

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

"PETROLEUM PRODUCTS (SPECIAL PROVISIONS) (AMENDMENT) BILL"

S.C.S.D. No. 50/2022 **Petitioner** A.E. Dissanayake,
No. 17/4, Thalangama North, Battaramulla.

Counsel Nuwan Peiris

S.C.S.D. No. 51/2022	Petitioners	1. Sri Lanka Nidahas Sevaka Sangamaya No. 341/21, 4 th Floor, Sarana Mawatha, Colombo.
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2. Samaraweera Mudalige Don Jagath
Wijayagunaratna
No. 2/4, Vipulasena Elders' Home,
Deans Road, Colombo 10.

3. Aruna Nishantha Ranaweera
No. 127/3, Delgahawatta Road,
Hokandara South.

4. Omaththe Mudiyanseelage Sampath Jayasekara,
No. 106/5B, Bomaluwa Road,
Watapuluwa, Kandy.

Counsel Saliya Pieris, PC with Suren Gnanaraj, Rashmi
Dias, Sarinda Jayawardena and Sakuni
Weeraratna

S.C.S.D. No. 52/2022	Petitioners	1. Ceylon Petroleum Corporation Executive Officers' Union, Ceylon Petroleum Corporation, No. 609, Danister De Silva Mawatha, Colombo 09.
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2. R.A.B. Thilanga,
No. 1/1, Sooriya Pedesa, Pahala
Karagahamuna,
Kadawatha.

3. Vikum Singappulige,
No.121, 1st Lane, Sinhapura,
Thalangama South.
4. S.R.M.P. Jayawardena,
No. 6, Temple Lane, Ambagaha Junction,
Rajagiriya.

Counsel Manohara De Silva, PC with Nadeeshani
Lankatilleka

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

Respondent

Counsel for the State: Dr. Avanti Perera, DSG, with Indumini
Randeny, SC.

Before: **Murdu N.B. Fernando, PC, J.**
 Janak De Silva, J.
 Arjuna Obeyesekere, J.

The Court assembled for hearings at 10.00 a.m. on 8th and 9th September, 2022.

A Bill titled "Petroleum Products (Special Provisions) (Amendment) Bill" (Bill) was published as a Supplement to Part II of the Gazette of 12th August 2022 and placed on the Order Paper of Parliament on 31st August 2022 in accordance with Article 78(1) of the Constitution.

The jurisdiction of Court to determine the constitutionality of the Bill has been invoked by the Petitioners in terms of Article 121(1) of the Constitution. Court heard all the Petitioners and the Hon. Attorney-General.

Jurisdiction of Court

This Court is exercising the jurisdiction vested on it in terms of Article 120 of the Constitution which requires it to determine whether the Bill in its entirety or any of its provisions is inconsistent with the Constitution. When a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is required to make are specified in Article 123(2) which reads:

“(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –

(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or

(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or

(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,

and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.”

Existing Regulatory Framework

The Bill primarily seeks to replace the Energy Supply Committee, constituted in terms of the Energy Supply (Temporary Provisions) Act No. 2 of 2002 (Energy Supply Act), referred to in the Petroleum Products (Special Provisions) Act No. 33 of 2002 (Petroleum Products Act) by the Committee appointed by the Cabinet of Ministers (Committee) and to vest the Committee with certain functions. The Energy Supply Committee referred to in the Petroleum Products Act was vested with certain powers and functions in relation to the energy sector by the Energy Supply Act.

Hence, in examining the constitutionality of the provisions of the Bill, it is apposite to examine the existing legal framework on the regulation of the petroleum sector in Sri Lanka. This examination must begin with the Ceylon Petroleum Corporation Act, No.28 of 1961 as amended (CPC Act), which nationalised the petroleum industry and established the Ceylon Petroleum Corporation (CPC). Sections 5B (1) and (2) of the CPC Act gave a monopoly to the CPC to import, export, sell, supply or distribute petrol, kerosene, diesel oil and furnace oil. Section 5C of the CPC Act provided for the Minister to expand this monopoly by specifying that the right to import, export, sell, supply or distribute petroleum of any other class or description shall vest exclusively in the CPC.

Nevertheless, section 5B (3) of the CPC Act, permitted the sale, supply or distribution of petrol, kerosene, diesel oil or furnace oil by any person provided it is done under the written authority of the Minister or any authorized officer under subsection (4), or of the Board of Directors under section 5E, and in accordance with the terms and conditions subject to which such authority is granted. A further exception to the monopoly of the CPC is found in section 5B (4) of the CPC Act, whereby the Minister is empowered to grant written authority to any person to import, export, sell, supply or distribute petrol, kerosene, diesel oil and furnace oil for the sole purpose only of enabling such person to provide petroleum of that class or description as fuel for marine ships or aircraft.

As the learned DSG correctly submitted, the provisions in sections 5B (3), 5B (4) and 5E of the CPC Act are a form of licensing and performs a regulatory function. Nevertheless, after such written authority is granted, no further regulatory measures are contemplated by the CPC Act. Although the written authority given by the Board of Directors under section 5E of the CPC Act is subject to terms and conditions, no guidelines or criterion are laid down in the Act with regard to those terms and conditions.

The Petroleum Products (Regulation and Control of Supplies) Act No. 34 of 1979 was enacted with a view to provide for the regulation and control of the distribution and use of petroleum products with a view to ensuring the fair distribution of such products and to the conservation of supplies thereof.

In 2002, the Energy Supply Act, the Petroleum Products Act and the Public Utilities Commission of Sri Lanka Act No. 35 of 2002 (PUCSL Act) was enacted with a view to provide a more effective regulatory system for the energy sector.

According to the relevant Cabinet Memorandum, that preceded the enactment of the Energy Supply Act, it appears to have been enacted *“in view of the crisis faced by the energy supply situation in the country”* and because *“the Government has considered it necessary to create an Energy Supply Committee to deal with all matters in relation to the supply of power and energy”* and was made applicable to the entire energy industry.

In particular, section 5(g)(ii) of the Energy Supply Act empowered the Energy Supply Committee to regulate the activities of persons engaged in the importation, exportation, storage, distribution and supply of petroleum and petroleum products. Mr. Manohara De Silva PC submitted that in terms of section 5(2) of the Petroleum Products Act, the Energy Supply Committee was entrusted with the power to advise the Minister with regard to “conditions” in granting a license thus ensuring the regulation and control of these licensees. Nevertheless, the Energy Supply Committee did not have any regulatory powers in the absence of any Regulations prescribed by the Minister. In **Energy Supply (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 259 at page 262] this Court held that the power to “regulate” in this section will not be a violation of Article 12(1) of the Constitution since it would be done through Regulations to be made by the Minister, which would be of general application.

Moreover, the Energy Supply Committee did not have power in terms of section 5(c) of the Energy Supply Act to perform any functions in respect of licensing, regulatory and inspection measures in the petroleum industry since the Act did not provide for such functions. Thus, the submission by Mr. Saliya Peiris PC that the powers, duties and functions of the Energy Supply Committee over petroleum industry was later exercised by the Public Utilities Commission of Sri Lanka (PUCSL) established pursuant to the PUCSL Act cannot be sustained. As the learned DSG eloquently submitted *Nemo dat quod non habet* (no one gives what he doesn't have). In this case, no one can take, what you don't have.

Furthermore, as the learned DSG submitted, although there was provision for an Energy Regulator to be appointed under section 8(1) of the Energy Supply Act, tasked with being the Chief Executive Officer of the Energy Supply Committee, his powers did not go beyond those vested in the Energy Supply Committee itself. This becomes clear upon a consideration of section 8(3) of the Energy Supply Act which provided for the Energy Supply Committee to delegate to the Energy Regulator such powers as it considers necessary. As the Energy Supply Committee was vested with general powers and functions of a regulatory nature under sections 5(f) and 5(g)(ii) of the Energy Supply Act, they had no practical effect without enabling provision. Similarly, sections 25 and 26 of the Energy Supply Act did not give rise to any form of additional regulation, but merely caused a transfer of powers from one agency to another. As such the powers and functions of the Energy Regulator was limited to the powers of the Energy Supply Committee as a delegate of such committee.

The Energy Supply Act was in operation only for a period of two years from 22nd March 2002 to 22nd March 2004.

A more empowered regulatory regime over the petroleum industry was created by the Petroleum Products Act.

Section 5(1) of the Petroleum Products Act provided for the grant of licences by the Minister for the import, export, sale, supply and distribution of petroleum. In deciding to grant licences, the Minister must take into consideration the requirements of the petroleum sector and the interests of the national economy. The grant of such licences was to be made on the recommendation of the Energy Supply Committee. In terms of section 5(2) of the Petroleum Products Act, the licences to be issued shall be subject to such conditions as may be prescribed by the Minister on the advice of the Energy Supply Committee for the purpose of ensuring that the import, export, sale, supply or distribution of petroleum would be properly regulated. Although section 5(3) of the Petroleum Products Act limited the total number of licences to three in the first instance, the Energy Supply Committee was empowered to recommend to the Minister the increase of licences having regard to the interest of the national economy, needs of the consumers and the interest of the petroleum sector.

Although section 2 of the Petroleum Products Act stated that it will not operate in derogation of the powers vested in the CPC, section 4 specified that certain provisions of the CPC Act, including section 5B(1) (CPC's exclusive right to import, export, sell, supply distribute petroleum) and section 5E (the unfettered power of the Board of the CPC to grant written authority to any other party to sell, supply or distribute petroleum) did not apply in respect of the powers of the Energy Supply Committee.

Hence the Petroleum Products Act sought to regulate the downstream petroleum sector by removing the monopoly of the CPC and providing for the issue of licences subject to prescribed conditions.

The PUCSL Act provides a framework for the regulation of public utilities industries. According to section 2 of the PUCSL Act, it applies to the public utilities industries set out in the Schedule to the Act, the regulation of which is vested in or assigned to the PUCSL. Originally only the Electricity industry and Water service industry was listed. Thereafter, by way of a Resolution of Parliament, made in terms of Section 1(3) of the PUCSL Act, dated 05th April 2006, the Petroleum industry was added. During the hearing, it was unclear whether there was agreement amongst parties on whether the PUCSL did exercise any regulatory power in terms of the PUCSL Act over the petroleum industry. However, in the end Mr. Gnanaraj, making the reply submissions on behalf of the Petitioners in S.C.S.D. 51/2022 assisted Court to clear any doubts on whether the PUCSL did have any regulatory power over the petroleum industry as at now.

Upon an examination of the provisions of the PUCSL Act, Court is of the view that the PUCSL does not have any power of regulation over the petroleum industry merely upon it being included in the Schedule to the PUCSL Act. There must be the further condition of the PUCSL being vested with powers, functions and duties under the PUCSL Act or any industry Act as defined in the PUCSL Act. As there are no such provisions, the PUCSL has no licensing or regulatory powers over the petroleum industry, despite its inclusion in the Schedule to the PUCSL Act as resolved by Parliament in 2006.

Scope of Examination

Prior to examining the constitutionality of the Bill, it is important to examine the approach the Court should take in view of certain positions submitted by the counsel for the Petitioners.

Mr. Saliya Pieris PC submitted that the Bill must not be considered in isolation and that it must be considered in the context of the existing law.

He relied upon the determination of this Court in **Recovery of Loans by Banks (Special Provisions) (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 425 at page 432] where it was held:

“This Court does not have the 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.”

However, this Court, after considering the extract of the determination relied upon by Mr. Pieris PC, in **Prevention of Terrorism (Temporary Provisions) (Amendment) Bill** [S.C.S.D. 13-18/2022] held (at page 14) that:

“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.”

No doubt Court must consider the provisions of the Petroleum Products Act in order to consider the constitutionality of any amendment sought to be made to it. Nevertheless, such an examination cannot directly or indirectly inquire into, pronounce upon or in any manner call in question, the validity of any provisions of the Petroleum Products Act on any ground whatsoever as it would violate Article 80(3). There is a general rule in the construction of Statutes that what a Court or person is prohibited from doing directly, it may not do indirectly or in a circuitous manner. [**Bandaranaike v. Weeraratne and Others** (1981) 1 Sri.L.R. 10 at page 16].

Both Mr. De Silva PC and Mr. Pieris PC submitted that in examining the constitutionality of the Bill, the test should be whether it can be implemented arbitrarily. In support of this proposition reliance was placed upon the following extract in the determination of this Court in the **Sri Lanka Broadcasting Authority Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 79 at page 101]:

“These things may not happen, but they might happen because they are permitted. The evils to be prevented are those that might happen.”

Nevertheless, this approach is contrary to the approach taken by this Court prior to and after the determination in **Sri Lanka Broadcasting Authority Bill** [Supra.]

In **Third Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1978-1983) Vol. I, 139 at page 147]:

“A clear distinction must be borne in mind between the law and the administration of the law. A law cannot be struck down as discriminatory because of the fear that it may be administered in a discriminatory manner. Mere possibility of abuse of power is not sufficient ground to hold that a law offends the fundamental right of equality.”

This was quoted with approval by this Court in **Colombo Port City Economic Commission Bill** [S.C.S.D. 4-5, 7-23/2021, page 26].

In examining the constitutionality of a bill, this Court must make an objective assessment of the provisions of the bill to ascertain whether it is inconsistent with the provisions of the Constitution. Thus, in **Welfare Benefits Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 279 at page 282] it was held:

“It is not within the jurisdiction of the Court to speculate as to what would happen in the implementation of the scheme. The provisions of the Bill should be examined objectively to ascertain whether there are sufficient safeguards to prevent discrimination on any of the grounds referred to in Article 12 (2) of the Constitution and to prevent arbitrariness in the decision making process. The Provisions referred to above are in our view adequate safeguards in this regard.”

This approach was reiterated in the **Twentieth Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (2019-2020) Vol. XV, 87 at pages 133-134] where it was held:

“We considered all these submissions in relation to the Clause under consideration and are of the view that a decision on the inconsistency or consistency with a Constitutional provision cannot be based on surmise and conjecture. When we exercise jurisdiction in relation to an amendment to the Constitution, it does not extend to consider desirability of a provision or to delve into policy matters. Sole consideration would be the Constitutionality of the provision.

This Court in the Special Determination in the Bill titled “Welfare Relief Benefits” [SC SD 7/2002, Decisions of the Supreme Court on Parliamentary Bills (1999-2003) Vol. VII, page 281 at 282] observed;

“it is not within the jurisdiction of the Court to speculate as to what would happen in the implementation of the scheme. The provisions of the Bill should be examined objectively to ascertain whether there are sufficient safeguards to prevent discrimination....”

It is our view that Clause 17(4) is not inconsistent with any Article referred to in Article 83 of the Constitution. Hence Clause 17(4) can be passed with the special majority in Parliament.”

Provisions of the Bill

Clause 1 of the Bill provides for the Minister to specify the date on which the other provisions of the Bill come into operation.

Clause 2 of the Bill amends the long title of the Petroleum Products Act.

Clause 3 is consequential to the amendment made by Clause 4.

Clause 4 of the Bill makes provision for the Committee to be vested with power under the Petroleum Products Act.

Clause 5 of the Bill substitutes the words “the Minister” for the words “Minister in charge of the subject of Power and Energy”.

Clause 6 of the Bill amends the definition of the words “Minister” and “Energy Supply Committee” in the Petroleum Products Act and are amendments consequential to the amendment made by Clause 4.

Clause 7 of the Bill provides validity for the powers exercised and acts done prior to the commencement of this amendment.

Clause 8 of the Bill is a transitional provision aimed at extending the provisions of the Bill to licences already issued under the Petroleum Products Act.

We will now examine the constitutionality of the provisions of the Bill on the grounds impugned by the Petitioners.

Clauses 2 and 3

Mr. Saliya Pieris PC submitted that Clauses 2 and 3 of the Bill are inconsistent with Articles 1, 3, 4(d), 12(1), 13(4), 14(1)(g), 14(1)(h) read with Articles 27(2)(a) to 27(2)(f), 27(7), 27(8), 27(14) and Article 76 of the Constitution and cannot be passed as law except if approved by the People at a Referendum in addition to two thirds vote of the

whole number of the members of Parliament in favour as required by Article 84(2) of the Constitution.

He submitted that even though at the very least the objects, powers, functions and duties of the Energy Supply Committee had been circumscribed by the Energy Supply Act, the proposed Committee has no objects, powers, functions and duties specified by law save and except for the power to recommend to the Minister the grant of a licence or additional licences to any person or body to import, export, sell, supply or distribute petroleum or to advise the Minister on the conditions to be prescribed in a licence to ensure that the import, export, sale, supply or distribution of petroleum would be properly regulated. Several authorities were cited to support the proposition that vesting of unfettered and arbitrary power is a violation of Article 12(1) of the Constitution.

In **Special Goods and Services Tax Bill** [S.C.S.D. 01-09/2022] it was held (at pages 35-36):

“Thus, it is seen that unspecific, wide and unregulated discretion is to be vested in the Minister. The conferment of such absolute and unfettered discretionary power distinctly lends itself to manifestly unreasonable, capricious or arbitrary decision making. It is necessary to emphasize that when unfettered and absolute power is vested in a human being or a group of persons, cannot be a guarantee of objectivity, reasonableness, absence of arbitrariness, protection of national and public interest, and the power will not be abused or used for corrupt purposes. The only assurance of objective, purposive, reasonable and transparent decision-making arises out of the vesting of well-structured power which must be exercised in accordance of well-defined, specific and objective criteria developed for the specific purpose of achieving objectives for which power has been vested. This Court needs to highlight that absolute and unfettered discretion being vested in an officer of the Executive is a recipe for (i) unreasonable and arbitrary decision-making, (ii) abuse of power, (iii) corruption, and (iv) the roadway to depredation of the Rule of Law On all such accounts, it results in an infringement of Article 12(1) of the Constitution which guarantees equal protection of the law.”

In **Colombo Port City Economic Commission Bill** [Supra. at page 30] it was held:

“Upon reading of the Bill, the Court is of the view that the regulatory structure set out in the Bill lacks clarity and provides for the exercise of arbitrary power by the Commission and thus, inconsistent with Article 12(1) of the Constitution.”

In **Prevention of Terrorism (Temporary Provisions) Amendment Bill** [S.C.S.D. Nos. 13-18/2022] Court held (at pages 36- 38) that:

“When a provision of law is vague, it would only benefit the wrongdoer. Such a provision would not uphold the Rule of Law.

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.”

Court has no doubt that vesting of arbitrary and unfettered power on any person or body is a violation of Article 12(1) of the Constitution. Nevertheless, Court observes that in making recommendations for the grant of licence or increase of it, the Committee does not have any unfettered power. It must, in terms of section 5(1) of the Petroleum Products Act, have regard to the requirements of the petroleum sector and the interests of the national economy. The Energy Supply Committee too was previously subject to the same requirements. Similarly, when recommending the increase of licences, the Committee must, in terms of section 5(3) of the Petroleum Products Act, take into consideration the interest of the national economy, the needs of the consumers and the interests of the petroleum sector. The Energy Supply Committee too was previously subject to the same requirements.

Nonetheless, Mr. Saliya Pieris PC contended that these words are vague terms and entirely subjective in nature and as such the existing law provides no guidelines or safeguards with regard to the exercise of such power by the Minister.

However, this submission disregards the fact that they are existing provisions of law and that Article 80(3) of the Constitution prohibits Court from directly or indirectly inquiring into, pronounce upon or in any manner call in question, the validity of any provision of the Petroleum Products Act on any ground whatsoever. Nonetheless, it was submitted that Article 80(3) of the Constitution will not circumscribe a review of the impugned clauses in view of the determination of this Court in **Special Goods and Service Tax Bill** [S.C.S.D. 01-09/2022] wherein it was held (at page 20):

“Upon a consideration of the constitutional duty conferred on this Court and the submissions made in this regard by the learned DSG and learned counsel for the Petitioners, it is the considered view of this Court that when a Bill is impugned before this Court on the alleged footing that one or more clauses of such Bill are inconsistent with the Constitution, this Court must consider the impugned clauses of the Bill and arrive at a finding regarding the constitutionality of the impugned clauses. This Court must and easily can perform that duty without infringing Article 80(3) of the Constitution. Once the jurisdiction of this Court has been invoked, refraining from determining the constitutionality of a clause in a Bill that is challenged, on the footing that there appears to be provisions in existing laws which are similar, if not identical to the impugned clauses, would be an abdication of the constitutional responsibility cast on the Supreme Court. The purpose of the exercise of this constitutional duty by the Supreme Court is to determine the constitutionality of the impugned Bill and its clauses, and to also prescribe the manner in which such Bill should be enacted by Parliament.”

Nevertheless, there the Court was making reference to an existing provision in another law and held that Article 80(3) of the Constitution will not prevent the examination of the constitutionality of a similar provision in a bill before Court merely due to the same provision being part of another Act. In the matter before Court, the Petitioners are seeking to impugn the constitutionality of certain provisions of the Petroleum Products Act during a challenge to the constitutionality of an amendment to that Act. Such a course of action is not permitted.

In **Active Liability Management Bill** [Decisions of the Supreme Court on Parliamentary Bills (2018) Vol. XIV, 5 at page 13] it was held:

“Therefore, the money raised in the form of loans under this Bill would be deposited in accordance with the law prevailing in this country. Thus, depositing of money raised in the form of loans under this Bill cannot violate the Constitution. If a person or an agency of the Government acts in accordance with the law prevailing in this country, can such an act be construed as a violation of the Constitution? If this question is answered in the affirmative, we would be declaring that acting in accordance with the prevailing law of the country is a violation of the Constitution. Further if this question is answered in the affirmative, this Court would indirectly challenge the validity of the prevailing law. At this stage we would like to consider Articles 16 (1) and 80 (3). Article 16 (1) of the Constitution reads as follows: -

“All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.”

Article 80 (3) of the Constitution reads as follows: -

“Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, 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.”

When the above Articles of the Constitution are considered, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. For the above reasons, we hold that if a person or an agency of the Government acts in accordance with the law prevailing in this country, such an act cannot be construed as a violation of the Constitution.”

Court further observes that in terms of section 5(2) of the Petroleum Products Act, the grant of a licence in terms of section 5(1) shall be subject to such conditions as may be prescribed. Court is of the view that the word “shall” in section 5(2) of the Petroleum Products Act makes it mandatory to prescribe the conditions prior to issue of any licences. In **Energy Supply (Special Provisions) Bill** [Supra.] this Court held that the power to “regulate” in the relevant section will not be a violation of Article 12(1) of the Constitution since it would be done through Regulations to be made by the Minister, which would be of general application. Similarly, as the licence to be issued shall be subject to prescribed conditions, there is no violation of Article 12(1) of the Constitution.

This may well be the reason why the learned DSG informed Court during the hearing that the Hon. Attorney-General has received instructions from the Secretary, Ministry of Power and Energy that no licences will be issued prior to the conditions being prescribed by way of Regulations. After the hearings were concluded, the Hon. Attorney-General has by way of motion dated 13th September, 2022 submitted a letter dated 9th September, 2022 under the hand of M.P.D.U.K. Mapa Pathirana, Secretary, Ministry of Power and Energy and countersigned by Chaminda Hettiarachchi, Additional Secretary (Development) undertaking that no licences will be issued prior to the conditions being prescribed by way of Regulations.

It is also our view that the prescribed conditions should be placed before Parliament for its approval in terms of section 7(3) of the Petroleum Products Act expeditiously.

For the foregoing reasons, we hold that Clauses 2 and 3 are not inconsistent with the Constitution.

Clause 4

Mr. Manohara De Silva PC and Mr. Saliya Pieris PC referred to the composition of the Committee in the Bill and made a comparison with the composition of the Energy Supply Committee established under the Energy Supply Act. It was submitted that the Energy Supply Committee was composed of representatives of the relevant stakeholders so that necessary recommendations and advice could be tendered to the Minister taking into consideration the criteria as spelt out in the Petroleum Products Act whereas the Committee does not have representatives of the relevant stakeholders. Accordingly, it was submitted that the change of composition of the Committee will result in the Minister exercising his powers arbitrarily without proper consultation with other stakeholders in violation of Article 12 (1) of the Constitution.

In support of this proposition the determinations of this Court in **Sri Lanka Broadcasting Authority Bill** [Supra. page 94], **Private Medical Institutions (Registration) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 189 at page 193], **Engineering Council, Sri Lanka Bill** [Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, 69 at page 70] were cited.

Court agrees that the composition of the Committee must be such that all relevant criteria in the Petroleum Products Act will be considered in making recommendations or giving advice to the Minister. The composition of the Committee as presently envisaged in the Bill does not do so. Hence Clause 3(2) of the Bill is inconsistent with Article 12(1) of the Constitution and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84.

The inconsistency will cease if the composition of the Committee is changed to include the following:

- (1) Secretary to the Ministry in charge of the subject of Economic Policy Development.
- (2) Secretary to the Ministry in charge of the subject of Investment Promotion.

Clause 7

Mr. Manohara De Silva PC submitted that Clause 7 has the effect of retrospective operation of the Energy Supply Committee and accordingly the amendment sought may give legitimacy to illegal acts already committed. Therefore, it was submitted that Clause 7 of the Bill is inconsistent with Articles 3, 4, and 12 (1) of the Constitution.

Clause 7 states that any power exercised or any act done by the Energy Supply Committee prior to the commencement of the Bill in pursuance of any power conferred on it by the principal enactment shall be deemed to be validly exercised. It is a deeming provision.

In Jinawathie and Others v. Emalin Perera [(1986) 2 Sri.L.R. 121 at 130] Ranasinghe J. (as he was then) held:

"In statutes the expression "deemed" is commonly used for the purpose of creating a statutory function so that the meaning of a term is extended to a subject matter which it properly does not designate. Thus, where a person is "deemed to be something" it only means that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were. When a thing is deemed to be something, it does not mean that it is that which it is deemed to be, but it is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing it is nevertheless deemed to be that thing."

Bennion, Statutory Interpretation (5th Ed., page 950) states:

"The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further."

Hence a deeming provision must be constantly construed contextually and in relation to the legislative purpose to ascertain its true effect.

In **S v. Rosenthal** 1980(1) SA 65(A). Trollip J. (at 75H-76A) went on to explain some of the usual meanings and effect of deeming provisions as follows:

“That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily, thereto as being merely prima facie or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive.”

Upon an examination of Clause 7, we are of the view that it is a deeming provision falling within (iii) above, namely that it brings conclusive or irrebuttable validity to any power exercised or any act done by the Energy Supply Committee through legislative intervention thereby excluding the judicial power of the People. Hence Clause 7 is inconsistent with Articles 3 and 4(c) of the Constitution and may be passed only by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83.

Clause 8

Mr. Saliya Pieris PC submitted that this clause is vague and ambiguous as the Bill does not provide for any terms and conditions to be imposed on a licensee or for the making of rules or regulations. Therefore, it was contended that clause 8 is inconsistent with Article 12(1) read with Articles 3 and 4(d) of the Constitution and therefore cannot be passed as law except if approved by the People at a Referendum in addition to two thirds vote of the whole number of the members of Parliament in favour as required by Article 84(2) of the Constitution. Although the Bill does not provide for the imposition of any terms and conditions on a licensee, the licences referred to therein are licences issued under the Petroleum Products Act which provided for conditions to be prescribed.

We hold that Clause 8 is not inconsistent with the Constitution.

Mr. Nuwan Pieris appearing on behalf of the Petitioner in S.C.S.D. 50/2022 submitted that the Bill should have been sent to all the Provincial Councils for consultation and concurrence in terms of Article 154(5) of the Constitution as it is a matter coming within Item 23 of List III (Concurrent List) of the Ninth Schedule of the 13th Amendment to the Constitution. The learned DSG contended that the subject matter of the Bill is a matter falling within the Reserved List and submitted that identifying whether the particular subject-matter of a bill is devolved to the Provincial Councils cannot be done by merely looking at the heading in the List and that the object and purpose test must be applied. Reliance was placed upon the determinations of this Court in **Agrarian Services Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 9 at page 18], **Water Services Reform Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 439 at page 441], **Town and Country Planning (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2010-2012) Vol. X, 55] and **Mutual Assistance in Criminal Matters Bill** [Decisions of the Supreme Court on Parliamentary Bills (2013) Vol. XIV, 43 at page 45].

We see no need to determine this issue as admittedly the Provincial Councils are not presently constituted. In **Colombo Port City Economic Commission Bill** [Supra. pages 23-24] it was held:

“It is the view of the Court that the requirement to refer a Bill to every Provincial Council is a procedural step in the legislative process. However, in interpreting this provision (in a situation where a Bill has not been referred to a Provincial Council) it is necessary to consider the application of the maxim ‘lex non cogit ad impossibilia’ – law does not compel a man to do that which he cannot possibly perform.

Court has previously held in Ananda Dharmadasa and Others v. Ariyaratne Hewage and Others (2008) 2 SLR 19, that the principle lex non cogit ad impossibilia is applicable in interpreting procedural requirements in the Constitution.

The existence of a Provincial Council constituted in accordance with the law is a pre-requisite to decide whether there is non-compliance with this procedural step in a given situation. It is pertinent to note that at present, none of the

Provincial Councils have been constituted in accordance with the law. Therefore, referring a Bill to Provincial Councils at this point of time, for the expression of its views is an act which cannot possibly be performed. Thus, noncompliance with this procedural step which cannot be performed, in the present circumstances, should not adversely impact on the legislative power of Parliament, which is a part of inalienable sovereignty of the People”.

This position was re-iterated in **Twenty First Amendment to the Constitution Bill** [S.C.S.D. 31,32,34,36-37/2022, page 8]. Accordingly, this Court is of the view that the need to refer the Bill to all Provincial Councils does not in any event arise.

This Court notes that the Energy Supply Committee was, in terms of section 15 of the Energy Supply Act, a Scheduled Institution within the meaning of the Bribery Act, and the provisions of that Act was to be construed accordingly. Nevertheless, the Committee is not made a Scheduled Institution within the meaning of the Bribery Act. Recent events have left no doubt that the petroleum industry is an essential service for the community. It is of great importance that the regulatory framework of this sector is brought within all laws aimed at ensuring an environment free of bribery and corruption. Hence the failure to make the Committee appointed by the Cabinet of Ministers a Scheduled Institution within the meaning of the Bribery Act is a violation of the Rule of Law and results in the Bill as a whole being inconsistent with Article 12(1) of the Constitution. This inconsistency will cease if the following clause is added to the Bill:

“The Committee appointed by the Cabinet of Ministers shall be deemed to be a Scheduled Institution within the meaning of the Bribery Act, and the provisions of that Act shall be construed accordingly.”

We have examined the rest of the clauses of the Bill and determine that they are not inconsistent with the Constitution.

Summary of the Determination

- A. Clause 3(2) of the Bill is inconsistent with Article 12(1) of the Constitution and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84. The inconsistency will cease if the composition of the Committee is changed to include the following:
1. Secretary to the Ministry in charge of the subject of Economic Policy Development.
 2. Secretary to the Ministry in charge of the subject of Investment Promotion.
- B. Clause 7 of the Bill is inconsistent with Articles 3 and 4(c) of the Constitution and may be passed only by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83.
- C. The Bill as a whole is inconsistent with Article 12(1) of the Constitution. This inconsistency will cease if the following clause is added to the Bill:
- “The Committee appointed by the Cabinet of Ministers shall be deemed to be a Scheduled Institution within the meaning of the Bribery Act, and the provisions of that Act shall be construed accordingly.”

We place on record our deep appreciation of the assistance given by all learned Counsel for the Petitioners and the learned DSG.

Murdu N.B. Fernando, PC
Judge of the Supreme Court

Janak De Silva
Judge of the Supreme Court

Arjuna Obeyesekere
Judge of the Supreme Court