

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

*In the matter of an application in terms of Article 121
read with Article 120 of the Constitution to determine
whether the Bill titled "Prevention of Terrorism
(Temporary Provisions) (Amendment)" or any part
thereof is inconsistent with the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

S.C. S.D. NO 13/22

Petitioner:

1. Centre for Policy Alternatives
(Guarantee) Limited,
No. 6/5, Layards Road,
Colombo 05.
2. Dr. Paikiasothy Saravanamuttu,
No. 3, Ascot Avenue,
Colombo 05.

Counsel:

Viran Corea with Luwie Ganesathasan,
Khyati Wikramanayake, Thilini
Vidanagamage and Charya
Samarakoon.

S.C. S.D. NO 14/22

Petitioner:

Ambika Satkunanathan,
No. 27 Rudra Mawatha,
Colombo 06.

Counsel:

Pulasthi Hewamanna with Harini
Jayawardhane

S.C. S.D. NO 15/22

Petitioner:

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

Counsel:

Pulasthi Hewamanna with Fadhila
Fairoze.

S.C. S.D. NO 16/22

Petitioner:

1. Sylvester Jayakody,
General Secretary,
Ceylon Mercantile Industrial &
General Workers Union (CMU),
No. 03, Bala Tampoe Lane,
Colombo 03,
Sri Lanka.
2. Benedict Joseph Stalien Fernando,
General Secretary,
Ceylon Teachers' Union,
Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.
3. Ruwan Laknath Jayakody
Arachchige Jayakody,
19/3, Sulaiman Terrace,
Colombo 05.
4. Kavindya Christopher Thomas,
No. 80, Station Road,
Udahamulla,
Nugegoda.

Counsel:

Ermiza Tegal with M. Rifaideen, M.
Doss, J. Dehiaththage, L. Hemachandra,

S. Arulingam, S. Daniel and M.
Schubert.

S.C. S.D. NO 17/22

Petitioner:

Senaka Perera,
No. 188,
Hulftsdorp Street,
Colombo 12.

Counsel:

Lakshan Dias with Maneesha
Kumarasinghe instructed by Prabodha
Ratnayake.

S.C. S.D. NO 18/22

Petitioner:

1. Kurukulasuriya Marius Rukshan
Fernando,
No. 281, Deans Road,
Colombo 10.
2. Lucille Mary Ann Abeykoon,
No. 3/4 A, Digana Road,
Nattarampotha,
Kandy.
3. Rev. Fr. Kuranage
Pattrick Sujeewa Perera,
22nd Mile Post,
Puttalam Road,
Saliyawewa Junction.
4. Gopal Logeswary,
No. 273/1,
Mannar Road,
Paddanchchipuliyankulam,
Vavuniya.

5. Rev. Sr. Sylvia Cullen,
St. Josephs' Covent,
Kegalle.
6. Ihalagama Gedara Mudiyanseelage Asela
Bandara Ihalagama,
No. 42/c Kahalla,
Katugasthota.
7. Rev. Sr. Concelia Marianpillai,
No. 10,
Janapada Mawatha,
Daluwakotuwa,
Kochchikade,
Negombo.
8. Rev. Sr. Eymard Perera,
St' Joseph Vaz,
Convent,
Mawathagama.
9. Rev. Sr. Rita Kurusumuthu,
Holy Cross Convent,
No. 10,
Janapada Mawatha,
Kochchikade.
10. Rev. Sr. ms Janova
Catherine Sebastian,
Nazareth Convent,
Madolkelle.
11. Rev. Sr. Victorine Selvathy Malachias,
Holy Family Convent,

Mullaitivu.

12. Rev. Sr. Mary Barbara,
Carmel Convent,
Bandarawela.

13. Rev. Sr. M. Selvamalar Vincent,
Our Lady of Lanka Convent,
No.116, Katugastota Road,
Mahaiyawa.

14. Rev. Sr. Mary Kanthini,
St. Theresa's Convent,
Elpitiya.

15. Dharshanie Maryanne
Suranganie Alles,
SFO,
No. 957/2, 37th Lane,
Pothuarawa Road,
Malabe.

16. Rev. Fr. Soosaiappu Anton Hubert
Jeyabalan Croos,
St. Joseph's Church,
Thalvupadu,
Mannar.

17. Rev. Fr. Ranmuni Jude Vernon Rohan
Silva,
No. 281, Deans Road,
Colombo 10.

18. Rev. Fr. Annakkarage Uloge

Lakshman Peiris
Jesuit Residence,
Kaluwella,
Galle.

19. Rev. Fr. Nandana
Anthony Edward
Manatunga
St. Anthony's Church,
Wattegama.

20. Mr. Wijesinghe Arachchige Don
Shirley Lal Gregory Wijesinghe,
165, Kirimetiyyagala,
Kadawatha.

21. Rev. Sr. Ethel Fernando,
Holy Family Convent,
Kyrinjanpitiya,
Kalpitiya.

Counsel : Suren D. Perera with Geeva Nilmalgoda.

Attorney General

Counsel : Nerin Pulle P.C., ASG with Kanishka de
Silva Balapatabendi SSC, Shiloma David
SC and Medhaka Fernando SC for the
Attorney General.

Before:

P. PADMAN SURASENA, J

MAHINDA SAMAYAWARDHENA, J

ARJUNA OBEYESEKERE, J

The Bench assembled for hearing the petitions on 18th February 2022 and 21st February 2022.

The Bill titled "Prevention of Terrorism (Temporary Provisions) (Amendment)" (hereinafter sometimes referred to as the Bill) was published in the Gazette on 21st January 2022 and was placed on the Order Paper of Parliament on 10th February 2022.

The above-mentioned Petitioners have filed six petitions [SC (SD) No. 13/ 2022 dated 11th February 2022, SC (SD) No. 14/ 2022 dated 14th February 2022, SC (SD) No. 15/ 2022 dated 15th February 2022, SC (SD) No. 16/ 2022 dated 15th February 2022, SC (SD) No. 17/ 2022 dated 15th February 2022 and SC (SD) No. 18/ 2022 dated 17th February 2022] invoking the jurisdiction vested in this Court by virtue of Article 120 read with Article 121(1) of the Constitution, in respect of the aforementioned Bill. The Petitioners have prayed for a determination from this Court under Article 123 of the Constitution.

The Petitioners have filed the aforementioned petitions in the Registry of the Supreme Court during the period 11th February 2022 to 17th February 2022. Upon receipt of the said petitions, Court issued notices on the Hon. Attorney General as required by Article 134 (1) of the Constitution. As the learned Additional Solicitor General who appeared for the Hon. Attorney General confirmed that the copies of the petitions have been delivered to the Speaker, as per the requirement in Article 121(1), Court commenced hearing on 18th February 2022 and concluded on 21st February 2022.

The Bill proposes to amend Sections 9, 10, 11, 15, 15A, 19, 26 and 31, repeal Section 14 and insert new Sections 9A, 9B, 10A and 15B into the Principal Act/ Enactment which is the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended by Prevention of Terrorism (Temporary Provisions) (Amendment) Act Nos. 10 of 1982 and 22 of 1988. It will hereinafter sometimes be referred to as the Principal Act or the PTA.

Although there are 14 main Clauses in the Bill, the Petitioners in all the applications have cumulatively challenged Clauses 2, 3, 4, 5, 6, 10, 11 and 12 of the Bill only. Clauses 1, 7, 8, 9, 13 and 14 of the Bill have not been challenged.

The Petitioners have prayed for a determination that some of the provisions in the afore-stated Clauses of the Bill are inconsistent with Articles 3, 4, 11, 12(1), 13(2), 13(4) and 13(5) of the Constitution and therefore cannot be enacted into law, unless the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), and is approved by the People at a Referendum.

Let us now proceed to determine whether the said Bill or any provision thereof is inconsistent with the Constitution.

CLAUSE 2 OF THE BILL

Clause 2 of the Bill seeks to amend Section 9 of the Principal enactment. Section 9, as it presently stands, reads as follows:

"Detention orders.

9(1) Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order

that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time:

*Provided, however, that the aggregate period of such detention shall not exceed a period of **eighteen months**.*

(2)(a) At any time after an order has been made in respect of any person under subsection (1), the minister may direct that the operation of such order be suspended and may make an order under sub section (1) of Section 11.

(b) The Minister may revoke any such direction if he is satisfied that the person in respect of whom the direction was made has failed to observe any condition imposed or that the operation the order can no longer remain suspended without detriment to public safety."

Clause 2 of the Bill reads as follows:

"Section 9 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (hereinafter referred to as the "principal enactment") is hereby amended in the proviso to subsection (1) thereof, by the substitution for the words "eighteen months" of the words "twelve months"."

It can clearly be seen that the effect of the Bill if passed by Parliament, would be only to reduce the aforesaid maximum period of eighteen months of detention to twelve months. The amended Section 9(1) [after incorporating the amendments sought to be added by Clause 2 of the Bill] would read as follows:

"Detention orders.

9(1) Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time:

*Provided, however, that the aggregate period of such detention shall not exceed a period of **twelve months**."*

(Emphasis added to signify the two words that are sought to be amended in Section 9(1))

In order to give context to the submissions of the learned Counsel for the Petitioners and the learned Additional Solicitor General, it would be appropriate to refer at the outset to Articles 4(d), 13(2) and 15(7) of the Constitution.

In terms of Article 4(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."*

Article 13(2) requires that *"Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with the procedure established by such law."*

Deviation from Article 13(2) is however permitted in terms of Article 15(7) which provides that, *"the exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society."*

In **The Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations (Amendment) Bill**,¹ where there was a similar provision conferring on the Minister power to detain persons for periods of 3 months at a time and for an aggregate period not exceeding one year, this Court stated as follows:

"Prima facie, Section 11 appears to be in conflict with Article 13(2) but Article 15(7) of the Constitution provides that the exercise and operation of all the fundamental rights declared and recognized, inter alia, by Article 13(2) shall be subject to such restriction as may be prescribed by law in the interest of national security, public order etc. We are, therefore, of the view that Section 11 is not inconsistent with the Constitution as its enactment was justified under Article 15(7)."

Mr. Hewamanne who appeared for the Petitioners in SC (SD) No. 14/ 2022 submitted that *'any restriction on fundamental rights, as recognized under international jurisprudence is that it must be for an appropriate purpose [vide Article 29(2) of the Universal Declaration of Human Rights] [which appropriate purposes are spelt out in Article 15 of the Constitution] and additionally such restriction must be necessary in a democratic society. They must be provided for by law, serve a legitimate purpose and be necessary as well as a proportionate restriction.'* There was no dispute among the

¹ SC Determination No. 5/79 - Decisions of the Supreme Court on Parliamentary Bills 1978 – 1983 Volume I pages 53 - 54

Petitioners that where the interests of national security require, such measures as permitted by Article 15(7) can be taken.

Submitting that the appositeness of policy consideration vis-a-vis national security must be relinquished to the sound judgment of Parliament, the learned Additional Solicitor General drew our attention to the decision of this Court in **Kumaranatunge Vs. Samarasinghe, Additional Secretary, Ministry of Defence and Others**,² where this position has been recognised in the following terms:

"I have already pointed out that the freedom from arbitrary arrest and detention guaranteed by Articles 13(1) and (2) of the Constitution is subject to such restrictions as may be prescribed by law in the interests, inter alia, of national security and public order. Law in this context is defined as including "regulations made under the law for the time being relating to public security. It is well recognised that individual freedom has in times of public danger to be restricted when the community itself is in jeopardy, when the foundations of organised government are threatened and its existence as a constitutional state is imperilled."

The learned Additional Solicitor General submitted that the fact that exigencies can arise in the realm of national security and that it is the prerogative of the Minister of Defence to act as required has been recognized by this Court in the **Prevention of Terrorism (Temporary Provisions) (Amendment) Bill**,³ where it was held that, *"There can be no doubt that the Minister is the best judge of what is necessary or expedient in the interest of National Security or Public Order in any given circumstance."*

² (1983) 2 Sri LR 63

³ SC SD No. 1/1982 – Decisions of the Supreme Court on Parliamentary Bills 1978 – 1983 Volume I page 131-133

It is on the above basis that the learned Additional Solicitor General submitted that the provisions of Section 9(1) of the Principal enactment are permissible in terms of Article 15(7) of the Constitution.

It is clear that the Bill proposes to bring down the period of detention permissible under Section 9(1) of the PTA from eighteen months to twelve months, in order to make that provision less stringent. The Petitioners do not complain that such reduction of the detention period from eighteen months to twelve months would be inconsistent with any provision of the Constitution.

Instead, the Petitioners have relied on the determinations by this Court in the **Recovery of Loans by Banks (Special Provisions) (Amendment) Bill**,⁴ and the **Debt Recovery (Special Provisions) (Amendment) Bill**,⁵ to support their argument that notwithstanding the provisions of Article 80(3), this Court can consider whether the detention of a person pursuant to an order under Section 9(1) of the PTA even for twelve months (after effecting the amendment) would be inconsistent with Articles 11, 12, 13(2), 13(4) and 13(5) of the Constitution, for the reasons they have set out in their petitions, oral submissions and written submissions. The argument advanced by the Hon. Attorney General in the above determinations⁶ was that the Court should consider the provisions of that Bill as being consistent with the Constitution in view of the previous Special Determination in relation to that Act [which was in force at the time], as the provisions of that Bill had only supplemented the provisions of the said Act in force.

Having considered the above contention, this Court in that determination had stated as follows:

⁴ SC SD No. 22/2003 - Decisions of the Supreme Court on Parliamentary Bills 1991 - 2003 Volume VII pages 427 – 432.

⁵ SC SD No. 23/2003 - Decisions of the Supreme Court on Parliamentary Bills 1991 – 2003 Volume VII pages 433 – 438.

⁶ Court heard both determinations together as the issue raised in both was the same and stated that reasoning set out in SC SD No. 22/2003 applies to SC SD No. 23/2003 as well.

"...This Court does not have jurisdiction to examine the constitutionality of the Act already in force. However, an amendment cannot be viewed in isolation. It certainly cannot derive a stamp of constitutionality from the Act that is in force..."⁷

We observe that this Court had made the above statement in that determination because of the fact that the provisions of that Bill (Recovery of Loans by Banks (Special Provisions) (Amendment) Bill) were not merely incidental in nature but had covered new ground seeking to strengthen the provisions of the Act then in force to the detriment of certain classes of persons. That was the basis upon which this Court held in the said determination that the provisions of that bill had denied the equal protection before the law guaranteed as a Fundamental Right under Article 12(1) of the Constitution. It was in that process that this Court stated that an amendment should not be viewed in isolation.

As has already been mentioned above, in the instant determination, we observe that Clause 2 of the Bill does not mention anything else other than proposing to substitute existing two words "eighteen months" with "twelve months" in Section 9 of the PTA. Thus, by any yardstick, the provision in Clause 2 of the Bill would not be to the detriment of the detainees but to their benefit.

We observe that as reflected in the Cabinet Memorandum dated 03rd December 2021, the proposed Bill is an initial step taken to bring Sri Lanka's counter terrorism legislation in line with other laws of the country and the international standards and best practices.

Thus, reduction of the period of detention by Clause 2 of the Bill is a progressive step by the Government towards advancing the Fundamental Rights declared and recognized by the Constitution as per Article 4(d) of the Constitution. It does not make provisions

⁷ SC SD No. 22/2003 - Decisions of the Supreme Court on Parliamentary Bills 1991 - 2003 Volume VII at page 432

abridging, restricting or denying those rights in a manner that is not provided for by the Constitution. Clause 2 of the Bill has aimed at relaxing the rigour of the existing provisions of the Principal enactment.

In the **Agrarian Services (Amendment) Bill** Determination,⁸ this Court considered the effect of the proposed amendment relaxing the stringency of the existing provision. That was where the bill proposed to amend the Agrarian Services Act No. 58 of 1979. Section 7 of the Agrarian Services Act had empowered a tenant-cultivator of a paddy land to nominate a member of his family to succeed to his rights upon his death upon the condition that any such successor must be a person whose main occupation is cultivation, and whose only source of income is derived from that paddy land. The complaint made to Court in that determination was that Clause 7 of the Agrarian Services (Amendment) Bill was inconsistent with the freedom of occupation guaranteed by Article 14(1)(g) of the Constitution as it had imposed a new and harsh condition to make a successor "*a person who is not permanently employed*". This was as opposed to the condition that prevailed that a successor must be '*a person whose only source of income is derived from that paddy land*'. This Court having considered those provisions in that determination, had the following to state:

"...Previously, a successor had to be a person whose only source of income was derived from that particular paddy field: not only were persons in permanent employment excluded, but even persons employed temporarily, intermittently or casually, self-employed persons, and persons deriving an income, however small, from any other source whatsoever, were debarred from succeeding. So far from interfering with any right or fundamental right, the proposed amendment relaxes the stringency of the existing disqualifications. The foundation of the objection thus crumbles, and there remains no question of unconstitutionality for consideration."

⁸ SC SD No. 02/1991 - Decisions of the Supreme Court on Parliamentary Bills 1991 – 2003 Volume VII pages 11 - 19

Admittedly Section 9(1) of the PTA in its original form (with the detention period of eighteen months) has become Law a long time ago. In terms of Article 80 (3), once a Bill becomes law, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever. Further in terms of Article 16(1), all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the fundamental rights provisions of the Constitution.

In **New Wine Harvest Ministries (Incorporation) Bill**⁹ this Court has held that, "*In exercising jurisdiction under Article 123 of the Constitution, we cannot examine the validity of past legislation. Nor can we take their content as a standard of consistency with the provisions of the Constitution. Our task is to examine the provisions of the Bill challenged by the Petitioner and to determine whether they are inconsistent or not with the provisions of the Constitution.*"

If this Court is to examine whether the detention of a person under Section 9 of the PTA even for 12 months, (after incorporating the amendment proposed by the Bill) is unconstitutional, which clearly is not in view of the provisions of Article 15(7) to which we have referred to earlier, we are of the view that we would then be inquiring into and calling in question the validity of Section 9(1) of the PTA which has already become a law.

This Court has time and again held as a general rule in the construction of statutes, what a court or a person is prohibited from doing directly, cannot be done indirectly or in a circuitous manner.¹⁰ For the above reasons we reject the argument of the Petitioners.

⁹ SC SD No. 2/2003 - Decisions of the Supreme Court on Parliamentary Bills 1991 – 2003 Volume VII page 363 - 366

¹⁰ **Bandaranayake Vs. Weeraratne & Others** 1981 (1) Sri LR 10 at 16.

As has already been mentioned above, the Petitioners do not complain that the reduction of the detention period to twelve months is inconsistent with any provision of the Constitution. Thus, we hold that Clause 2 of the Bill is not inconsistent with any provision of the Constitution.

CLAUSE 3 OF THE BILL

Clause 3 of the Bill which seeks to amend Section 9 of the Principal enactment reads as follows:

"3. The following new sections are hereby inserted immediately after Section 9 of the principal enactment and shall have effect as Sections 9A and 9B of that enactment:

9A.(1) A certified copy of the Order made under Section 9 shall be made available within a reasonable period to the Magistrate within whose judicial division the place of detention of the person in respect of whom such Order relates is situated, for the Magistrate to visit such place of detention, in terms of Section 9B.

(2) The detention of any person under Section 9 shall be communicated to the Human Rights Commission of Sri Lanka in terms of Section 28 of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, for the persons authorized by the Human Rights Commission of Sri Lanka to visit the place of detention in terms of that Act.

9B.(1) It shall be the duty of every Magistrate who has received a certified copy of a detention Order in terms of subsection (1) of Section 9A, to visit the place of detention of the person to whom the Order relates (in this section referred to as the "suspect") at least once in every month during the period

of detention, to ensure that the suspect is protected to the extent provided for in the Convention Against Torture and other Cruel, Inhumane or degrading Treatment or Punishment Act, No.22 of 1994.

(2) For the purpose of subsection (1), the Magistrate who visits any place of detention, shall—

(a) personally see the suspect, and look into his wellbeing, welfare and conditions under which he is kept at such place of detention;

(b) record his observations and any complaint the suspect may make.

(3) Where the Magistrate is of the opinion, that the suspect may have been subjected to torture, the Magistrate may direct that the suspect be produced before a Judicial Medical Officer for medical examination, and a report be submitted by such Judicial Medical Officer to the Magistrate.

(4) Where the report of such Judicial Medical Officer reveals that the suspect has been subjected to torture, the Magistrate shall make an appropriate order, to provide necessary medical treatment to the suspect.

(5) The Magistrate may also direct the Inspector General of Police to commence an investigation into the alleged torture in order to enable the Attorney-General to institute criminal proceedings against the person who is alleged to have committed the torture."

The Statement of Legal Effect of this Clause contained in the Bill itself is as follows:

"This clause inserts new sections 9A and 9B in the principal enactment to enable the Magistrate to visit the place of detention to ensure that the suspect is protected

to the extent provided for in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994."

The necessity for judicial oversight in respect of decisions of administrative authorities was referred to by this Court in the **Prevention of Terrorism (Temporary Provisions) (Amendment) Bill**.¹¹ While submitting that "*deprivation of personal liberty must be periodically subjected to judicial scrutiny*", the learned Additional Solicitor General stated that the above provisions in Clause 3 are, in principle, salutary, and promote a meaningful degree of judicial oversight during detention and are an advancement of the fundamental rights of the citizen as provided by Article 4(d). Whilst provisions that enhance judicial oversight in respect of persons detained in terms of an Order made under Section 9(1) are to be commended, we are of the view that the said provisions must indeed be meaningful and must reflect the democratic spirit underlying the proposed amendments.

The Petitioners' complaints against Clause 3 of the Bill are as follows:

- i. The phrase "reasonable period" in the proposed Section 9A(1) is vague as it does not specify a period and therefore will result in giving a possible opportunity for torture of suspects under detention in the absence of any provision to bring the detainees under judicial oversight as soon as possible;
- ii. Since Section 28 of the Human Rights Commission Act No. 21 of 1996 [hereinafter sometimes referred to as the HRC Act] has already compelled the authorities to inform the detention of any person under Section 9(1) of the PTA to the Human Rights Commission of Sri Lanka forthwith and in any case, not later than forty-eight hours from the time of such detention, the authorities must be compelled to inform the same, also to the Magistrate within whose judicial division the person is detained, within the same time period;

¹¹ Supra.

- iii. The provision in this Clause can be easily flouted as the provision does not even vaguely identify the authority which has the responsibility of making available the detention order to the Magistrate;
- iv. Although the safeguard mentioned in the proposed Section 9B(4) empowers the Magistrate to make an appropriate order to provide necessary medical treatment to the suspect under detention, the power of such Magistrate is restricted only to providing medical treatment;
- v. The absence of any provision empowering the Magistrate to make an order to change the place of detention when he forms the opinion that the suspect may have been subjected to torture would be a violation of the protection afforded by law to such person.

The Petitioners therefore argue that the Magistrate must be given wider powers to exercise judicial oversight over the detained suspect as the purpose of the proposed Section 9B [as reflected in the proposed Section 9B(1)] is to ensure that the suspect is protected to the extent provided for in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.

As regards the above complaints, we observe that Section 28(1) of the HRC Act has already compelled the authority concerned to inform the Human Rights Commission of any arrest or detention of any person under the PTA within a specified time period. It is reproduced below for easy reference:

Section 28.

"(Duty to inform Commission of arrest and power of Commission to inspect to obtain information).

28(1) Where a person is arrested or detained under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or a regulation made under the Public Security Ordinance, it shall be the duty of the person making such arrest or order of detention, as the case may be, to forthwith and in any case, not later than forty-eight hours from the time of such arrest or detention, inform the Commission of such arrest or detention as the case may be and the place at which the person so arrested or detained is being held in custody or detention. Where a person so held in custody or detention is released or transferred to another place of detention, it shall be the duty of the person making the order for such release or transfer, as the case may be, and in the case of a transfer, to inform the Commission such release or transfer, as the case may be, and in the case of a transfer, to inform the Commission of the location of the new place of detention."

Section 28(1) is already part of the law of the country. The said Section has specifically identified the authority which has the responsibility of informing the Commission of such arrest or detention. This is manifest from the phrase '*it shall be the duty of the person making such arrest or order of detention*'. Furthermore, the said authority is bound to inform of any arrest or detention under the PTA to the Commission within a specified time.

According to Section 10 of the said Act, one of the main functions of the Commission is to inquire into, and investigate, complaints regarding infringements or imminent infringements of Fundamental Rights. This is to ensure compliance with the provisions of the Constitution relating to Fundamental Rights and to promote respect for, and observance of, Fundamental Rights. Section 11 empowers the Commission for the purpose of discharging its functions to monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention.

It is to ensure due compliance with the above that the person making such arrest or order of detention under the PTA Act has been compelled to forthwith inform the Commission of such arrest or detention. Thus, Section 28 (1) of the HRC Act is clearly a progressive step by the Government, and ensures due compliance with the provisions of Article 4(d) of the Constitution.

We observe that in these circumstances, the proposed Section 9A(1) is vague for two reasons. The first is with regard to the failure to specify a specific time within which the Magistrate must be served with a copy of the Order under Section 9(1), with the phrase "reasonable period" in our view being subjective. The second is that the authority which has the responsibility of making available the detention order to the Magistrate has not been identified.

When a provision of law is vague, it would only benefit the wrongdoer. Such a provision would not uphold the Rule of Law. Thus, we are of the view that the proposed Section 9A(1) in Clause 3 cannot be considered as advancing or securing the fundamental rights of the people and is not in keeping with the current law with regard to the duty to inform any arrest or detention under PTA, found in Section 28 (1) of the HRC Act. Therefore, we are of the view that the proposed Section 9A(1) in Clause 3 in the present form would be inconsistent with Article 12(1) of the Constitution.

Further, one has to be mindful that the legal effect of this Clause contained in the Bill itself is '*to enable the Magistrate to visit the place of detention to ensure that the suspect is protected to the extent provided for in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.*'

It is to ensure such protection that the proposed Section 9B seeks to confer the Magistrate powers to exercise judicial oversight over the detained suspect. These safeguards are salutary and can be found in the proposed Section 9B as it has made it a duty of the

Magistrate (a) to visit any place of detention and personally see the suspect; (b) look into his wellbeing, welfare and conditions under which he is kept at such place of detention; and (c) to record his observations and any complaint the suspect may make.

Moreover, the proposed Section has provided for the Magistrate to direct that the suspect be produced before a Judicial Medical Officer for medical examination, and to submit a report by such Judicial Medical Officer to him, if he is of the opinion, that the suspect may have been subjected to torture. Indeed, the Magistrate is empowered to direct the Inspector General of Police to commence an investigation into any alleged torture in order to enable the Attorney-General to institute criminal proceedings against the person who is alleged to have committed the torture.

However, the absence of any clear legal provision to enable the Magistrate to make an order to change the place of detention when he forms the opinion that the suspect may have been subjected to torture at the place such detainee has been held at that time, would be inconsistent with Article 12(1) of the Constitution. The absence of such provision would not afford proper protection to the detainee to the extent provided for in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 which is the purpose of Clause 3 of the Bill.

This Court has stated time and again that vagueness must be avoided in the bills in order to make such provisions consistent with Article 12(1) of the Constitution. This Court in its determination in **Assistance to and Protection of Victims of Crime and Witnesses Bill**,¹² stated that, "*the constitutional provisions are to be understood and interpreted with an object-oriented approach considering the democratic spirit underlying it.*"¹³

¹² SC (SD) No. 1-6/2014 - Decisions of the Supreme Court on Parliamentary Bills 2014-2015 Volume XII pages 3 - 7

¹³ At page 6.

The following excerpts from that determination would be self-explanatory in this regard.

"Clause 3 (c) of the Bill is silent as to the person who would prescribe the procedure referred to therein. One does not know whether the procedure will be prescribed by the Authority or by the Minister. This uncertainty leads to the violation of Article 12 (1)..."¹⁴

"It is noted that the words "relevant authorities" referred to in Clause 3(f) has to be defined in order to avoid any vagueness. Failure to do so will permit various authorities to act in an arbitrary and discriminatory manner. It is a fundamental principle of law that persons or authorities whose functions are statutorily demarcated must be clearly identified. No absolute and unfettered discretions be placed on public functionaries and any such discretions is to be judged by reference to the purposes for which they were so entrusted. The inconsistency with Article 12 (1) could be avoided if a clear and unambiguous definition is given to the words "relevant authorities"¹⁵

We also observe that Section 370(3) of Code of Criminal Procedure Act No. 15 of 1979 as amended, has made it mandatory for the Magistrate to initiate legal proceedings when a report by the inquirer into Sudden Deaths has disclosed a reasonable suspicion that a crime has been committed. The said Section reads as follows:

"If the report or other material before him discloses a reasonable suspicion that a crime has been committed the Magistrate shall take proceedings under Chapter XIV and XV and in such event the record of the inquiry and the inquirer's report shall be annexed to the record of the proceedings before the Magistrate."

¹⁴ At page 4.

¹⁵ At Page 5.

The word used there is "shall". This is because there is no justification for a Magistrate not to initiate legal proceedings in such a situation.

Therefore, we hold that Clause 3 of the Bill cannot be enacted into law, unless the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), as per the Constitution.

We are however of the view that if the provisions in Clause 3 of the Bill are amended as set out below, it would cease to be inconsistent with any provision of the Constitution.

Our suggestions are as follows:

- 1) We suggest that "*within a reasonable period*" in Clause 9A(1) should be converted into a specific period. In keeping with Article 4(d) of the Constitution, we suggest that the words, "*forthwith and in any event not later than forty-eight hours from the time of the issuance of such Order*", which is similar to Section 28 (1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 be substituted instead of the phrase "*within a reasonable period*" in the proposed 9A(1) of Clause 3 of the Bill.
- 2) We suggest that the proposed Section 9A(1) should identify the authority which has the responsibility of making available a copy of the detention order to the Magistrate.
- 3) We also suggest that a provision be added to the proposed Section 9B(3) of Clause 3 of the Bill to enable the Magistrate to make an order to change the place of detention when he/she forms the opinion on the basis of the report of the Judicial Medical Officer that the suspect may have been subjected to torture at the place of detention where such detainee is being held.

- 4) We suggest that the proposed Section 9B(4) in Clause 3 of the Bill be altered by including the word "shall" in place of the word "may" to read as *"The Magistrate shall also direct the Inspector General of Police to commence an investigation ..."*

CLAUSE 4 OF THE BILL

Clause 4 of the Bill which seeks to amend Section 10 of the Principal enactment reads as follows:

"Section 10 of the principal enactment is hereby repealed and the following section is substituted therefor:

10. An Order made under Section 9 shall be final and shall not be called in question in any proceedings or in any court of law, save and except in proceedings under Article 126 or 140 of the Constitution."

This Clause amends Section 10 of the Principal enactment and the legal effect of the Section as amended is to enable a detainee to apply for a remedy guaranteed under Article 126 or 140 of the Constitution.

The Petitioners argue that an application under Article 141 of the Constitution, (i.e., an application for a writ of *Habeas Corpus*) cannot be filed in the Court of Appeal under the proposed Section 10 in Clause 4 of the Bill with a view of obtaining an order to bring up before court, the body of any person illegally or improperly detained in custody, to be dealt with according to law, as the said Article (Article 141) is not found in the proposed Section 10 of the Bill.

We are not prepared to accept the Petitioners' argument that an application to the Court of Appeal under Article 141 of the Constitution is not possible merely because there is no

reference to Article 141 in the proposed Section 10 of the Bill. While a constitutional provision cannot be ousted by a clause in a normal law – vide **B. Sirisena Cooray Vs. Tissa Dias Bandaranayake and two others**¹⁶ – the failure to make specific reference to any such Constitutional provision does not have the effect of depriving a citizen of the protection embodied in such a provision.

In fact, we are aware that there are numerous such applications filed in the Court of Appeal in the past in respect of persons detained under the PTA (Principal enactment) challenging the *vires* of the detention and that in some of those cases the Court of Appeal had proceeded to grant relief to such detainees. So were the proceedings under Articles 126 and 140 of the Constitution in respect of persons detained under the PTA (Principal enactment). We also observe that such judicial oversight had happened in the past even in the absence of any such provision and that Courts have specifically permitted proceedings under Article 126, 140 or 141 in respect of detainees under PTA. We also observe that Article 141 of the Constitution has not contemplated to subject itself to the provisions of ordinary law as it does not contain a clause such as “subject to any law”. Vide, **Atapattu and others Vs. People’s Bank and others**.¹⁷ Thus, it is a fact that no person is barred from making an application under the afore-stated Articles for redress from either the Court of Appeal or from the Supreme Court, as the case may be.

Be that as it may, the learned Additional Solicitor General has informed this Court that the Hon. Attorney General would be advising the Minister to insert Article 141 into the body of the proposed Section 10 in Clause 4 of the Bill and that the Minister would move that amendment at the Committee stage of Parliament to address the concerns of the Petitioners.

We agree with that submission of the learned Additional Solicitor General.

¹⁶ 1999 (1) Sri LR 1

¹⁷ 1997 (1) Sri LR 208

CLAUSE 5 OF THE BILL

Clause 5 of the Bill which seeks to amend Section 10 of the Principal enactment reads as follows:

"The following new section is hereby inserted immediately after Section 10 of the principal enactment and shall have effect as Section 10A of that enactment:

10A.(1) An Attorney- at- Law representing a person remanded or detained under this Act, shall have the right of access to such person and to make representations on behalf of such person, subject to such conditions as may be prescribed by regulations made under this Act or as provided for in other written law.

(2) A person remanded or detained under this Act shall have the right to communicate with his relatives, as provided for in written law."

This Clause inserts a new Section 10A in the Principal enactment to enable an Attorney-at-Law to have access to a person in remand or in detention, and also to enable the person so remanded or detained to communicate with his relatives.

The Petitioners argue that the right of access given to an Attorney- at- Law: to represent a person remanded or detained under this Act; and to make representations on behalf of such person, have been made subjected to the conditions which could be prescribed by regulations made under the Act. We observe that Section 27 of the PTA (Principal enactment) has already granted the Minister powers to '*make regulations under the Act for the purpose of carrying out or giving effect to the principles and provisions of the Act.*'

Thus, the power conferred on the Minister to make regulations is not a new power that is being introduced by the Bill for the first time.

The Petitioners did not demonstrate as to how this proposed provision namely, proposed Section 10A (1) becomes inconsistent with any of the Articles of the Constitution.

In the case of **Kumaranatunga Vs. Samarasinghe, Additional Secretary, Ministry of Defence and others**,¹⁸ the second condition mentioned in the detention order relevant to that case, issued under Regulation 17 of the Emergency Regulations that prevailed at that time, was that the detainee '*shall not receive or deliver any correspondence and other communications relating to his arrest and investigation*'. The petitioner in that case challenged that condition on the basis that it was tantamount to preventing the Petitioner from obtaining legal assistance with regard to his arrest and investigation and therefore is in violation of the fundamental right of the Petitioner to have legal representation. This Court having considered Section 260 of the Code of Criminal Procedure Act and Article 13(3) of the Constitution, held as follows.

"The second condition, it is submitted was tantamount to preventing the Petitioner from obtaining legal assistance in regard to his arrest and investigation and is in violation of the fundamental right of the Petitioner to have legal representation.

The fundamental right to have legal representation is found in Article 13(3) of the Constitution and reads thus:

"Any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law at a fair trial by a competent court. "

In the Code of Criminal Procedure Act, we have Section 260 which is as follows:

¹⁸ 1983 (2) Sri LR 63.

"Subject to the provisions of this Code and any written law every person accused before any criminal court may of right be defended by an attorney-at-law and every aggrieved party shall have the right to be represented in court by an attorney-at-law".

It will be seen that Article 13(3) of the Constitution and Section 260 of the Code of Criminal Procedure Act deal with persons accused in a court. But in the instant case, we are dealing with a situation where as Lord Wright pointed out in Liversidge v. Anderson,¹⁹ the control sought to be exercised over the person detained through the detention order is preventive, not punitive and the action is executive, not judicial."

I regret, therefore, to have to hold that in Sri Lanka there is no fundamental right to legal representation in a person held on a detention order under Regulation 17 until, of course, the matter is brought to court. I might add that as a matter of practice, the courts have whenever the circumstances warranted it and with suitable safeguards, permitted visits by lawyers to detainees to enable them to make representations against the validity of detention orders. In the instant case, such an order was made."²⁰

For these reasons, we hold that Clause 5 of the Bill is not inconsistent with any provision of the Constitution.

CLAUSE 6 OF THE BILL

Clause 6 of the Bill which seeks to amend Section 11 of the Principal enactment reads as follows.

¹⁹ (1942) AC 206 at 265.

²⁰ At page 83.

"Section 11 of the principal enactment is hereby amended as follows:

(1) by the insertion immediately after subsection (1) thereof, of the following subsections:-

(1A) The person to whom an Order made under subsection (1) relates, shall be produced before a Judicial Medical Officer for medical examination before serving such Order to such person and a report be submitted by the Judicial Medical Officer in respect of such person.

(1B) An Order made under subsection (1) shall be served on the person to whom the Order relates, by the Magistrate in whose judicial division such person resides and the report of the Judicial Medical Officer referred to in subsection (1A) shall be produced before the Magistrate to ensure that such person has not been subjected to torture before serving such Order on such person.

(1C) Where the report issued by the Judicial Medical Officer under subsection (1A) reveals that such person has been subjected to torture, the Magistrate shall make an appropriate order to provide necessary medical treatment to such person.

(1D) The Magistrate may also direct the Inspector General of Police to commence an investigation into the alleged torture in order to enable the Attorney-General to institute criminal proceedings against the person who is alleged to have committed the torture."

(2) in the proviso to subsection (3) thereof, by the substitution for the words "eighteen months." of the words "twelve months.";

(3) by the repeal of subsection (5) thereof and the substitution therefore of the following subsection:-

"(5) An Order made by the Minister under subsection (1) shall be final and shall not be called in question in any proceedings or in any court of law, save and except in proceedings under Article 126 or 140 of the Constitution."

The learned Additional Solicitor General has informed this Court that the Hon. Attorney General would be advising the Minister to insert Article 141 into the body of the proposed Section 11(5) in Clause 6 of the Bill and that the Minister would move that amendment at the Committee stage of Parliament. We agree.

This Clause amends Section 11 of the Principal enactment and the legal effect of the Section as amended is to enable the person subjected to prohibition or restrictions under Section 11(1) of the PTA to be produced before a Judicial Medical Officer to ensure that such person has not been subjected to torture before serving such an order.

We note that the proposed Sections 11 (1C) and 11 (1D) in Clause 6 of the Bill are similar in their nature to the proposed Sections 9B(4) and 9B(5) in Clause 3 of the Bill respectively. Therefore, the conclusions and suggestions we have made in respect of the proposed Sections 9B(4) and 9B(5) in Clause 3 of the Bill must apply to the proposed Sections 11(1C) and 11(1D) in Clause 6 of the Bill. Subject to the above, we hold that Clause 6 of the Bill is not inconsistent with any provision of the Constitution.

The other arguments advanced by the Petitioners in respect of Clause 6 of the Bill is similar to that advanced in respect of Clause 2 of the Bill.

Clause 6 of the Bill *inter alia*, has clearly proposed to provide for several safeguards by the insertion immediately after the existing Section 11(1) of the PTA, several sub subsections to Section 11 of the PTA numbered as 11(1A), 11(1B), 11(1C) and 11(1D).

When the afore-mentioned proposed sections in Clause 6 of the Bill are amended adopting the same way we have suggested regarding the proposed Sections 9B(4) and 9B(5) in Clause 3 of the Bill, none of those new sub sections proposed to be inserted into Section 11 of the PTA would be inconsistent with any provisions of the Constitution.

The Petitioners too, do not complain against introduction of the afore-said safeguards into Section 11. Instead, they seek to argue that the power given to the Minister to order restriction of movement of a person where "*the Minister has reason to believe or suspect that any person is concerned with or concerned in the commission of any unlawful activity...*" is inconsistent with the provisions of the Constitution.

As was held by this Court in **Kanthiah Chelliah and Others Vs. Paranage, Inspector of Police and Others**,²¹ the PTA, as the long title of the Act explains, was enacted for two purposes: (a) making temporary provision for the prevention of acts of terrorism in Sri Lanka, and (b) to prevent unlawful activities of any individual, group of individuals, association, organization within Sri Lanka or outside Sri Lanka. The complaint of the Petitioners is not a new phenomenon.

We have already commented on a similar argument advanced by the Petitioners in respect of Clause 2 in the Bill. We re-iterate the same position in respect of the rest of the arguments advanced by the Petitioners in respect of Clause 6 of the Bill as well.

We hold that we cannot inquire into, pronounce upon or in any manner call in question, the validity of Section 11 of the PTA on any ground whatsoever in terms of Article 80 (3) of the Constitution. We re-iterate that it is not permissible for this Court to examine in a circuitous manner,²² whether the power given to the Minister to order restriction of

²¹ [1982} 1 Sri LR 132 at 157

²² Bandaranayake Vs. Weeraratne & others 1981 (1) SLR 10 at 16.

movement of a person under Section 11 of the PTA is inconsistent with any provision of the Constitution for Section 11 of the PTA is already a law duly passed by Parliament.

For the above reasons, we reject the rest of the arguments of the Petitioners.

CLAUSE 10 OF THE BILL

Clause 10 of the Bill which seeks to amend Section 15 of the Principal enactment reads as follows:

"10. The following new section is hereby inserted immediately after Section 15A of the principal enactment and shall have effect as Section 15B of that enactment:-

15B. Notwithstanding anything to the contrary in the provisions of this Act, if the trial against a person remanded or detained under this Act has not commenced after the expiration of twelve months, from the date of arrest, the Court of Appeal may release such person on bail, upon an application in that behalf, made by the suspect or an Attorney-at-Law on his behalf:

Provided however, the preceding provisions of this section shall not preclude the High Court from making an order to remand any person under subsection (2) of Section 15, until conclusion of the trial:

Provided further, where the trial against an accused in respect of whom the indictment has been forwarded and filed in the High Court, has not commenced after the expiration of twelve months from the date of such filing, the High Court may consider to release such person on bail, upon an application in that behalf made by the accused or an Attorney-at-Law on his behalf."

This Clause inserts new Section 15B in the principal enactment to make provision for granting of bail to persons in remand or in detention. We found a contradiction between the provisions in Clause 10 of the Bill with Section 15(2) of the Act which we indicated to the learned Additional Solicitor General who appeared for the Hon. Attorney General. We indicated that for that reason, Clause 10 of the Bill would be inconsistent with the provisions of the Constitution. Subsequently the learned Additional Solicitor General has informed this Court that the Hon. Attorney General would be advising the Minister to resolve the said inconsistency by moving to amend Clause 10 of the Bill at the Committee stage of Parliament in the following manner:

CLAUSE 10

"15B - Notwithstanding anything to the contrary in the provisions of this Act, if the trial against a person remanded or detained under this Act has not commenced after the expiration of twelve months, from the date of arrest, the Court of Appeal may release such person on bail, upon an application in that behalf, made by such person or an Attorney-at-Law on his behalf:

Provided however, notwithstanding subsection (2) of Section 15, the High Court may in exceptional circumstances release on bail the accused subject to such conditions as the High Court may deem fit:

Provided further, where the trial against an accused in respect of whom the indictment has been forwarded and filed in the High Court, has not commenced after the expiration of twelve months from the date of such filing, the High Court may consider to release such person on bail, upon an application in that behalf made by the accused or an Attorney-at-Law on his behalf."

We agree. We hold that Clause 10 of the Bill if amended as set out above, would cease to be inconsistent with any provision of the Constitution.

CLAUSE 11 OF THE BILL

Clause 11 of the Bill which seeks to amend Section 19 of the Principal enactment reads as follows.

"Section 19 of the principal enactment is hereby repealed and the following section is substituted therefor:

"Notwithstanding the provisions of any other written law, every person convicted by any court of any offence under this Act shall, notwithstanding that he has lodged a petition of appeal against his conviction or the sentence imposed on him, be kept on remand until the determination of the appeal:

Provided however, that the Court of Appeal may in exceptional circumstances release on bail any such person subject to such conditions as the Court of Appeal may deem fit."

This Clause amends Section 19 of the Principal enactment and is consequential to the amendment made by Clause 10.

The Petitioners do not provide any legal basis to support their argument that Clause 11 is inconsistent with the provisions of the Constitution. They merely state that Clause 11 of the Bill is inconsistent with Article 11, Article 12, Article 13(2), Article 13(4) and Article 13(5) as well as other provisions of the Constitution; entail alienation of the judicial power of the people and as such are inconsistent with Article 3 read with Article 4 of the Constitution and the dignity of the person which is recognized as a fundamental value

enshrined in the Constitution, and accordingly are inconsistent with Article 3 of the Constitution.

We reject the above argument. Thus, we see no basis to hold that Clause 11 of the Bill is inconsistent with any provision of the Constitution.

CLAUSE 12 OF THE BILL

Clause 12 of the Bill which seeks to amend Section 26 of the Principal enactment reads as follows:

"Section 26 of the principal enactment is hereby repealed and the following section is substituted therefor:-

26.(1) An Order made or direction given under this Act may be questioned in proceedings under Article 126 or Article 140 of the Constitution.

(2) Subject to the provisions of subsection (1), no suit, prosecution or other proceeding, civil or criminal, shall lie against any officer or person for any act or thing in good faith done or purported to be done in pursuance or supposed pursuance of any Order made or direction given under this Act."

The learned Additional Solicitor General has informed this Court that the Hon. Attorney General would be advising the Minister to insert Article 141 into the body of the proposed Section 26(1) in Clause 12 of the Bill and that the Minister would move that amendment at the Committee stage of Parliament. We agree.

This Clause amends Section 26 of the Principal enactment and the legal effect of the Section as amended is to make provision to question an order made or direction given

under the Principal enactment despite the protection afforded to officers for any act or thing done or purported to be done in good faith.

The Petitioners complain that the proposed Section 26(2) of Clause 12 is drafted in such a manner to grant the authorities complete immunity from civil and criminal liability as there is no good faith requirement for the acts or things done or purported to be done under the PTA. In their submissions the Petitioners complain that the proposed Section 26(2) of Clause 12 violates Article 12(1) of the Constitution and amounts to an alienation of the judicial power of the people and hence also violates Article 3 read with Article 4.

We are of the view that the phrases "*purported to be done*" and "*supposed pursuance of*" found in the proposed Section 26(2) in Clause 12 are confusing and vague. Therefore, the reasons we have given as to why a vague provision is inconsistent with Article 12(1) of the Constitution must apply here as well.

Further, we cannot see the proposed Section 26(2) in Clause 12 as a provision of law advancing or securing the Fundamental Rights declared and recognized by the Constitution as per Article 4(d) of the Constitution. Therefore, we are of the view that the proposed Section 26(2) in Clause 12 in that form would be inconsistent with Article 12(1) of the Constitution.

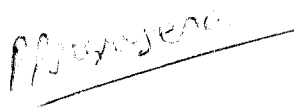
We suggest as per Article 123(1)(c), that if the provisions in the proposed Section 26(2) in Clause 12 of the Bill is amended as follows, it would cease to be inconsistent with any provision of the Constitution. The draft suggested by us is as follows:

"26. (1)

(2) *Subject to the provisions of subsection (1), no suit, prosecution or other proceeding, civil or criminal, shall lie against any officer or person for any*

act or thing done in good faith in pursuance of any order made or direction given under this Act."

We place on record our appreciation of the assistance given by the learned Counsel who appeared for the Petitioners, and the learned Additional Solicitor General who represented the Hon. Attorney-General, in these proceedings.



P. PADMAN SURASENA, J
JUDGE OF THE SUPREME COURT



MAHINDA SAMAYAWARDHENA, J
JUDGE OF THE SUPREME COURT



ARJUNA OBEYESEKERE, J
JUDGE OF THE SUPREME COURT