

**“Contempt of a Court, Tribunal or Institution Bill”**

Before : Murdu N.B. Fernando PC Judge of the Supreme Court  
Shiran Gooneratne Judge of the Supreme Court  
Achala Wengappuli Judge of the Supreme Court

**SCSD 58/2023**

Petitioner : Visakesa Chandrasekeram

Counsel : Saliya Peiris PC with Pulasthi Hewamanna,  
Ms Harini Jayawardhana, Ms Fadhila Fairoze, Ms. Githmi  
Wijenarayana and Farhad Jiffry

Intervenient Petitioners: Kaushalya Nawaratna

Isuru Balapatabendi

Counsel : Faisz Musthapha PC with Shantha Jayawardena  
instructed by K.M.S.K. Perera

Intervenient Petitioner: Tharindu Iranga Jayawardhana

Counsel : Thishya Weragoda with Dilan Nalaka  
and Ms Dinithi Fernando

**SCSD 59/2023**

Petitioner : W.J. Basil Fernando

Counsel : Pulasthi Hewamanna with Ms Harini  
Jayawardhana, Ms Fadhila Fairoze, Ms. Githmi  
Wijenarayana and Farhad Jiffry

**SCSD 60/2023**

Petitioner : Kingsly Karunaratne

Counsel : Pulasthi Hewamanna with Ms Harini  
Jayawardhana, Ms Fadhila Fairoze, Ms. Githmi  
Wijenarayana and Farhad Jiffry

**SCSD 61/2023**

Petitioners : Sanjeewa Dasanayake  
Sandun Nagahawatta

Counsel : Saliya Peiris PC with Pulasthi Hewamanna,  
Ms Harini Jayawardhana, Ms Fadhila Fairoze, Ms. Githmi  
Wijenarayana and Farhad Jiffry

**SCSD 62/2023**

Petitioner : Nagananda Kodituwakku

Counsel : Petitioner in person

Respondent in all

All Petitions : Hon. Attorney General

Counsel : Nerin Pulle PC, ASG with Jehan Gunasekara SC,  
M. Fernando SC and Nisal Kohona SC

Court assembled for hearing at 10.00 a.m. on the 3<sup>rd</sup> and 4<sup>th</sup> August 2023.

The Bill titled “Contempt of a Court, Tribunal or Institution” (hereafter referred to as “the Bill”) was published in the Government Gazette on 23<sup>rd</sup> June 2023 and placed on the Order Paper of Parliament on 18<sup>th</sup> July 2023.

Several Petitioners have, by forwarding their petitions to this Court, invoked its jurisdiction in terms of Article 121(1) of the Constitution seeking a determination that the Bill as a whole or one or more of its Clauses are inconsistent with the provisions of the Constitution. Intervenient Petitioners, two Attorneys-at-Law in their capacity as the principal office bearers of the Bar Association of Sri Lanka and a journalist intervened in SC SD 58/2023, challenging the constitutionality of the said Bill.

The Hon. Attorney General was notified in terms of Article 134(1) of the Constitution.

The Counsel representing the Petitioners, the Petitioner of SCSD 62/2023 in person, the Intervenient Petitioners and the learned Additional Solicitor General were heard before this bench at the sittings held on 3<sup>rd</sup> and 4<sup>th</sup> August 2023.

Long title of the Bill indicate it is to provide for the uniform application of the law relating to the contempt of a Court, Tribunal or Institution; to provide for the procedure in punishing the contempt of a Court, Tribunal or Institution; and to provide for matters connected therewith or incidental thereto.

In Clause 2 of the Bill, the following objects are set out;

- (a) uphold the dignity and authority of a Court, Tribunal and Institution;
- (b) protect the due administration of justice;
- (c) ensure adherence to judicial directives;
- (d) preserve and maintain the effectiveness and impartiality of a Court, Tribunal or Institution;
- (e) safeguard public order, public health and morals;

- (f) strike a balance between the right of expression, fair comment and compliance with judicial directives;
- (g) set out with precision the ambit of contempt of a Court, Tribunal or Institution; and
- (h) ensure the observance of, and respect for, the due process of law.

The Bill contains a total of 17 Clauses. Clause 3 sets out the acts that are deemed to be in contempt of a Court, Tribunal or Institution and Clause 4 sets out the defences one could raise when charged with contempt of a Court, Tribunal or Institution. Power of the Supreme Court and the Court of Appeal to punish for contempt of a Court, is described in Clause 5, whereas Clause 6 describes the power of a Court of First Instance to punish for contempt.

Clause 7 sets out the procedure where contempt of a Court is committed in the face of the Supreme Court or of the Court of Appeal, whereas Clause 8 lays down the procedure where contempt of Court is committed not in the face of Supreme Court or the Court of Appeal. In Clause 9, the procedure for the exercise of jurisdiction of the Court of Appeal in respect of contempt committed against a Court of First Instance, Tribunal or Institution is stated. Clause 10 sets out the procedure for the exercise of jurisdiction conferred on the Courts of First Instance to try contempt of Court.

The punishment for contempt of Court is specified in Clause 11 while Clause 12 deals with appeals from any order or decision of the Court of Appeal in the exercise of its jurisdiction to punish for contempt of Court of First Instance, Tribunal or Institution to the Supreme Court.

Clause 13 imposes a period of limitation for institution of proceedings for contempt of Court. Clause 14 deals with contempt of a Court, Tribunal or Institution, committed by a body of persons. Clause 15 states the provisions of the Act to prevail over other

written law. Interpretations are contained in Clause 16 and Clause 17 deals with any inconsistency between the Sinhala and Tamil texts.

The Petitioners collectively challenge the constitutionality of the Bill as a whole is inconsistent with Article 105(3) of the Constitution and therefore should be passed in Parliament with a special majority of votes and approved by the People at a Referendum. The Petitioners also contend that provisions contained in Clauses 2, 3(1)(b), 3(2), 4(1), 5, 6, 7, 8, 9, 11, 12 and 16 are inconsistent with the Articles 3, 4, 12(1), 13(3), 13(5), 14(1)(a), 105(3), 106, 127, 128, 136(1)(b), 138 and 146 of the Constitution.

In challenging the constitutionality of the Bill as a whole, the Petitioners contend that Article 105(3) confers a special and unique power to punish acts in contempt of the Supreme Court or of the Court of Appeal itself, whether committed in the Court itself or elsewhere. This power was conferred to protect the independence of the Institution of the Judiciary, in view of the key role it plays in determining rights of the People.

It was with that objective, the Petitioners contended that the Article 105(3) had conferred such an unrestricted power to Superior Courts of Record to determine the acts of contempt, the procedure it should adopt in dealing with acts of contempt and the sentences that should be imposed. Conferring of such a wide discretion, as indicative by the phrase contained in Article 105(3), “... *as the Court may deem fit*”, the said sub Article permits those Courts to determine whether a particular act is contemptuous or not, which Clause 3 of this Bill seeks to restrict by defining several specific acts constituting that are in contempt of a Court, Tribunal or Institution. Thus, it was contended the restriction imposed by Clause 3 of the Bill is contrary to the provisions of Article 105(3) of the Constitution. Clause 11 of the Bill also restricts the wide discretion conferred by the said Article on the power of Courts to impose any sentence “... *as the Court may deem fit*”, by inserting a ceiling on the period of imprisonment it could impose. Mr. Saliya Peiris PC points out, that not only Clause 3 restricts jurisdiction conferred on Superior Courts of Record under Article 105(3), it

also has a chilling effect by restricting the freedom of expression, a guaranteed fundamental right under Article 14(1)(a), and thus inconsistent with the provisions of Article 4(d) of the Constitution.

Mr. Peiris did mount another challenge on the constitutionality of the Bill by questioning the legislative competence to pass the said Bill containing several Clauses laying down procedural provisions as to the conduct of proceedings of the Supreme Court, when Article 136(1)(b) states that the proceedings, in relation to exercise of several jurisdictions conferred on this Court by the Constitution or any other law, be governed by the Rules of the Supreme Court.

Learned Counsel contended that the power conferred under Article 105(3) is necessary to be retained in this Court, for the purpose of maintaining the independence of the Institution of the Judiciary, facilitating the key role it plays in protection of the rights of the People.

In view of the primary challenge on the constitutionality of the Bill, the learned Additional Solicitor General, contended that contrary to the contention of the Petitioners, that the Bill, in its entirety, protects, vindicates and enforces the rights of the People in terms of Article 105(1) of the Constitution as well as advances, secures and respects the fundamental rights of the People guaranteed under Articles 10, 11, 12, 13, and 14, read together with Articles 3 and 4(d) of the Constitution.

It was submitted by the learned Additional Solicitor General that the Bill in fact enhances the fundamental rights and sovereignty of the People in the manner stipulated in Article 3 and 4(d) of the Constitution and does not have a prejudicial impact on the sovereignty of the People.

He further contended that if the position taken by the Petitioners regarding the Bill is accepted by Court, the resultant position would be restriction, abridgement and denial of the rights guaranteed under Article 10, 11, 12, 13, and 14 of the Constitution and therefore would have a prejudicial impact on the sovereignty of the People.

He relied on the determination in ***In Re Nineteenth Amendment to the Constitution Bill*** (2015) Decisions of the Supreme Court on Parliamentary Bills Vol. XII - (2014-15) p.33 .

In affirming the Constitutionality of the Bill as a whole, learned ASG submitted that;

- I. Article 105(3) of the Constitution only vests forum jurisdiction on the Supreme Court and the Court of Appeal to punish for contempt of itself, whether committed in the Court itself or elsewhere,
- II. Article 105(3) does not in any way restrict the legislative power of the Parliament to regulate the exercise of its powers to punish for contempt by the Supreme Court and the Court of Appeal,
- III. Since the Bill protects, vindicates and enforces the rights of the People in terms of Article 105(1) of the Constitution as well as advances, secures and respects the fundamental rights of the People guaranteed under Article 10, 11, 12, 13, and 14 of the Constitution, in accordance with Article 3 read together with Article 4(d) of the Constitution, the Bill cannot be stated to be inconsistent with Article 105(3) or to be an implied amendment of Article 105(3) of the Constitution.

Learned ASG, during his submissions referred to the discretion that was conferred by Article 105(3) on the Superior Courts of Record as an untrammelled discretion without a limitation and, in view of the contemporary approach of the Courts to such an absolute discretion, the Bill proposes to introduce certain parameters within which the Courts should exercise the said jurisdiction. He advocated, similar to other public bodies, Courts too must not possess absolute discretion and the Bill proposed a reasonable limitation of that discretion. He relied on the judgment of this Court in ***Perera v Vice Admiral Karannagoda*** (SC Appeal No. 11/2017 – decided on 11.01.2023)

where it was stated at p. 134 of the dissenting judgment “[U]nfettered and unreviewable absolute discretion finds no place in the present era of constitutionalism and the rule of law on which the Sovereignty of the People of the Democratic Socialist Republic of Sri Lanka has been founded.”

The Petitioners and Intervening Petitioners moved this Court to exercise its jurisdiction conferred under Article 120 of the Constitution to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.

If the Court is of the determination that the Bill or any provision thereof is inconsistent with the Constitution, the Court shall state;

- a. whether such Bill is required to comply with the provisions of sub Articles 82(1) or 82(2),
- b. whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of Article 84(2); or
- c. whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of Article 84(2) and approved by the People at a Referendum per Article 83,

This Court, under the said jurisdiction, may specify the nature of the amendments which would make the Bill or any provision thereof cease to be inconsistent with the Constitution.

It is observed by this Court that the Bill is the result of an attempt made to fulfil a pressing need to codify the substantial body of jurisprudence on contempt of Court, which had been moulded and developed, for over two centuries by the judiciary of this Country, adopting Common law principles and practices. Thus, the purpose of the Bill



is not to create a new jurisdiction for the Courts, but to provide for uniform application of the law relating to the contempt of a Court.

The Petitioners and the Intervient Petitioners moved this Court to exercise its jurisdiction conferred under Article 120 of the Constitution to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.

The Royal Charter of Justice of 18<sup>th</sup> April 1801, by its Clause VI established the Supreme Court, a Court of Record, for the purpose of administration of justice in the maritime provinces. The Supreme Court was empowered to “*punish contempt thereof*”. Charter of 1801 was eventually succeeded by the Charter of 1833 which conferred appellate jurisdiction to the Supreme Court and original criminal jurisdiction throughout the island after the Kandyan Kingdom came under colonial rule. ***In the matter of the Application of John Ferguson for a Writ of Prohibition against the District Judge of Colombo***, a judgment delivered in 1874 and reported in 1 NLR 18, the Supreme Court pronounced; “ *... we have no hesitation in declaring that we are quite prepared to hold and maintain that this Court, as the Supreme judicial tribunal in and throughout this Island, vested with all the high prerogative powers conferred on it by the Crown, has all the power of punishing for contempt, wherever committed in this Island, possessed by the Superior Courts of Westminster.*”

None of the Charters provided any definition to the acts which constitute contempt nor the procedure by which a person alleged to have committed an act of contempt should be tried. This lacuna was filled by the judiciary by adoption of Common law jurisprudence and equity principles. This position is reflected from the said judgment referred to above where it was held “[T]he proceeding adopted in this instance was entirely under the English law, and in accordance with its forms, and our decision is based on the English decisions, which have always been recognized and acted upon in our Courts in matters of contempt.” Thus, there exists a substantial body of jurisprudence of the Supreme Court, nurtured and refined with the influence of English Common law, that had accumulated for over two centuries.

In 1890, the Courts Ordinance was enacted to amend and consolidate the law relating to Courts and their powers and jurisdictions. Section 6 created the Supreme Court of the Island of Ceylon and stated that it continues to be the only Superior Court of Record. Section 47 of the Courts Ordinance conferred full power and authority on the Supreme Court to take cognizance of and to try in a summary manner any offence of contempt committed against or in disrespect of the authority of itself or offence of contempt committed against or in disrespect of the authority of any other Court. It must be noted that conferment of power to punish for contemptuous conduct, the determination of what constitutes an act of contempt had been left to the Courts to decide. However, section 47 provided the manner and the limits within which a convicted person could be punished. Relevant part of the section reads thus; *"... on conviction to commit the offender to jail until he shall have purged his contempt or for such period as to the Court or Judge shall seem meet; and such imprisonment shall be simple or rigorous as such Court or Judge shall direct, and the offender may in addition thereto or in lieu thereof, in the discretion of such Court or Judge, be sentenced to pay a fine not exceeding five thousand rupees."*

The section did provide the Supreme Court with a very wide discretion, not only with regard to determining the act of contempt, but also in the sentencing of an offender, by providing multiple options in the determination of the best mode and manner of punishment to be imposed on an offender to a sentence, most appropriate to the circumstances the Court was presented with, but deliberately desisted itself from specifying any limitation to that discretion, within which it should be exercised.

Courts Ordinance was repealed by Administration of Justice Law No. 44 of 1972 and by section 8(1), the Supreme Court of the Republic of Sri Lanka was established. Section 9 of the said Law, the status of the Supreme Court, as the only Superior Court of Record under the Courts Ordinance, was retained. Section 43(3) stated *"[T]he Supreme Court may take cognizance of and try in a summary manner any offence of contempt committed against or in disrespect of its authority and on conviction may*

*impose a sentence of imprisonment not exceeding seven years or a fine not exceeding seven thousand rupees or both such imprisonment and fine*". The Administration of Justice Law also did not provide a definition of the offence of contempt and left its determination to the Supreme Court. The sub section 43(3) of the said law made reference to summary manner, as Section 47 of Courts Ordinance did, by specifying the procedure. Importantly, this sub section imposed a ceiling on the term of imprisonment, a Court could impose on such a person and also on the amount of fine.

The Republican Constitution of 1972, by Article 64(1) conferred the Constitutional Court of the full power to take cognizance of and try in a summary manner any offence of contempt and to commit the offender to jail, until he shall have purged his contempt or to serve a term of imprisonment.

It is evident that commencing from 1801 and up to the repeal of the Administration of Justice Law in 1979, ( by section 457(1) of the Code of Criminal Procedure Act No. 15 of 1979), for over 175 years, the Supreme Court had the power to punish acts of contempt committed against its authority as a Superior Court of Record. This power was exercised by the Court, acting under the powers conferred by written law as well as adopting Common law principles, which, in the formulation of the procedures and defining different acts of contempt, contributed significantly to demarcate the jurisdictional boundaries . Thus, there exists a rich and diverse body of jurisprudence on the law of contempt covering the acts that are contemptuous, the manner of dealing with them and the punishments that are meted out to the offenders.

On 21<sup>st</sup> July 1978, the People of Sri Lanka, having expressed their mandate freely, and through their elected representatives, adopted and operated a new Republican Constitution, conferring themselves with an inalienable Sovereignty in terms of Article 3. Article 4(c) mandates the Parliament to exercise the judicial power of People through Courts, Tribunals and Institutions created and established, or recognised by the Constitution, or created and established by law. Thus, the Courts, Tribunals and Institutions, that are mandated by the People to exercise their judicial power could be

classified into two groups. The Courts, Tribunals and Institutions created and established, or recognised by the Constitution belong to one such group while the Courts, Tribunals and Institutions created and established, or created and established by law belong to the other.

In terms of Article 105(1), the status of the Supreme Court of the Republic of Sri Lanka, the Court of Appeal of the Republic of Sri Lanka, the High Court of the Republic of Sri Lanka and such other Courts of First Instance, Tribunals or such Institutions as Parliament may from time to time ordain and establish, were termed as the institutions that are established for the administration of justice which protect, vindicate and enforce the rights of the People. The only exception provided to the provisions of this sub article is in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, and, in such an instance, the judicial power of the People may be exercised directly by Parliament, according to law.

The present Supreme Court of the Republic of Sri Lanka is therefore clearly a Court created and established by constitutional provisions of the 1978 Constitution, severed from its predecessor, namely the Supreme Court of the Republic of Sri Lanka, established under the Administration of Justice Law. Article 169(2) is clear in this regard as it states, “ *the Supreme Court established by the Administration of Justice Law No. 44 of 1973, shall, on the commencement of the Constitution, cease to exist ...*”.

The Supreme Court of the Republic of Sri Lanka, in its present form, was established, by the Constitution. It was conferred with multiple jurisdictions by the Constitution. It was invested with all the powers including to punish for contempt of Court by the Constitution. Therefore, the present Supreme Court of the Republic of Sri Lanka is essentially a creation of the 1978 Constitution. The Supreme Court, thus created, in terms of Article 118 is the highest and final Superior Court of Record in the said Republic.

Article 105(2) states all Courts, Tribunals and Institutions created and established by existing written law for the administration of justice and for the adjudication and settlement of industrial and other disputes, other than the Supreme Court, shall be deemed to be Courts, Tribunals and Institutions created and established by Parliament. Parliament may replace or abolish, or amend the powers, duties, jurisdiction and procedure of, such Courts, Tribunals and Institutions. The exception is the Supreme Court.

In terms of Article 105(3), the Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a Superior Court of Record and shall have all the powers of such Court including the power to punish for contempt of itself, whether committed in the Court itself or elsewhere, with imprisonment or fine or both as the Court may deem fit.

The power to punish for contempt, conferred on this Court as well as the Court of Appeal, under the 1972 Constitution was conferred by, Administration of Justice Law, an Act of Parliament. The power of the Supreme Court to punish for contempt since its establishment with the Charter of Justice and continued under Courts Ordinance and Administration of Justice Law, is conferred upon the newly established Supreme Court, by a constitutional provision. In ***Ganeshanantham v Vivien Goonewardene and three Others*** (1984) 1 Sri L.R. 319, this Court observed that “[T]he Supreme Court which existed up to the time of the first Republican Constitution of 1972 and which continued to exist under that Constitution ceased to exist when the 1978 Constitution became operative. (Vide Article 105 (2) of the Constitution). Its place was taken by the Court of Appeal (Vide Article 169 (2) of the 1978 Constitution). A new Supreme Court has been constituted which is the highest and final Superior Court of Record. (Article 118 of the Constitution).”

In view of the provisions of the Article 105(2), the continued relevance of the body of jurisprudence on contempt, created and nurtured by the preceding Supreme Courts

was considered in ***Hewamanne v De Silva and another*** (1983) 1 Sri L.R. 1 and this Court held (at p.12) that the Supreme Court ;

*“... is vested with a power to punish for contempt and this power is found in Article 105 (3). The law of contempt, which is a concept known to English law was well known in this country from early British times. This English law of contempt, modified to some extent in its application here, was in operation immediately prior to the coming into operation of this 1978 Democratic Socialist Republican Constitution. It had been continued in operation by the earlier Republican Constitution of 1972, which also kept alive the then existing law of contempt of Court. Our Constitution has a Chapter on Fundamental Rights, including freedom of speech and expression. Those provisions, if applicable, may have modified probably to some degree the existing law of contempt of Court, but in view of the provisions of Article 16, it is not necessary to go into that question in any detail. Article 16, which is one of the Articles contained in the Chapter on Fundamental Rights, states that: "All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter."*

In conferring powers on the Superior Courts of Record, Article 105(3) states it “... shall have all the powers of such Court including the power to punish for contempt of itself,”. The term “Court of Record”, was clarified by the Full Bench decision in ***The King v Samaraweera*** (1917) 19 NLR 433, on following terms; “ Courts of Record are those the orders and judicial proceedings of which are enrolled for a perpetual memorial and testimony, and the records of which are absolutely authoritative, as distinguished from Courts not of record, the acts of which may be evidenced by rolls and records, but are not established absolutely thereby and must be proved like other facts”. Their Lordships further observed that “[T]he Supreme Courts of Record in England have always had full power to deal summarily with contempt of their authority, and the

*power dates back to the time when the Sovereign personally, or his immediate representative, sat to administer justice (see ex parte Joliffe, 42 L.J. Q.B. 121): "It is laid down by high authorities, and is according to the reason of the thing, that every Court of Record has power to fine and imprison for contempt committed in the face of the Court, while the Court is sitting in the administration of justice. Such a power is obviously necessary for the administration of public justice".*

The sub Article 105(3) states that the Superior Courts of Record "... shall have all the powers of such Court including the power to punish for contempt of itself." The importance of the insertion of the word "*including*" in Article 105(3) is a significant factor.

This factor was considered by the Supreme Court of India, in its judgment of **Delhi Judicial Service Association v State of Gujarat** 1991 AIR 2176. The Court held that the expression used in Article 129 "... declares the Supreme Court a Court of Record and it further provides that the Supreme Court shall have all the powers of such a Court including the power to punish for contempt of itself. The expression used in the Article 129 is not restrictive, instead it is extensive in nature." The Court added that the section 19 of the Contempt of Court Act 1971 "*does not and cannot affect the width and amplitude of inherent powers of this Court under Article 129.*" Article 129 of the Constitution of India also reads "[T]he Supreme Court shall be a Court of Record and shall have all the powers of such a Court including the power to punish for contempt of itself".

Inherent jurisdiction of a Court, enabling it to punish acts of contempt, is one such principle originated and adopted from Common law jurisprudence and acted on by Courts of Record, in dealing with acts of contempt. This principle was emphasised by the Constitutional Court of India in the judgment of **Supreme Court Bar Association v Union of India** AIR 1998 SC 1895. The Court said; "[T]he power that Courts of Record enjoy to punish for contempt is a part of their inherent jurisdiction and is essential to enable the Courts to administer justice according to law in a regular, orderly and

*effective manner and to uphold the majesty of law and prevent interference in the due administration of justice”.*

The Constitutional Court further observed that “ ... the power to punish for contempt, being inherent in a Court of Record, it follows that no Act of Parliament can take away that inherent jurisdiction of the Court of Record to punish for contempt and the Parliament’s power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court ...”.

Plain reading of Article 105(3) of 1978 Constitution indicates that the said sub Article neither imposes any restriction on the Superior Courts of Record to determine the acts of contempt nor does it restrict the power of such Court to impose a punishment. The phrase “ *as the Court may deem fit*” indicates the wider discretion purposely conferred by the Article is untrammelled by any form of a limitation. That represents the will of the People, in seeking to administer justice, which protect, vindicate and enforce their rights, through the Superior Courts of Record, established by Article 105(1), when they adopted and enacted the Constitution in the year 1978.

In ***Supreme Court Bar Association v Union of India*** (supra) it was observed that ;

*“ ... a case of contempt of Court is not stricto sensu a cause or a matter between the parties inter se. It is a matter between the Court and the contemnor. It is not, strictly speaking, tried as an adversarial litigation. The party, which brings the contumacious conduct of the contemnor to the notice of Court, whether a private person or the subordinate Court, is only an informant and does not have the status of a litigant in the contempt of Court case.*

*The contempt of Court is a special jurisdiction to be exercised sparingly and with caution, whenever an act adversely effects the administration of justice or which tends to impede its course or tends to shake public confidence in the judicial institutions. This jurisdiction may also be*



*exercised when the act complained of adversely affects the majesty of Law or dignity of the Courts. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the Courts of law. It is an unusual type of jurisdiction combining 'the jury, the judge and the hangman' and it is so because the Court is not adjudicating upon any claim between litigating parties. This jurisdiction is not exercised to protect the dignity of an individual judge but to protect the administration of justice from being maligned. In the general interest of the community it is imperative that the authority of Courts should not be imperilled and there should be no unjustifiable interference in the administration of justice. It is a matter between the Court and the contemnor, and third parties cannot intervene."*

In a subsequent pronouncement of the Supreme Court of India, ***Pallav Sheth v Custodian and Others*** (2001) Law Suit 1043, the Court stated thus;

*" It, however, appears to us that providing for the quantum of punishment or what may or may not be regraded as acts of contempt or even providing for a period of limitation for initiating proceedings of contempt cannot be taken to be a provision which abrogates or stultifies the contempt jurisdiction under Article 129 or Article 215 of the Constitution."*

The Petitioners contended that, if the Bill seeks to change the power invested on this Court by Article 105(3) of the Constitution, it must be a Bill amending the Constitution or a Bill, which require passage by either a Special Majority in Parliament or a Special Majority in Parliament and approved by the People at a Referendum, as envisaged in Article 83 of the Constitution.

It was further contended that the Bill is intend to establish regulations and limitations on the exercise of the powers of the Supreme Court and the Court of Appeal concerning contempt matters, which is a vital safeguard for the protection of the

Judiciary and its independence, and therefore it is essential for the proper administration of justice that the Courts possess the authority to address instances of contempt effectively.

The Petitioners also contend that, as per sub Articles 136(1) and 136(1)(b), the procedure for matters of contempt of Court must be determined by the rules of the Supreme Court and not through an Act of Parliament, while highlighting the fact that unlike other Articles, such as Article 138, which may be subject to any law, Article 105(3) is not made subject to any law. The Petitioners further contend that the contents of the Bill will have the effect of keeping the powers of the Superior Courts of Record conferred by Article 105(3) in a suspense, with parallel provisions, contrary to the strict bar put in place by Article 75.

Clearly the Petitioner's challenge on the legislative competency of the Parliament, in relation to the Bill, is twofold. Firstly, they contend the Bill intend to be enacted as an ordinary Act of Parliament, instead of an amendment to the Constitution, cannot be enacted to takeaway a power conferred by an Article of the Constitution. Secondly, some of the provisions of the Bill would have the effect of suspending a part of the Constitution.

Article 75, states Parliament shall have power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution, subject to the limitations as set out in its proviso to Article 75(a) states Parliament shall not make any law suspending the operation of the Constitution or any part thereof. Whether the enactment of the Bill will have the effect of suspending the effect of Article 105(3) should be considered by this Court with the several Clauses the Bill contains.

Plain reading of Article 75 does not impose any restriction on the Parliament to make ordinary laws on any subject or area. The proviso of the Article deals with situations involving constitutional provisions. In the Reserved list (List II of Ninth Schedule), under

the heading “*Justice in so far as it relates to the judiciary and the Courts structure*”, the following are stated;

- (a) Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court) and the fees taken therein ; persons entitled to practise before the Supreme Court, Court of Appeal and other Courts ;
- (b) Constitution, organisation, jurisdiction and powers of the Court of Appeal and the fees taken therein ; and
- (c) Jurisdiction and powers of all Courts, except the Supreme Court and the Court of Appeal.

In the determination of ***Municipal Councils (Amendment) Bill, Urban Councils (Amendment) Bill and Pradeshiya Sabha (Amendment) Bill*** (SC SD 25-33, 36-41, 43-54 and 56/2023) The primary constitution of the Petition is accordingly rejected this Court stated “ ... *[O]ur Constitution is based on the concept of separation of powers and thus, the executive, legislature and the judiciary function independently from each other*” and further observed that “... *the Parliament is the supreme authority that can make, amend or repeal any law in the country*”. In view of the forgoing, the Parliament has the power to legislate on contempt of Court. Therefore, we are of the view that the challenge by the Petitioners to the legislative competency to make laws on contempt, is without merit and the primary contentions

In relation to the constitutionality of the provisions contained in the individual Clauses of the Bill, the Petitioners and the Intervient Petitioners have placed the following contentions before this Court for its consideration.

### **Clause 2**

The Petitioners contended that inclusion of “ *safeguard public order, public health and morals*”, on Clause 2(e) lacks rational nexus to the objective of the Bill.

Inclusion of the of the words “ *safeguard public order, public health and morals*” in Clause 2(e), in our view, brings in ambiguity by over expanding its scope, which has no rational connection to the rest of the objects of the Bill.

Therefore Clause 2(e) is inconsistent with Article 12(1) of the Constitution.

### **Clause 3**

On behalf of the Petitioners Mr. Saliya Peiris PC, contended that Clause 3 of the Bill creates different offences relating to contempt of Court, some of which far exceeds in its scope that are recognised by Common law principles.

The Petitioner in SC SD 62/2023, who appeared in person, contended that Clauses 3(1)(b) and 3(2)(d) of the Bill are inconsistent with the Sovereignty of the People, as it imposes a bar on any form of recording of judicial proceedings by making such an act deemed to be an act of contempt of a Court.

Mr. Peiris’s other challenge on the constitutionality of Clause 3 was concentrated on the offences contained in the provisions of Clauses 3(2)(c)(i)-(iii), 3(2)(d)(i) and 3(2)(e)(i)-(iii), which said to be imposing strict liability. He highlighted the ambiguity in the words “*scandalising*” and “*lowering*” either “*judicial authority*” or “*dignity*” and contended that the resultant ambiguity impinges on the fundamental rights guaranteed under Article 14(1)(a) of the Constitution. Mr. Peiris further contended that the ambiguity of certain words in Clause 3(2)(c) renders it inconsistent with the Constitution, particularly the Article 12(1) of the Constitution.

It was contended that Clause 3(2)(d)(i) of the Bill, by which the use and bringing in devices or instruments for the purpose of recording in audio and video are made contemptuous acts is inconsistent with Article 106, according to which the proceedings of every Court be held in public, subject to the provisions of the Constitution. He cited an article authored by Prof. *Joseph Fernandez* titled “*Truth in Journalism: Oxymoron or Lofty Ideal ?*” in support of the said contention.

A similar contention was advanced by Mr Hewamanna, who particularly challenged the inclusion of the act of scandalize, as an act of contempt into Clause 3(2)(c), on the basis that it had lost relevance in the contemporary judicial systems with the enhanced recognition afforded to the freedom of expression. He submitted that, in effect scandalization had become an obsolete tool in dealing with contemptuous conduct. He was critical that the inclusion was made without providing a proper definition for the act, and therefore it impinges on the freedom of expression of the People. He placed reliance on a Consultation paper of the Law Commission of the United Kingdom, compiled in the year 2012, in order to impress upon this Court that it is a counterproductive measure to the objects of the Bill, as set out in Clause 2 of the Bill. He attributed the reason for the current thinking that it is as an obsolete offence, because it is the judges themselves who decide what is scandalous and not.

Mr. Thishya Weragoda, representing the Intervient Petitioner, a journalist who was arrested and produced before Court under ICCPR Act, allegedly for conducting a public press conference. He contended that, in terms of Cause 3(2)(d)(ii) of the Bill, a mere recording and publication of what transpires in Court could be construed as an act of scandalizing Court and would diminish transparency of Court proceedings and public confidence in the administration of justice.

Mr. Faiz Mustapha PC described the word "*contempt*" is used as an elastic term in Clause 3, whereas the word "*dissatisfaction*" in Clause 3(2)(e)(ii) is a vague term, as it does not accommodate a *bona fide* mistake made by the doer of the act.

Mr. Hewamanna had tabulated about 30 different acts that are set out in the different sub Clauses in Clause 3, as acts that are deemed to be contemptuous and contended that the provisions contained in Clause 3(2)(e)(ii) and (iii), are contrary to Article 14(1)(a), as it unduly restricts any reasonable criticism on the Judiciary and the Court.

Learned ASG contended that contempt of Court is an offence purely *sui generis* in nature and one that is vaguely defined up to now, and Clause 3 of the Bill seeks to address this issue by setting out precise statutory parameters identifying the multiple

offences. He further contended that the proposed Bill seeks to advance, secure and respect fundamental rights of a person to a fair trial, guaranteed under Article 13(3) of the Constitution.

It is observed that the contention of the Petitioners against the provisions that are contained in Clause 3(2)(e)(i) to (iii) is that they unduly restrict any legitimate criticism on the Judiciary. They expressed fears that Clause 3 of the Bill would create an indirect avenue to transgress into the rights of the People on free speech.

The Petitioners are challenge to the constitutionality of the offences that are set out in Clause 3 to the words “ *cause prejudice*” contained in Clause 3(1)(b), owing to its vagueness.

The contention that the degree of causing prejudice is not indicated in the said Clause, and the mere use of “ *cause prejudice*”, in the context of the said Clause, would in our view lead to ambiguity. The mere use of the words “cause prejudice”, without setting out the degree of the prejudice, which render an act contemptuous is too vague and overbroad. Hence the inclusion of “*cause prejudice*” in Clause 3(1)(b) is inconsistent with Article 12(1) of the Constitution.

Learned ASG tendered a schedule of proposed amendments which the Hon. Attorney General would be advising the Government to be moved at the Committee stage into Clause 3. As stated therein if the word “*grave*” is inserted, the word prejudice would raise the degree to a higher level. We are of the view that the inconsistency will cease if the above amendment is made.

In relation to Clause 3(2)(c), Mr Mustapha PC, contended that the words “*not substantially true*”, creates a similar difficulty in relation to the degree to which the term “ *substantially*” should be established.

Therefore, we are of the view that the resultant ambiguity would make the said provision inconsistent with Article 12(1).

Similarly, it was contended that Clause 3(2)(c) of the Bill states any person who does the act of expressing, pronouncing, or publishing any matter that is not substantially true which scandalizes or lowers the “*judicial authority or dignity of a court, tribunal or institution*”, commits the offence of contempt of a Court.

The said ambiguities in Clause 3(2)(c) of the Bill is inconsistent with Article 12(1) of the Constitution.

If the proposed amendment, as indicated by the learned ASG, to replace the words “*not substantially true*”, with the insertion of the more definitive word “*false*” in the said Clause, the inconsistency ceases.

The substantial portion of the challenge to the constitutionality of the Clause 3 of the Bill by Mr. Peiris and Mr. Hewamanna is on the counterproductive inclusion of the now ‘*obsolete*’ offence of scandalization, as one of the acts of contempt in Clause 3(2)(c). This contention is advanced on the footing that it unduly restricts the freedom of expression and of publication, rights guaranteed under Article 14(1)(a). Before we proceed to consider the constitutionality of the said Clause, it is relevant to consider the judicial approach to the criticism directed towards scandalization.

***In the matter of Armand de Souza, Editor of the Ceylon Morning Leader*** (1914) 18 NLR 33, it was stated “ ... *no kind of doubt as to the right of any member of the public to criticise, and to criticise strongly, judicial decisions or judicial work, and to bring to the notice of the proper authorities any charge whatever of alleged misconduct on the part of a Judge.*” In ***Attorney General v Siriwardena*** (1978-79-80) 1 Sri L.R. 377, this Court stated “*Criticism is permitted. The proceedings in Parliament and Courts of Justice are published so that the public should be aware of what is happening within their walls, for the welfare of the community depends on what is said and done there. The law also recognises the fact that a citizen can form his own opinion on such proceedings and has the right to criticise them.*”

However, in the case of **Ceylon Morning Leader** (supra), the Court observed “[B]ut it is a very different matter to claim that irresponsible persons, upon ex parte statements, are to be at liberty to invite themselves into the judgment seat, and to scatter broadcast imputations such as those with which we have here to do. The law of contempt, as has often been pointed out both in England and in this Colony, exists in the interests, not of the Judges, but of the community. The Supreme Court would be false to its duty if it permitted attacks of this kind to go unpunished”. In the case of **Attorney General v Nadesan** (1978-79-80) 1 Sri L.R. 339, this Court quoted Lord Atkin’s statement in **Ambard v. Attorney-General for Trinidad and Tobago**, (1936 AC 322, 335) where the right to criticise exceeds its acceptable limits and becomes an act of scandalize were considered, and is reproduced below;

*“But whether the authority and position of an individual Judge, or the administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong-headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune.”*

The Court then, in determining the rule, stated “ [W]e do not have to consider whether the arguments or views expressed by the respondent are correct or incorrect: what arises for our consideration is whether, in expressing his arguments and views, be they correct or incorrect, he has kept within the bounds of proper criticism or not”.

The contention of the Petitioners that scandalization of the Judiciary is an obsolete weapon against acts of contempt is not one of recent origin but was in existence even during the latter part of the 18<sup>th</sup> Century. It was observed by this Court in the case of



*Ceylon Morning Leader* (supra) that “[T]he doubt, suggested in **McLeod v St. Aubyn**, (1899) A. C. 549 as to how far committals for contempt by scandalizing the Court were still in force in England, has been removed by the decision of three Judges of the King's Bench Division in the case of **Queen v. Gray** (1900) 2 Q. B. 36 where a scurrilous attack upon a Judge which had no reference to any pending judicial proceedings was punished by the Court on summary process.”

It once again appeared in 1939, *In the matter of a Rule under Section 51 of the Courts Ordinance on H.A. Hulugalle, Editor, “Ceylon Daily News”*, 39 NLR 294 (at p.302), but was rejected by Court; “ ... in support of the first suggestion the case of **McLeod v. St. Aubyn** (1899) A. C. 549, in which Lord Morris delivering judgment in the Judicial Committee of the Privy Council said that committals for contempt of Court by scandalizing the Court itself had become obsolete in England. This observation was disproved next year by the incidence of the case of **Reg v. Gray** (supra) and as the Privy Council applied the law laid down in respect of this kind of contempt in that case as a test in the recently decided case of **Ambard v. Attorney-General for Trinidad** (1936) A. C. ,322.”

It appeared once more in the judgment of **Hewamanne v De Silva and another** (supra) but did not succeed to convince the Court.

The recent pronouncement of the Privy Council in **Dooharika v Director of Public Prosecutions ( Commonwealth Lawyers Association intervening)** [2015] AC 875 having noted that 80 years have passed since the judgment of **Ambard v. Attorney-General for Trinidad and Tobago** and considered the proposition made in an Article by Lord Pannick QC (a copy was tendered to this Court by the Petitioners), their Lordships said “ [T]here is considerable force in these points and it is readily understandable that the law in England and Wales has now been altered by the statue” but stopped shy of making a positive declaration of its fate.

Thus, it appears that the debate continues unabated, well into the 21<sup>st</sup> Century, as the Consultation Paper No. 207 of the Law Commission of the United Kingdom, a document relied on by the Petitioners, reveal the primary basis of the proposal to abolish the offence of scandalising the Court. This is because the report itself concedes that there had been no prosecutions of the offence since 1931. Nonetheless, it suggested to policy makers to consider a third option to create a modified version of the offence. Therefore, inclusion of scandalization into Clause 3 of the Bill cannot be faulted by attaching a tag of obsolescence.

The power to determine the acts of contempt and to impose punishment for them was originally exercised by Courts under its inherent jurisdiction. The Charter of 1833 contained no reference to the power of the Supreme Court or of the District Court (the two Courts which that instrument established) to deal with cases of contempt, a departure from its predecessor in 1801. Statutory conferment of that jurisdiction on this Court was first made by the Courts Ordinance. Section 47 of that Ordinance stated the Supreme Court “ ... *shall have full power and authority to take cognizance of and to try in a summary manner any offence of contempt ...*”.

The Ceylon (Constitution) Order in Council 1946 had no express provision regarding the jurisdiction to try and punish instances of contempt of Court. After the enactment of Courts Ordinance, the present Constitution, which was enacted in 1978, only conferred power to the Supreme Court and Court of Appeal to deal with acts of contempt under its Article 105(3). During the period which lasted over two centuries, in the absence of statutorily provided definition of contempt and the procedure to deal with such instances of contempt, the Superior Courts, when dealing with matters concerning contempt, consistently acted on Common law principles, and moulded its approach accordingly.

***In the matter of the Application of John Ferguson for a Writ of Prohibition against the District Judge of Colombo*** (supra), this Court had quoted Chief Justice Rowe’s pronouncement in Brodie’s case (2 Lorenz, 85), (at p.189) “[I]t is in the Judges of the

*Supreme Court only, as in men whose education, experience, and habitual self-control exercised daily in the face of the public, the Bar, and the Press, may be presumed to qualify them to be safe depositories of such power, that this large discretion in committing 'for contempt is vested'. This particular aspect of the unique jurisdiction was reiterated in **In re U.P. Jayatilake** (1961) 63 NLR 282, by inserting a citation from **Bex v Gray** (1900) 2 QBD (at p. 40); "It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear, and beyond reasonable doubt ...".*

In a recent pronouncement this Court; **Hee Jung Kim alias Kim Hee Jung and Another v Bandumali Jayasinghe** (SC Contempt No. 03/16 – decided on 15.01.2021 observed "*Contempt of Court is a multifaceted offence, for which it is difficult to lay down a precise definition. In English Common Law, contempt of Court is an act or omission calculated to interfere with the due administration of justice.*"

In **Parliament (Powers and Privileges) Amendment Bill** (S.C Special Reference Application Nos. 2 and 3 of 1978), this Court considered the constitutionality of the Bill brought in to remove the ceiling placed by Section 28(1) of the Parliament (Powers and Privileges) Act No. 37 of 1987, by removing the words "*a fine not exceeding five thousand rupees*" by substitution of the words "*a fine*". This Court determined thus;

*"[T]he relevant clause in the proposed Bill repeals the monetary punishment it can impose and substitutes therefore, on account of fine, an unspecified amount leaving to the good sense and reasoning of the Supreme Court and Parliament to impose reasonable measure of fine as each particular case may call for. Counsel for Petitioners did not question the validity of the blank power granted to Supreme Court to impose any amount of fine for a breach. Since the Constitution has provided that the judicial power of the People shall be exercised by Parliament itself in the area covered by its privileges, immunities and powers Parliament should be deemed to be competent to decide on the measure of fine which an infraction of its privilege may reasonable call for, even though its*

*members may not have had a judicial training. That Parliament will exercise its powers reasonably and not arbitrarily is the faith of the Constitution.”*

The procedure adopted by the Courts thus far, in dealing with acts of contempt, reflects the restraint it had consistently maintained despite being conferred with unrestricted power to punish, invested by the Constitution in them. The Courts, dealt with each instances of contempt, by acting within the Common law principles and equity.

The impact and the degree of influence of the English Common law and its principles on law of contempt had over our Courts even during the latter part of the 18<sup>th</sup> Century is evident from the judgment of **Ferguson** (supra - at p. 192) where the following observation was made; “... a careful study of the English decisions will show that even the Judges of the Superior Courts have refrained from pursuing the course of summary attachment, and have preferred the procedure by criminal information, except in cases where the nature of the contempt called for instant action on the part of the Court”. Court further observed “ [T]he proceedings adopted in this instance was entirely under the English law, and in accordance with its forms, and our decision is based on the English decisions, which have always been recognized and acted upon in our Courts in matters of contempt.” This is a clear indication that the Courts were alive to the requirement of maintaining a strict restraint, evolved out of contemporary developments in the law of contempt. This approach was formed by the Courts, long before the birth of the Universal Declaration of Human Rights or of the emergence of the rights-based approach, adopted by the Courts in the discharge of its task of judicial review, founded on the principles on human rights.

Learned ASG commented that if the Petitioner’s contention of conferment of unrestricted discretion in respect of acts of contempt is accepted it would then result in a restriction, abridgment or denial of the rights guaranteed under Articles 10, 11, 12, 13 and 14 of the Constitution. In this regard, the following segment reproduced

below from the said **Parliament (Powers and Privileges) Amendment Bill** (supra) would suffice to clear any apprehensions.

This Court stated “ *the proposed amendment affects only the measure of monetary punishment for a breach of privilege as defined by existing law. The Bill does not create any new offence in relation to the privilege of Parliament. It only removes the limitation on the jurisdiction of Parliament as to the amount of fine it can impose by way of a punishment, for breach of its privileges. Parliament is the best judge of the monetary punishment which a breach of its privilege may call for.*” Adopting the said reasoning to the instant Bill, none of the offences in Clause 3 seeks to codify were new offences as they were already recognised as such in Common law. The Cabinet memorandum pertaining to the Bill justified the proposal also on the basis that the Bill is to “*preserve the existing common law on contempt and to ensure the common law develops in a way that promotes ‘free comment’ while upholding the dignity of the Courts*”.

The Courts, having relied on the contemporary principles of judicial review in the exercise of discretion by all public bodies, cannot claim immunity from these very principles, while dealing with the proposed legislation to codify the acts of contempt. The statement of this Court in **Parliament (Powers and Privileges) Amendment Bill** – (supra), that “*That Parliament will exercise its powers reasonably and not arbitrarily is the faith of the Constitution*” is applicable to all organs of the State, including the Judiciary.

On the contrary, the Courts had consistently displayed its traditional trait of reasonableness, restraint and always considered the larger interest of the retention of the Supremacy of Law, when it was called upon to make a determination in an act of contempt, as evidenced by the substantial body of jurisprudence available on this area. It is relevant in this context to note that Article 15(7) too provides for imposing restrictions to rights conferred under Article 14, of meeting the just requirements of the general welfare of a democratic society. Therefore, in our view, the decision of the

Government to include scandalization as an act of contempt cannot be considered as an obsolete offence or counterproductive action.

As challenged by the Petitioners, the provisions contained in Clause 3(2)(d)(i) to (iii) on the basis that it is inconsistent with Article 106, cannot be accepted as a valid contention due to the fact that a person who wishes to use any instrument mentioned in the said Clause could do so with permission of the presiding Judge, who is entrusted with the responsibility of maintaining the decorum and authority of his Court. Therefore, we reject the said contention and hold that provisions contained in sub Clauses 3(2)(d)(i) to 3(2)(d)(iii) are not inconsistent with the Constitution.

It must be noted that Article 15(2) is clear on this issue. It states that the exercise and operation of the fundamental rights declared and recognised by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law. One such restricted area where such restrictions may be prescribed as per Article 15(2) is contempt of Court.

Offences contained in Clause 3(1), 3(2)(a) to 3(2)(e) clearly refers to the intent of the person and the contention of the Petitioners that strict liability principles were introduced in Clause 3 cannot be accepted.

We hold that there is no inconsistency of the provisions that are contained in Clauses 3(2)(a) to 3(2)(e) with the Constitution, subject to the amendment to Clause 3(2)(c) of the Bill, as suggested by the Hon. Attorney General.

#### **Clause 4**

Mr. Musthapha PC contended that Clause 4(1), which deal with the defences, confines only to publications and expressions that are made in “*good faith*” and therefore is too restrictive on the freedom of expression. He advanced a similar contention for the words “*true facts*” as referred to in Clause 4(1). He contended further that the restriction of defences only to *bon fide* publications and expressions of true and accurate facts, is clearly a restriction imposed in excess than necessary in a democratic

society and cited the judgment of ***Sunila Abeysekara v Ariya Rubasinghe*** (2000) 1 Sri L.R. 314, as a factor that made the said Clause inconsistent with Article 14(1)(a).

In our view, the words true facts would reasonably pose a difficulty in assessing the degree of truth of a fact, in relation to another fact and therefore, is vague and ambiguous, rendering it inconsistent with Article 12(1).

However, if the proposed amendment to replace the word “*true facts*” with “*accurate facts*” is made such inconsistency would cease.

#### **Clause 5 and 6**

There was no challenge to Clause 5 and 6 which refer to the powers of the Supreme Court. It merely describes the powers of the Supreme Court and the Court of Appeal, in dealing with contempt of a Court.

#### **Clauses 7, 8, and 9**

Petitioner, who appeared in person, contended that Clauses 7, 8, 9 and 10, which set out the procedure in which the proceedings against a person accused of committing contempt Court is to be conducted confers wide powers to Court and therefore are inconsistent with the constitutional provisions that guarantee his right to freedom of expression, right to equality and right to a fair trial. He contended that Clause 7(1) is violative of rules of natural justice, as it provides for the arrest and detention of the person, who commits or alleged to have committed contempt of Court, without affording him of any legal assistance to defend himself.

Other Petitioners contend that Clause 8(1) made contempt proceedings could only be instituted by way of a motion. If the Court causes to issue a rule against such a person on such a motion, it must indicate therein the nature of the charge. Issuance of a rule is followed by a hearing of the said charge, where such person is expected to make his defence and to adduce evidence in his defence. It was contended that there is no procedure laid down to take down any evidence or affording the person alleged to have committed contempt of any opportunity to test the validity of the allegation of

contempt by cross examination and, immediately after the issuance of a rule, the burden shifts to the person on whom a rule is issued for contempt to adduce evidence, compelling Courts to ignore the rules of natural justice and to act contrary to Articles 13(3) and 13(5). Learned Counsel compared Clauses 7, 8 and 9 with the provisions contained in Section 796 of the Civil Procedure Code, in support of his contention, as an instance where such protection is afforded to the person charged. Learned Counsel for the Intervenant Petitioner contended that provisions contained in Clause 8 permit Courts to act on unsubstantiated motion, which is inconsistent with Article 12(1) of the Constitution.

It also contended that Article 13(3) and 13(5) guarantees a fair trial to a person charged with an offence, along with the presumption to his innocence, but the procedure set out in Clauses 7, 8 and 9 of the Bill, is inconsistent with the provision of the said Article.

Learned ASG submitted that the Bill seeks to establish a comprehensive and uniform procedure, to try and determine instances of contempt by insertion of Clauses 7, 8 and 9, which satisfies the inviolable requirements of Article 13(4).

We observe that Clause 7(1) is in respect of the instances where it is alleged or appears to the Supreme Court or the Court of Appeal, that a person has committed contempt in its presence or hearing. Provisions of Clause 7(7) provide for the Court, either to make an order detaining the person alleged to have committed contempt or to release him on bail, subject to conditions. Clause 7(4) permits such person to make an application to the Chief Justice to make a direction to have him tried by Judges, other than the Judge or Judges in whose presence or hearing the alleged act was committed. Clause 7(1)(c) states that after serving such person with a rule, the Court is required to fix a date for the hearing of the charge, which is indicative that the hearing on the alleged act of contempt is not followed immediately after the act was committed. The ensuing time period permits such person to secure legal representation for his hearing.



In view of these considerations we see no legal validity in the said contention that Clause 7(1) is inconsistent with Article 13(3). Right to a fair trial includes right to be tried by an unbiased Court or Tribunal and the particular provision already referred to in Clause 7(4) provides an opportunity for a person charged with contempt, to exercise that right.

Provisions of Clause 7(3) indicate that when the Supreme Court or the Court of Appeal proceed for hearing of a charge, Court could take evidence along with the evidence of the person who was charged with. However, there is no indication as to who serves the charge on the person alleged to have committed the contempt. The practice of Courts is to have the charge prepared and signed by the Registrar of that Court, representing the authority of Court. Absence of a formal charge impinges the right to a fair trial and is inconsistent with Article 13(2) of the Constitution.

However, the proposed amendment by the Hon. Attorney General of the insertion of the words "*signed by the Registrar of the Court*" if inserted into Clause 7(1)(b), the said inconsistency would cease.

The provisions contained in Article 7(3) deals with the procedure in taking evidence but provides no opportunity for the person charged to tender his evidence before the Court proceeds to determine same. The non-availability of an opportunity of presenting his evidence in the provisions of Clause 7(3), for the consideration of Court before it proceeds to determine the charge and the sentence or to make an order of discharge, impinges on the right to a fair trial per Article 13(3) and renders the Clause inconsistent with the Constitution.

In contrast, the contention that the invocation of the jurisdiction under Clauses 8(1)(b) 8(1)(c), 9(1)(b) and 9(1)(c) by filing of a motion only without any supporting material, is inconsistent with Article 12(1).

The proposed amendment by the Hon. Attorney General for inclusion of the phrase “*affording the person charged with contempt an opportunity to furnish an affidavit in defence*” if inserted would cease the said inconsistency in these Clauses.

#### **Clause 10**

There was no challenge to the constitutionality of the provisions contained in Clause 10, which provide for the procedure in relation to Courts of First Instance.

#### **Clause 11**

Mr. Peiris invited our attention to Clause 11(2) which deals with punishments that could be imposed on a person who commits an act of contempt, by restricting the wide discretion thus far conferred to Courts by Article 105(3). He contended the Article 105(3) allowed the Courts to decide on an appropriate sentence, which effectively ensured that the observance of and respect for the due process of law. Learned Presidents Counsel cited the sentence imposed by this Court in the case of ***Regent International Hotels Ltd, v Cyril Gardiner and Others*** (1978-79-80) 1 Sri L.R.278, as one such instance. He further pointed out that the Bill had completely left out prescribing a punishment to a situation falling under Clause 5(3) where the Court of Appeal finds a person guilty of contempt of Court of First Instance.

In Clause 11(1) of the Bill, punishment meted out to a person referred to in Clause 5(1) is set out, which deals with the power of the Supreme Court and the Court of Appeal to punish for contempt of a Court. The said Clause restricts the sentence that could be imposed to a fine not exceeding rupees five hundred thousand or to simple imprisonment for a period not exceeding one year or to both. In relation to a person referred to in Clause 6(1), the prescribed punishment to be imposed is a fine not exceeding rupees three hundred thousand or to simple imprisonment for a period not exceeding one year or to both.

If a person is found guilty of contempt of a Tribunal or Institution, he shall be liable to be imposed a fine not exceeding rupees one hundred thousand or to simple

imprisonment for a period not exceeding six months or both. Clause 11 (4) provides a discretion to remit the punishment on an apology made *bona fide*, even if such apology is qualified or conditional. Clause 11(5) provides for situations where power to hear and determine contempt of a Court is provided for in any other law, and the proviso to Clause 11(5) states that the Court shall not impose a sentence, in excess of the sentence specified in that Clause.

Mr. Peiris, having contended that the Bill severely restricts the power of the Superior Courts to properly punish a person, and in buttressing his contention, referred to the judgment of this Court in ***Regent International Hotels Ltd. v Cyril Gardiner and Others*** (supra), where Samarakoon CJ stated “[T]he Supreme Court being the highest and final Superior Court of Record in the Republic and the Court of Appeal being a Superior Court of Record with appellate jurisdiction have all the power of punishing for contempt, wherever committed in the Island in *facie curiae* or *ex facie curiae*” and proceeded to impose a term of imprisonment on the person who committed contempt until the contempt is purged.

They also referred to ***Chandradasa Nanayakkara v Liyanage Cyril*** (1984) 2 Sri L.R. 193, where the Court of Appeal had dealt with an offender who had intimidated a Judge to alter an order already made in the discharge of his judicial duties by imposing a sentence of imprisonment extending to seven years, since the “... *outrageous on nature of the acts committed by the respondent constitutes not only an affront to the dignity and authority of Court but also a direct challenge to the fundamental supremacy of the law itself.*”

In our view, the sentence imposed by this Court in ***Regent International Hotels Ltd. v Cyril Gardiner and Others*** (supra) is illustrative of the dexterity in the hands of the Court. In adopting the term “*until the contempt is purged*” from Article 64 of the repealed Republican Constitution and using it in the exercise of the discretion conferred by Article 105(3) to impose a sentence “*as the Court may deem fit*”, the Court was alive to protect the Supremacy of Law, in its unfailing effort to ensure that

the relief obtained by the appellant Company by way of an enjoining order could not be breached indefinitely. The limitations imposed by Clause 11 in sentencing a person who was found guilty, no doubt restricts the discretion of Court, it has had exercised thus far, in determining the sentence.

It appears that the Bill intends to introduce uniformity in sentencing of a person who committed acts of contempt and, in view of statutory provisions which prescribe punishments for contempt are in varying degrees and severity. Article 105(3) confers power on the Superior Court of Records to impose a sentence "*as the Court may deem fit*". Section 18 of the Judicature Act No. 15 of 1978 confers power and authority on the High Court of the Republic of Sri Lanka to commit the offender to jail for a period not exceeding five years. Such imprisonment shall be simple or rigorous as the Court shall direct and the offender may, in addition thereto, or in lieu thereof, in the discretion of the Court, be sentenced to pay a fine not exceeding five thousand rupees. Section 55(2) of the Judicature Act provides for imposing following sentences by the Courts that are referred to therein, on such a person;

(a) by a District Court and Family Court a fine not exceeding two thousand five hundred rupees or imprisonment, either simple or rigorous, for a period not exceeding two years;

(b) by a Small Claims Court and Magistrate's Court – a fine not exceeding one thousand five hundred rupees or imprisonment either simple or rigorous, for a period not exceeding eighteen months; and

(c) by a Primary Court – a fine not exceeding five hundred rupees or imprisonment, either simple or rigorous, for a period not exceeding three months.

However, in our view, in an attempt to bring uniformity in sentencing, Clause 11 of the Bill had created a situation where its provisions result in an unequal treatment of

offenders. As pointed out by Mr. Peiris, Clause 11 of the Bill had completely left out prescribing a punishment to a situation falling under Clause 5(3) where the Court of Appeal finds a person guilty of contempt of Court of First Instance. As such, that Court may impose a sentence *“as the Court may deem fit”* in the absence of a provision in the Bill, thus creating a disparity of the sentence imposed on another person who had been found guilty for contempt, under Clause 5(1) or of Clause 6(1).

Clause 11 of the Bill creates another inequality, when it fails to mention any of the factors that could be taken into consideration by the sentencing Court in the determination of an appropriate sentence on such a person whereas an offender to any other offence, who should be dealt according to the provisions of the Code of Criminal Procedure Act No. 15 of 1979, as per Section 5, will have the advantage of having his sentence suspended under Section 303 of that Code. Similarly, such a person is deprived of an opportunity to seek a conditional discharge from the sentencing Court, in terms of Section 306 of the said Code.

This Court, in its judgment in ***The Attorney General v Silvan Silva*** (1981) 1 Sri L.R. 364, where a person was found guilty for giving false evidence, considered the following factors in determining the sentence;

*“In regard to sentence we have considered the fact that the respondent, a public officer aged 32 years will lose his job, He has apparently had a good record until this lapse occurred. In all the circumstances we sentence the respondent to two years rigorous imprisonment suspended for an operational period of five years. In addition, we impose a fine of Rs. 500/- in default three months rigours imprisonment”.*

The approach adopted by the Court, in this instance, is indicative of the consideration of some of the factors that are referred to in Section 303 of the Code of Criminal Procedure Act had become relevant, in arriving at the determination on an appropriate sentence.

The third inequality exists in relation to the sentence of imposition of a fine. Clause 11 contains provisions for imposition of varying degrees of fines, depending on the Court, which sentences such a person. In relation to an offender, who had been imposed with a fine, a sentencing Court would, as a rule impose a default term, in the form of a term of imprisonment, which would become operative in the event if the offender fails to pay the fine. Section 291(1)(b) of the Code of Criminal Procedure Code Act provides for this course of action. However, a person, who had been imposed a fine under Clause 11, will not be subject to a default term of imprisonment, creating an inequality with an offender, who is subject to such a term.

In ***Re Garumunisinghe Thilakaratne*** (1991)<sup>1</sup> SLR 134 is a case where a reporter of a newspaper, sent a report of a speech made by a Member of Parliament, at a political party meeting. The report was published almost *verbatim*. The M.P. was reported as stating that the pending inquiry by the Supreme Court into a petition filed by the leader of his party had already been decided and that if the petitioner was not successful, that would be an end of justice in the country. The Court found he committed contempt. However, in sentencing, the Court said “ ... *taking into account the prompt expressions of regret and the apologies tendered, we deemed it sufficient to sentence each of the respondents to pay a fine of Rs 500 with a default sentence in the case of the 1<sup>st</sup> respondent (editor) of a term of two months simple imprisonment.*”

The default sentence is imposed for the purpose of ensuring compliance of the sentence of fine. Clause 15 of the Bill states the provisions of the instant Bill have the effect, notwithstanding anything to the contrary contained in any other law, and accordingly, in the event of any inconsistency between the provisions in the Bill and such other law, its provisions shall prevail. Thus, a person committed contempt of Court is placed in an advantages position than a person convicted for an offence under the Penal Code, should the former decide to default his sentence of fine. Provisions of Clause 11, in the absence of any Clause in the Bill that empowers the Court to impose a default sentence, statutory provisions that are found in Section 291(1)(b) of the Code

of Criminal Procedure Act, becomes inconsistent with the provision of the Bill and thereby creates an inequality. In addition, such a situation would obviously negate the very purpose of imposition of a fine, by leaving its compliance to the discretion of the person who was found guilty .

These disparities in the proposed sentencing regime are further compounded by Clause 11(5). Said Clause compels a Court, that tries a person for contempt under any other law, to impose a sentence on such a person, within the limits as specified in Clause 11, and not under the other law, disregarding the sentencing provision provided under that law, which effectively prevents the sentencing Court from imposing a default sentence.

Similarly, Clause 11 creates a yet another inequality on the persons who are to be sentenced under Section 799 of the Civil Procedure Code. Clause 10(1) lays down the procedure for the exercise of jurisdiction conferred on the Court of First Instance to try contempt of a Court. Clause 11 states, subject to sub Clauses 10(2) and 10(3), such matters must be heard and determined in accordance with the procedure set out in Chapter LXV of the Civil Procedure Code.

Section 799 of Chapter LXV of the Civil Procedure Code states;

“Every sentence of fine or imprisonment passed by a Court in exercise of its special jurisdiction to take cognizance of, and to punish by way of summary procedure the offence of, contempt of Court, and offences by this Ordinance made punishable as contempt of Court, shall be carried into effect in the same manner and according to the same procedure as is provided in the Code of Criminal Procedure Act for carrying into effect sentences of fine or imprisonment passed by any Court, in the exercise of its ordinary criminal jurisdiction.”

Thus, a person who was convicted for an act of contempt under Chapter LXV of the Civil Procedure Code is entitled to certain provisions enabling him to specified benefits

contained in those provisions of the Code of Criminal Procedure Act, whereas another person, who was sentenced under Clause 11 of the Bill, would be denied of any such advantage as offered by those provisions.

In addition, Section 800 of the Civil Procedure Code states;

“The provisions of Article 105 (3) of the Constitution and Sections 18 and 55 of the Judicature Act shall apply to the sentence of fine or imprisonment, as the case may be, that may be imposed on conviction for contempt under this Chapter by the various Courts.”

Section 5A of the High Court of the Provinces (Special Provisions) Act, as amended by Act No. 54 of 2006, conferred jurisdiction on Provincial High Courts to exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be.

Section 2 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 confers jurisdiction on such High Court to have exclusive jurisdiction to take cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the First Schedule to this Act, subject to the conditions as stated therein.

In both these instances, the High Court of the Province exercises jurisdiction over the matters that falls under Chapter LXV of the Civil Procedure Code. A person who commits contempt of a Court in such instances is excluded from the sentencing regime, as provided for in Clause 11 of the Bill. The Provincial High Court, in the exercise of such powers, will have the powers conferred on that Court by Sections 18 and 55 of the Judicature Act. Section 18 confers powers on that Court to impose a punishment more severe than what is contemplated in Clause 11. In view of the fact that the said inclusion of Article 105(3) in the said Section, the Superior Courts of



Record could sentence a person, as the Court may deem fit. In view of these factors it is evident that a parallel regime on sentencing is created, where a person punished under Chapter LXV of the Civil Procedure Code would be imposed a more severe sentence than to his counterpart, who commits an act specified under Clause 3 of the Bill.

In view of the declared intention in presenting the Bill that it is to provide for a uniform application of law in sentencing relating to multiple forms of committing offences of contempt of a Court, and in the scheme presented in the Bill, Clause 11 provides uniformity in sentencing. In the process, however, it had created an opportunity which results in many a inequality, referred to in the preceding paragraphs, which renders Clause 11 of the Bill inconsistent with Article 12(1).

The schedule, which the learned ASG tendered to this Court after the hearing, containing the proposed amendments to the Bill that will be suggested at the Committee stage, does not address any of these inequalities referred to above and mere inclusion of the words “ *or suspended*” to Clause 11(4) would not in any way cease these inequalities. As such, we hold that the Clause 11, as a whole is inconsistent with the provisions of Article 12(1) of the Constitution and it could be validly passed in Parliament into Law only with a special majority with 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 prescribed in terms of Article 84(2) of the Constitution.

### **Clause 12**

The inconsistency contained in Clause 12(1)(a) with Articles 127 and 128, as urged by the Petitioners, is that the provisions contained in the said Clause provide for an appeal being heard by two judges of the Court of Appeal, where the order or decision made by a single judge of that Court, whereas Article 127(1) confers jurisdiction on the Supreme Court to correct all errors in fact or in law committed by the Court of Appeal or any Court of First Instance, Tribunal or Institution. It was contended that the word

*“Bench”* in the said Clause lacks clarity. Another contention admitted by the Petitioner is that the Bill does not provide for an appeal against a conviction entered by the Supreme Court.

We observe Clause 12(1) confers a right to appeal from any order or decision of the Court of Appeal in the exercise of its jurisdiction to punish for contempt of a Court of First Instance, Tribunal or Institution, if that order or decision is made by a single Judge of that Court. In such a situation an appellant could prefer an appeal against that order or decision to a Bench not less than two judges of the Court of Appeal.

This Clause creates a right of appeal within the Court of Appeal, when one of its Judges made the impugned order or decision, whereas the Article 128, confers the right to appeal against an order or decision of the Court of Appeal to the Supreme Court. Article 146 provide for the manner of the sittings of the Court of Appeal. Thus, we are of the view that the Clause 12(1) is inconsistent with Article 146(2)(iv) of the Constitution.

The said Clause also creates an anomaly in the appellate procedure in conceding an order or decision made by a single Judge of the Court of Appeal is appealable to the same Court and could be reviewed by another Bench of that Court, which is only numerically superior.

For this reason, we are of the view that the Clause 12(1) is inconsistent with Article 146(2)(iv) of the Constitution.

Learned ASG indicated that an amendment to the said Clause would be made at the Committee Stage to delete the section *“(a) where the order or decision is that of a single judge, to a Bench of not less than two judges of the Court of Appeal; (b) where the order or decision is that of a Bench of the Court of Appeal”*.

The said inconsistency will cease if the above amendment is made is made to the said clause.

Mr Mustapha submitted that when the Supreme Court finds a person committed contempt of Court of itself or whether committed in its presence or hearing or elsewhere, no provision is made for an appeal against such an order in the Bill. However, conformant of such a right of appeal will also have the disqualification referred to in Clause 12(1) discussed above. Moreover, Article 118 declares that the Supreme Court shall be highest and final superior Court of Record in the Republic.

### **Clause 13**

The Petitioners did not challenge the constitutionality of Clause 13 but expressed certain reservations on the duration of the time period within which a Court could take cognizance of an act of contempt. Clause 13 imposes a period of limitation to initiate any proceedings for contempt. It contains the phrase *“after the expiry of a period of one year from the date on which the contempt is alleged to have committed”* as the date from which the reckoning commences. Clause 5(1) provide for the Supreme Court or the Court of Appeal to punish for contempt of itself whether committed in its presence, hearing or elsewhere. Clause 8(1)(a) to 8(1)(c) indicate when the Supreme Court or the Court of Appeal may take cognizance of an act of contempt. In view of the scope of the two Clauses, and particularly for acts of contempt committed *“elsewhere”* if the time runs from the commission of the alleged act of contempt would have a serious impact, particularly in relation to a situation under Clause 8(1)(b) and 8(1)(c).

Learned ASG indicated that the following section *“such contempt was formally brought to the attention of that Court”* instead of the phrase *“after the expiry of a period of one year from the date on which the contempt is alleged to have committed”*. Will be introduced at the Committee Stage.

### **Clause 16**

Mr. Mustapha had listed out 13 administrative tribunals and public functionaries that are conferred with power by different statutes to make determinations and the

contention that the term “*institution*” in Clause 16 of the Bill would include them as well. Therefore, is inconsistent with Article 12(1) of the Constitution.

Learned Counsel for the Petitioner contended that the terms “*institution*” and “*tribunal*” are vague and overbroad. He listed out 13 administrative tribunals and public functionaries that are conferred with power by different statutes to make determinations. In this regard references made to offences in relation to “*institution*” and “*tribunal*” also by Mr Peiris, which in his contention were defined overbroadly in the interpretation Clause 16. Therefore, he submitted Clause 16 is inconsistent with Article 12(1).

We observe Article 105(1)(c) states the High Court of the Republic of Sri Lanka and such other Courts of First Instance, tribunals or such institutions, Parliament may from time to time ordain and establish as the “*institutions for the administration of justice which protect, vindicate and enforce the rights of the People*”.

The interpretation for “*institution*” as provided for Clause 16 is “*an institution created and established for the administration of justice and for the adjudication and settlement of industrial and other disputes*”. Similarly, the interpretation of “*tribunal*” reads as “*a tribunal created and established for the administration of justice and for the adjudication and settlement of industrial and other disputes*”. We are of the view that in Clause 16, the words “*institution*” and “*tribunal*” are given identical description in the interpretation, leading to ambiguity and un-certainty and for that reason is inconsistent with Article 12.

Learned ASG, proposed to insert the words “*by written law*” to the definition “*institution*” and “*tribunal*”. Thus, amended interpretation would read in both instances as “*an institution created and established by written law for the administration of justice and for the adjudication and settlement of industrial and other disputes*”.

The inconsistency will cease if the above amendment is made to the said Clause.

In conclusion, we wish to place on record of our deep appreciation of the learned President's Counsel, learned Counsel, the Petitioners and the learned Additional Solicitor General for their submissions and assistance.

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

**Shiran Gooneratne**  
**Judge of the Supreme Court**

**Achala Wengappuli**  
**Judge of the Supreme Court**