

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

In the matter of Ordinary exercise of jurisdiction of the Supreme Court under Article 121 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Rule 63 of the Supreme Court Rules of 1978 against the Bill titled "Counter Terrorism"

SC.SD. No. 41/2018

Duminda Nagamuwa,
No.553/B2, Gemunu Mawatha,
Udumulla, Battaramulla.

PETITIONER

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Hulftsdorp,
Colombo-12.

RESPONDENTS

SC.SD.NO. 42/2018

1. Young Lawyers Association
2. Manju Sri Chandrasekera,

No.121/1/1, Hulftsdorp Street,
Colombo-12.

PETITIONERS

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Hulftsdorp,
Colombo-12.

RESPONDENT

SC.SD.NO. 43/2018

Wimal Weerawansa, MP.
Leader of the National Freedom Front,
342/1/4, E.W. Perera Mawatha,
Kotte Road, Pita-Kotte.

PETITIONER

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Hulftsdorp,
Colombo-12.

RESPONDENT

SC.SD.No. 44/2018

S.C.C.Elankovan, Bar Maniam Lane,
Thellippalai, Jaffna.

PETITIONER

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Hulftsdorp,
Colombo-12.

RESPONDENT

SC.SD.No. 45/2018

S.S.Abdul Saroor,
No.202,
W.A.Silva Mawatha,
Colombo-06.

PETITIONER

-Vs-

Hon. Attorney-General,
Attorney-General's Department,

Hulftsdorp,

Colombo-12.

RESPONDENT

SC.SD.NO. 46/2018

Aslam Othman,

149, Kew Road,

Colombo-02.

PETITIONER

-Vs-

Hon. Attorney-General,

Attorney-General's Department,

Hulftsdorp,

Colombo-12.

RESPONDENT

SC.SD.No. 47/2018

1) K.M. Rukshan Fernando also

Known as Ruki Fernando,

3 /4 , Gamunu Mawatha,

Attidiya,

Dehiwala.

- 2) Ilandari Dewa Geethika Dharmasinghe,
451/6/F, Gotabaya Road,
Wanawasala, Kelaniya.
- 3) Shiran Mario Illanperuma,
15/2A, Sri Dharamarama Road,
Ratmalana.
- 4) Ekeshwara Kottegoda Vithana,
F25, National Housing Scheme,
Polhena, Kelaniya.

PETITIONERS

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Hulftsdorp,
Colombo-12.

RESPONDENT

Before:	:	
Sisira J de Abrew, J	:	Judge of the Supreme Court
Vijith K. Malalgoda PC, J	:	Judge of the Supreme Court
Murdu Fernando PC, J.	:	Judge of the Supreme Court

Counsel:

Niran Anketel for the Petitioner in SC.SD.No. 41/2018.

Nuwan Bopage with Chatura Weththasinghe for the Petitioner in SC.SD No. 42/2018.

Manohara de Silva PC with Canishka Witharana, Kapila Gamage, Boopathy Kahathuduwa instructed by G. T. Madubashini for the Petitioner in SC.SD.NO. 43/2018.

Pulasthi Hewamanne for the Petitioner in SC.SD.No. 44/2018 and SC.SD.No. 45/2018.

Hejaaz Hizbullah with M. Jegatheeswary, Muneer Thaufeek, Mohamed Aslam and Shifan Maharoof instructed by Ms. Thusari Jayawardena for the Petitioner in SC.SD.No. 46/2018

Ermiza Tegal with Ms. Swasthika Arulingam, Lakmali Hemachandra and Thiagi Piyadasa instructed by Priyalal Sirisena for the Petitioners in SC.SD. No. 47/2018.

Yasantha Kodagoda ASG, PC with Nerin Pulle DSG, Ms. Yuresha de Silva, SSC and Ms. Kanishka de Silva SC for the Hon. Attorney-General.

The Court assembled for the hearing on 18.10.2018, 19.10.2018, 22.10.2018 and 23.10.2018

A Bill titled "Counter Terrorism" was published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 14.9.2018 and has been placed on the Order Paper of Parliament on 9.10.2018.

The long title of the Bill reads as "An Act to make provision for the protection of Sri Lanka and the People of Sri Lanka from acts of terrorism and other offences associated with terrorism; for the prevention of terrorism and other offences associated with terrorism committed within or outside Sri Lanka; for the prevention of the use of Sri Lankan territory and its people for the preparation for terrorism outside Sri Lanka; to provide for the detection of acts of terrorism and other offences associated with terrorism; and to provide for the identification, apprehension, arrest, custody, detention, investigation, prosecution and punishment of any person who has committed an act of terrorism or any offence associated with terrorism; for the repeal of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979; and for matters connected therewith or incidental thereto."

The above named petitioners presented petitions to this Court in respect of the above Bill in terms of Article 121 of the Constitution. The said petitions were taken up for consideration. Learned counsel appearing for the petitioners and the learned Additional Solicitor General made submissions. The Petitioners, in their petitions have stated that several Clauses of the Bill titled "Counter Terrorism" are inconsistent with Articles 3,4,10,12(1),12(2) and 14 of the Constitution. Learned counsel appearing for the Petitioners contended that certain clauses of the Bill should be approved by the People at a Referendum.

Learned counsel for Petitioners referring to Clause 2(1) of the Bill contended that if a person commits an offence against the Government of Sri Lanka such a person

is not covered by this Bill. He contended that any person who commits an offence under this Bill in respect of (1) a citizen of Sri Lanka and (2) a property owned by the Government of Sri Lanka, has been covered by Clause 2(1) (c) of the Bill but any person who commits an offence in respect of the Government of Sri Lanka has not been covered by this Bill. He further contended that if any person wages war against the Government of Sri Lanka such a person has not been covered by this Bill. Relying on the above submission he submitted that Bill violates Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the Constitution). I now advert to this contention. The above contention can be nullified if the following clause is inserted as 2(1)(c)(iii) in the Bill.

“(iii) the Government of Sri Lanka”. Then Clause 2(1)(c) would read as follows.

“(c) any person, who commits an offence under this Act, within or outside the territory of the Republic of Sri Lanka in respect of-

- (i) a citizen of Sri Lanka including a citizen deployed in an international peace-keeping or monitoring mission;
- (ii) a property owned by the Government of Sri Lanka
- (iii) the Government of Sri Lanka.”

However we will now consider whether the above argument learned counsel for the petitioners can be accepted or rejected. At this stage it is necessary to consider Clause 8(a) of the Bill. It reads as follows.

“Acts which constitute an offence under paragraph (b) of Section 6 shall be as follows:-

(a) Committing-

- (i) *an offence against the State, punishable under sections 114 and 116 to 126;*
- (ii) *an offence relating to Army, Navy, and Air Force, punishable under sections 128 to 137;*
- (iii) *the offence of human trafficking under section 360c, of the Penal Code;”*

Section 6 of the Bill deals with offences associated with terrorism. Section 114 of the Penal Code reads as follows.

Whoever wages war against the Republic, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment of either description, which may be extended to twenty years, and shall forfeit all his property.

Thus it is clear that if any person wages war against the Government of Sri Lanka, such a person is covered by Clause 8 of the Bill. If a Foreign National wages war against the Government Sri Lanka he is also covered under 2nd proviso to Clause 2(1)(d) of the Bill which reads as follows.

“Provided further, that if he does not have his habitual residence in Sri Lanka, provisions of this Act, may be enforced with the concurrence of the foreign State of which he is a citizen;”

No argument can be advanced against the words ‘with the concurrence of the foreign State of which he is a citizen’ since it is common sense that the Government of Sri Lanka without the concurrence of the foreign State, cannot prosecute a Foreign National who does not reside in this country and has done acts of terrorism in the foreign country where he resides. For the above reasons, I reject the above contention of learned counsel for the Petitioners.

Learned counsel for the Petitioners referring to the words 'only if' found in 1st proviso to Clause 2(1)(d) of the Bill contended that a person who had been a citizen of Sri Lanka and continues to have habitual residence in Sri Lanka is only covered by this Bill but not the others. He therefore contended that the Bill violates Article 12(1) of the Constitution. For the purpose of clarity we state below Clause 2(1)(d) of the Bill. It reads as follows.

Any person who had been a citizen of Sri Lanka, and commits an offence under this Act, within or outside the territory of the Republic of Sri Lanka;

Provided however, provisions of this Act shall be enforced in respect of such person, only if he continues to have his habitual residence in Sri Lanka:

Provided further, that if he does not have his habitual residence in Sri Lanka, provisions of this Act, may be enforced with the concurrence of the foreign State of which he is a citizen;

But this argument cannot be accepted as the 2nd proviso even deals with Foreign Nationals. For the above reasons we reject the above argument.

Learned counsel for the petitioners advanced an argument with regard to Clause 4(1)(a) and (b) of the Bill. Therefore it is necessary to state the said clause below. Clause 4(1)(a) and (b) read as follows.

Clause 4(1) (a) (b):-

4. (1) *Any person who –*

- (a) *commits an offence under section 3 with the intention to cause death, and causes the death of any other person in the course of committing such offence, shall, upon conviction by the High Court be punished with life imprisonment ;*
- (b) *commits an offence under section 3 and causes the death of any other person in the course of committing such offence, of which the reasonable foreseeable consequence is the death of any other person, shall, upon conviction by the High Court be punished with imprisonment for a period which may extend to life imprisonment; or*

Learned counsel for the Petitioners contended that any person who causes death of a person with the intention of causing death is sentenced to death under Section 296 of the Penal Code but any person with the intention of causing harm to territorial integrity or sovereignty of Sri Lanka and causing death of any other person causes death of a person is sentenced to life imprisonment in terms of Clause 4 of the Bill. Learned counsel therefore contended that Clause 4 of the Bill violates Article 12(1) of the Constitution. Learned Additional Solicitor General however contended that imposition of death sentence is cruel and violates Article 11 of the Constitution. If this contention is accepted, this court would be indirectly declaring that Section 296 of the Penal Code violates Article 11 of the Constitution. Under and in terms of Articles 16 and 80(3) of the Constitution, this court cannot make such a declaration. Therefore we hold that imposition of death sentence would not violate Article 11 of the Constitution. I now advert to the contention advanced by learned counsel for the Petitioners. When considering this contention it is necessary to consider Section 294 and 296 of the Penal Code. Section 294 of the Penal Code reads as follows.

"Except in the cases hereinafter excepted, culpable homicide is murder –

Firstly – If the act by which the death is caused is done with the intention of causing death ; or

Secondly – If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused ; or

Thirdly – If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death ; or

Fourthly – If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

Section 296 of the Penal Code: *"Whoever commits murder shall be punished with death."*

Clause 3(1) of the Bill reads as follows:

"3. (1) Any person, who commits any act referred to in subsection (2), with the intention of -

- (a) intimidating a population;*
- (b) wrongfully or unlawfully compelling the government of Sri Lanka, or any other government, or an international organization, to do or to abstain from doing any act ;*
- (c) preventing any such government from functioning ;*

or

- (d) *causing harm to the territorial integrity or sovereignty of Sri Lanka or any other sovereign country,*

shall be guilty of the offence of terrorism."

Clauses 3(2)(a) read as follows:

"(2) An act referred to in subsection (1) shall be –

- (a) *murder, attempted murder, grievous hurt, hostage taking or abduction of any person ;"*

It is necessary to consider illustration (a) of Section 294 of the Penal Code. It reads as follows.

"A shoots Z with the intention of killing him. Z dies in consequence. A commits murder."

When Clauses 3 and 4 of the Bill are considered we would like to make the following observation.

When any person with the intention of

1. causing harm to the territorial integrity or sovereignty of Sri Lanka or
2. wrongfully or unlawfully compelling the government of Sri Lanka to do or to abstain from doing any act

commits murder of a person (causes death of a person with the intention of causing death), he is sentenced to life imprisonment. But as set out in illustration (a) to Section 294 of the Penal Code, when A shoots Z with the intention of killing him and he dies, Z is sentenced to death. Thus the principle enunciated in Article 12(1) of the Constitution is violated here. Article 12(1) of the Constitution reads as

follows. "All persons are equal before the law and are entitled to equal protection of law."

Considering all the above matters, we hold that Clauses 4(a) and 4(b) of the Bill violate Article 12(1) of the Constitution.

According to Clause 5 of the Bill any person convicted of abetting an offence described in Clause 3 of the Bill will be sentenced to a term of fifteen years imprisonment and to a fine not exceeding rupees one million.

Learned counsel for the Petitioners contended that according to Section 102 of the Penal Code, if a person is found guilty for abetting the offence of murder, he will be sentenced to death but in terms of Clause 5(1) of the Bill if a person is found guilty for abetting the offence of murder described in Clause 3 of the Bill, court cannot impose death sentence on him and court will have to sentence him to a term of fifteen years imprisonment and to a fine not exceeding rupees one million. Therefore, he contended that Clause 5 of the Bill violate Article 12(1) of the Constitution. But this contention cannot be accepted in view of Clause 5(2) of the Bill which reads as follows.

"If the offence of terrorism is committed consequent to the commission of an offence under subsection (1), the offender shall be punished with the same penalty as if he has committed the offence of terrorism."

For the above reasons, we reject the above contention learned counsel for the Petitioners.

Learned counsel for the Petitioners referring Clause 24(1) of the Bill contended that the officer-in-charge of a police station in which the suspect is detained can examine the suspect in order to see whether there are visible injuries. If there are

injuries that are not visible to the naked eye of the officer-in-charge of the police station, what would be the position? If the suspect is a victim of a sexual assault what would be the position? These were the questions presented during the course of the argument by learned counsel for the Petitioners. He therefore contended that above section would violate Article 11 of the Constitution. In terms Clause 24(2) of the Bill, the officer-in-charge of a police station is required to produce the suspect before a Judicial Medical Officer (JMO) only if there are visible injuries. Thus, if an allegation is levelled against the officer-in-charge of a police station, he can always take up the defence that he did not see any injuries on the body of the suspect. This was the submission made by learned counsel for the Petitioners. But when the above contention is considered one must not forget Clause 27 (3) of the Bill which reads as follows.

“The Magistrate before whom the suspect is produced, shall

(a) personally see the suspect, and look into his well-being and welfare through a private interview; and

(b) record any comment the suspect may provide.”

Therefore, it is seen if the suspect has any injury, he or she can complain to the Magistrate at the said private interview and the Magistrate can make an order to the effect that the suspect should receive medical treatment and be examined by a Judicial Medical Officer.

Learned counsel for the Petitioners referring to Clause 27(1) of the Bill contended that a Police officer who arrested a suspect can keep the suspect for 48 hours in his custody without producing before the Magistrate and that therefore this clause would violate Article 13(2) of the Constitution. But even under Section 7 of the

Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979, a Police officer can keep a suspect arrested in connection with an offence under the said Act for a period of 72 hours. Thus, the power of a police officer that a suspect arrested in connection with an offence under the said Act can be kept in his custody for a period of 72 hours is a part of existing law. If this court declares that 48hour detention of a suspect by a police officer violates Article 13(2) of the Constitution, this court would be indirectly declaring that section 7 of the Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 would violate the Constitution. But when we consider Articles 16 and 80(3) of the Constitution, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. Court must accept the existing law enacted by the Parliament as valid law. By clause 27(1) of the Bill the period of 72hour detention is going to be reduced to 48 hours. When we consider the above matters the above contention of learned counsel for the Petitioners cannot be accepted.

According to Clause 27(1) of the Bill, a suspect who has been arrested and detained by a police officer in terms of this Bill should be produced before any Magistrate within 48 hours of the arrest. According to Article 13 (2) of the Constitution such a suspect should be produced before the Judge of the nearest competent court. It is therefore seen that production of a suspect under the said clause takes place before **any** Magistrate but according to Article 13 (2) of the Constitution, production of a suspect should take place before the Judge of the **nearest competent court**. Learned counsel for the Petitioners therefore contended that Clause 27(1) of the Bill would violate Article 13 (2) of the Constitution. I now advert to this contention. It has to be noted here, in terms of Clause 27(1) of the Bill the police officer who arrested the suspect will have to produce him within 48

hours before a Magistrate. Therefore, the suspect is brought under the judicial supervision. What is important in this Clause is the production of the suspect before a Magistrate within 48 hours of the arrest. Learned Additional Solicitor General submitted that there could be a situation where the police officer cannot reach the nearest Magistrate due to terrorist activities and in such a situation the most practical way is to produce the suspect before a Magistrate. In our view there is substance in this argument. When we consider all the above matters, we reject the argument of learned counsel for the Petitioners as there is no merit in it.

Learned counsel for the Petitioners referring to Clause 27(1) of the Bill contended that if a person is arrested by a member of an armed forces and/or a coast guard officer he too will have to be produced before a Magistrate but Clause 27(1) of the Bill does not provide for such a situation. Learned Additional Solicitor General submitted that the Attorney General would advise the Minister of Justice to introduce the following amendment as 27(1)A.

“Following the production of a person who has been arrested by an officer or member of the armed forces or a coast guard officer, before the Officer-in-Charge of a police station or a designated police officer in terms of section 18 (1), such person shall be produced before any Magistrate by such police officer not later than forty eight hours following such person having been produced before such police officer.” The above contention of learned counsel for the Petitioners is nullified with this amendment.

Learned counsel for the Petitioners whilst referring to Clause 27(2)(a) of the Bill contended that the words ‘the Magistrate shall make an order to give effect to such Detention Orders’ in the said Clause would violate Article 13 (2) of the Constitution. But it has to be noted here that when a Detention Order issued under

the Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 for a period of three months was in operation, there is no requirement to produce the suspect before a Magistrate. Clause 27(2)(a) of the Bill seeks to relax the above position and under this Clause even if there is a Detention Order the suspect will have to be produced before a Magistrate; the Detention Order must be placed before the Magistrate for his inspection; and the Magistrate will make an order giving effect to the Detention Order only if it is a valid Detention Order. Since the Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 is an existing law, court will have to consider the fact that it is consistent with the Constitution. If the existing law is consistent with the Constitution, relaxation of that law cannot violate the Constitution. Therefore we reject the above contention of learned counsel for the Petitioners.

Learned counsel for the Petitioners referring to Clause 27(2)(b) of the Bill contended that when the officer-in-charge of a police station who fails to produce a Detention Order before the Magistrate, makes an application to remand the suspect, the Magistrate has no option but to remand him. He therefore contended that the said Clause would violate Article 13 (2) of the Constitution. We now advert to this contention. Although learned counsel for the Petitioners contended so, he has lost sight of the words 'based on grounds that the Magistrate deems reasonable' in the said Clause. The above words clearly indicate that the Magistrate has the power to use his discretion to remand or not to remand. For the above reasons we reject the above argument of learned counsel for the Petitioners.

Learned counsel for the Petitioners referring to Clause 36(6)(b) and 39(4) of the Bill contended that the Magistrate has no discretion when making orders under the said Clauses. Therefore these Clauses would violate Article 13 (2) of the

Constitution. We now advert to this contention. At this juncture it is necessary to consider Clause 36(6) of the Bill. It reads as follows.

36 (6) (a):- *"Where the Magistrate refuses to grant the extension of the Detention Order he shall inquire whether there exists any justifiable reason to remand the suspect."*

36(6) (b):- *"After the inquiry, if the Magistrate is of the opinion that there exists any reasonable ground to believe that the suspect has committed an offence under this Act, the suspect shall be placed in remand custody."*

36(6) (c):- *"Where there is no reason to believe that the suspect has committed an offence under this Act, he shall be released from detention."*

The words '*whether there exists any justifiable reason*' in Clause 36(6)(a) of the Bill and the words '*there exists any reasonable ground*' in Clause 36(6)(b) of the Bill clearly indicate that the Magistrate can use his discretion. Further Clause 36(6)(c) of the Bill clearly indicates that the Magistrate can use his discretion. Clause 39(3) and 39(4) of the Bill reads as follows:

39 (3) *"Upon completion of the period of detention under a Detention Order, the suspect shall be produced before a Magistrate."*

39 (4) *"Where upon such production the officer in charge of the relevant police station or any other police officer authorized by him informs the Magistrate that -*

(a) there exists a well-founded grounds to believe that the suspect has committed an offence under this Act and that

further investigations are being conducted; or

(b) the investigations have been completed and that the Attorney-General has been, or is to be requested to consider the institution of criminal proceedings against the suspect,

the Magistrate shall direct that the suspect be detained in remand custody."

According to Clause 39 (3) of the Bill, the suspect will have to be produced before the Magistrate upon completion of the period of Detention Order. According to Clause 39 (4) of the Bill, the Magistrate shall make a remand order when the officer-in-charge of a police station informs the Magistrate that there are well-founded grounds to believe that the suspect has committed an offence. What happens if the Magistrate decides that there are no grounds to believe that the suspect has committed an offence? Then the Magistrate cannot make an order remanding the suspect. The Magistrate also cannot make an order to detain the suspect as the period of detention has come to an end. Then the Magistrate can act under Section 36(6)(c) and release him from detention. Clause 36 of the Bill discusses about a situation **before** the completion of the period of Detention Order. Clause 39 (3) and (4) of the Bill discuss about a situation **after** the completion of the period of Detention Order. If the Magistrate has power under Clause 36(6)(c) of the Bill to release the suspect from detention **before** the completion of the Detention Order why can't the Magistrate under same Clause [36(6)(c)] of the Bill release the suspect from detention **after** the completion of the period of Detention Order when he decides that there are no reasonable or well-founded grounds to

believe that the suspect has committed an offence? Therefore, the contention that the Magistrate's discretion has been taken away from this Bill and it would violate Article 13 (2) of the Constitution cannot be accepted and is hereby rejected. However, learned Additional Solicitor General submitted that the Attorney General would advise the Minister of Justice to move the following amendment to Clause 39 of the Bill.

"... if following the examination of a report submitted by the officer-in-charge of the police station, the Magistrate is satisfied that, there exists prima facie, a basis to conclude that the suspect has committed an offence under this Act, he shall direct that the suspect be detained in remand custody."

Learned counsel for the Petitioners referring to the words 'confidential report' in Clause 36 submitted that when the officer-in-charge of a police station files a confidential report the suspect would be at a disadvantageous position as he would not get the said report. But this argument is nullified since Clause 36(3) of the Bill gives the opportunity to the suspect or his Attorney-at-law to obtain information in the said report.

Learned counsel for the Petitioners referring to Clause 68(5) of the Bill contended that this clause would violate Article 12 (1) of the Constitution. Clause 68(5) of the Bill reads as follows:

"Where the suspect declines to make a statement to the Magistrate, such fact shall be communicated by the Magistrate to the relevant police officer and the suspect shall be kept in remand custody."

Learned counsel for the Petitioners contended that under this clause even a suspect who is on bail can be remanded if he refuses to make a statement to the Magistrate and it would violate Article 12(1) of the Constitution. In our view Clause 68(5) would violate Article 12(1) of the Constitution. Learned Additional Solicitor

General submitted that the Attorney General would advise the Minister of Justice to move the following amendment to Clause 68(5) of the Bill.

"Where the suspect declines to make a statement to the Magistrate, such fact shall be communicated by the Magistrate to the relevant police officer and if at the time the suspect was being detained in terms of a detention order or in remand custody, be returned to detention or remand custody, as the case may be. If the suspect was already on bail, he shall be enlarged on bail."

If this amendment is introduced to Clause 68(5) of the Bill, violation of the Constitution discussed above would cease to operate.

Learned counsel for the Petitioners referring to Clauses 62(1) and 81 of the Bill contended that when a proscription order in terms of Clause 81 of the Bill is made by the Minister, it would violate fundamental rights guaranteed by Article 14(1) of the Constitution. Clause 62(1) of the Bill reads as follows.

"62 (1) *"Where a police officer not below the rank of a Senior Superintendent of Police receives information that an offence under this Act is committed or likely to be committed, he may issue any one or more of the following directives to the public, for the purpose of protecting persons from harm or further harm, associated with such offence:-*

- (a) *not to enter any specified area or premises;*
- (b) *to leave a specified area or premises;*
- (c) *not to leave a specified area or premises and to remain within such area or premises;*
- (d) *not to travel on any road;*
- (e) *not to transport anything or to provide transport to anybody;*

- (f) to suspend the operation of a specified public transport system;
- (g) to remove a particular object, vehicle, vessel or aircraft from any location;
- (h) to require that a vehicle, vessel, ship or aircraft to remain in its present position;
- (i) not to sail a vessel or ship into a specified area until further notice is issued;
- (j) not to fly an aircraft out of, or into, a specified air space;
- (k) not to congregate at any particular location;
- (l) not to hold a particular meeting, rally or procession; and
- (m) not to engage in any specified activity;

Provided however, no directive under paragraphs (k), (l) or (m) shall be issued, without the prior approval obtained from a Magistrate, who shall prior to the issuance of such directive satisfy himself of the necessity for issuing the same and may make an order to issue such directive subject to such condition."

Clause 81(1) and (2) of the Bill read as follows.

"81. (1) *"Notwithstanding anything in any other written law where the Minister has reasonable grounds to believe that any organization is engaged in any act amounting to an offence under this Act, or is acting in a manner prejudicial to the national security of Sri Lanka or any other country, he may by order published in the Gazette, (hereinafter referred to as "Proscription Order") proscribe such organization in terms of the provisions of this Act."*

(2) *"A Proscription Order may be made by the Minister, for giving effect to-*

(a) a recommendation made by the Inspector General of Police or

(b) a request made by the Government of any foreign country to the Government of Sri Lanka."

But it has to be stated here that according Article 15(7) of the Constitution, the exercise of fundamental rights guaranteed by Article 14 of the Constitution shall be subject to restrictions as may be prescribed by law in the interest of national security. Thus, the Parliament can enact legislation placing restrictions in the exercise of fundamental rights guaranteed by Article 14 of the Constitution and enacting such legislation cannot violate the said fundamental rights. This Bill is one such legislation. For the above reasons we reject the above contention of learned counsel for the Petitioner.

According to Clause 72 of the Bill, the Attorney General has the power to suspend and defer the institution of criminal proceedings against a person who is alleged to have committed certain offences under this Bill. The Attorney General does not have this power in respect of certain offences. They are discussed in Clause 72 of the Bill. Learned counsel for the Petitioners therefore contended that the Attorney General encroaches to the judicial power of courts. He therefore contended that this Clause would violate Article 3 and 4 of the Constitution. We now advert to this contention. Although learned counsel contended so, the Attorney General cannot take the above decision on his own. He will have to obtain sanction of the High Court to the imposition of one or more conditions stipulated in Clause 72(3) of the Bill. The decision of the Attorney General to suspend and defer the institution of

criminal proceedings is also subject to the judicial review. This view is supported by Clause 96 of the Bill. The Court of Appeal in the exercise of its writ jurisdiction can quash the decision of the Attorney General. Therefore we are unable to agree with the said contention and reject the same.

According to Clause 77 of the Bill the Attorney General has the power to withdraw indictments filed against an accused person who is alleged to have committed an offence under this Bill. Learned counsel for the Petitioners therefore contended that this power amounts to an encroachment of judicial power of courts. But the withdrawal of indictment has to be done with the permission of the High Court Judge. Under Section 194 (1) of the Code of Criminal Procedure Act No 15 of 1979 (CPC) the Attorney General has the power to withdraw indictments. Under Section 194 (3) of the Code of Criminal Procedure Act No 15 of 1979 (CPC), the prosecuting counsel has the power to withdrawal of indictments with the consent of the Presiding Judge. Thus, the power of the Attorney General to withdraw indictments is a part of the existing law. If this Court declares that the power of the Attorney General to withdraw indictments violates the Constitution, this Court would be indirectly declaring that Section 194 (1) and Section 194 (3) of the CPC would violate the Constitution. But under and in terms of Articles 16 and 80(3) of the Constitution, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. Therefore we are unable to agree with the said argument and reject the same as there is no merit in it.

Clause 93(3) of the Bill reads as follows: "For the purpose of this section the expression "law" includes international instruments which recognize human rights and to which Sri Lanka is a signatory."

Article 170 of the Constitution reads as follows: "Law means any Act of

Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council." Therefore international instrument cannot be a part of law defined by our Constitution

When we consider this Article, we are of the opinion that Clause 93(3) of the Bill violates the legislative power of the people discussed in Article 4(a) of the Constitution. Article 3 of the Constitution-

"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 of the Constitution reads as follows.

"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."*

According to Article 3 of the Constitution, Sovereignty includes the powers of the Government. What are the powers of the Government? They are the legislative power of the People, the Executive Power of the People and the Judicial Power of the People. When we consider Articles 3 and 4 of the Constitution, we feel that the Sovereignty is

1. the legislative power of the People,
2. the executive power of the People,
3. the judicial power of the People and
4. the franchise of the People

Therefore it is correct to say that the legislative power of the People is a part of Sovereignty. Therefore if a Clause of a Bill violates the legislative power of the People it would violate Article 3 and 4 of the Constitution. For the above reasons we hold that Clause 93(3) of the Bill violates Article 3 and 4 of the Constitution.

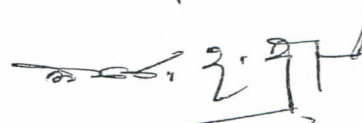
We have earlier decided that Clause 4(a) and 4(b) and 68(5) of the Bill violate Article 12 (1) of the Constitution and Clause 93(3) violates Article 3 and 4 of the Constitution.

Learned Additional Solicitor General submitted that death sentence is cruel and it would violate Article 11 of the Constitution. In this connection we would like to consider an observation made by Samarakoon CJ, Sharvananda J and RS Wanmasundera J in the Determination delivered on the Poisons, Opium and Dangerous Drugs (Amendment) Bill dated 23.2.1984 wherein it says thus "*One member of the Court is of the opinion that the imposition of the death Sentence for offences under this Act violates Article 11 of the Constitution. The majority is of the view that it does not violate Article 11 of the Constitution.*" Imposition of death sentence is a part of existing law. Vide Section 296 of the Penal Code. Under and

in terms of Articles 16 and 80(3) of the Constitution, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. Therefore we are unable to agree with the above contention of the learned Additional Solicitor General and hold that imposition of the death Sentence would not violate Article 11 of the Constitution. If a Clause of a Bill violates Article 12(1) of the Constitution, such a violation would amount to violation of Article 3 of the Constitution because according to Article 3 of the Constitution, Sovereignty includes fundamental rights of the people. We have earlier decided that Clause 4(a) and 4(b) and 68(5) of the Bill violate Article 12 (1) of the Constitution. Therefore we hold that they violate Article 3 of the Constitution. However violation of Article 3 of the Constitution by Clauses 4(a) and 4(b) of the Bill would cease to operate if same punishment found in Section 296 of the Penal Code is introduced after removing the words 'life imprisonment' in Clauses 4(a) and 4(b) of the Bill. Violation of Article 3 of the Constitution by Clause 68(5) of the Bill would cease to operate if the amendment proposed by the Attorney General to Clause 68(5) of the Bill is introduced.

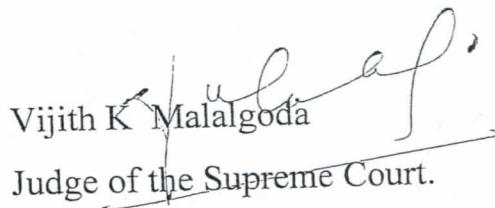
We have earlier held that Clause 93(3) of the Bill would violate Articles 3 and 4 of the Constitution. Learned Additional Solicitor General submitted that the Attorney General would advise the Minister of Justice to delete Clause 93(3) of the Bill. If Clause 93(3) of the Bill is deleted, the violation of Articles 3 and 4 of the Constitution by the said Clause would cease to operate. We have held that Clauses 4(a) and 4(b), 68(5) and 93(3) of the Bill violate Article 3 of the Constitution. Therefore we are of the opinion that 4(a) and 4(b), 68(5) and 93(3) of the Bill will have to be passed by a two-third majority referred to in Article 83 of the Constitution and approved by the People at a Referendum. We have examined the

Bill and are of the opinion that Clauses other than 4(a) and 4(b), 68(5) and 93(3) of the Bill, can be passed by simple majority of the Parliament.



Sisira J de Abrew

Judge of the Supreme Court.



Vijith K Malalgoda

Judge of the Supreme Court.



Murdu Fernando

Judge of the Supreme Court.