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

"CORONAVIRUS DISEASE 2019 (COVID-19) (TEMPORARY PROVISIONS) BILL"

Before: Murdu N.B. Fernando PC J.,

Yasantha Kodagoda PC J. and

A.H.M.D. Nawaz J.

Petitioner: Aruna Laksiri Unawatuna,
No.02,
Buddhist Center Road,
Colombo 10.

Petitioner appeared in person.

S.C.S.D. No. 24/2021

Vs.

Respondent: Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Counsel: Nerin Pulle, Senior Deputy Solicitor General with Dr. Avanti Perera, Senior State Counsel.

The Court assembled for the hearing on 17.06.2021 and 18.06.2021.

A Bill titled CORONAVIRUS DISEASE 2019 (COVID-19) (TEMPORARY PROVISIONS) was published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 13th May, 2021 and placed on the Order Paper of Parliament on 08th June, 2021.

The jurisdiction of this Court to determine the constitutionality of the aforesaid Bill was invoked in terms of Article 121 of the Constitution by a petition presented to this Court by the Petitioner. Upon receipt of the petition, the Attorney General was noticed as required by Article 134(1) of the Constitution and the Court heard the Petitioner and the Attorney General.

The Petitioner in the petition filed, challenged that Clauses 3, 4 and 11 of the CORONAVIRUS DISEASE 2019 (COVID-19) Bill ("the Bill"), are inconsistent with the provisions of Article 3, 4(d), 12(1) and 106 of the Constitution and for that reason the Bill cannot become law unless the provisions laid down in Article 83 of the Constitution is adhered to. In the written submissions tendered to this Court the Petitioner also challenged that Clauses 2, 3, 4, 6, 7, 10, 11 and 12 of the Bill are inconsistent with the provisions of Articles 1, 2, 3, 4(c), 5, 9, 12(1), 23, 24, 76, 78, 80,157 and 170 and submitted that the provisions laid down in Article 84(2) of the Constitution should also be followed.

The contention of the Respondent was that the provisions of the Bill are not inconsistent with the Constitution and that this was a timely piece of legislation brought to safeguard the interests of persons affected by CoronaVirus Disease 2019 ("COVID-19") which gripped the mankind in an unprecedented manner and disrupted the daily lives of people throughout the globe and was declared as a pandemic by the World Health Organization, on 11th March 2020.

In the said backdrop, we now proceed to examine the provisions of this Bill for its constitutionality.

The Long Title of the Bill reads as follows:

> An act to make temporary provisions in relation to situations where persons were unable to perform certain actions required by law to be performed within the prescribed time periods due to Covid-19 circumstances; to assign alternative

courts where a court cannot function due to Covid-19 circumstances; to conduct court proceedings using remote communication technology to facilitate the control of Coronavirus Disease 2019 (Covid-19); to grant relief in relation to parties to certain contracts who were unable to perform contractual obligations due to Covid-19 circumstances and for matters connected therewith or incidental thereto.

The Bill consists of the following Parts and a Schedule.

Part I – Relief for inability to comply with Prescribed Time Periods (Clause 2);

Part II – Designation of Alternative Courts (Clause 3);

Part III – Conducting Court proceedings using Remote Communication Technology (Clause 4);

Part IV – Temporary relief in respect of Contracts (Clauses 5 to 8); and

Part V – General Provisions (Clauses 9 to 12).

Clause 1

Clause 1(1) of the Bill, provides that it shall be in operation for a period of two years commencing from 1st March, 2020. Clause 1(2) of the Bill makes provision for effecting extensions to the duration of the Bill.

Clause 2

Clause 2(1) of the Bill makes provision for a court, tribunal or any other authority established by or under any law, to allow, admit or entertain an action, application, appeal, proceeding or act, **notwithstanding the lapse of the time period prescribed by law** for such purpose, if the court, tribunal or any other authority is satisfied, that a person was prevented from instituting or filing any action, application, appeal or other legal proceeding, within the prescribed period or to perform any act within a prescribed period, **due to a "Covid-19 circumstance**" and to exclude in calculating the said prescribed time period, when such person was subjected to a "Covid-19 circumstance".

Whilst the Petitioner, did not challenge the basic concept and the contents of the aforesaid provisions in Clause 2, his ground of challenge was pivoted and mounted upon the definition of the term "Covid-19 circumstance".

This term is defined in Clause 12, the interpretation section, as follows:

- Covid-19 circumstance includes –

  (a) Covid-19;

  (b) the operation of or compliance with any law of Sri Lanka or another country, or territory, or an order or direction of the Government or any statutory body, or of the Government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (Covid-19); or

  (c) any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a) or (b).

The term "Covid-19" referred to above [in item (a) in Clause 12 -the interpretation section] means *"the Coronavirus Disease 2019 (Covid-19) declared as a quarantinable disease by notification published in the Gazette Extraordinary No 2167/18 of March 20, 2020 under the Quarantine and Prevention of Diseases Ordinance (Chapter 222).*

The Petitioner did not raise any objection to items (a) and (c) of the definition in "Covid-19 circumstance" in the above sub-clause, but strenuously contended that the definition given in item (b) in "Covid-19 circumstance", would bring in a foreign law and / or a law applicable in another country or territory and/ or an order or direction of a foreign agency to be applicable in Sri Lanka. Therefore, the Petitioner contended, that such definition would be to the detriment of the People and thus erode the sovereignty which is in the People and therefore violates Article 4(c) read together with Article 3 of the Constitution. Hence, the Petitioners principal contention was that the term "Covid-19 circumstance" which is referred to in Clauses 2, 3, 4, 6, 7, 10 and 12 of the Bill, makes the Bill in its entirety, inconsistent with Articles 3 and 4(c) of the Constitution and the numerous other Articles relied upon by the Petitioner and more fully referred to earlier in this determination.

In response to same, the submission of the Senior Deputy Solicitor General was that this Bill is a salutary piece of legislation which accords with the constitutional mandate cast upon all organs of Government i.e., the Executive, Legislature and Judiciary as set out in Article 4(d) of the Constitution. The learned Counsel further contended that the Bill is a widely accepted necessity in the current context and is fashioned to suit the new normal. He vehemently relied on the dictum of this Court in **SC. SD. 08 and 09/ 2005 - The Tsunami (Special Provisions) Bill**, where it was determined that *affirmative action by the State is the need of the hour.*

The learned Counsel went on to submit that therefore, the provisions of the Bill must be broad enough to capture not only the present context but also the uncertainties which the ever evolving Covid-19 may bring in the future and that the presence of item (b) in the definition of the term "Covid-19 circumstance" in Clause 12 [the interpretation section] would give some guidance to the type of circumstances envisaged, in other countries, in order to co-relate to the law, order or directions issued by agencies and authorities in those countries and territories, in the context of 'Covid-19' alone, and that the emphasis should be on the practical reality of Covid-19 only and not on the legality, legitimacy, binding effect, desirability, territorial or extra-territorial nature or threat of an infiltration of foreign law into Sri Lanka. In the absence of item (b), the learned Counsel submitted, the word "circumstance" will have no boundaries and remain undefined, as a vague and broad term which would in turn be inconsistent with Article 12(1) of the Constitution, since equal protection of the law cannot be guaranteed in a context of uncertainty.

We have considered the submissions of both parties pertaining to the definition of "Covid-19 circumstance", especially in the light of the provisions of Clause 3, which provides for the transfer of cases to an alternative court and also with regard to Clauses 2, 4, 6 and 7 of the Bill and we see no justifiable ground or reason whatsoever, to include a term *'operation of or compliance with a law of another country or a territory or an order or direction of a Government or any statutory body, public authority of another country or territory, whether it is a law, order or direction made by reason of or in connection with Covid-19'*, as referred to in item (b) of the definition of "Covid-19 circumstance", in Clause 12 of the Bill.

Article 1 of the Constitution, recognise that Sri Lanka is a Free, Sovereign, Independent and Democratic Socialist Republic. Thus, unequivocally this country is a Sovereign State. Although the courts of this country have been guided by the persuasive value of judgements of foreign jurisdictions, that cannot and should not mean, that in roads could be made to include 'operation or compliance of foreign law' in to the definition of a term in a Bill, whether it be necessitated in view of the present pandemic situation or otherwise.

Similarly, such a definition cannot be made "speculating" the unforeseen future and considering the uncertainties of the ever-evolving Covid-19 or its variants and mutations. This Court in **SC. SD. No. 11/1997** to **15/1997- Sri Lanka Broadcasting Authority Bill** observed, "*these things may not happen, but they might happen, because they are permitted.*"

In any event, the Bill before us for determination provides "Temporary Provisions" and the time duration of the Bill is for a period of two years unless extended. Moreover, it is observed that item (c) of the sub-clause in the definition of the term "Covid-19 circumstance" comprehensively provides for "*any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a) and (b)*".

Hence, we are of the view, that item (b) in the definition of "Covid-19 circumstance", in Clause 12 of the Bill, which provides *inter-alia 'for operation of or compliance with any law of another country or territory or of the Government or other public authority of another country or territory'*, notwithstanding it is made by reason or in connection with Covid-19, is inconsistent with the provisions of Article 4(c) read together with Article 3 of the Constitution. Thus, the said sub-clause could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum, by virtue of the provisions of Article 83 of the Constitution.

Similarly, Clauses 2, 3, 4, 6, 7 and 10 of the Bill read together with the impugned definition in Clause 12 of the Bill too, are inconsistent with the provisions of Article 4(c) read together with Article 3 of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution and approved by the People at a Referendum, by virtue of the provisions of Article 83 of the Constitution.

However, if item (b) in the definition of the term "Covid-19 circumstance" in Clause 12 is deleted and item (c) therein, is suitably amended, we are of the view that the said inconsistency with the Constitution would cease and this Bill may be passed with a simple majority in Parliament.

Notwithstanding the above discussed pivotal issue, this Bill was challenged, in relation to several other Clauses as well.

The next objection raised by the Petitioner was with regard to Clause 2(2)(b) of the Bill. The contention of the Petitioner was that through this process foreign law will be introduced into Sri Lanka and therefore the said Clause is inconsistent with Article 4(c) of the Constitution.

However, we observe that the aforesaid sub-clause is an integral part of Clause 2(2) of the Bill. It specifically ensures that the relief granted with regard to exclusion of the time limits under Clause 2(1) shall not apply in relation to any application or appeal for which the Supreme Court Rules and the Court of Appeal Rules [more fully referred to in Clause 2(1)(i) to (iv) of the Bill] have already been formulated [by virtue of Article 136 of the Constitution] and relief granted. The said Supreme Court and Court of Appeal Rules refer to the time periods, 16.03.2020 to 18.05.2020 and 24.10.2020 to 31.01.2021 only.

Clause 2(2)(b) of the Bill, on the other hand makes provision for further exclusion of time periods by way of Supreme Court or Court of Appeal Rules to be formulated, under Article 136 of the Constitution but within the period of the operation of the Act, as relief to a party affected in respect of any "Covid-19 circumstance". This provision in our view, only ensures further grant of relief to a party affected, by way of exclusion of time, in addition to the periods referred in the Supreme Court and Court of Appeal Rules already promulgated and more fully referred to in Clause 2(1) of the Bill.

In the said circumstances, we see no merit in the argument of the Petitioner pertaining to Clause 2(2)(b) of the Bill and we are of the view that Clause 2(2)(b) of the Bill is not inconsistent with the provisions of the Constitution.

Clause 3

Clause 3(1) of the Bill provides, that in the event of a disruption of the ordinary function of any court of first instance, due to any "Covid-19 circumstance", **for the Judicial Service Commission to designate**, the nearest court of concurrent jurisdiction as the alternative court in place of such court, where the ordinary function is disrupted. We observe that it is a discretionary provision.

The Clause goes onto provide, upon such designation, such alternative court shall consider and hear any action, prosecution, proceeding or matter filed or considered by such court or any new matter that has been filed in the alternative court.

The proviso to Clause 3(1) further provides for circumstances, in which a transfer should not be made, i.e., when a matter is reserved for judgement, order *et al* or when hearing has been concluded.

Clause 3(2) empowers, upon the resumption of ordinary function of such original court, for the presiding judge of the alternative court to re-transfer an action, prosecution, proceeding or matter filed or considered by the alternative court more fully referred to in Clause 3(1), back to the original court, subject to the limitations referred to in the proviso to Clause 3(2).

The contention of the Petitioner is that this Clause is inconsistent with Article 3, 4(c) and 12(1) of the Constitution, in so far as the mechanism of transfer is ambiguous and unclear, that there are no guidelines pertaining to transfer of a case and that it is in conflict with the powers of the Court of Appeal which is empowered to transfer a case upon an application being made by a party.

The learned Senior Deputy Solicitor General, in response to the Petitioners submissions contended, that the provisions laid down in the Clause itself, for the transfer and re-transfer of cases is rooted in the law itself, as disruption due to any "Covid-19 circumstance" and thus, the mechanism was clear, precise and unambiguous.

The learned Counsel also contended with regard to the failure to lay down guidelines, that the Judicial Service Commission, at its discretion and wisdom may take cognizance of "Covid-19 circumstance" which disrupted the function of the original court.

It was also contended that the power of the Judicial Service Commission to designate a court, is not a judicial power but an administrative power and hence there is no erosion of judicial power and that the sovereignty of the people will not be affected.

Upon questioned by Court, with regard to the forum jurisdiction, the Senior Deputy Solicitor General contended that when the Judicial Service Commission designates an alternative court, as expressly laid down in Clause 3(1) itself, the forum jurisdiction is conferred on the said court. It was also contended that thereafter, implicitly physical transfer of all cases should take place and the scheme of the provision is that, it ought to be by the Judicial Service Commission itself, although it is not expressly provided for in Clause 3(1) of the Bill. It was also submitted that this transfer is subject however, to the provisions of Sections 46 and 47 of the Judicature Act No. 2 of 1978 as referred to at the commencement of the Clause itself, as well as the limitation referred to in the proviso to Clause 3(1) therein.

Notwithstanding the said submission, the learned Senior Deputy Solicitor General, tendered to Court certain amendments that will be moved to the Bill, at the committee stage in Parliament.

We note that the principal amendment to be moved at the committee stage, is to the afore discussed Clause 3(1) of the Bill. It contemplates, '*by operation of law, for the geographically nearest court of concurrent jurisdiction*' to be the assigned court to take over the functions of the original court. Hence, the requirement for the Judicial Service Commission to designate a court will not arise.

In the absence of a decision making authority and specific guidelines with regard to the mechanism of transfer of cases as well as the functionality and duties of the assigned court, the proposed amendment in our view, would give rise to certain other practical difficulties and issues.

However, prior to examining the said amendment to be moved at committee stage in Parliament, we wish to look at Clause 3(1) of the Bill in its original form and its constitutionality.

Judicial Service Commission established by virtue of the provisions of Chapter XV A of the Constitution, is an independent entity, vested with powers as laid down in Article 111H of the Constitution. Clause 3(1) of the Bill makes provision for the Judicial Service Commission to designate an alternative court in the event the ordinary function of a court of first instance is disrupted due to a "Covid -19 circumstance".

We are of the view that the discretionary power bestowed upon the Judicial Service Commission, to make a considered and independent decision, irrespective of any specific guidelines referred to in Clause 3(1), does not impinge the constitutionality of such Clause. Moreover, we are of the view that it is implicit, that the mode and manner of transfer of cases, should only take place with the cognizance of the Judicial Service Commission and consequent to the designation of the alternative court by the Judicial Service Commission. Hence, the provisions of Clause 3 of the Bill, in our opinion, is not inconsistent with the Constitution.

However, to avoid any doubt and to bring in more clarity with regard to the mechanism of transfer of cases and other ancillary matters, provision may be made by including a suitable sentence to such effect in the said Clause 3(1).

Having examined Clause 3 of the Bill in its original form, the Court would now consider the proposed amendment that is to be brought into the said Clause at the committee stage.

By the suggested amendment, the assignment of the alternative court will be by operation of law. Thus, the provision of designation of such court by the Judicial Service Commission will be dispensed with. Hence, there will be no independent authority to assess the "Covid-19 circumstance" and to take necessary steps to transfer cases from the 'original court' to the 'assigned court'. For example, if the ordinary function of the geographically nearest court of concurrent jurisdiction in the province is also disrupted due to "Covid-19 circumstance" what will be the alternative court? Where can an action be filed?

Similarly, during a pandemic, it may not be prudent or advisable to automatically transfer all cases to an alternative court. A prioritization of cases will have to be made.

Thus, we are of the view, that there should be an independent authority bestowed with necessary powers to assess and take decisions pertaining to transfer of a case to an alternative court and the transfer cannot take place by operation of law alone.

Hence, we are of the opinion that the amendment sought to be moved will give rise to numerous other issues, legal and otherwise and will not assist in achieving the object of the Bill to provide relief and redress to persons affected by Covid-19.

In the said circumstances, we see no basis or reason in going forward with the proposed amendment and dispense with the powers and duties bestowed upon the Judicial Service Commission to designate and monitor, discharge and perform its functions empowered to the Judicial Service Commission by virtue of the Constitution itself.

Thus, we are of the view, that the proposed amendment to be moved to Clause 3(1) of the Bill at the committee stage in Parliament, should be dispensed with.

Clause 4

Clause 4 provides for conducting of court proceedings using remote communication technology and for the Minister to make regulations pertaining to same with the concurrence of the Chief Justice.

The Petitioner challenged the provisions of the said Clause upon the basis that this Clause read together with Clause 11, the regulation making power of the Minister, vests excessive power on the Minister, pertaining to administration of this Bill.

Article 136 (1) of the Constitution, empower the Chief Justice and three other judges of the Supreme Court appointed by the Chief Justice, to make Rules regulating the practice and procedure of court and in sub- clause (l) makes provision for Rules to be made for "all matters of practice and procedure [..] not specifically provided for or under any law". We note, that already Rules have been promulgated pertaining to *electronic filling and urgent digital hearings in the Supreme Court and the Court of Appeal.* Thus, we observe that in the said circumstances, the need to empower the Minister to make regulations as laid down in Clause 4 of the Bill, pertaining to remote communication technology, exclusively to courts of first instance will not arise. Hence, we are of the view that the provisions in Clause 4 are inconsistent with Article 136 read together with Article 4 (c) of the Constitution.

However, the learned Senior Deputy Solicitor General, appraised this Court about the committee stage amendment that is to be moved to this Clause and contended that the Minister will no longer have a role to play under Clause 4. The suggested amendment would incorporate the aforementioned Supreme Court and Court of Appeal Rules, into Clause 4 of the Bill and other Rules as may be made under Article 136 within the period of operation of this Bill and the said Rules will apply *mutatis mutandis,* in relation to any action, application, appeal or proceeding conducted before a court of first instance, to the extent possible.

Hence, we are of the view, that if the proposed amendment is incorporated to Clause 4 of the Bill at the committee stage, then the inconsistency of Clause 4 of the Bill, with Article 136 read together with Article 4 (c) of the Constitution would cease.

In passing, we may add that for elegance in language and in order to maintain consistency, it is desirable that the terminology referred to in the written law pertaining to similar provisions, maybe incorporated into this Clause as well.

Clauses 5, 6, 7 & 8

Clauses 5, 6, 7 and 8 consist of Part IV of the Bill, wherein relief in respect of 'exclusion of time' is granted by a court, tribunal or any other authority, to a party of a contract, who is subject to "Covid-19 circumstance" and is unable to perform any rights or obligations under the said contract.

However, we observe, that this relief is not granted to each and every party to a contract, but to a specific set of persons. In order to make an application for such relief, the principal criteria is that the 'contract' should be a 'scheduled contract'.

According to Clause 5, a 'scheduled contract' means any contract specified in the schedule to the Bill or any other contract as may be prescribed, from time to time.

Upon perusal of the schedule to the Bill, it is observed that the 14 contracts specified and more fully defined therein, are all commercial contracts.

Hence, the question posed by this Court to the Respondent was the rationale of the classification of such contracts and whether the provisions of the said Clause would impinge Article 12(1) of the Constitution.

The contention of the learned Senior Deputy Solicitor General was that the implicit categorization of commercial contracts in itself is justified as a reasonable classification with a rational and intelligible criteria. He further contended that the said criteria was arrived at having taken into consideration the representations of stakeholders and being satisfied, that it is the parties to a commercial contract on whom the immediate and urgent focus of relief should be made and the schedule of contracts is not exhaustive and can be further expanded.

The learned Counsel went on to submit that it is a matter of policy and not constitutionality and when it comes to matters of 'an economic nature', judicial intervention is slow and hesitant and drew our attention to a number of Supreme Court Special Determinations in respect of fiscal legislation, which he contended was somewhat relevant, to the matter in issue and thus, submitted that the classification is justifiable and reasonable.

However, we observe that this Bill makes provision to **grant relief to persons affected by "Covid-19 circumstance"**. We also note, unlike Part 1 of the Bill which provides relief for exclusion of time periods for *any person* affected by "Covid-19 circumstance", Part IV of the Bill provides relief only for a *certain category of persons,* namely parties to a commercial contract and thus leaves out all the other contracting parties. The examination of the list of contracts in the schedule of the Bill, emphasizes the said fact in greater extent. For example items (a) and (b) of the schedule, provides that a contract for the grant of a loan by a licensed bank or a finance company to an enterprise, where such facility is secured against any commercial or industrial immovable property or plant or machinery, such contract falls within a 'scheduled contract', *whereas* when a loan by the same licensed bank or a finance company is granted to an individual, and such facility is secured against immovable property, been a land or residential property, such contract will not fall within the categorization of scheduled contracts.

The selection of contracts to be classified as scheduled contracts maybe a matter of policy but it has to be based on rational and intelligible criteria. The relief that is granted to the contracting parties to a scheduled contract, by virtue of Clause 6(2) of the Bill, (where no specific procedure is laid down) is only an order of court, that the period which a contracting party was subjected to "Covid-19 circumstance", prevented such party from performing an obligation or exercising a right. In our view this criterion cannot be limited to commercial contracts only and should equally apply to all contracts and any contracting party affected by a "Covid-19 circumstance" should be able to obtain relief under this provision. The submission that the list can be expanded, in our view, will not take away the arbitrariness of granting relief only to certain identified contracting parties.

It is also noted, that according to the provisions of Clause 7(1), obtaining such an order of court by virtue of Clause 6(2), would not prevent the right of the other contracting party, to institute 'an action' prescribed in detail in Clause 7(2), and the contracting party who obtained an order under Clause 6(2) could only use the order obtained, as a defense available to such party.

In our view, the categorization of the scheduled contracts and the privileges granted to only the contracting parties of the scheduled contracts to obtain relief as discussed above, does not fall within the ambit of the term 'economic in nature', where judicial intervention should be slow and hesitant, as contended by the learned Counsel. Moreover, it does not fall within the regime of fiscal legislation as well and in our view, the determinations of this Court pertaining to fiscal legislation has no applicability in the present context. Clause 6(2) is purely an exercise of excluding time, subject however to the time limitation referred to in Clause 9 of the Bill.

Thus, we are unable to agree with the submissions made by the learned Senior Deputy Solicitor General, that the categorization of certain contracts as scheduled contracts under Clause 6(2), and leaving out certain other contracts, especially in the context of obtaining relief by way of an exclusion of a time period, when a contracting party was subjected to "Covid-19 circumstance" <u>and</u> unable to perform any obligation or exercise any right, under such contract due to Covid-19 circumstance, is justified and reasonable and is based on rational and intelligible criteria.

The object of this Temporary Provisions Bill is to provide relief to all persons affected by "Covid-19 circumstance." In the said circumstances, we see no basis or reason to grant relief only to a certain segment of contracting parties.

Hence, we are of view that the provisions of Clauses 5, 6 and 7 of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

Clauses 9, 10, 11 and 12

The aforesaid Clauses consist of Part V, which lays down the general provisions of the Bill. Subject to the observations of this Court pertaining to the term "Covid-19 circumstance", these Clauses are not inconsistent with the Constitution.

The Determination of the Court.

For the reasons adumbrated above, in terms of Article 123(1) of the Constitution we determine as follows:

(i) Clauses 2, 3, 4, 6, 7 and 10 of the Bill, read together with the definition of "Covid-19 circumstance" in Clause 12 of the Bill are inconsistent with Articles 3 and 4(c) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

However, if the definition of "Covid-19 circumstance" in Clause 12 is amended as opined by this Court, the said inconsistency would cease and this Bill may be passed with a simple majority in Parliament.

(ii) Clause 4 of the Bill is inconsistent with Article 136 read together with Article 4 (c) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution.
However, if the said Clause is amended in terms of the proposed amendment tendered to this Court, the said inconsistency would cease and the Bill may be passed with a simple majority in Parliament.

(iii) Clauses 5, 6 and 7 of the Bill are inconsistent with Article 12 (1) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution.

We determine that the other provisions of the Bill are not in conflict with the Constitution and may be passed with a simple majority in Parliament. However, with regard to Clause 3(1) of the Bill, as opined by this Court provision may be made.

We place on record our appreciation of the assistance given by the Petitioner and the learned Senior Deputy Solicitor General who appeared on behalf of the Hon. Attorney General.

Murdu N.B. Fernando, PC

Judge of the Supreme Court

Yasantha Kodagoda, PC

Judge of the Supreme Court

A.H.M.D. Nawaz J.,

I have read in draft the conclusions and reasoning of my sister judge Murdu N. Fernando PC. J, and brother judge Yasantha Kodagoda PC. J, on the Bill titled Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) and in a summary their determinations are as follows:

(i) Clauses 2, 3, 4, 6, 7, 8, 9 and 10 read together with the definition of "Covid-19 circumstance" in Clause 12 of the Bill are inconsistent with Article 3 and 4 (c) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

However if the definition of "Covid-19 circumstance" in Clause 12 could be amended as opined by this court, the said inconsistency would cease and this Bill may be passed with a special majority in Parliament.

(ii) Clause 4 of the Bill is inconsistent with Article 136 read together with Article 4 (c) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution.

However if the said Clause is amended in terms of the proposed amendment tendered to this court, the said inconsistency would cease and the Bill may be passed with a simple majority in Parliament.

(iii) Clauses 5, 6, 7 and 8 of the Bill are inconsistent with Article 12 (1) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution.

At the outset I would like to state that as determined by Her Ladyship and His Lordship, Clause 4 of the Bill will cease to be inconsistent when the Committee Stage Amendments thereto are moved and enacted with a simple majority.

While I thus agree with the conclusion reached by Her Ladyship Murdu N. Fernando PC. J, and His Lordship Yasantha Kodagoda PC. J, on Clause 4 of the Bill, I am afraid that I would dissent from their conclusion that Clauses 2, 3, 4, 5, 6, 8, 9 and 10 read together with the definition of "Covid-19 circumstance" in Clause 12 of the Bill are inconsistent with Article 3 and 4 (c) of the Constitution and thus they could only be passed with the special majority provided for in Article 84 (2) of the Constitution and approved by the People at a referendum by virtue of the provisions of Article 83 of the Constitution.

Her Ladyship and His Lordship have opined that if the definition of "Covid-19 circumstance" in Clause 12 is amended, the said inconsistency would cease and the bill may be passed with a simple majority in Parliament.

Thus in the determination of the majority it is the pervasive presence of the phrase "Covid-19 circumstance" as defined, in the aforesaid clauses of the Bill, that constitutes the causal factor of the inconsistency and therefore I would assay the definitional clause to demonstrate that in my determination the said definition of "Covid-19 circumstance" in no way eventuates in any such inconsistency with the Constitution. If I could demonstrate that the definition of "Covid-19 circumstance" in Clause 12 does not infringe the Constitution or any of its Articles, then the corollary follows that none of the Clauses wherein the phrase "Covid-19 circumstance" occurs namely Clauses 2, 3, 4, 5, 6, 7, 8, 9 and 10 would be tainted with inconsistency with the Constitution.

Though I do not determine Clauses 2, 3, 4, 5, 6, 7, 8, 9 and 10 to be inconsistent with the Constitution, I do subscribe to the view that the definition of Covid-19 circumstance in Clause 12, if at all, could be amended only on account of its tautology, which I will later advert to in this determination. Notwithstanding the view I hold as to the amendment of definition of Covid-19 circumstance in the end because of its inherent tautology, upon an analysis of the definition of "Covid-19 circumstance" in Clause 12, I determine that even in its current format as the definition stands in the Bill, it does not fall foul of the supreme law of the country.

I would set down my reasons as to why I determine the definition to be consonant with the Constitution. Before doing so, let me observe that the proposed legislation titled "Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) BILL would appear to be pre-emptive in that it is not intended to result in any extinction of liability or rights due to the raging pandemic but rather it authorizes the dispute resolution mechanism in this country to adapt the procedural form or timeframes to the unforeseen circumstances that have infiltrated into every aspect of litigation. The common law concepts of force majeure and hardship consists in the elimination of obstacles in the resolution of disputes caused by uncontrollable and unforeseen circumstances and it would appear that the clauses under consideration namely 2, 3, 4, 5, 6, 8, 9 and 10 intend to enact legislative responses to Covid 19 induced crises in litigation. The majority determination deals with the exact scope and ambit of the aforesaid clauses but I would only briefly advert to their legal effects when necessary and now I proceed to answer the question as to why I determine the clauses to be consonant with the Constitution.

Clause 2

The impugned definition of Covid-19 circumstance

The definition of Covid-19 as it stands now in the draft Bill reads as follows:

"Covid-19 circumstance" includes

a) Covid-19;

b) the operation of or compliance with law of Sri Lanka or another country or another country or territory or an order of direction of the Government or any statutory body, or of the Government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19);or

c) any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a) or (b).

The gravamen of the Petitioner's complaint was that the operation of or compliance with any law of another country or territory would intrude on the sovereignty of the People as adumbrated in Article 3 read with Article 4 of the Constitution. It is not as if the decision-making process of the Sri Lankan judiciary or tribunal is intruded upon or affected by an extraterritorial law or order but on the contrary the import of the definition (b) only means that the Sri Lankan courts which have to take into account a Covid-19 circumstance for the purpose of granting reliefs to litigants under the Act if enacted, will also take cognizance of a factual consequence brought about by a Covid related law or order of an overseas country. In my view there is nothing unconstitutional in such a provision.

Craies On Legislation-a Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation edited by Daniel Greenberg, Counsel for domestic legislation, House of Commons (2020) has this interesting passage which makes it patently clear that what is sought to be achieved in this Bill does not trespass on the legislative province of the Sri Lankan Parliament nor is it an intrusion on the decision-making power of the judiciary in this country.

In paragraph 3.5.1 of the 12th Edition of that well-known tome on statutory interpretation it is unambiguously stated as follows:

> *"As a general rule the person on whom a power to legislate is conferred cannot use that power to confer a further power to legislate."*

If the Constitution recognizes Parliament as its legislative repository in Articles 4 (a) and 75 of the Constitution, such a delegate vested with the legislative power of the people cannot alienate that power and what Craies on Legislation states as a prohibition against further delegation (sub-delegation) in para 3.5.1 of the 12th Edition of *Craies,* is well encapsulated in Article 76 (1) of the Constitution.

"Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power."

Of course this article operates subject to the power of Parliament to sub-delegate the plenitude of its legislative power only to its authorized agents such as the President who is authorized to make emergency regulations and a person or body who is empowered to make subordinate legislation for prescribed purposes.

Nowhere does the proposed legislation attempt a sub-delegation of its legislative power outside the pale and remit of Article 76 of the Constitution. Nowhere does the proposed legislation abdicate its law making power to an external institution such as a foreign legislature. Such an intendment is further from the true import of the Bill before us. No legislative power is sub-delegated or further delegated to an outside instrumentality in contravention of Article 76 of the Constitution.

Let me juxtapose the impugned limb (b) of the definition "Covid-19 circumstance" in Clause 12 -the Interpretation Clause.

(b) *The operation of or compliance with any law of Sri Lanka or another country or territory, or an order or direction of the Government or any statutory body, or the Government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19)*

When the definition of Covid-19 circumstance includes in its limb (b) "the operation of or compliance with ***any law of another country or territory***, or ***an order or direction of the Government or other public authority of another country or territory***, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19)," it will become inconsistent with the Constitution and more particularly with Articles 4 (a) and 76 of the Constitution, only if that other country or territory has enacted their legislation for the sake of Sri Lanka. The truth is to the contrary. The Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Bill does not aim at such an impermissible sub-delegation. Rather it only allows a Court in Sri Lanka to take cognizance of the consequence of the Covid related legislation of the other country or territory in order to grant time extensions and relief to a litigant possibly impacted by the Covid related legislation. The adjectival clause "*being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19)*" in Clause (b) of the definition makes it clear that it is only a Coronavirus related legislation or order of another country whose impact is brought to the notice of our judiciary so that it will deem it as a Covid-19 circumstance to grant relief to a party affected by such circumstances. Take for instance the case of a Sri Lankan undergoing travelling restrictions to come back to Sri Lanka on account of a foreign law or direction that has barred his journey back home. In the meanwhile the time limit for his contemplated suit to vindicate his rights in Sri Lanka under a cause of action may be running out by his prolonged stay overseas but the Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Bill gives him a breathing space in that clause 2 (1) of the Bill enables him to obtain an extension of time beyond the statutory time limit provided he establishes to the satisfaction of the relevant court that he was prevented from complying with the statutory time limit because of a Covid 19 circumstance that would include a law or order passed in relation to the pandemic in the country where he became sequestered. The law or order passed in the foreign country causally led to a Covid 19 circumstance and that circumstance is invoked by the litigant for purposes of obtaining an exemption or extension of time that this proactive legislative seeks to achieve.

In no way does such a judicial cognizance of the passage of foreign law or order that made it impossible for him to comply with statutory time limits impinge on the sovereignty of the People. The competent court where relief is sought under Clauses 6, 7 and 9 takes into consideration the foreign law or order only as a Covid-19 circumstance that made it impossible for a litigant to comply with time limits or perform his contractual obligations.

It is a question of fact whether the foreign law or order prevented or disrupted a litigant in his quest to vindicate his legal rights or perform his obligations. It is not an illegal usurpation of the legislative power of the People that is engaged here.

The question before Court would be whether it is satisfied that the foreign law or order made by reason of or in connection with Coronavirus Disease 2019 or compliance thereof operated so as to prevent or disrupt a person to comply with limitation periods or to perform obligations imposed or secure rights conferred by certain contracts known as Scheduled Contracts. There are component elements that are stipulated for this excusatory plea of Covid-19 circumstance to succeed. There must be a foreign law or order occasioned by Coronavirus Disease, which eventually leads to an impossibility for a person to comply with limitation periods or contractual obligations. The Bill enables this circumstance to be pleaded as a defense to seek time extensions and relief from performance of contractual obligations.

The collocation of the words in Clause (b) of the definition of "Covid-19 circumstance" namely "*operation of…any law of … another country or territory, or an order or direction of ….. or the Government or other public authority of another country or territory….*" only connotes an extraterritorial and external phenomenon because its consequence transcends boundaries. Its reliance by a person as causative of his impossibility to perform or comply with a time limit does not result in the use by a Sri Lankan court of that law or order to adjudicate on the merits of a dispute. Thus there is no intrusion on judicial power as adumbrated by Article 4 (c) of the Constitution.

Accordingly I am irresistibly driven to the determination that the retention in the impugned clause of the words "*any law of ... or another country or territory, or an order or direction of ..... or the Government or other public authority of another country or territory....*" does not infringe any provisions of the Constitution, least of all on sovereignty which all organs of government would indisputably recognize as inalienably inherent in the People of our country.

There is another argument that is germane to the issue. When an authority of a foreign country issues a Covid-related direction which impacts on a person's ability to timeously initiate legal proceedings in Sri Lanka, certainly the exercise of discretion in the foreign jurisdiction is having a consequence of fact. By no stretch of imagination can it be argued that it amounts to intentional delegation of legislative power. A reference to a foreign law or order that emanated due to Covid is not equivalent to delegation. What is offensive of the Constitution is an unlawful abdication or alienation of legislative power and in my view the definition does not result in such an alienation. A mere reliance on a foreign law or order is not an intrusion on sovereignty of the country. *Craies* on Legislation articulates the true test of delegation at page 172 of its 12th Edition. Daniel Greenberg -the learned Editor makes the assertion that if a particular enactment or order is made wholly without reference to the referential use that would be made of it, that enactment would not amount to a delegated legislation

In this instance the particular foreign law or direction of a foreign body is not made with the knowledge that a referential use of it would be made in Sri Lanka. For instance the law is not made in England expressly with reference to it becoming directly applicable in Sri Lanka. In the case of delegated legislation in its true sense, the delegate enacts it with the knowledge that it will have direct application in Sri Lanka. In this instance no such direct application of a foreign law is intended but a mere reliance thereof to secure an exemption for instance from a time limit and it does not intrude prejudicially on the legislative power or judicial power of the People. Our domestic legislation is rife with such examples.

The one-month time limit stipulated in Article 126 (2) of the Constitution is deferred by section 13 of the Human Rights Commission Act, No 21 of 1996 which provides that the period of time where an inquiry is pending before the Human Rights Commission shall not be taken into account in computing the one month time limit prescribed in Article 126 (2) of the

Constitution. Thus a mere impact on the Fundamental Rights jurisdiction of the Supreme Court alone does not impinge on the sovereignty of the People-see Priyantha Jayawardena, PC J., in the Special Determination on **"Twentieth Amendment to the Constitution" S.C.S.D.No 01-36/2020.** Since a Covid circumstance transcends passport control, it is immaterial that its impact arises from an impossibility arising from Sri Lanka or overseas. In my view the scheme of the Bill is premised on the doctrine of *lex non cogit ad impossibilia.*

Broom's Legal Maxims (11th Edition, p 177) indicate that however mandatory a provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance particularly where it is a question of time factor. It is but fair that relief is molded, varied or re-shaped in the light of updated facts. The proposed bill in my view puts the doctrine on a legislative footing.

In the circumstances I determine that the presence of the sub-clause (b) in the definition of the phrase "Covid-19 circumstance" does not infringe any of the provisions of the Constitution and the appearance of the phrase "Covid-19 circumstance" in Clauses 2, 3, 4, 5, 6, 7, 8, 9 and 10 does not render those clauses inconsistent with the Constitution. As such it is my determination that these clauses can be enacted with a simple majority in Parliament.

An Amendment of the Definition of Covid-19 Circumstance

I have already opined that despite my holding that the definition of Covid-19 circumstance as it stands in the bill is not inconsistent with the Constitution, it will not be repugnant if it is sought to amend the definition.

The bill in its current form defines the phrase in Clause 12 as follows:

"Covid-19 circumstance" includes

a) Covid-19;

b) the operation of or compliance with law of Sri Lanka or another country or another country or territory or an order of direction of the Government or any statutory body, or of the Government or other public authority of another country or territory, being a any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19);or

c) any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a) or (b).

Though the formulation is consonant with the Constitution, a close scrutiny will show that sub-clause (b) is in effect an example of sub-clause (c). It is for this reason I observed that clause (b) is tautologous as sub-clause (c) would adequately cover sub-clause (b). In such circumstances even if sub-clause (b) is deleted and a new definition is reformulated as below, the Bill will have the salutary effect it seeks to achieve. In my view the amendment would only be a distinction without a difference.

The new formulation

The definition could be suitably amended in the following way to avoid tautology.

"Covid-19 circumstance" includes

a)Covid-19;or

c)any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a).

Clauses 5, 6, 7 and 8 of the Bill

I next turn to Clauses 5, 6, 7 and 8 which are found in Part IV of the Bill. It is under the aegis of these clauses that parties to a "Scheduled contract" are granted relief in respect of their inability to perform their contractual obligations or in the enforcement of contractual rights emanating from the said Scheduled contracts they are empowered to institute actions.

Clause 5 of the Bill reads as follows:

For the purpose of this Part, a "Scheduled contract" means any contract specified in the First Schedule to this Act or any other contract as may be prescribed, from time to time.

In terms of this Clause, a Scheduled contract would be any contract specified in the First Schedule to the Act or any other contract as may be prescribed from time to time. A close scrutiny of the Scheduled contracts in the First Schedule would indicate that the Scheduled contracts in the First Schedule do not evince a comprehensive and closed list. The use of the word "include" in the First Schedule shows the intention of the legislature to enlarge the scope of Scheduled Contracts. The enlargement can take place either by subordinate or delegated legislation made by the Minister from time to time or from an argument that a particular contract on which relief is sought is indeed included within the rubric of Scheduled contracts.

I would for purposes of clarity set out the Scheduled contracts that have been specified in the First Schedule:

Scheduled contracts include-

(a) a contract for the grant of a loan facility by a bank licensed under the Banking Act, No. 30 of 1988 or a finance company licensed under the Finance Business Act, No. 42 of 2011 to an enterprise, where such facility is secured, wholly or partially, against any commercial or industrial immovable property located in Sri Lanka;

(b) a contract for the grant of a loan facility by a bank licensed under the Banking Act, No. 30 of 1988 or a finance company licensed under the Finance Business Act, No. 42 of 2011 to an enterprise-

(i) where such facility is secured, wholly or partially, against any plant, machinery or fixed asset located in Sri Lanka; and

ii) where such plant, machinery or fixed asset, as the case may be, is used for manufacturing, production or other business purposes;

(c) a performance bond or equivalent that is granted pursuant to a construction contract or supply contract;

(d) a hire-purchase agreement within the meaning of the Consumer Credit Act, No. 29 of 1982, where the good hired or conditionally sold under the agreement is —

(i) any plant, machinery or fixed asset located in Sri Lanka, where such plant, machinery or fixed asset is used for manufacturing, production or other business purposes; or

(ii) a commercial vehicle;

(e) a lease of –

(i) any plant, machinery or fixed asset located in Sri Lanka, where such plant, machinery or fixed asset is used for manufacturing, production or other business purposes; or

(ii) a commercial vehicle;

(f) a finance lease within the meaning of the Finance Leasing Act, No. 56 of 2000, where the equipment provided under the finance lease is-

(i) any plant, machinery or fixed asset located in Sri Lanka, where such plant, machinery or fixed asset is used for manufacturing, production or other business purposes; or

(ii) a commercial vehicle;

(g) an event contract;

(h) a tourism-related contract;

(i) a construction contract or supply contract;

(j) a lease of non-residential immovable property;

(k) an option given by a housing developer to an intending purchaser for the purchase of one or more units of housing accommodation;

(l) an agreement between a housing developer and a purchaser for the sale and purchase of one or more units of housing accommodation;

(m) an option given by a commercial property developer to an intending purchaser for the purchase of one or more units of commercial property;

(n) an agreement between a commercial property developer and a purchaser for the sale and purchase of one or more units of commercial property.

It is parties to the above contracts who secure rights under Clauses 6, 7 and 8. In terms of **Clause 6 of the Bill,** a party who is unable to perform an obligation imposed on him by the contract but who is subject to a Covid-19 circumstance can make an application to court or tribunal to seek a deferral of his contractual obligation. If a Covid-19 circumstance has prevented a party from performing his obligations or exercising his right under the contract, the period of such circumstance would be excluded from the period within which such party would otherwise be required to perform the obligation or exercise the right.

According to **Clause 7 of the Bill** any party who could vindicate a right against any other party under the contract who is otherwise subjected to a Covid-19 circumstance can institute proceedings against the other party. In such a situation the proviso to Clause 7 (1) enables the other party to plead his inability due to Covid-19 circumstance as a defence. The actions that a party could institute arising from the Scheduled contracts are said to include the type of actions set out in Clause 7 (2).

Clause 8 of the Bill clarifies the position that the relief that is granted under Part IV of the Bill is only a deferral of the contractual obligations or rights and they would in no way constitute an extinction of the contractual obligations or rights.

The quintessential issue that came up in the course of the argument was whether the Scheduled contracts expressly listed under the First Schedule would constitute the creation and classification of commercial contracts as a class and whether in such circumstances the categorization can be justified with rational and intelligible criteria.

If one takes a closer look at the Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Bill under consideration, there is indeed an underlying deferral of contractual obligations or rights that arise from commercial contracts. Take for instance the following contracts given in the First Schedule:

a) a contract of loan given by a bank or a finance company to an enterprise which has secured that loan against a commercial or industrial immovable property;

b) a secured loan given by a bank or a finance company where plant machinery or a fixed asset etc have been given as a security;

c) a performance bond given in the case of a construction contract or supply contract.

The list is undoubtedly not exhaustive but one could perceive the underlying policy of the legislature to treat these industries and persons as having been disrupted by the Covid-19 circumstance, which has in turn debilitated their ability to service the loans granted by lending institutions.

In the case of a performance bond issued at the instance of a builder, a call on the performance bond is a right inherent in the beneficiary of the performance bond namely the employer who has entered into a building contract with the builder. The issuer of the performance bond may be a bank or an insurance company who has a contractual liability to pay on the call once a breach of contract is brought to its notice. Here the builder is empowered under Clause 6 to seek relief. Clause 7 will enable the beneficiary to exercise his right to call on the performance bond. The proviso to Clause 7 (1) provides that a COVID-19 event will be a defence to any breach of contract claim if it is the reason for the inability to do something in pursuance of the contract.

It is in public domain that construction contracts have been hit hard by the Covid-19 pandemic. The raging pandemic has had the side effect of disrupting supply chains and limiting working hours along with myriad other issues great and small that have left contractors staring at completion dates they have little hope of meeting. In order to get protection under the Act the burden of proof is on the builder to prove his inability to perform the obligations which must be, to a material extent, caused by a COVID-19 circumstance. As it stands, a COVID-19 circumstance is defined broadly as:

a) Covid-19 ;

b) the operation of or compliance with any law of Sri Lanka or another country or territory, or an order or direction of the Government or any statutory body, or of the government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19);

If a party to a contract encounters issues due to the laws of other countries, sub-clause (b) would be very useful in circumstances where a party is delayed by suppliers or where personnel are unable to travel due to COVID-19 measures. In any event I have dealt with this issue before and the citation of sub-clause (b) in this context is only to mirror its relevance to the issue of the builder.

I have sought in the above discussion to pinpoint the legislative policy which seems to pervade the ameliorating clauses that provide relief to these contractual parties.

The issue that came up before court was whether the legislature could group together these contracts without offending Article 12 of the Constitution. Article12 (1) of the Constitution specifically spells out that all persons are equal before the law and are entitled to the equal protection of the law. It is realistic to pose the question as to why small time borrowers and individual house owners who have secured their loans by mortgaging their housing have been excluded but it is axiomatic that their non-selection is not per se discriminatory and arbitrary provided that the legislation is so pervasive as to promote a legitimate aim and policy.

A consequence of this classification certainly triggers the argument that other borrowers and contracting parties are not entitled to the same rights. But it is a given that it is legitimate and rational for a legislature to enact a law specifying a threshold. As could be seen, undoubtedly commercial enterprises which have entered into Scheduled contracts have suffered financially that the legislature has felt it legitimate to give them a shot in the arm by giving them deferrals and postponement of the enforcement of their contractual obligations. Some of these enterprises employ a whole host of work force that retrenchment due to the Covid-19 pandemic has been abundant and these enterprises have not been able to finance their loans though they have contributed to the national economy.

It is no secret that the Covid-19 pandemic and its impact on economic activity have resulted in many businesses being unable to fulfill their contractual obligations. As a result such businesses and enterprises are exposed to the consequences of failing to comply – such as claims for damages, forfeiture of deposits, termination of leases, insolvent proceedings etc. In the circumstances if the legislature goaded by a legitimate policy to protect and give relief to this category attempts a classification, this could hardly be condemned as discriminatory. If the legislature had felt that they would afford this relief to this category because the blows on their coffers are harder and they should be resuscitated to promote economic activity, the legislature is guided by a legitimate aim and such a classification would not offend Article 12 of the Constitution.

This differentiation is not arbitrary or unreasonable, and is referable to a legitimate object, namely, to facilitate the recovery of these institutions who, in the legislative eye, play a significant role in the provision of cash flow for the promotion of the economy. The consequential discrimination from the point of view of the small time borrowers and weaker parties to a contract is almost inevitable. Whenever there is a classification permitted by Article 12, there will be consequential differences.

I find that there is rationale in the classification sought to be attained by the Bill and though it is axiomatic that Article 12(1) of the Constitution postulates that equals must be treated equally and unequals cannot be treated equally, it is ingrained in Article 12 (1) of the Constitution that the state is allowed to classify persons or things for legitimate purposes- ***Perera v. Building Materials Corporation*** **(2007) BLR 59** and ***Dayawathie and Others v. Dr. M. Fernando and Others*** **(1988) 1 Sri LR 371,**

In the circumstances the classification made in clause 5, 6, 7 and 8 read with the First Schedule of the Bill is based on intelligible differentia and it bears a reasonable and a rational relation to the objects sought to be attained by the Bill.

In **S.C.S.D. No. 27/2004 re. "Inland Revenue (Amendment) Bill",** the Supreme Court categorically determined as follows:

> ***"The substantive provisions of the Act grant concessions from income tax or impose and clarify liabilities.*** *The former Constitutional Court and this Court have in several determinations stated that in taxation matters the legislature has the greatest freedom of classification and concessions granted or liability imposed have not been held to be inconsistent with Article 12(1) which provides for the equal protection of the law."*

I would cite in this connection a decision of the former Constitutional Court made in respect of **the Finance (Amendment) Act, of 1978.** The Court observed as follows:

> *"In taxation matters, even more than in other fields, it is well established that the legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally that it cannot be justified on the basis of any valid classification."*

A slew of Special Determinations of this court in respect of fiscal legislation has emphasized this dictum that the policy of the legislature if it is referable to a legitimate objective is best left to the legislature and there has been judicial reticence and non-interference with such policy.

I take the view that the co-equal status of legislative, judicial and executive branches of government has entailed a significant degree of judicial restraint concerning matters that properly fall within the purview of other branches of government. Courts tend to shy away from reviewing the merits of matters involving intricate balancing of competing policy considerations that "judges are ill equipped to trespass into these domains and adjudicate thereon."

It is worth adverting to the observations made in **the *Colombo Port City Commission Bill* (SCSD 4, 5, & 7-23/2021)**

> *"This Court has on numerous occasions emphasized that in revenue matters, in making classifications for the purpose of granting concessions or imposing liability, there is a wide discretion. [Inland Revenue Amendment Bill S.C.S.D. No.*

> *3/1980; Finance Bill S.C.S.D. No. 28/2004, Value Added Tax (Amendment) Bill S.C.S.D. No. 29/2004, Value Added Tax (Amendment) Bill S.C.S.D. No. 2/2005, Finance (Amendment) Bill S.C.S.D. No. 6/2005, Inland Revenue (Amendment) Bill S.C.S.D.No. 5/2005, Default Taxes (Special Provisions) Bill S.C.S.D. No.02/2009]. Such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable or discriminatory"*

No tinge or taint of arbitrariness or unreasonableness could taint the policy objective behind Part IV in categorizing Scheduled contracts as Clause 5 empowers the Minister to prescribe any other contracts from time to time. In other words the Minister has been empowered by Clause 5 of the proposed Bill and Clause 11 (1) of the Bill empowers the Minister to make regulations in respect of all matters which are required by this Act to be prescribed. In other words a discretionary power has been conferred on the Minister by this proposed legislation enabling him to add additional types of contracts if needed. It automatically follows that any inaction or even action on the part of the Minister in regard to his power of expanding the list of additional contracts can always be challenged under Article 126 of the Constitution. This takes away any allegation of arbitrariness or discrimination that could be leveled against this legislation as the list of Scheduled contracts is not fixed or static. Given the fluid nature of the Covid-19 situation, it should not be assumed that it is the end of the road for small time borrowers and house owners who have hypothecated their accommodation. There could be subsequent additions in the event individuals and specific industries come under further financial pressure.

Therefore the non-selection of any other borrower and a party to a contract is not anathema to Article 12 of the Constitution. Though the legislature may not have decided now not to give them relief, it has appointed a delegate to ameliorate their hardships in the future.

The question of priority that has been given to a specific category appears to be galvanized by social engineering and economic consideration and I take the view that owing to the polycentric nature of decision-making on Covid-19 measures and the concomitant legislative response in the form of this legislation, the views of the legislature and executive will carry much weight before this court. In such circumstances I determine that Clauses 5, 6, 7 and 8 of the Bill are consistent with Article 12 (1) of the Constitution and could be validly passed with a simple majority.

For the aforesaid reasons the pith and substance of my determination in terms of Article 123 (1) of the Constitution would be as follows:

(i) Clauses 2, 3, 4, 6, 7, 8, 9 and 10 read together with the definition of "Covid-19 circumstance" in clause 12 of the Bill are consistent with Article 3 and 4 (c) of the Constitution and could be validly passed with a simple majority.

The Definition of "Covid-19 circumstance" could however be amended owing to the fact that sub-clause (b) is an example of sub-clause (c).

(ii) Clause 4 of the Bill is inconsistent with Article 136 read together with Article 4 (c) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution.

However if the said Clause is amended in terms of the proposed amendment tendered to this court, the said inconsistency would cease and the Bill may be passed with a simple majority in Parliament.

(iii) Clauses 5, 6, 7 and 8 of the Bill are consistent with Article 12 (1) of the Constitution and could be validly passed with a simple majority in Parliament.

I also determine that the other provisions of the Bill are not in conflict with the Constitution and may be passed with a simple majority in Parliament.

I wish to place on record my appreciation of the assistance given by the learned Counsel for the Petitioner and the learned Senior Deputy Solicitor General.

Judge of the Supreme Court