so will permit various authorities to act in an arbitrary and discriminatory manner. It is a fundamental principle of law that persons or authorities whose functions are statutorily demarcated must be clearly identified. No absolute and unfettered discretions be placed on public functionaries and any such discretions is to be judged by reference to the purposes for which they were so entrusted. The inconsistency with Article 12 (1) could be avoided if a clear and unambiguous definition is given to the words " relevant authorities".

It has been pointed out that the word "Legal Counsel" in Clause 3(h) may lead to an interpretation to mean a "Foreign Counsel" representing a victim in any on-going investigation. Learned Deputy Solicitor General undertook to substitute the word "Attorney-at-Law" in place of the word "Legal Counsel". Further, it was also agreed to reformulate the definitions of "victims of crime" found in Clause 46.

One of the duties and functions of the National Authority of the Protection of Victims of Crime and Witnesses as spelt out in Clause 13 (1)(k) is to take measures to sensitize Public Officers involved on enforcement of law including Officers of the Sri Lanka Police and Public Officers associated with the Probation and Social Services on the needs of Victims of Crime and Witnesses. Clause 13 (1) (I) empowers the National Authority of the Protection of Victims of Crime and Witnesses to promote and ensure the observance and application of codes of conduct, recognized norms and best practices relating to the protection of the right and entitlement of victims of crime and witnesses by Officers of the Sri Lanka Police and Officers of Government Social Services Institutions. (Emphasis added.) Learned Counsel for the Petitioners brought to the notice of Court that Item 7 in List 1 of the 9th Schedule to the Constitution provides the following matter as a subject coming under the Provincial Coucils List:

Social Services and Rehabilitation

7.1 Probation and Child Care Services;

The Court has to consider whether "Probation and Social Services" in its entirety has been devolved on the Provincial Councils. What has been devolved with regard to "Social Services" is Probation and Child Care and not Probation on the needs of victims of crime and witnesses. Thus, we are unable to hold that probation on the special needs of victims of crime and witnesses, is a devolved subject.

Item 1 in the 9th Schedule to the Constitution, provides for Police and Public Order and the exercise of Police Powers to the extent set out in Appendix I within the Province. In terms of Clause 2:2 of Appendix 1, a Provincial Division shall consist of the Deputy Inspector General of Police, Senior Superintendents of Police, Assistant Superintendents of Police, seconded from the National Division and Provincial Assistant Superintendents of Police, Chief Inspectors, Inspectors, Sub Inspectors, Sergents and Constables recruited in the Province.

It would thus be seen, in terms of Clause 13 (1) (k) and 13 (1) (I), the National Authority for the Protection of Crime and Witnesses may exercise certain amount of control over these Officers of the Sri Lanka Police in the Province. It was argued that "Police and Public Order" being a devolved subject within a province to the extent set out in Appendix I, the consultation process referred to in Article 154 (G) (3) needs to be complied with. Sensitizing the Police Officers involved in the enforcement of law with regard to the needs of victims of crime and witnesses is not a devloved subject. As such, we are of the view that Article 154 (G) (3) need not be complied with.

Clause 28 (1) (a) (ii) permits every High Court and every Magistrate Court to impose a fine on a convicted person subject to a limitation refereed to therein. Item 36:8 in List 1 of the Ninth Schedule provides that "fine imposed by Courts" to be a subject of the Provincial Councils. By virtue of such devolution, every Provincial Council may make statutes applicable to the Province for which it is established in respect of "fines imposed by Courts". Thus, this Bill cannot in terms of Clause 29 (3) (c) create a fund to collect such fines unless the Bill is referred by the President, after its publication in the *Gazette* and before it is placed on the Order Paper of Parliament, to every Provincial Council for its views thereon as provided in Article 154 (G) (3) of the Constitution. Thus, Clause 29 (3) (c) should be deleted in order to ensure that the "Protection Fund" does not get any monies from "Court fines".

In the course of the argument, Learned Deputy Solicitor General submitted that an earlier version of the Bill (S. C. Determination No. 1/2008) sought to be enacted in 2008 not only received the scrutiny of this Court but was determined to be not inconsistent with the Constitution. It is observed that Court having considered the provisions contained in S. C. Determination No. 1/2008 which was referred to the Supreme Court by His Excellency the President in terms of Article 122 (1) (b) suggested certain amendments, inclusions, modifications and alterations. However, we do not know whether the suggestions were incorporated in the Bill and the Court had no opportunity of considering the same. The constitutional provisions are to be understood and interpreted with an object-oriented approach considering the democratic spirit underlying it. Hence, we do not express any opinion on those matters.

The provisions in the Bill along with the suggested amendments, if incorporated into the Bill, would be in consonance with the Constitution and would not be offensive of any provisions in the Constitution or the 13th Amendment thereto.

Subject to the above mentioned observations, we make a determination that in terms of Article 123 (1) of the Constitution, neither the Bill nor any provision thereof is inconsistent with the Constitution.

We place on record our deep appreciation of the assistance given by all Learned Counsel for the Petitioners and the Learned Deputy Solicitor General who appeared on behalf of the Hon. Attorney-General.

K. SIRIPAVAN, J.
Judge of The Supreme Court

S. E. WANASUNDERA, P. C. J
Judge of The Supreme Court

SARATH DE ABREW, J.
Judge of The Supreme Court

First Reading:	10.09.2014 (Hansard Vol. 229; No.02; Col. 143-144)
Bill No :	322
Sponser/ Relevant minister:	Minister of Justice
Petitions announced in Parliament:	23.09.2014 (Hansard Vol.229; No.03; Col.201)
Decision of the Supreme Court Announced in Parliament:	09.10.2014 (Hansard Vol.229; No.07; Col.668-676)
Second Reading:	19.02.2015 (Hansard Vol.232; No.10; Col.1081-1168)
Committee of the whole Parliament and Third Reading:	19.02.2015 (Hansard Vol.232; No.10; Col.1168-1174)
Hon. Speaker's Certificate:	07.03.2015
Title:	Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015

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2015

D I G E S T

NINETEENTH AMENDMENT TO THE CONSTITUTION	**04/2015 to 10/2015 14/2015 to 17/2015 & 19/2015**	**26 - 39**

to amend the Constitution of the Democratic Socialist Republic of Sri Lanka.

- referred to the Supreme Court under Article 121 (1).

- determined that

(a) *the Bill complies with the provisions of Article 82 (1) of The Constitution;*

(b) *the Bill requires to be passed by a special majority specified in Article 82 (5) of the Constitution;*

(c) *paragraphs 42 (3), 43 (1), 43 (3), 44 (2), 44 (3) and 44 (5) in Clause 11 and paragraph 104B (5) (c) in Clause 26 require the approval of the People at a Referendum in terms of the provisions of Article 83 of the Constitution.*

PENAL CODE (AMENDMENT)		
- to amend the Penal Code (Chapter 19)	**S.C. S. D. 23/2015, S.C. S. D. 24/2015, S.C. S. D. 25/2015, S.C. S. D. 26/2015, S.C. S. D. 27/2015 & S.C. S. D. 28/2015**	**40 - 41**
CRIMINAL PROCEDURE (AMENDMENT)		
- to amend the Code of Criminal Procedure Act, No. 15 of 1979	**S.C. S. D. 23/2015, S.C. S. D. 24/2015, S.C. S. D. 25/2015, S.C. S. D. 26/2015, S.C. S. D. 27/2015 & S.C. S. D. 28/2015**	**40 - 41**

- *Supreme Court has communicated that the petitioners of the above Bills have informed that they would not proceed with the petitions.*

S.C. Special Determination No. 01/2015

"APPROPRIATION (AMENDMENT) BILL"

BEFORE :	Chandra Ekanayake,	Judge of the Supreme Court
	Sarath De Abrew,	Judge of the Supreme Court
	Priyantha Jayawardena PC,	Judge of the Supreme Court

COUNSEL : Indika Demuni de Silva, Deputy Solicitor-General with
Dr. Avanti Perera, Senior State Counsel and
Suren Gnanaraj, State Counsel for the Attorney-General

The Court assembled for the hearing at 10.00 a.m. on 2nd February, 2015.

A Bill titled " AN ACT TO AMEND THE APPROPRIATION ACT NO. 41 OF 2014 " has been referred to the Chief Justice by His Excellency the President in terms of Article 122 (1) (b) of the Constitution for determination by this Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view, the Bill is urgent in the national interest.

Indika Demuni de Silva, Deputy Solicitor– General with Dr. Avanti Perera, Senior State Counsel and Suren Gnanaraj, State Counsel, appeared on behalf of the Attorney – General and assisted this Court in consideration of the provisions of the Bill.

The Bill seeks to amend Section 2 (1), 2 (1) (b), 2 (2), 2 (4), First, Second and Third Schedules of the said Appropriation Act No.41 of 2014 in order to vary the limits in the following manner;

(i) by the substitution for the words "Rupees Two Thousand One Hundred Sixty Eight Billion Two Hundred Ninety Two Million Seven Hundred Eighteen Thousand", of the words " Rupees One Thousand Nine Hundred Eighty one Billion Two Hundred Ninety Two Million Seven Hundred Eighteen Thousand" in section 2 (1),

(ii) by the substitution for the words " does not exceed Rupees One Thousand Seven Hundred Eighty Billion " of the words "does not exceed Rupees One Thousand Five Hundred Ninety Three Billion" in section 2 (I) (b),

(iii) by the substitution for the words "Rupees Two Thousand One Hundred Sixty Eight Billion Two Hundred Ninety Two Million Seven Hundred Eighteen Thousand" of the word "Rupees One Thousand Nine Hundred Eighty One Billion Two Hundred Ninety Two Million Seven Hundred Eighteen Thousand" in section 2 (2), and

(iv) by the substitution for the words "Rupees One Thousand Two Hundred Thirty Six Billion Seven Hundred Seven Million Two Hundred Eighty Two Thousand" of the words "Rupees One Thousand Two Hundred Thirty Six Billion Seven Hundred Eight Million Four Hundred Fifty Two Thousand" in section 2 (4).

Amendments to the said schedules are consequential to the proposed amendments to the principle enactment. Whilst the proposed amendments to section 2 (1), 2 (1) (b) and 2 (2) reduce the limits, the proposed amendments to section 2 (4) increases the limit, stipulated in the said section. Mrs. Demuni de Silva, submitted that the provisions of the Bill do not violate any of the Articles of the Constitution.

Having considered the provisions of the Articles set out in Chapter 17, and the provisions of Articles 75 and 76 of the Constitution in relation to the proposed Bill we are of the opinion that the amendments sought to be made are within the legislative powers of Parliament, and do not violate any of the provisions of the Constitution.

We accordingly determine that neither the Bill nor any of the provisions thereof are inconsistent with the Constitution.

CHANDRA EKANAYAKE
Judge of the Supreme Court

SARATH DE ABREW
Judge of the Supreme Court

PRIYANTHA JAYAWARDENA, PC
Judge of the Supreme Court

First Reading:	05.02.2015 (Hansard Vol. 232; No.05; Col. 430)
Bill No :	331
Sponsor/ Relevant minister:	Ministry of Finance
Decision of the Supreme Court Announced in Parliament:	05.02.2015 (Hansard Vol.232; No.05; Col.409-410)
Second Reading:	05.02.2015 (Hansard Vol.232; No.05; Col.431-534) 06.02.2015 (Hansard Vol.232; No.06; Col.557-646) 07.02.2015 (Hansard Vol.232; No.07; Col.660-739)
Committee of the whole Parliament and Third Reading:	07.02.2015 (Hansard Vol.232; No.07; Col.739-743)
Hon. Speaker's Certificate:	07.02.2015
Title:	Appropriation (Amendment) Act No. 1of 2015

S.C. (SD) No. 2/2015

"NATIONAL AUTHORITY ON TOBACCO AND ALCOHOL (AMENDMENT) BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Sisira J. de Abrew	-	Judge of the Supreme Court, and
Priyantha Jayawardena, PC	-	Judge of the Supreme Court

COUNSEL :

Janak de Silva, Deputy Solicitor - General, with Anusha Fernando SSC and Suranga Wimalasena SSC for the Attorney-General

Faisz Musthapa PC with Faisza Markar, Manoj Bandara, Lakshana Perera and Mehran Casseem for Ceylon Tobacco Company PLC. Mr. Musthapha was permitted to make submissions in respect of the Bill.

The Court assembled for the hearing at 10.45 a.m. on 6th February, 2015.

A Bill titled: "AN ACT TO AMEND THE NATIONAL AUTHORITY ON TOBACCO AND ALCHOHOL ACT, NO. 27 of 2006" has been referred to the Chief Justice by His Excellency the President in terms of Article 122 (1) (b) of the Constitution for special determination of this Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view, the Bill is urgent in the national interest.

Janak de Silva, Deputy Solicitor-General with Anusha Fernando SSC and Suranga Wimalasena SSC appeared on behalf of the Attorney-General and assisted this Court in the consideration of the provisions of the Bill.

Mr. Faisz Musthapha, P.C. sought to intervene on behalf of Ceylon Tobacco PLC on the basis that Ceylon Tobacco PLC is directly affected by the amendment sought by the Bill. The Court gave a hearing to Mr. Musthapha in terms of Article 134 (3) of the Constitution.

The Bill seeks to amend Section 34 of the National Authority on Tobacco and Alcohol Act, No. 27 of 2006 in order to comply with Article 11 of Frame work Convention on Tobacco Control (FCTC) on the basis of national interest to comply more effectively with the international obligation of Sri Lanka with a view to protect public health.

The proposed amendment seeks to make the following changes to Act No. 27 of 2006.

(a) It repeals Section 34 of the said Act and substitutes a new Section,

(b) A new Section 34A is inserted immediately after Section 34 of the principal enactment.

The amendments made by (a) and (b) above must be read together to understand the changes sought to be made to the said Act. Section 34 (1) of the said Act as it stands now does not specify the size of the pictorial health warning contemplated therein. The size of the pictorial health warning was specified by the Minister of Health by regulations made under Sections 30 read with 34 of the said Act. The two amendments explained above are intended to impose 80% as the size of the pictorial health warning by the main Act itself. The amendment also increases the maximum fine to Rs.50,000 from Rs.2,000.

(c) Section 45 of the principal enactment is amended by adding the definition of "health warnings".

(d) Manufacturers and importers of existing tobacco products are granted a grace period to comply with the provisions of the amendment.

(e) Regulations already made in terms of Section 34 of the principal enactment prior to February 1, 2015 are kept alive in so far as they are not inconsistent with the provisions of the amendment.

At the hearing before Court, Mr. Janak de Silva suggested the following amendments to the Clause 2 of the Bill;

The amended Clause was made available to both the Court and Mr. Musthapha and it was agreed that submissions be restricted to the amended formulation. The re-formulation of Clause 34 as drafted by the Legal Draftsman and submitted to Court is as follows:

Existing Clause 2 of the Bill shall be replaced with the following:-

"34(1) A manufacturer or an importer of a tobacco product shall cause to be displayed conspicuously and in legible print-

(a) on the top surface area of both front and back sides of every packet, package or carton containing the tobacco product manufactured or imported by such manufacturer or importer, such health warnings, as may be prescribed, subject to the provisions of section 34A; and

(b) on every packet, package or carton containing the tobacco product manufactured or imported by such manufacturer or importer, a label or a statement specifying the tar and nicotine content in each tobacco product in such packet, package or carton.

(2) A person shall not sell, offer for sale, supply, distribute or store a packet, package or carton containing tobacco products unless a health warning as provided for in subsection (1) (a) and a label or a statement specifying the tar and nicotine content in each such product as provided for in subsection (1) (b), are displayed conspicuously in legible print on every packet, package or carton containing the tobacco products.

(3) Any person who contravenes the provisions of subsection (1) or subsection (2) commits an offence and upon conviction after summary trial by a Magistrate be liable to an imprisonment of either description for a term not exceeding one year or to a fine not exceeding rupees fifty thousand or to both such fine and imprisonment."

He further submitted that the words "and shall come into operation with effect from February 1st, 2015" in Clause 1 will be deleted as the said date has now passed and the Bill is not intended to be passed with retrospective effect.

Mr. de Silva further submitted that the aforesaid suggested amendments to the Bill can be moved at a Committee stage in Parliament to replace Clauses 1 and 2 of the Bill. He thus argued that effect must be given to Framework Convention on Tobacco Control as Sri Lanka has already signed and ratified the said Treaty.

Mr. de Silva drew the attention of Court to the WHO Framework Convention on Tobacco Control. He drew the attention of Court to Article 2.1 and Article 5.2 of the WHO Framework Convention on Tobacco Control.

"Article 2.1

In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law."

"Article 5.2

Towards this end, each Party shall, in accordance with its capabilities:

(*a*) establish or reinforce and finance a national coordinating mechanism or focal points for tobacco control; and

(*b*) adopt and implement effective legislative, executive, administrative and/ or other measures and cooperate, as appropriate, with other Parties, in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke."

In the determination of S.C. (S.D.) No. 13 - 22/05 (National Authority on Tobacco and Alcohol Bill) it was held that " the Petitioners who are from the alcohol and tobacco industries and trade do not dispute the findings disclosed in these publications that manage from specialized Agencies of the United Nations; their contention is that the health risk of the illicit trade is far worse and the restrictions sought be placed on the lawful trade would aggravate the health risk resulting from the illicit trade. This argument fails to account for the basic premise that the harmful impact of alcohol, tobacco and for that matter drug, whether the source of supply of such substance is lawful or illicit, is a common pattern of use, addiction and dependence. Undoubtedly, the health risk of illicit use is worse. But, the behavioral tendency of use, addiction and dependence being the same, the lawful trade and the illicit trade would have the effect aggravating such behavioral tendency. The user would have recourse to the licensed sources as well as illicit sources when the behavioral trend is set in motion. Hence, from the point of public health, there is a harmful interlink. The likely pattern is that addiction will start from the licensed source and get aggravated in the fold of the illicit trade. The illicit trade is per se contrary to law, punishable under various Statutes and there is no question of regulating an illicit trade. On the contrary the trade that is carried out on the basis of a license or authority of the law, which is found to be harmful to public health should necessarily be subject to restraint in order to minimize the harmful consequences to public health."

Mr. de Silva drew the attention of the Court to an International Status Report - September 2014 (Fourth Edition) published by the Canadian Cancer Society. Page 2 of the said report contains the following details;

"The top countries in terms of warning size as an average of the front and back:

1. 85% Thailand (85% of front, 90% of back)
2. 82.5% Australia (75%, 90%)
3. 80% Uruguay (80%, 80%)
4. 75% Brunei (75%, 75%)
5. 75% Canada (75%, 75%)
6. 75% Nepal (75%, 75%)
7. 65% Togo (65%, 65%)
8. 65% Turkey (65%, 65%)
9. 65% Turkmenistan (65%, 65%)
10. 65% Mauritius (60%, 70%)
11. 65% Mexico (30%, 100%)
12. 65% Venezuela (30%, 100%)

Page 7 of the said report states " Effective package warnings increase awareness of the health effects and reduce tobacco use. As a result of health warnings, consumers receive more information, not less. Consumers are entitled to be fully informed of the many health effects of tobacco products, and the package is the best way to do that. Studies show that consumers, including children, underestimate the health effects, in low, middle and high income countries."

Mr. Musthapha relied on the judgment of the Court of Appeal in C.A. Writ Application No. 336/12 (C.A. Minutes of 12.05.14) and sought to argue that the pictorial health warning covering 80% of the front and back side of a packet was unreasonable and is violation of the vested right to use the trade and enshrined in section 121 (1) of the Code of Intellectual Property Act.

This Court is now exercising its constitutional jurisdiction by virtue of a reference made by His Excellency the President in terms of Article 122(1)(b). The submission of the Learned President's Counsel that the amendments sought to be made would affect the decision of the Court of Appeal in Writ Application No.336/12 is misconceived as this Court is exercising sole and exclusive jurisdiction to determine any question as to whether the Bill or any provision thereof is inconsistent with the Constitution. One of the objects of Act No. 27 of 2006 as stated in the preamble to the said Act is to "identify the policy on protecting public health in order to eliminate harms relating to tobacco and alcohol".

A policy once formulated is not good for ever. The Government has the power to change the policy. The executive power is not limited to frame a particular policy. It has untrammelled power to change, re–change, adjust and readjust the policy taking into account the relevant and germane considerations. It is entirely in the discretion of the Government how a policy should be shaped. It should not however be arbitrary and capricious. As rightly submitted by Mr. Faisz Musthapha "to declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative." Thus, the covering the area of 80% of both front and back sides of every packet, package or cartoon contacting cigarettes and other tobacco products cannot be considered arbitrary and capricious. In this context it may be appropriate to reproduce the observation made by this Court in S.C. (S.D.) No. 13-22/05 (National Authority on Tobacco and Alcohol Bill) which reads thus:-

" In this connection we cite the observations made by Supreme Court of India in the case of Vincent vs. Union of India 1987 All India Reporter - S.C. 1– page 990 at page 995 which reads as follows:

> *" …… maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore, is of high priority - perhaps the one at the top."*

Ceylon Tobacco Company PLC in the Writ Application urged that the regulations formulated under Act, No. 27 of 2006 with regard to pictorial warnings were ultra vires, since the said Act does not empower the Minister to make such regulations. The said argument was rejected by the Court of Appeal. The Court of Appeal in its Judgment held that Section 30 read with Section 34 of the said Act enables the Minister to prescribe pictorial health warnings by way of subordinate legislation. Hence, this Court does not see any violation based on the Judgment of the Court of Appeal.

Mr. Musthapha sought to argue that the change of policy is likely to frustrate the legitimate expectation of Ceylon Tobacco Company PLC and has an important bearing on the protection afforded by Article 12 of the Constitution. Once the Government lays down a policy it has to follow it uniformly. Government cannot resort to such policy in certain cases where it likes and depart from the said policy as it chooses. Having laid down a definite policy if the Government pick and choose by an irrational method certain traders only, than that would amount to an arbitrary action violation of Article 12. The legitimate entitlement of Ceylon Tobacco Company PLC to continue to engage in lawful trade and to use its trade mark as provided in the Intellectual Property Act has not been hindered by the proposed amendments. Thus, the Court does not see any violation of Article 12 and/or 14(1)(g) of the Constitution. The grace period given in Clause 5 in order to comply with the provisions of Section 34A is reasonable in its operation and the Court would hesitate to intervene and strike down what the Government has proposed. This Court cannot strike down a decision to grant a grace period only up to 1st June, 2015. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide.

Mr. Janak de Silva submitted that the provisions of the Bill do not violate any Article of the Constitution. We are inclined to agree with the submission made by Mr. Janak de Silva.

We have considered the amendments sought to be made and are of the opinion that the proposed amendments are within the legislative powers of the Parliament and do not violate any of the provisions of the Constitution.

We accordingly determine that neither the Bill nor any provision thereof is inconsistent with the Constitution.

In conclusion we wish to place on record our appreciation for the valuable assistance rendered by the Deputy Solicitor General and the Learned President's Counsel.

K. SRIPAVAN
Chief Justice

SISIRA J. DE ABREW
Judge of The Supreme Court

PRIYANTHA JAYAWARDENA, PC
Judge of The Supreme Court

First Reading:	10.02.2015 (Hansard Vol.232; No. 08; Col. 756)
Bill No:	333
Sponsor/ Relevant Minister:	Minister of Health and Indigenous Medicine
Decision of the Supreme Court in Parliament:	10.02.2015 (Hansard Vol.232; No. 08; Col. 745-749)
Second Reading:	20.02.2015 (Hansard Vol.232; No. 11; Col. 1226-1296)
Committee of the whole Parliament and Third Reading:	20.02.2015 (Hansard Vol.232; No. 11; Col. 1297-1300)
Hon. Speaker's Certificate:	03.03.2015
Title:	National Authority on Tobacco and Alcohol (Amendment) Act, No. 3 of 2015

SC. SD. 03/2015

"NATIONAL MEDICINE REGULATORY AUTHORITY BILL"

BEFORE:

S. Eva Wanasundera, PC.	—	Judge of the Supreme Court
B. P. Aluwihare, PC.	—	Judge of the Supreme Court, and
P. Jayawardena, PC.	—	Judge of the Supreme Court

COUNSEL:

Mr. Janak de Silva, Deputy Solicitor General, with Ms. Anusha Fernando, Senior State Counsel and Ms. Sureka Ahamed, State Counsel for Attorney General.

The Court assembled for the hearing at 10.45 a.m. on the 10th of February, 2015.

A Bill titled "An Act to Provide for the establishment of a Regulatory Authority to be known as the National Medicines Regulatory Authority which shall be responsible for the regulation and control of registration, licensing, manufacture, importation and all other aspects pertaining to medicines, medical devices, borderline products and for the conducting of clinical trials in a manner compatible with the national medicines policy; to provide for the establishment of divisions of the national medicines regulatory authority including the medicines regulatory division, medical devices regulatory division, borderline products regulatory division and clinical trials regulatory division; to establish a national advisory body, to repeal the Cosmetics, Devices and Drugs Act, No. 27 of 1980; and for matters connected therewith or incidental thereto", cited as **the National Medicine Regulatory Authority Act,** No. ….. of 2015, has been referred to the Chief Justice by His Excellency the President of Sri Lanka in terms of Article 122 (1) (b) of the Constitution of the Democratic Socialist Republic of Sri Lanka for the Special Determination of the Supreme Court as to whether the Bill of any Provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view, the said Bill is urgent in the national interest.

Mr. Janak de Silva, Deputy Solicitor General with Ms. Anusha Fernando, Senior State Counsel and Ms. Sureka Ahamed, State Counsel appeared on behalf of the Attorney General and assisted this Court in the consideration of the provisions of the Bill.

The Bill seeks to repeal the Cosmetics, Devices and Drugs Act, No. 27 of 1980. The Bill provides for the establishment of a Regulatory Authority to be known as the National Medicines Regulatory Authority. This Authority will hold responsibility for the regulation and control of registration, licensing, manufacture and importation of medical devices, borderline products and investigational medicinal products and all other aspects pertaining to medicines. Furthermore, it provides for the establishment of divisions of the National Medicine Regulatory Authority and the establishment of a National Advisory Body.

The National Medicines Regulatory Authority, consisting of 13 members is placed as apex body independent of the Department of Health and is a body corporate which has perpetual succession and which can sue and be sued. The powers and functions of the Authority are stipulated in Section 14 of the Bill and includes provisions to guide and oversee all aspects regarding medicinal drugs which is an essential part of the health services in the country. By Article 27 (2) (C) of the Constitution, the State has pledged to establish in Sri Lanka a

democratic socialist society, the objectives of which includes the realization by all citizens of an adequate standard of living for themselves and their families under the Directive Principles of State Policy. This Bill is patient - centric, in that to make good quality affordable medicines, medical devices and borderline products continuously available to the patients in the society with adequate checks and balances. We observed that the Bill is designed with the best interest of the general public in mind, in line with the policy objectives of the Government.

At the hearing before Court, many clauses which would attract Article 12 (1) of the Constitution were taken into consideration and amendments to overcome the situation were agreed upon in court.

This Court suggested that in Clause 12 (b) of the Bill, the word "absolute" should be deleted and it should read as "The Authority shall have the discretion of accepting or rejecting the views of the experts" and the Deputy Solicitor General agreed to the said amendment.

Under 'Delegation of the Powers of the Authority'. Clause 25 (1) was agreed upon to read as follows:—

> "The Authority may in writing and subject to such condition as may be specified therein, delegate to the CEO and any Head of the relevant division of the Authority and of its powers or functions and any such persons of Head of the relevant divisions shall exercise or perform such powers or functions in the name and on behalf of the Authority".

The Deputy Solicitor General suggested to delete certain parts of Clauses 29 (2), 36, 40, 101 (3), 119 (5) (b) last line of 130, 131 (1) and 143 (2) to read as follows:—

Clause 29 (2) - Expenses incurred by the any member, the CEO or any Officer or employee of the Authority in any suit or prosecution brought against him before any Court or tribunal in respect of any Act, which is done or purported to be done by him under the provisions of this Act, or any other written law or if the Court holds that such act was done in good faith, be paid out of the Fund of the Authority, unless such expenses are recoverable by him in such suit or prosecution.

Clause 36 - The Minister may make regulations to give effect to the provisions of this Part of this Act.

Clause 40 - The Minister may make regulations to give effect to the provisions of this Part of this Act.

Clause 101 (3) - Any person who contravene any provisions specified in sub section 1 or 2 of this Section commits an offence.

Clause 119 (5) - The Authority may upon consideration of all records and information pertaining to the application, (a) grant the Applicant the license; or (b) refuse the application and inform the reasons for such refusal to the Applicant in writing forthwith.

Clause 130 - Last line - to read as "shall be guilty an offence under this Act."

Clause 131 (1) - Every person who contravenes any of the provisions of this Act or any regulation made thereunder shall be guilty of an offence and shall on conviction be liable:-
(a)……

Clause 143 (2) - No civil or criminal proceedings shall be instituted against any person for any act which in good faith is done or purported to be done by him under this Act or any regulation make thereunder.

This Court was concerned of Clause 125 (1) (e) which empowers an authorized officer to seize and detain any article or vehicle in relation to contravention of provisions of the Act or regulations made thereunder and of Clause 125 (9) which requires such officer to inform the Authority. The Deputy Solicitor General addressed court on this matter and gave us the discretion to give a specific time for the officer to inform the Authority. This Court is of the view that Clause 125 (9) should remain as it is, since the authorized officer is duty bound to inform the Authority as soon as possible, without much delay and that is the reason why it is mentioned in the said Clause that the officer should inform the Authority "as soon as practicable".

Clause 49 (1) (c) as in the Bill drew the attention of Court since it refers to "any substance that may cause injury to the health of the user", where the word "injury" could even be interpreted to mean "side-effects" of a drug administered to cure a disease. The Deputy Solicitor General suggested that an amendment to read it differently, qualifying the word "injury", could overcome this problem. The amended Clause 49 (1) (c) to be read as follows is in accordance with the wording used by the World Health Organization in their model law. Court is satisfied with this amendment to read as follows:-

Clause 49 (1) (c) - "has in or upon it any deleterious substance that may cause injury to the health of the user; or"

This Court was called upon to exercise its constitutional jurisdiction by virtue of a reference made by His Excellency the President in terms of Article 122 (1) (b) on the provisions of this Bill. Article 27 (1) of the Constitution states that the Directive Principles of State Policy contained in Chapter VI of the Constitution shall guide the Parliament, the President and the Cabinet of Ministers in the enactment of laws. In the case of *Wijebanda Vs Conservator General of Forests and Others (2009, 1 SLR 337)*, this Court held that although the Directive Principles of State Policy are not specifically enforceable against the State, they provide important guidance and direction of the various organs of the State in the enactment of laws and in carrying out the functions of good governance.

This Court observes that public health by itself is not specifically mentioned in the Directive Principles of State Policy in Article 27 of the Constitution. Yet, it is quite significant that adequate and affordable health facilities such as the core substance included in this Bill, providing and regulating safe drugs for affordable prices available at safe places as well as regulating the manufacturing of medicines, medical devices and borderline products are facilities necessary to ensure "an adequate standard of living" for all citizens alike, which is included in Article 27 (2) (c).

In the Indian case of *Vincent Panikurlangara Vs Union of India & Others [1987 AIR 990, 1987SCR (2) 468 1987SCC (2) 165, JT 1987 (1) 610, 1987 SCALE (1) 490],* the Supreme Court of India made the following observation:-

"As pointed out by us, maintenance and improvement of public health to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore, is of high priority, perhaps the one at the top."

"The State's obligation to enforce production of qualitative drugs and elimination of the injurious ones from the market must take within its sweep an obligation to make useful drugs available at reasonable prices so as to be within the common man's reach. That would involve regulating the price. It may be that there may be an improved quality of a particular medicine which on account of its cost of production will have to sell at a higher price but for every illness which can be cured by treatment, the patient must be in a position to get its medicine. This, in our view, is an obligation which the Court has already found in the relevant Article of Part IV of the Constitution."

This Court concludes therefore that the Bill is an attempt by Parliament to enact laws in accordance with the Directive Principles of the Sate Policy.

We further note that the Bill is intended to apply across the board to the private as well as the public sector. Public Corporations such as State Pharmaceutical Corporation and State Pharmaceutical Manufacturing Corporation are also brought within the regulatory scheme set up by this Bill. Hence it covers "policy". We are of the opinion that the Bill is not inconsistent with Article 12 (1) of the Constitution.

The subject matter of this Bill does not come within any of the headings in the Provincial Council List or the Concurrent List contained in the Constitution and therefore it can be enacted without following the procedure set out in Article 154 G (3) or 154 G (5) of the Constitution.

We have considered the provisions of this Bill and we are of the opinion that the Bill contains "national policy" which is within the legislative competence of Parliament. We do hereby determine that the Bill is not subject to any of the prohibitions or restrictions in the 13th Amendment, is not inconsistent with any of the provisions of the Constitution and may be passed by Parliament with a simple majority.

We wish to place on record our appreciation of the valuable assistance rendered by the Deputy Solicitor General.

S. EVA WANASUNDERA
Judge of The Supreme Court

B. P. ALUWIHARE
Judge of The Supreme Court

P. JAYAWARDENE
Judge of The Supreme Court

First Reading:	03.03.2015 (Hansard Vol.232; No.12; Col.1369-1370)
Bill No.:	335
Sponsor / Relevant Minister:	Minister of Health and Indigenous Medicine
Decision of the Supreme Court in Parliament:	18.02.2015 (Hansard Vol.232; No.09; Col.905 - 909)
Second Reading:	04.03.2015 (Hansard Vol.232; No.13; Col.1547 - 1687) 06.03.2015 (Hansard Vol.232; No.14; Col.1742 - 1750)
Committee of the whole Parliament and Third Reading:	04.03.2015 (Hansard Vol.232; No.13; Col.1750 - 1772)
Hon. Speaker's Certificate:	19.03.2015
Title:	National Medicines Regulatory Authority Act, No. 5 of 2015

S.D. 04/2015, S.D. 05/2015, S.D. 06/2015, S.D. 07/2015, S.D. 08/2015, S.D. 09/2015
S.D. 10/2015, S.D. 14/2015, S.D. 15/2015, S.D. 16/2015, S.D. 17/2015, S.D. 19/2015

"NINETEENTH AMENDMENT TO THE CONSTITUTION BILL"

BEFORE:

K. Sripavan	-	Chief Justice
Chandra Ekanayake,	-	Judge of the Supreme Court
Priyasath Dep, PC	-	Judge of the Supreme Court

S. D. No. 04/2015

Petitioner	-	Gomin Kavinda Dayasiri
Counsel		Gomin Dayasiri with Manoli Jinadasa, J. P. Gamage, Rakitha Abeygunawardena and Sulakshana Senanayake
Intervenient Counsel	-	Suren Fernando, M. A. Sumanthiran, Dr. Jayampathy Wickramaratne, P.C, with Nizam Kariappar, Ms. Pubudini Wickramaratne, Nayantha Wijesundera and Ms. Galusha Wiriththamulla Chrishmal Warnasuriya instructed by Sunil Watagala

S. D. No. 05/2015

Petitioner	-	Liyana Pathiranage Ivan Perera
Counsel	-	Prabath Colombage
Intervenient Counsel	-	Chrishmal Warnasuriya instructed by Sunil Watagala

S. D. No. 06/2015

Petitioner	-	Udaya Prabath Gammanpila
Counsel	-	Manohara de Silva, P.C. with Rajitha Hettiarachchi, Arinda Wijesurendra and Hirosha Munasinghe
Intervenient Counsel	-	Faiz Musthapa, P.C. with Faizer Marker and Ashiq Hashin, Suren Fernando, Saliya Peiris with Asthika Devendra, Thanuka Nandasiri Viran Corea with Santa de Fonseka and Vdya Nathaniel Mr. Alagaratnam, P.C., Chrishmal Warnasuriya instructed by Sunil Watagala, J.C. Weliamuna with Pulasthi Hewamanne, Pasindu Silva, Senura Abeywardena

S. D. No. 07/2015

Petitioner	-	Dharshan Arjuna Narendra Weerasekera
Counsel	-	Dharshan Weerasekera appears in Person

S. D. No. 08/2015

Petitioner	-	Ven. Bengamuwe Nalaka Thero
Counsel	-	Manohara de Silva, P.C. with Rajitha Hettiarachchi, Arinda Wijesurendra and Hirosha Munasinghe

S. D. No. 09/2015

Petitioner	-	Swarnapali Wanigasekera, A-A-L
Counsel	-	Kalyanada Tiranagama with Sandamali Ekanayake

S. D. No. 10/2015

Petitioner	-	Ven. Matara Ananda Sagara Thero
Counsel	-	Kushan D' Alwis, P.C. with Kaushalya Navaratne and Chamath Fernando

S. D. No. 14/2015

Petitioner	-	Dampahalage Don Somaweera Chandrasiri, Vice Chairman, Mahajana Eksath Peramuna
Counsel	-	Canishka Witharana with Tissa Yapa And Dakshina Coorey

S. D. No. 15/2015

Petitioner	-	Gayan Nishantha Sri Warnasinghe
Counsel	-	M. C. Jayaratne with Nadika N. Seneviratne, M.D.J. Bandara and M. Nilanthi Abeyratne instructed by S. M. D. Tuder Perera

S. D. No. 16/2015

Petitioner	-	MTV Channel (Pvt.) Limited
Counsel	-	Romesh de Silva P.C. with Sanjeewa Jayawardena, P.C. Sugath Caldera, Rajeeve Amarasuriya, Niranjan Arulpragasam and Viswa De Livera Tennakone instructed by G.G. Arulpragasam

S. D. No. 17/2015

Petitioner	-	MBC Networks (Private) Limited
Counsel	-	Romesh de Silva P.C. with Sanjeewa Jayawardena, P.C. Sugath Caldera, Rajeeve Amarasuriya, Niranjan Arulpragasam and Viswa De Livera Tennakone instructed by G.G. Arulpragasam

S. D. No. 19/2015

Petitioner	-	Jayakodi Arachchige Sisira Jayakodi,
Counsel	-	J.C. Boange

COUNSEL :

Y.J.W. Wijeyatilake, P.C. , Attorney General with Anusha Navaratne, Addl. Solicitor General, Indika Demuni de Silva, Senior Deputy Solicitor General, Nerin Pulle, Deputy Solicitor General, Yuresha Fernando, Senior State Counsel And Suren Gnanaraj, State Counsel for the Attorney General.

Court assembled at 10.00 a.m. on 01st, 02nd, and 6th of April 2015.

A Bill bearting the title "An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka" - "19th Amendment to the Constitution" was placed on the Order Paper of Parliament on 24th March 2015. Thirteen petitions, numbered as above have been presented invoking the jurisdiction of this Court in terms of Article 121 (1) for a determination, in respect of the Bill.

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

The Petitioners and/or Counsel representing them, the Intervenient Petitioners and the Hon. Attorney General were heard before this Bench at the sittings held on 01st April 2015, 02nd April 2015, and 06th April 2015.

The proposed 19th Amendment as contained in the Bill seeks to make the following principal amendments which could be categorized as follows:

1. Inclusion of a right to information.
2. Reducing the term of office of the President.
3. Introducing a two term limit on the number of terms a person can hold office as President.
4. Provision for an acting President in the event of death/absence of the incumbent President.
5. Imposition of additional duties on the President.
6. Effective renumbering of Article 42 as Article 33A.
7. The circumstances in which Presidential immunity will not apply.
8. Amendments relating to the time period within which an election shall be held if an election is determined to be void.
9. Reintroduction of the Constitutional Council.
10. Changes made to Chapter VII with regard to matters concerning the Executive, the Cabinet of Ministers, the appointment of Ministers and the ceiling on the numbers of Ministers
11. Reducing the Term of Parliament.
12. Amendments relating to the prorogation of Parliament.
13. The jurisdiction of the Supreme Court relating to disciplinary actions against Members of Parliament.
14. Removal of the provisions relating to urgent Bills.
15. Provisions relating to the Independent Commissions (to be appointed based on the recommendations of the Constitutional Council).
16. Special provisions applicable to the incumbent President.

While the Supreme Court has sole and exclusive jurisdiction to determine any question as to whether any Bill or any provisions thereof is inconsistent with the Constitution, in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, Article 120 (a) provides that the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83.

Article 83 states:

Notwithstanding anything to the contrary in the provisions of Article 82 -

(a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Article 1,2,3,6,7,8,9,10 and 11 or of this Article; and

(b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over six years. Bill inconsistent with the Constitution.

Shall become law if the number of votes cast in favour thereof amounts to not less than two - thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

The people therefore have chosen and mandated the legislaturee to make constitutional amendments save and except those affecting the entrenched Articles referred to in Article 83.

In most of the petitions, the Petitioners argued that the Bill alters the basic structure of the Constitution by the diminishing the final discretionary authority of the President to make decisions concerning executive governance and thereby violate the basic structure of the Constitution. Mr. Manohara de Silva, P.C. claimed that if the Executive power is alienated from the President, the very act of alienation or transfer of Executive power from the President to another body would violate Article 3 of the Constitution.

Article 3 provides that:

"In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of Government, fundamental rights and the franchise."

Article 4 provides that:

"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;

(d) The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

(e) The franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."

It has to be borne in mind that the Sovereign people have chosen not to entrench Article 4. Therefore, it is clear that not all violations of Article 4 will necessarily result in a violation of Article 3.

The first two Articles in Chapter VIII of the Constitution are of crucial importance in describing the structure in which executive power was sought to be distributed. Article 42 states "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security". (emphasis added.) Thus, the President's responsibility to Parliament for the exercise of Executive power is established. Because the Constitution must be read as a whole, Article 4 (b) must also be read in the light of Article 42. **Clearly, the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance.** (emphasis added.)

In fact, Mr. Sumanthiran contended that Article 42 is identical to the corresponding provision in the 1st Republic Constitution of 1972, which stated in Article 91 that " the President shall be responsible to the National State Assembly for the due execution and performance of the powers and functions of his office under the Constitution and under other law, including the law for the time being relating to public security." Thus, the position of the President vis-à-vis the legislature, in which the President is responsible to the legislature, was untouched by the 1978 Constitution.

Article 43 of the 1978 Constitution states:

"(1) There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament.

(2) The President shall be a member of the Cabinet of Ministers, and shall be the Head of the Cabinet of Ministers.

Provided that, notwithstanding the dissolution of the Cabinet of Ministers under the provisions of the Constitution, the president shall continue in office.

(3) The President shall appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament."

This important Article underscores that the Cabinet collectively is charged with the exercise of Executive power, which is expressed as the direction and control of the Government of the Republic and the collective responsibility of Cabinet, of which the President is the Head., It establishes conclusively that the President is not the sole repository of Executive power under the Constitution. It is the Cabinet of Ministers collectively, and not the President alone, which is charged with direction and control of Government. Further, this Cabinet is answerable to Parliament.

Therefore the Constitution itself recognizes that Executive Power is exercised by the President and by the Cabinet of Ministers, and that the President shall be responsible to Parliament and the Cabinet of Ministers, collectively responsible and answerable to Parliament with regard to the exercise of such powers. Additionally, certain powers with regard to the Public Service are vested in the Public Service Commission and some in the Cabinet of Ministers (Articles 54 and 55), again showing that executive power is not concentrated in the President. Chapter VII, VIII and IX of the Constitution are titled "The Executive - The President of the Republic", "The Executive - The Cabinet of Ministers" and "The Executive - The Public Service" respectively.

It may be relevant to note the following observations made by Court in the determination of the Nineteenth Amendment (S.C.S.D. 11/02 - S.C.S.D. 40/02) with regard to the Executive power of the President:

"Mr. H.L. de Silva, P.C. submitted forcefully that they are "weapons" placed in the hands of each organ of Government. Such a description may be proper in the context of a general study of Constitutional Law, but would be totally inappropriate to our Constitutional setting, where sovereignty as pointed out above, continues to be reposed in the People and organs of Government are only custodians for the time being, that exercise the power for the People. Sovereignty is thus a continuing reality reposed in the People.

Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People. Similarly, legislative power should not be identified with the Prime Minister or of any party or group in Parliament and thereby be given a partisan form and character. It should be seen at all times as the power of People. Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as "weapons" in the hands of the particular organ of Government. (emphasis added.)

The role of the Cabinet in the Executive in Re the Thirteenth Amendment Determination [(1987) 2 S.L.R. 312 at 341] as observed by Wanasundara, J. in his dissenting judgment is stated thus:

"It is quite clear from the above provisions that the Cabinet of Ministers of which the President is a component is an integral part of the mechanism of Government and the distribution of the Executive power and any attempt to by-pass it and exercise Executive powers without the valve and conduit of the Cabinet would be contrary to the fundamental mechanism and design of the Constitution. It could even be said that the exercise of Executive power by the President is subject to this condition. **The people have also decreed in the Constitution that the Executive Power can be distributed to the other public officers only via the medium and mechanism of the Cabinet system.** This follows from the pattern of our Constitution modeled on the previous Constitution, which is a Parliamentary democracy with a Cabinet system. The provisions of the Constitution amply indicate that there cannot be a Government without a Cabinet. The Cabinet continues to function even during the interregnum after Parliament is dissolved, until a new Parliament is summoned. To take any other view is to sanction the possibility of establishing a dictatorship in our country, with a one man rule." (emphasis added.)

The People in whom sovereignty is reposed having made the President as the Head of the Executive in terms of Article 30 of the Constitution entrusted in the President, the exercise of the Executive power being the custodian of such power. If the people have conferred such power on the President, it must be either exercised by the President directly or someone

who derives authority from the President. There is no doubt that the Executive powers can be distributed to others via President. However, if there is no link between the President and the person exercising the Executive power, it may amount to a violation of mandate given by the people to the President. If the inalienable sovereignty of the people which they reposed on the President in trust is exercised by any other agency or instrument who do not have any authority from the President then such exercise would necessarily affect the sovereignty of the People. It is in this backdrop the Court in the Nineteenth Amendment Determination came to a conclusion that the transfer, relinquishment or removal of a power attributed to one organ of Government to another organ or body would be inconsistent with Article 3 read with Article 4 of the Constitution. Though Article 4 provides the form and manner of exercise of the sovereignty of the people, the ultimate act or decision of his executive functions must be retained by the President. So long as the President remains the Head of the Executive, the exercise of his powers remain supreme or sovereign in the executive field and others to whom to such power is given must derive the authority from the President or exercise the Executive power vested in the President as a delegate of the President. The President must be in a position to monitor or to give directions to others who derive authority from the President in relation to the exercise of his Executive power. Failure to do so would lead to a prejudicial impact on the sovereignty of the People. The constitutionality of the following Clauses are examined, keeping in mind the observations referred to above.

Clause 11

(i) 42 (3) The Prime Minister shall be the head of the Cabinet of Ministers.

(ii) 43 (1) The Prime Minister shall determine the number of Ministers of the Cabinet of Ministers, and the Ministries and the assignment of subjects and functions to such Ministers.

(iii) 43 (3) The Prime Minister may at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet of Ministers. Such changes shall not affect the continuity of the Cabinet of Ministers and the continuity of its responsibility to Parliament.

(iv) 44 (2) The Prime Minister shall determine the subjects and functions which are to be assigned to ministers appointed under paragraph (1) of this Article, and the Ministries, if any, which are to be in charge of, such Ministers.

(v) 44 (3) The Prime Minister may at any time change assignment made under paragraph (2)

(vi) 44 (5) At the request of the Prime Minister, any Minister of the Cabinet of Ministers may by Notification published in the Gazette, delegate to any Minister who is not a member of the Cabinet of Ministers, any power or duty pertaining to any subject or function assigned to such Cabinet Minister, or any power or duty conferred or imposed on him or her by any written law, and it shall be lawful for such other Minister to exercise and perform any power or duty delegated notwithstanding anything to the contrary in the written law by which that power or duty is conferred or imposed on such Minister of Cabinet of Ministers.

Clause 11 deal with " The Executive - The Cabinet of Ministers". In the absence of any delegated authority from the President, if the Prime Minister seeks to exercise the powers referred to in the aforesaid Clause, then the Prime Minister would be exercising such powers which are reposed by the People to be exercised by the Executive, namely, the President and not by the Prime Minister. In reality, the Executive power would be exercised by the Prime Minister from below and does not in fact constitute a power coming from the above, from the President. In the words of Wanasundera, J. as stated in Re the Thirteenth Amendment to the Constitution at page 359 *"If the Executive power of the People can be renounced in this manner, serious question regarding the proper administration of the country could arise. At the bare minimum, legislation permitting such a renunciation must have the approval of the People at a Referendum."*

By virtue of the Executive power vested in the President, as guaranteed in Article 4 (b) of the Constitution, certain rights flow to the citizens enabling them to enjoy those rights in its fullest measure, subject of course to permissible restrictions. The President cannot relinquish his Executive Power and permit it to be exercised by another body or person without his express permission or delegated authority. As laid down by Sarath N. Silva, CJ. *In Patrick Lowe and Sons Vs. Commercial Bank of Ceylon Ltd. (2001) 1 S.L.R. 280, "What is not permitted by the provisions of the enabling statute should be taken as forbidden and struck down by Court as being in excess of authority."* (emphasis added.) Thus, permitting the Prime Minister to exercise Executive power in relation to the six paragraphs referred to above had to be struck down as being in excess of authority and violate of Article 3.

Clause 2

14A (1) - Every citizen shall have the right of access to any information held by:-

(a) the State a Ministry or any Government Department or any statutory body established or created by or under any law;

(b) any Minister of a Province or any Government Department or any statutory body established or created by a statute of the Provincial Council;

(c) any local authority; and

(d) any other person,

being information that is required for the exercise or protection of the citizens' rights.

(2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

(3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three - fourths of the members of such body are citizens.

The thrust of the submission of Mr. Gomin Dayasiri was that paragraph 14A(1) enables even foreigners to receive benefits as they become the beneficiaries of the rights by virtue of the synthetic definition of a citizen given in the Bill as per the proposed paragraph 14A (3). It was also stressed on the fact that the proposed amendment enables a foreigner with the help of four other citizens of Sri Lanka living abroad or living in Sri Lanka to access this information via setting up a hoaxed unincorporated body. Further it was the contention of the Counsel that when a fundamental right of this nature is conferred it amounts to a right as provided for by law and therefore it amounts to granting of a right conferred by paragraph 14A (1) against an individual and secondly, the said paragraph 14A (1) becomes a source of law by which that 'right of access' is granted to the accessory. Counsel heavily laid stress on the following aspect also with regard to the proposed paragraph 14A (2), that is, the defenses under 14A (2) are restricted by the inclusion of the phrase "prescribed by law", as there are no specific laws which have been enacted in relation to the right of privacy of an individual or reputation of others which are vague principles for which no defenses would be available for a Court to consider. The Court notes that the definition given to a "citizen" is identical to the definition given in Article 121 (1) of the Constitution.

Having considered the submissions of the Counsel the Hon. Attorney - General informs Court that he wishes to bring in the following amendments at the Committee stage:

(*a*) to delete the words 'held by" in above 14A (1) and following to be added thereof - "Being information that is required for the exercise or protection of the citizens' rights held by any person of"

(*b*) In paragraph 14A (2) after the word privacy following words to be interpolated - 'Contempt of Court, Parliamentary privilege'

(*c*) In paragraph 14A (2) to delete the words 'information received' and to replace with 'information communicated'

It was the submission of the Counsel that the sub-paragraph 14A (1) (d) violates the rights of the people. However, the Hon. Attorney General has agreed to delete the above 14A (1) (d), and to replace it with the following provision:-

> 14A (1) (d) Any other person, being information that is required for the exercise or protection of the citizen's right of access to information in relation to a person or an institution referred to in sub-paragraph (a), (b) or (c) of this paragraph.

We are of the view that, Clause 2 does not become inconsistent with any of the entrenched provisions of the Constitution.

Submission was made with regard to Clause 5 of the Bill which reads as follows:-

Clause 5 33 (1) The President shall be the symbol of National unity.

Mr. Canishka Witharana brought to the notice of Court that the origin of our National Flag is based on a Report of the National Flag Committee. Counsel submitted that in 1979, a Cabinet Memorandum has been submitted by the Minister of State on the use of National Flag and was approved by the Cabinet of Ministers in 1981. The code for the use of

National Flag prepared by the Cabinet Sub Committee provides that each of us have to think more deeply of the National Flag and when we see our National Flag automatically our shoulders will strengthen, our hearts lift and our thoughts go to our motherland. Thus, the message and the significance of the National Flag is stated as follows :-

> "Respect the National Flag and it will inspire you. This is the basic message of the National Flag. It is a message which should reach every Sri Lankan because the National Flag is a symbol of our motherland, our Independence and the unity of our People. It is a symbol of our hopes and aspirations in the Nation's future."

Thus, it has been categorically stated that the National Flag is the symbol of the unity of our People. Considering the above, we are of the view that Paragraph 33 (1) in Clause 5 is incorrect and be deleted.

It was argued by the Counsel for the Petitioners that the establishment of the Constitution Council and its composition will impinge on the sovereignty of the people, in as much as it will impose a fetter on the executive power of the people. It was contended that the Constitutional Council will not be a representative of the people. Clause 10 provides that the Constitutional Council shall consist of the Prime Minister, the Speaker, the Leader of the Opposition, one person appointed by the President, five persons appointed by the President on the nomination of both by the Prime Minister and the Leader of the Opposition and one person nominated by agreement of the majority of the Members of Parliament belonging to political parties other than to which the Prime Minister and the Leader of the Opposition belong.

All appointments of non ex-officio members of the Constitutional Council are made by the President. Subparagraph (5) requires all non ex-officio members to be persons of eminence and integrity who have distinguished themselves in public or professional life and who are not members of any political party. Considering the composition of the Constitutional Council one could see that it would be a representative body, reflecting the views of the diverse groups in Parliament, and also be apolitical in so far as the non ex-officio members are concerned. The established of the Constitutional Council was considered by this Court In Re Seventeenth Amendment to the Constitution (S.C. Determination 6/2001), which held that the establishment of the Constitutional Council would not impinge on Article 3 or 4 of the Constitution, even though the Court noted that there is a restriction in the exercise of the discretion hitherto vested in the President, the said restriction per se would not be an erosion of the Executive power by the President, so as to be inconsistent with Article 3 read with Article 4 (b) of the Constitution.

The purpose and object of the Constitutional Council is to impose safeguards in respect of the exercising of the President's discretion, and to ensure the propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions. It sets out a framework within which the President will exercise his duties pertaining to appointments. When Sub Clause 41B, is considered the President continues to be empowered to make the appointments of Chairmen and members of the Independent Commissions. However, such appointments are to be made on a recommendation of the Constitutional Council on which a duty is cast to recommend fit and proper persons to such offices. Similarly in terms of Sub Clause 41C the President makes the appointments to key offices including the Judges of Superior Courts. However, prior to the appointments his recommendations would have to be approved by the Constitutional Council.

Sub Clause 41C (4) of the Bill sets out that the Constitutional Council shall obtain the views of the Chief Justice, the Minister of Justice, the Hon. Attorney-General and the President of the Bar Association of Sri Lanka, in the discharge of its functions relating to the appointment

of the Judges of the Supreme Court and the President and Judges of the Court of Appeal. Seeking the views of different stakeholders can in no way be offensive to the exercise of the powers of appointment. In fact a consulting process will only enhance the quality of the appointments concerned. In the *Silva V Shirani Bandaranayake (1997*) 1 SLR 93 Mark Fernando J. observed that a practice had been developed where relevant stakeholders were consulted. At page 95, His Lordship quoted from an article written by the then President of the Court of Appeal which had stated as follows:- *"Under the Constitution, the President of the Republic has the sole prerogative to appoint Judges……..In practice Judges are selected through a process of nomination by the Chief justice, the Attorney General and the Minister of Justice."* Therefore, we are of the opinion that Clause 10 and the provisions contained therein (Chapter VII A) do not violate any of the entrenched provisions in Article 83 of the Constitution.

Clause 26

104 B (5) (*c*) -

> **Where the Sri Lanka Broadcasting Corporation, the Sri Lanka Rupavahini Corporation or the Independent Television Network or any other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of every private broadcasting or telecasting operator, as the case may be, contravenes any guidelines issued by the Commission under sub-paragraph (*a*), the Commission may appoint a Competent Authority by name or by office, who shall, with effect from the date of such appointment, take over the management of such Broadcasting Corporation, Rupavahini Corporation or Independent Television Network, or other broadcasting or telecasting enterprise owned or controlled by the State or the Enterprise of such private broadcasting or telecasting operator, as the case may be, insofar as such management relates to all political broadcasts or any other broadcast, which in the opinion of the Commission impinge on the election, until the conclusion of the election, and the Sri Lanka Broadcasting Corporation, the Sri Lanka Rupavahini Corporation and the Independent Television Network or other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of such private broadcasting or telecasting operator, shall not, during such period, discharge any function connected with, or relating to, such management which is taken over by the Competent Authority.**

While making submissions on the aforesaid provision, Mr. Faiz Musthapa, P.C. and Mr. Sanjeewa Jayawardene, P.C. submitted that as to what is a "political broadcast", or what is the factor which impinges on an election are not matters which should be left to the formation of a subjective, arbitrary and collaterally motivated which promotes an arbitrary exercise. Counsel further submitted that the Election Commission should not be vested with such a far-reaching power to take over a private broadcasting/telecasting station on the purported basis of various subjective factors. The State taking over its own media institutions may be permitted, but if it is extended to private media institutions, providing balanced and multi perspective news and views the same will be most prejudicial. Furthermore, this provision does not set out the qualification and/or the post that a person holds in order to be appointed as a Competent Authority and this too will severely impinge upon the rights of the citizens and also rights and interests of the media institutions who may well be supervised and effectually managed by persons not eligible or suitable for same.

The Election Commission has been vested with untrammelled power and the eligibility and suitability of the members would be of paramount consideration in the public interest. There does not appear to be a mechanism where an aggrieved citizen could impugn and challenge an appointment of a Competent Authority that is not fitting. We are therefore of the view that the functions of the Competent Authority would directly affect and have a bearing on the franchise of the people and the process of selection of the representatives of people which has a direct nexus to the exercise of the sovereignty of the People. Accordingly, we are of the view that the aforesaid Clause violates Article 3 of the Constitution and therefore has to be approved by the People at a Referendum as provided in Article 83 of the Constitution.

We note that paragraph 153C in Clause 40 does not permit the Rules framed by the Audit Service Commission to be placed before Parliament. Failure to do so would undermine the Parliamentary control over the Rule making powers of the Audit Service Commission established by the Constitution. Hence, we suggest that the said paragraph be amended to enable the Audit Service Commission to place its Rules before the Parliament for it's approval.

We have considered the remaining provisions of the Bill with the assistance of the Hon. Attorney General and we do not see any other matters that would require consideration by this court in terms of Article 83 of the Constitution.

Accordingly, this Court determines that the Bill titled "The Nineteenth Amendment to the Constitution.":-

(*a*) complies with the provisions of Article 82 (1) of the Constitution;

(*b*) requires to be passed by a special majority specified in Article 82 (5) of the Constitution;

(*c*) that paragraphs 42 (3), 43 (1), 43 (3), 44 (2), 44 (3) and 44 (5) in Clause 11 and paragraph 104B (5) (*c*) in Clause 26 require the approval of the People at a Referendum in terms of the provisions of Article 83 of the Constitution.

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

K. SRIPAVAN
Chief Justice

CHANDRA EKANAYAKE
Judge of the Supreme Court

PRIYASATH DEP P. C.
Judge of the Supreme Court

First Reading	: 24.03.2015 (Hansard Vol.233; No.06; Col.572)
Bill No.	: 338
Sponsor / Relevant Minister	: Prime Minister and Minister of Policy Planning, Economic Affairs, Youth, Child and Cultural Affairs
Petition Announced In Parliament	: 07.04.2015 (Hansard Vol.234; No.01; Col.1 - 2)
Decision of the Supreme Court in Parliament	: 09.04.2015 (Hansard Vol.234; No.03; Col.261 - 284)
Second Reading	: 27.04.2015 (Hansard Vol.234; No.07; Col.511 - 690) 28.04.2015(Hansard Vol. 234; Part I; No. 08; Col.710-886)
Committee of the whole Parliament and Third Reading	:28.04.2015 (Hansard Vol. 234; Part II; No. 08; Col.887-1004)
Hon. Speaker's Certificate	: 15.05.2015
Title	: Nineteenth Amendment to the Constitution

S.C.S.D. 23/2015, S.C.S.D. 24/2015, S.C.S.D. 25/2015, S.C.S.D. 26/2015, S.C.S.D. 27/2015 and S.C.S.D. 28/2015

"PENAL CODE (AMENDMENT) BILL AND CRIMINAL PROCEDURE CODE (AMENDMENT) BILL"

BEFORE: B. P. Aluwihare, PC J.
Upaly Abeyrathne, J.
Anil Goonaratne, J.

S.C.S.D. 23/2015 & S. C. S. D. 24/2015
M. A. Sumanthiran with Gehan Gunatilake and Niran Anketell for Petitioner

S.C.S.D. 25/2015
Lakshan Dias, Petitioner in person

S.C.S.D. 26/2015
Nuwan Bopage with K. Kodikara and Chathura Weththasinghe instructed by Anusha Wickramasinghe for Petitioner

S. C. S. D. 27/2015, S. C. S. D. 29/2015, S. C. S. D. 30/2015, S. C. S. D. 31/2015
Manohara de Silva, PC with Canishka Witharana, Tissa Yapa and H. M. Thilakaratne for Petitioner

S.C.S.D. 28/2015
Viran Corea with Luwie Ganeshanthasan and Subhashini Samaraachchi for Petitoner

S.C.S.D. 23/2015, S. C. S. D. 24/2015, S. C. S. D. 25/2015, S. C. S. D. 26/2015, S. C. S. D. 27/2015 and S. C. S. D. 28/2015, S. C. S. D. 29/2015

Kapila Waidyaratne, PC Senior ASG with A. Navavi, SSC, S. de Silva, SSC and H. Opatha, SC for AG

S.C.S.D. 23/2015, S. C. S. D. 24/2015,

S. C. S. D. 25/2015, S. C. S. D. 26/2015,

S. C. S. D. 27/2015, S. C. S. D. 28/2015,

Senior ASG Kapila Waidyaratne, PC submits that the Govenment had communicated to the Hon. Attorney General to the effect that both Penal Code (Amendment) Bill and Criminal Procedure Code (Amendment) Bill relevant to these applications would not be pursued with. The Learned Counsel for the Petitioners submit that in the circumstances the determination on any question on the said Bill do not arise for consideration.

The Counsel further request that these proceedings be communicated to His Excellency The President and the Hon. Speaker in terms of Article 121 (3) of the Constitution.

Senior ASG Kapila WAidyaratne, PC submits that Hon. Attorney General has had no notice of the Applications No. **S. C. S. D. 29/2015, S. C. S. D. 30/2015 and S. C. S. D. 31/2015**

(Approved by Hon. B. P. Aluwihare PC. J.)

First Reading	:	11.12.2015 (Hansard Vol.241; No. 08; Col. 1492 - 1493)
Bill No	:	45 & 46
Sponsor/ Relevant Minister	:	Minister of Justice
Petition announced in Parliament	:	19.12.2015 (Hansard Vol.241; No. 15; Col. 2965)
Decision of the Superme Court	:	12.01.2016 (Hansard Vol.242; No. 02; Col. 23 - 24)
Remarks	:	Withdrawn by the Minister on 27. 01. 2016 (Hansard Vol. 242; No. 4; Col. 339)
Title	:	Penal Code (Amendment) Bill & Code of Criminal Procedure (Amendment) Bill