

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

In the matter of Applications in terms of
Article 121 read with Article 123, Article 78,
and Chapter XVI of the Constitution, to
determine whether the Bill titled "National
Hydrographic Bill (L.D. O. 36/2023)" or any
part thereof is inconsistent with the
Constitution.

S.C. (S.D.) NO. 122/2023

Don Lalith Priyankara Hewage,
Hydrographer,
No. 197/11/A,
Vihara Mawatha,
Moratuwahena Road,
Athurigiriya.

Petitioner

Vs.

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

Respondent

Counsel: Nuwan Pieris for the Petitioner.
State Counsel Hashini Opatha, with State Counsel Abigail Jayakody and State Counsel Rushani Abeykoone for the Respondents.

S.C. (S.D.) NO. 123/2023

Upul S. P. K. Liyanage,
President,
Scientists' Association of NARA,
Crow Island, Mattakuliya,
Colombo 15.

Petitioner

Vs.

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. W. S. L. C. Perera,
Surveyor General,
No.150, Bernard Soysa Road,
Narahenpita,
Colombo 05.
3. The National Aquatic Resources
Research and Development Agency,
Crow Island, Mattakuliya,
Colombo 15.

Respondents

Counsel: Nuwan Pieris for the Petitioner.
State Counsel Hashini Opatha, with State Counsel Abigail
Jayakody and State Counsel Rushani Abeykoone for the
Respondents.

S.C. (S.D.) NO. 124/2023

Liyanage Prasaad Augustus Shantha Priya
Perera, CSSI,
The President,
Surveyors' Institute of Sri Lanka,
No. 275/75.
Professor Stanley Wijesundara Mawatha,
Colombo 07.

Petitioner

Vs.

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. The Surveyors' Institute of Sri Lanka,
No. 275/75,
Professor Stanley Wijesundara Mawatha,
Colombo 07.
3. The Surveyor General of Sri Lanka,
The Surveyor General's Office,

Colombo 05.

Respondents

Counsel: Dr. S. F. A. Cooray with Sudharshani Cooray for the Petitioner.
State Counsel Hashini Opatha with State Counsel Abigail
Jayakody and State Counsel Rushani Abeykoone for the
Respondents.

Before: Yasantha Kodagoda, PC, J.
Mahinda Samayawardhena, J.
K. Priyantha Fernando, J.

Determination of the Supreme Court

Court assembled for hearing on 6th and 7th November 2023.

The two petitioners in SC/SD/122/2023 and SC/SD/123/2023 by petitions filed in Court on 26.10.2023 invoked the jurisdiction of this Court in terms of Article 121 read with Article 123 of the Constitution to determine whether the Bill titled the “National Hydrographic Bill” or any part thereof is inconsistent with Articles 1, 2, 3, 4, 12, 14, 166 and 167 of the Constitution. The petitioner in SC/SD/124/2023 filed his petition in Court on 31.10.2023 alleging violation of the identical Articles.

Thereafter, on 02.11.2023, by way of Motion, the petitioner in SC/SD/122/2023 filed in Court an amended petition. On a consideration of the said Motion, the Presiding Judge in chambers issued a directive that the said Motion be supported in open Court on 06.11.2023.

According to Article 121, the constitutional jurisdiction in respect of Bills of Parliament vested in this Court may be invoked “by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court.” The Supreme Court, *ex mero motu* cannot invoke that jurisdiction. Thus, the consideration of the Bill for compliance with the Constitution is limited to the grounds on which the provisions of the Bill were challenged before this Court.

After the completion of the oral hearing, the Court granted time till 2.40 pm on 08.11.2023 to tender written submissions. This Determination is founded upon the contents of the afore-stated petitions, material placed before this Court on behalf of the petitioners and the respondents, and the submissions made by learned counsel representing all parties including their written submissions.

A Bill titled “National Hydrographic Bill” (hereinafter referred to as “the Bill”) was published in Part II of the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 06.10.2023, and has been placed on the Order Paper of Parliament on 20th October 2023. Following the completion of the hearing, by Motion dated 14th November 2023, the Honorable Attorney General has brought to the attention of this Court that this same Bill was published in the *Gazette* on 12th October 2023 as well, just prior to the Minister presenting the Bill in Parliament. The references contained in this Determination to the clauses of the Bill are founded upon the Bill that was placed before this Court by the petitioners as contained in the Government *Gazette* of 06.10.2023. During the hearing, learned State Counsel representing the Honourable Attorney General did not contest the accuracy of the Bill presented by the petitioners to this Court.

The long title and preamble of the Bill are reproduced below, as they set out the purpose and the legislative intent of the proposed Act.

"AN ACT TO MAKE PROVISIONS FOR GIVING EFFECT TO CERTAIN SPECIFIC OBLIGATIONS OF SRI LANKA UNDER THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA 1974; FOR THE ESTABLISHMENT OF THE NATIONAL HYDROGRAPHIC OFFICE; FOR THE REGISTRATION OF HYDROGRAPHIC SURVEYORS AND NAUTICAL CARTOGRAPHERS; AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO."

"WHEREAS an International Convention for the Safety of Life at Sea, 1974 was adopted by the International Conference on Safety of Life at Sea on November 1, 1974 and entered into force on May 25, 1980 (in this Act referred to as the "Convention"):

AND WHEREAS the Government of Sri Lanka acceded to the International Convention for the Safety of Life at Sea, 1974 on August 30, 1983:

AND WHEREAS although the Merchant Shipping Act, No. 52 of 1971 as amended by Act, No. 17 of 2019 has already given effect to the International Convention for the Safety of Life at Sea, 1974, it is necessary to make specific legal provisions to give effect to Sri Lanka's obligations in relation to Regulations 4 and 9 of Chapter V of the aforesaid Convention:"

Thus, it is seen that the long title and the preamble of the proposed law as contained in the Bill, clearly set out that the Bill is to be enacted to give domestic legal effect to certain obligations of the state, arising out of international law.

A consideration of the Bill reveals that, at the very core of the Bill, is *inter-alia* the objective of the state to regulate the provision of services in hydrographic surveying and nautical cartography, the creation of the National Hydrographic Office and National Hydrographic Council.

Learned State Counsel in her written submissions, quoting literature of the International Hydrographic Organization (IHO) provided this Court with definitions of hydrographic surveying and nautical cartography. With the aid of the afore-stated definitions and the submissions of learned counsel for the petitioners and respondents, this Court has formulated the following descriptions of Hydrography and Cartography, as they are necessary for the determination this Court has arrived at:

***Hydrography** involves surveying an area of the earth covered by water and measuring the depth of such water and fixing the position of all the navigational hazards that lie on the seafloor, such as wrecks and rocks. It includes measuring the tide and the currents. Hydrographic data and information are required for the safe, efficient and sustainable conduct of every human activity that takes place in, on or under the sea including marine navigation. The equipment needed for hydrography include specialized ships and boats operating echo sounders and sonars, survey aircrafts fitted with lasers, and satellite observations.*

***Cartography**, is the art and science of graphically representing a geographical area, usually on a flat surface such as a map or chart (referred to as a 'nautical chart') using the data and information gathered through hydrographical surveying.*

During the hearing, learned counsel concurred with each other that, while hydrographic surveying relates to the collection and analysis of data and information pertaining to area of the earth covered with water including primarily the sea, nautical cartography relates to converting such data and information gathered through hydrographic surveying into visual representations as an optical chart, of which the end product is referred to as a nautical chart. It is such nautical chart that is used for marine navigational purposes to ensure safe navigation.

Learned State Counsel submitted that the intention of the state through the enactment of the Bill and the enforcement of the proposed law, is to be able to develop nautical charts of the territorial waters of Sri Lanka and surrounding areas, and make such charts available for a fee to those engaged in navigating the seas of Sri Lanka. She submitted that the proposed scheme would result in the state being able to earn a considerable amount of foreign currency. She lamented that the present scheme which was aimed at providing the data and information gathered through hydrographic surveying by officials of the National Aquatic Resources Development Agency (NARA) to a particular office in a foreign country and thereby earning royalty, resulted in the state earning only a fraction of the envisaged earnings, in comparison with the proposed system where nautical charts are prepared locally by officers of the National Hydrographic Office and sold directly to shipping lines and other persons who require nautical charts. She submitted that, when preparing such charts, steps will be taken to hold back data and information the dissemination of which would be injurious to national security and other national interests. She submitted that the present scheme does not involve such screening.

It was the position of the learned State Counsel, that since the colonial era, hydrographic surveying had been conducted in the territorial waters of Sri Lanka by the Navy. In view of the resources and manpower of the Navy being required to combat terrorism, in the 1980s during the period of the armed conflict, the functions of hydrographic surveying and nautical cartography along with equipment used in that regard had been handed over to the NARA, of which the statutorily vested primary function is the preservation and development of aquatic resources. Thereafter, the National Aquatic Resources and Development Agency Act, No. 54 of 1981 (hereinafter referred to as "the NARA Act") was amended by Act No. 32 of 1996, whereby the NARA was empowered to carry-out some functions in respect of "*hydrographic surveying and nautical charting*". To

be specific, section 2 of the principal Act was amended by the substitution for the words "*and management activities on the subject of aquatic resources*", of the words "*management and conservation activities on the subject of aquatic resources, hydrographic surveying and nautical charting*".

Learned State Counsel submitted that hydrographic surveying was vested with NARA for the purpose of aiding and assisting in achieving its objects in respect of "aquatic resources" and not in furtherance of any other specified objective.

However, by virtue of acceding to several international conventions and participation in certain international organizations, Sri Lanka as a sovereign nation and a coastal state has certain obligations and requirements to carry-out hydrographic surveying and nautical charting. She submitted that it is the present policy of the state that such activities should be vested in the Sri Lanka Navy. She emphasized that this policy decision had been taken by the Cabinet of Ministers following several meetings of a committee which comprised of representatives from stakeholder organizations which included the NARA.

Learned State Counsel submitted that the United Nations Convention on the Sea (UNCLOS) was ratified by Sri Lanka in July, 1994; the International Convention on the Safety of Life at Sea (SOLAS) on 25th May 1980, and the International Hydrographic Organization (IHO) Convention on 11th July 1983. She submitted that, the SOLAS came into force in Sri Lanka on 25th May 1980. Certain provisions of SOLAS were incorporated into the domestic legal system by amendments to the Merchant Shipping Act, No. 52 of 1971, the NARA Act and the Ports Authority Act, No. 51 of 1979. However, to-date, Regulations 4 and 9 of Chapter V of SOLAS had not been given domestic legal effect. She further submitted that the Bill is for the enactment of provisions of law to give domestic legal effect to the obligations of Sri Lanka under and in terms of the afore-stated two Regulations.

This Court observes that as the Preamble to the Bill states, the proposed law is to be enacted through the Bill in fulfilment of certain international obligations. It is our view that the failure to mention all the international conventions in the long title or in the Preamble to the Bill does not make the Bill unconstitutional.

Upon an examination of the NARA Act (as amended), it is the view of this Court that, the provisions of that law do not give domestic legal effect to Regulations 4 and 9 of the SOLAS. Thus, the allegation that the enactment of the proposed law is unnecessary, is not well-founded.

This Court observes that the Bill *inter alia* addresses some dimensions in respect of two professions. They are the professions of Hydrographic Surveyors and Nautical Cartographers.

It is relevant to note that though Hydrographic Surveyors were represented in proceedings before this Court, Nautical Cartographers were not.

During the course of the hearing, it became apparent and learned counsel too agreed that, the provisions of the Bill need to be considered only from the perspectives of Articles 12 and 14(1)(g) of the Constitution.

The petitioners' primary concerns were two-fold. They being, the manner in which the proposed law sought to provide for (i) the registration of Hydrographic Surveyors, and (ii) the appointment of the National Hydrographer. Learned counsel for the petitioners frankly submitted that the apprehension of the petitioners was that through the enactment of the proposed law, the interests of the petitioners would be adversely affected. Learned State Counsel vehemently submitted that the interests of the petitioners would not be adversely affected, and that the enactment of the proposed law was in public and national interests.

At the commencement of the hearing, learned State Counsel tendered to Court a document containing certain amendments which she submitted the Minister intends to present to the Parliament during the Committee Stage of the proceedings before Parliament. We have considered the contents of that document, and the said proposed amendments are reproduced verbatim below. This Court notes that, some of these amendments seek to address certain concerns the petitioners have regarding the Bill.

They are as follows:

Page 3, Clause 4: delete lines 8 and 9 and substitute the following: -

“preparation, distribution, sale and updating of all types of navigational charts, publications and hydrographic services;”;

Page 20, Clause 18: delete line 25 and substitute the following: -

“qualifications and experience as may be prescribed in compliance with international standards.”;

Page 24, Clause 23: delete line 15 and substitute the following: -

“Surveyor or the Nautical Cartographer, the Office may, after due inquiry cancel”;

Page 30: insert the following immediately after line 18: -

“Authenticity of nautical charts & etc.”

34. Any nautical chart, fair sheet or any other navigational chart or bathymetric sheet prepared in accordance with any other written law, purporting to be a true copy of such a nautical chart or fair sheet and purporting to be signed by the National Hydrographer or any officer acting on his behalf shall be admissible in evidence in all cases and for all purposes and may be taken as prima facie evidence

of the truth of the facts stated therein and it shall not be necessary to prove that such copy was in fact signed or authenticated by the National Hydrographer or the officer acting on his behalf or that it is a true copy or that the facts stated therein are accurate until the contrary is proved.”; and

Page 37, Clause 47: (1) delete lines 29 to 31 (both inclusive) and substitute the following:-

“hydrosatial” means the hydrosatial sciences or denoting data, information and knowledge that is associated with a particular location and time of earth’s waters and their contiguous zones;”;

Page 38: (2) delete lines 1 and 2.

: (3) immediately after line 8, insert the following: -

“marine” means anything related to navigation or shipping and includes anything related to or connected with the sea and refers to things which are used or adopted for the use at sea;”;

: (4) delete lines 9 to 11 (both inclusive) and substitute the following:-

marine data” means data relating to navigation or shipping and includes any data related to or connected with sea and refers to data which are used or adopted for the use at sea;”;

: (5) immediately after line 19, insert the following: -

*“maritime” means bordering on, concerned with or related to the sea;”;
and*

Page 39: (6) delete lines 20 to 31 (both inclusive) and substitute the following: -

“nautical chart” means a chart specifically designed to meet the requirements of marine navigation, showing depths of water, nature of bottom, elevations, configuration and characteristics of coast, dangers, and aids to navigation.”

Article 120 of the Constitution clothes this Court with constitutional jurisdiction when it provided that *"The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution"*.

When a Determination is made by this Court 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:

"123(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."

It is necessary to note that, this Determination is confined to an examination of the clauses of the Bill that were challenged before this Court, and do not relate to an examination of the proposed Committee Stage amendments.

In light of the submissions made by learned counsel for and against the impugned Bill, this Court will now consider whether the Bill, in whole or in part, is unconstitutional. The attention of this Court is primarily drawn towards determining whether either one or more of the clauses of the Bill are *ex facie*

unreasonable, irrational or arbitrary, and therefore would (i) defeat the purposes for which the proposed law is to be enacted, and (ii) whether the manner in which the respective clauses have been drafted would render the exercise of powers under such provisions (when enacted) abusive, unreasonable or arbitrary. This is for the purpose of determining whether, any clause of the Bill is inconsistent with Article 12(1) of the Constitution. It is in view of this that this Court in its Determination of the constitutionality of the Special Goods and Services Tax Bill [SC SD 01-09/2022] held that “... *when a particular provision of a Bill which comes under scrutiny by this Court is found to contain policy which when converted into legislation would become inconsistent with the Constitution, it is then the bounden duty of this Court to point out such inconsistency.*” and that “... *should it be found that there is no rational nexus between the declared objectives of the Bill and the clauses contained therein, it is necessary to declare such transgression to be unconstitutional, as such a Bill if enacted would be manifestly unreasonable and arbitrary and therefore would result in an infringement on Article 12 of the Constitution.*”

This Determination will now deal with challenges to individual clauses of the Bill.

Clause 6(1)(b) – Constitution of the Council

In terms of clause 5 of the Bill, the administration and management of the affairs of the National Hydrographic Office shall be vested in the National Hydrographic Council.

Clause 6 deals with the constitution of the Council.

Clause 6(1)(b) reads as follows:

“The Council shall consist of

(a).....

(b) three members appointed by the Minister who shall possess academic or professional qualifications and has experience in the fields of hydrography or hydrography related discipline (hereinafter referred to as "appointed members")."

The petitioners alleged that due to the manner in which this clause had been drafted, there exists a possibility of excluding a Hydrographic Surveyor from being appointed as an appointee of the Minister, and therefore this clause is arbitrary and is a violation of Article 12(1) of the Constitution.

When reading Clause 6(1) in its entirety, it can be seen that, the Council includes fourteen *ex-officio* members including the Chairman of the Governing Board of NARA, in addition to the three members appointed by the Minister. Further, we note that the clauses of the Bill will be interpreted in light of the objectives and the purpose of the Bill. It is our understanding and learned counsel also agreed that because the scope of the respective fields is distinct, though there can be an overlap, hydrographic surveying and nautical cartography are two distinct professions. The National Hydrographic Council is to regulate professionals engaged in both these professions. Thus, it would be necessary to ensure that, there is at least one Hydrographic Surveyor and one nautical cartographer serving in the Council. The absence of a minimum of one appointee per each of these two professions can render the Council incapable of discharging its functions in the manner provided in the proposed law. Therefore, the absence of a Hydrographic Surveyor and a Nautical Cartographer serving on the Council will make the composition of the Council unreasonable and arbitrary, and therefore would violate Article 12(1). The said unreasonableness and arbitrariness shall be remedied, if clause 6(1)(b) is amended to read as follows:

(b) three members appointed by the Minister who shall possess academic or professional qualifications and has experience in the fields of hydrography or hydrography related

disciplines (hereinafter referred to as "appointed members") including at the minimum, one qualified Hydrographic Surveyor and one Nautical Cartographer.

Clause 15 – National Hydrographer

Clause 15 was a major point of concern to the petitioners.

To the extent relevant to this Determination, clause 15 provides as follows:

"15(1) There shall be a National Hydrographer of the Office appointed by the Council in consultation with the Minister."

"15(2) The person appointed as the National Hydrographer shall-

(a)...

(b)...

(c) be a Hydrographic Surveyor or a Nautical Cartographer with at least fifteen years experience in –

(i) nautical charting and related activities,

(ii) practical use of electronic and printed nautical charts and nautical publications; and

(iii) hydrographic project management;

(d) ...

(e) ..."

The position of the petitioners was that this provision of the Bill enables even a nautical cartographer to be appointed to hold the office of the National

Hydrographer. It was submitted that the functions of a Nautical Cartographer and a Hydrographic Surveyor are distinct and separate. A Nautical Cartographer does not possess the knowledge and the skills that are necessary to carry out the functions of a Hydrographic Surveyor. Counsel for the Petitioners in SC/SD 122 and 123 of 2023, originally submitted that that the field of nautical cartography exists within hydrographic surveying and not *vice versa*. However, learned counsel subsequently agreed with the learned State Counsel that these two fields are interrelated.

On a consideration of the totality of the material placed before this Court and the submissions made by learned counsel, it is the view of this Court that hydrographic surveying and nautical cartography are inter-related, yet distinct and separate fields of professional activity. Learned counsel for the petitioners submitted that the afore-stated provision is irrational and is in violation of Article 12(1) of the Constitution, as, if a Nautical Cartographer is appointed to the Office of the National Hydrographer, he would not be able to efficaciously perform the functions of the Office of the National Hydrographer. Further, it was submitted that in view of Article 14(1)(g), the Fundamental Rights of Hydrographic Surveyors would be affected in a situation where a nautical cartographer is appointed to the post of National Hydrographer. Learned counsel for the Petitioners submitted that if the words "*or a nautical cartographer*" is omitted from this clause, the arbitrary nature of the clause could be removed and the clause would become constitutional.

It was the contention of the learned State Counsel that the NARA Act will remain in force and therefore the position of the Chief Hydrographer of NARA will not be affected. She submitted that the proposed law does not seek to monopolize the provision of hydrographic services by the Sri Lanka Navy or exclude the functioning of the NARA from rendering such services, provided such services are provided in conformity with the proposed law. Learned State Counsel

submitted that, in the circumstances, no hindrance will be caused to the functioning of the office of the Chief Hydrographer of NARA, as he could continue to hold the said office as the Chief Hydrographer of NARA. Learned State Counsel also submitted that a hydrographic surveyor is required to perform the role of acquiring data and information accurately according to the IHO standards. A nautical cartographer performs the role of charting the collected and analyzed data accurately according to the IHO standards. Further, in the whole process from gathering raw data and information to the final product of preparation of a nautical chart, both the hydrographic surveyor and the nautical cartographer have special roles to perform. A hydrographic surveyor should acquire data and information, while applying sound velocity and tide correction in sea for the specific location. While analyzing such raw data and information, a nautical cartographer must merge ground verification to collected raw data, remove sensitive data and information, and develop the final product of a nautical chart.

It is the view of this Court that even the submissions made in this regard by the learned State Counsel, supports the position advanced on behalf of the petitioners that hydrographic surveying and nautical cartography are distinct fields of professional activity to be performed though seamlessly and in partnership by two distinct professionals, namely, hydrographic surveyors and nautical cartographers.

Furthermore, in its present wording, clause 15(2)(c) necessitates the person to be appointed to the office of the national hydrographer to possess at least 15 years of experience in nautical charting and related activities and the practical use of electronic and printed nautical charts and nautical publications, which are admittedly, activities associated with nautical cartography.

On a consideration of (a) the material placed before this Court, (b) the submissions made by learned counsel, (c) the distinction in the skills and functions of Hydrographic Surveyors and Nautical Cartographers, (d) the functions which the proposed law would require the 'National Hydrographer' to perform, and (e) the nomenclature provided to the post, it is the view of this Court that it would be irrational to provide the opportunity to the Council to appoint a Nautical Cartographer to the post of the 'National Hydrographer' and to require a person to be appointed to the post of the National Hydrographer to possess experience which a Nautical Cartographer should possess. Therefore, this Court holds that clause 15(2)(c) is inconsistent with Article 12(1) of the Constitution.

However, that inconsistency can be rectified if Clause 15(2)(c) is amended to read as follows:

15(2)(c) - *"be a Hydrographic Surveyor with at least fifteen years post-qualification experience in (i) professional activities of a hydrographic surveying, (ii) hydrographic project management, and (iii) possesses a thorough understanding in nautical cartography."*

Qualifications for registration as a Hydrographic Surveyor and as a Nautical Cartographer

According to clause 17 of the Bill, no person shall practice as a Hydrographic Surveyor or as a Nautical Cartographer unless such person is registered under the provisions of clause 18 of the Bill. According to clause 18, a person who wishes to practice as a Hydrographic Surveyor or as a Nautical Cartographer, shall make an Application to the National Hydrographic Office for registration, and such applicant *"shall possess such qualifications and experience as may be*

prescribed". In terms of clause 47, "*prescribed*" means prescribed by regulations made under the Act.

Clause 18(2) as presently constituted reads as follows:

"The applicant under subsection (1) shall possess such qualifications and experience as may be prescribed."

Learned State Counsel informed this Court in writing that during the Committee Stage of the enactment of the Bill, clause 18(2) will be amended to read as follows:

"The applicant under subsection (1) shall possess such qualifications and experience as may be prescribed in compliance with international standards."

The bone of contention of the petitioners is that in order to register as a Hydrographic Surveyor, one must first be a qualified Surveyor who has been granted a certificate under section 39 of the Survey Act, No. 17 of 2002, and that the said requirement must be written into the proposed new Act. Learned counsel did not make any submission with regard to the purported need for such minimum professional qualification to be registered as a Nautical Cartographer.

We are unable to accept this position, due to the following reasons:

In terms of clause 45, the Minister can make regulations on various matters, one of which being qualifications and experience of an applicant who wishes to register as a Hydrographic Surveyor or as a Nautical Cartographer.

Clause 47 defines the terms "Hydrographic Surveyor" and "Nautical Cartographer" in the following manner:

"“Hydrographic Surveyor” means any person who studies and practices the science of hydrography complies with the international standard of competence as laid down by the international organizations."

“‘Nautical Cartographer’ means the person employed in drawing and constructing electronic or printed nautical charts complies with the international standard of competence as laid down by the international organizations.”

Following a careful consideration of the material placed before this Court on behalf of the petitioners and the state, it is our considered opinion that, ‘hydrographic surveying’ is not necessarily a field of specialization of ‘surveying’. It is our view that, in the contemporary world, hydrographic surveying and nautical cartography are *sui generis* fields of professional activity.

We wish to observe that the law cannot specify rigid criteria in respect of qualifications and experience an applicant should possess for registration. However, the insistence on compliance with international standards of competence is quite understandable, reasonable and necessary. As the learned State Counsel pointed out, international standards vary from time to time, and according to such standards, there is no prerequisite that a Hydrographic Surveyor or a Nautical Cartographer must be a registered land Surveyor.

Furthermore, the Bill provides for there to be regulations specifying the qualifications and experience required for registration. As has been provided by the Preamble to the Bill and the objects of the ‘National Hydrographic Office’ contained in Clause 3, the main purpose of this Bill is to establish a regime which enables compliance with obligations of Sri Lanka under certain international conventions, and in the circumstances, the standards contained in such international conventions must be given recognition in the law to be enacted. We agree with the submission of learned State Counsel that such international standards cannot be specifically spelt out in the proposed law. We note that the maritime sector is inherently of an international and evolving nature, and is associated with the application of developments in advanced technology and other skills relevant to contemporary navigation and maritime affairs. Therefore,

invariably the fields of hydrographic surveying and nautical cartography will from time to time undergo dynamic changes with comparable requirements in terms of competency and proficiency in these two evolving fields. In these circumstances, it is justifiable and reasonable for the law to provide for recognition of international standards of competence to be used to stipulate from time to time, required minimum qualifications to be possessed by an applicant seeking registration as a Hydrographic Surveyor or as a Nautical Cartographer. Such legislative provisions would indeed be the most feasible and appropriate in respect of the special circumstances relevant to the subject matter of the Bill. It is also observed that including the required qualifications in the body of the Act would make the proposed law inflexible to an extent of the need arising to amend the law, each time international standards of competence change. That in our view would defeat the purpose of this Bill and the establishment of the Office, and may also give rise to non-fulfillment of Sri Lanka's obligations under international law.

In view of the foregoing, we hold that, Clause 18(2) of the Bill read with the definitions of the terms 'Hydrographic Surveyor' and 'Nautical Cartographer' contained in Clause 47, is not inconsistent with the Constitution.

Clause 23(3) – violation of the principle of *audi alteram partem*

Clause 23(3) states as follows:

“Where such Hydrographic Surveyor or the Nautical Cartographer, as the case may be, fails to submit the reasons within the period of one month or where the Office is not satisfied with the reasons given by the Hydrographic Surveyor or the Nautical Cartographer, the Office may cancel the registration of such Hydrographic Surveyor or

the Nautical Cartographer as the case may be, and inform such person in writing about such cancellation."

Learned counsel for the petitioner in SC/SD/124/2023 sought to contrast this with clause 26(6) which is in reference to the Appeals procedure, states that "*The Office shall not take any action under this section without affording the person an opportunity of being heard.*" It was submitted that when reading Clause 26(6) in conjunction with the maxim *expressio unius, est exclusio alterius*, there exists a violation of Article 12(1) of the Constitution. Rules of *natural justice* are generally read into statutes when interpreting the law. However, particularly since the need to comply with the principle of affording a *fair hearing* has been specifically included in Clause 26(6) and there is no reference to it in Clause 23(3), the apprehension of learned counsel seems, in the view of this Court to be well-founded.

However, learned State Counsel has submitted in writing that Clause 23(3) will be amended at the Committee Stage of the enactment of the Bill to read as, instead of "*the Office may cancel*", "*the Office may, after due inquiry cancel*". If that amendment is to be introduced, there will be no violation of Article 12(1).

Clause 25 – Constitution of the Appeal Board

Clause 25(1) of the Bill proves as follows:

"The Minister shall appoint an Appeals Board which shall consist of –

- (a) a registered Hydrographic Surveyor or a Nautical Cartographer with at least five years experience;*
- (b) an Attorney - at - Law who is qualified in the field of maritime law with at least ten years experience in the relevant field; and*
- (c) a Class 1 officer of the Sri Lanka Administrative Service."*

It was submitted on behalf of the petitioners that, according to Clause 25(1)(a) there could be an instance where the Appeals Board could be constituted even where none of the members of the Appeals Board is a Hydrographer. It was submitted that that this would be arbitrary and open to abuse and hence would be a violation of Article 12(1) of the Constitution, as in such event, there would be no person serving on the Appeals Board who is competent to decide on the matter being considered.

It is our view that, this submission is well-founded, and that Clause 25(1)(a) is in violation of Article 12(1) of the Constitution. An experienced Hydrographic Surveyor and a Nautical Cartographer must serve on the Appeals Board, when a grievance of a Hydrographic Surveyor or a Nautical Cartographer is to be considered and decided upon.

However, Court observes that, if Clause 25(1)(a) is amended in the following manner, it would cease to be unconstitutional.

Clause 25(1)(a) - delete the words "or" and substitute therefore the word "and"

CLAUSE 43

Clause 43 of the Bill provides as follows:

"43. The Minister may from time to time issue to the Council, general or special directions as to the exercise, performance and discharge of the powers, duties and functions of the Office."

Learned counsel for the Petitioners submitted to Court that, the "Minister" has been defined as the Minister of Defence in terms of Clause 47 of the Bill. It was

alleged that, allowing the Minister to issue directions to the National Hydrographic Council which carries out the administration and the management of the National Hydrographic Office will lead to the '*militarization of the National Hydrographic Office*'. It was also submitted that while there may be some justification in authorizing the Minister to give "general directions" to the Council pertaining to matters of state policy, there would be no justification in empowering the Minister to give "special directions". It was submitted that conferring that power to issue special directions would be out of place, unnecessary, arbitrary and capricious and thus would be in violation of Article 12(1) of the Constitution.

Learned State Counsel contended that compliance with 'directions' would not be mandatory, and thus, the Council may, if it so desires, decide not to comply with a particular direction that the Minister may issue.

Learned State Counsel also submitted that any direction that could be outside such scope and/or perverse or arbitrary could be challenged and/ or struck down and/or considered void by operation of law and/ or by a valid challenge to the same. Additionally, it was submitted that this clause is contained in numerous Acts and had never been the subject of challenge.

We observe that the interpretation given by the learned State Counsel to the term 'direction' is contrary to the literal meaning of that term and its general usage, and thus is unacceptable. Furthermore, the availability of judicial review is not a justification to confer power that may be abused, resulting in a violation of the *rule of law*.

In terms of Clause 6, the Council consists of eminent professionals. Once a direction is given by the Minister there exists no discretion to the Council to decline to accept it. It would be obligatory on the Council to comply with the direction. Thus, this clause in its present form leaves inappropriate room for the

Minister to issue case-specific special directions, which may be contrary to the objects of the proposed law and lend itself to a violation of the *rule of law*. Providing such room in legislation would result in a situation which directly infringes upon the *rule of law*, and hence would violate Article 12(1) of the Constitution.

However, the above inconsistency shall cease to exist if the words “or special” is removed from Clause 43, and the power to issue directions is qualified in the following manner and for the amended clause to read as follows:

“The Minister may from time to time, for the purpose of giving effect to the objectives of the Act and state policy, issue to the Council, general directions as to the exercise, performance and discharge of the powers, duties and functions of the Council and the Office of the National Hydrographer.”

CLAUSE 44

Clause 44 of the Bill provides as follows:

“The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.”

Both learned Counsel for the petitioners submitted that, Clause 44 of the Bill conflicts with several maritime laws. In particular, learned counsel for the petitioner in SC/SD/124/2023 submitted that the functions of the National Hydrographic Office as contained in the Bill is already being carried out by NARA under the NARA Act No. 54 of 1981 (as amended). The learned Counsel pointed out that, it would be arbitrary to have a second statutory body to carry

out the same functions as the NARA, and the creation of another statutory authority for the same purpose would be violative of Article 12(1) of the Constitution.

We are of the view that the afore-stated matter comes within the purview of executive and legislative policy and therefore is not within the jurisdiction of this Court. Furthermore, NARA has not been excluded in the performance of its statutorily vested functions. It is the view of this Court that permitting through different legislative instruments for two distinct statutorily created bodies to perform functions, some of which may be identical, parallel or similar, would not violate provisions of the Constitution.

Determination of the Court

For the above-stated reasons, this Court makes the following determination in terms of Article 123 of the Constitution:

1. Clause 15(2)(c) of the Bill is inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution. However, the said inconsistency can be rectified if Clause 15(2)(c) is amended to read as follows:

“Be a Hydrographic Surveyor with at least fifteen years post-qualification experience in

- (i) engaging in professional activity of a Hydrographic Surveyor;*
- (ii) hydrographic project management; and*
- (iii) thorough understanding in nautical cartography”*

2. As it exists Clause 23(3) of the Bill is inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution. However, the said Clause shall cease to be inconsistent if it is read as, instead of "*the Office may cancel*", "*the Office may after due inquiry cancel*" as per the proposed Committee Stage amendment.
3. Clause 25 of the Bill is inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution. Clause 25 would cease to be unconstitutional if the word "*or*" is deleted and the word "*and*" is substituted therefor.
4. Clause 43 of the Bill is inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution. However, the above inconsistency shall cease to exist if the words "*or special*" is removed from Clause 43, the power to issue directions is qualified in the following manner and for the amended clause to read as-

"Minister may from time to time, for the purpose of giving effect to the objectives of the Act and state policy, issue to the Council, general directions as to the exercise, performance and discharge of the powers, duties and functions of the Office."

We have examined the Bill in its entirety and have arrived at the conclusion that the Bill as a whole, and the specific provisions excluding the provisions referred to in 1-4 above, are not inconsistent with the provisions of the Constitution.

In the circumstances, this Court is of the view that, upon the amendments suggested by this Court referred to above, and the proposed Committee Stage amendments being effected, the Bill and its provisions will cease to be inconsistent with the provisions of the Constitution.

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

On this 16th day of November, 2023,

**YASANTHA KODAGODA, PC,
JUDGE OF THE SUPREME COURT**

**MAHINDA SAMAYAWARDHENA
JUDGE OF THE SUPREME COURT**

**K. PRIYANTHA FERNANDO
JUDGE OF THE SUPREME COURT**