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

In the matter of an application under Article 121 in respect of the Bill titled "Office for Reparations".

S.C. S.D. 19/2018 Petitioner: Gange Dinesh de Silva,
No 51, Kandawatte Road,
Nugegoda.

Counsel: Nayantha Wijesundera

S.C. S.D. 20/2018 Petitioner: Wijesuriya Arachchige Palitha Senadeera,
No. 501, Naragahapaluwa,
Batuwatta,
Ragama

Counsel: Manohara Silva PC with Canishka Witharana, Anura Wickramanayake, Boopathy Kahathuduwa and Imalka Abeysinghe.

Deputy Solicitor General Nerin Pulle with State Counsel Kanishka Balapatabendi for the Attorney General

Before: Buwaneka Aluwihare PC. J
Priyantha Jayawardena PC J.
Prasanna Jayawardena PC J.

The Bench sat for hearing on 26. 07. 2018.

A Bill in its short title referred to as "OFFICE FOR REPARATIONS" was placed on the order paper of Parliament on 17th July 2018.

2 petitions numbered S.C S.D. 19/18 and S.C. S.D. 20/18 were filed by citizens invoking the jurisdiction of the Supreme Court in terms of Article 121 to determine whether the Bill or any provision of the Bill are inconsistent with the Constitution. Upon receipt of the petitions the Court issued notice on the Attorney General as required under Article 134 (1) of the Constitution.

At the outset, the learned President's Counsel for Petitioner in S.C S. D 20/18 contended that Parliament cannot proceed with this Bill without first referring it for the expression of the views of the Provincial Councils under Article 154 G (3), as it deals with the subject matter "Social services and Rehabilitation" which is listed in item 7 in the Provincial Council List.

The learned President's Counsel contended that the Bill seeks to, *inter alia*, repeal the Rehabilitation of Persons, Properties and Industries Authority Act No. 29 of 1987 and absorb in its place the functions which were hitherto carried out by the Rehabilitation of Persons, Property and Industries Authority. It was his submission that these functions which the Office for Reparations intends to perform include 'rehabilitation' or at the very least share traits of rehabilitation and would therefore fall within item 7 in the Provincial List. Even if the said functions do not constitute 'rehabilitation' within the meaning of item 7, he also submitted that they would be 'social services.'

In response, the learned Deputy Solicitor General submitted that the Bill makes provisions for establishing—for the first time—an Office for Reparations [hereinafter sometimes referred to as the "Office"], which has the objective of formulating a national policy on reparations. It was also argued that 'reparations', being a subject that is not specifically dealt in any of the lists in the Ninth Schedule, would fall under the purview of Parliament as the Reserved List apportions *all subjects and functions not specified in List I or III* to the central legislative competence.

The thrust of the State's argument is that the concept of reparations must be viewed within the broad objective of the Bill. The Bill is a special legislative response to promote the State policy on reconciliation. It introduces a form of compensation that transcends the mere provision of monetary compensation and includes even psycho-social services in an effort to reorganize civil life. This rationale is reflected in the interpretation given to the terms 'individual and collective reparations' in the Bill. It is an emerging concept that espouses values stretching beyond the concept of rehabilitation and as correctly pointed by the Deputy Solicitor General is

a subject that is not already recognized in the Ninth Schedule. By virtue of its novelty, it would fall under the heading *'all subjects and functions not specified in List I or III'* in the Reserved List.

In any event, even if we were to constrict the breadth of the term 'reparations' to 'rehabilitation' and/or 'social services', the Bill would not necessarily attract the special legislative procedure under Article 154 G (3), as 'Social services and Rehabilitation' is also a subject found in the Concurrent List. In fact, it is our opinion that the definition of reparations as illustrated in clause 27 is best reflective of the instances enumerated in item 7.3 of the Concurrent list which reads;

"Restoration, reconstruction and rehabilitation of towns, villages, public institutions and properties, industries, business places, places of worship and other properties destroyed or damaged, grant of compensation or relief to persons or institutions who have sustained loss or damage and the reorganization of civil life"

For the foregoing reasons we are of the view that the proposed Bill does not attract the provision of Article 154 G (3) of the Constitution.

The second and the more contentious ground of challenge centered on the definition of an *'aggrieved person'* in clause 27, which reads;

> *"(a) persons who have suffered a violation of human rights or humanitarian law (as contained in the First, Second, Third and Fourth Geneva Conventions of 1949), as applicable –*
>
> *(i) in the course of, consequent to, or in connection with the conflict which took place in the Northern and Eastern Provinces or its aftermath; or*
>
> *(ii) in connection with political unrest or civil disturbances; or*
>
> *(iii) in the course of systematic gross violations of the rights of individuals, groups or communities of people of Sri Lanka; or*
>
> *(iv) due to an enforced disappearance as defined in the International Convention for the Protection of all Persons from Enforced Disappearance Act, No. 5 of 2018"*

The said clause also proceeds to define 'Human Rights' to mean;

"all fundamental rights recognized by the Constitution and rights contained in Acts of Parliament enacted to give effect to international human rights treaties which have been ratified by Sri Lanka"

Accordingly, in order to come within the ambit of 'an aggrieved person' in terms of clause 27 (a), as it presently stands, the applicant must have suffered a violation of fundamental rights, a human right recognized in the Human Rights Treaties which Sri Lanka has ratified or a violation of international humanitarian law as recognized in the First to the Fourth Geneva conventions. Clause 11 (c) of the Bill gives the Office the power to *"identify the aggrieved persons who are eligible for reparations as well as their level of need."* The learned Counsel for the Petitioners correctly submitted that the Office cannot 'identify' an aggrieved person without first making a determination to the effect that there has been a violation of a fundamental right or human right or a humanitarian law violation. On that basis, it was argued that clause 27 (a) read in the context of the Bill results in usurping the judicial power of the People and violates Article 4 (c) of the Constitution. Mr. Wijesundera also submitted that Article 3 and 4 are 'intrinsically linked' and cited several previous determinations by this Court in support of his contention.

In response, the learned Deputy Solicitor General submitted that the Office for Reparations has only a specific role to play, which is to formulate and recommend to the Cabinet of Ministers, policies on reparations and to facilitate and implement such policies on reparations as approved by the Cabinet of Ministers. The several functions and powers enumerated in clause 11 are given for the specific purpose of 'formulating the policy' and would not, in any manner, encompass an *inter partes* judicial determination of rights and obligations. He submits that the act of identifying 'an aggrieved person' would not entail any judicial consequences is further fortified by clause 25 of the Bill which specifically states that *"The entertaining of any application from, or the grant of reparations to, any aggrieved persons or representatives of such aggrieved persons shall not result in the civil or criminal liability of any other person."*

Having carefully considered the jurisprudence on judicial and quasi-judicial powers and legislative enactments relevant to this subject, we are of the view that the term judicial power is a dynamic concept to which no rigid interpretation ought to be given. On this point, we agree with Justice Weeramantry's prudent observation in **Tucker v The Ceylon Mercantile Union [73 NLR 313]** that 'each case of alleged encroachment upon the judicial power must be considered in the light of its own particular facts and circumstances, and no general rule can

be formulated for determining whether such encroachment has taken place.' It is not, as contended, confined simply to an *inter-partes* determination of rights and obligations.

In the background of this reasoning, we proceed to examine the nature of the functions assigned to the Office for Reparations by looking at the Bill in its entirety.

Under clause 11 (c) read with clause 27 (a), in order to identify an `aggrieved person', the Office for Reparations will have to both ascertain facts as well as law. In the case of an alleged violation of human rights, clause 27 defines 'human rights' as 'all fundamental rights recognized by the Constitution and rights contained in Acts of Parliament enacted to give effect to international human rights treaties which have been ratified in Sri Lanka'. Therefore, in the case of an alleged violation of 'human rights' the law to be applied by the Office will be the Fundamental Rights recognized in Chapter III of the Constitution and the extensive body of law which has been developed by this Court when interpreting and applying those fundamental rights. The Office for Reparations will also have to consider legislation enacted to give effect to 'international human rights treaties which have been ratified by Sri Lanka' and the body of jurisprudence both local and foreign which are relevant for such treaties. In the case of an alleged violation of 'humanitarian law', the Bill does not provide a definition. Therefore, in the case of an alleged violation of humanitarian law, the law to be applied by the Office for Reparations will be the body of jurisprudence which is relevant to humanitarian law.

Thus, the task of the Office for Reparations is not simply to ascertain a fact. They are called first and foremost to define and interpret the contours of rights— inclusive of the Fundamental Rights chapter of the Constitution. In this regard, the powers of the Office for Reparations are even greater than those given to the Human Rights Commission of Sri Lanka. Under section 17 of the Human Rights Commission of Sri Lanka Act, the Commission does not have the power to determine the scope and the ambit of a fundamental right. Where the necessity arises, they must refer that question to the Supreme Court of Sri Lanka.

"Where in the course of an inquiry or investigation conducted by the Commission a question arises as to the scope or ambit of a fundamental right, the Commission may refer such question to the Supreme Court under Article 125 of the Constitution, for the determination of the Supreme Court"

In the present instance, the Bill leaves it solely to the discretion of the Office for Reparations to set the limits of a right, apply the facts at hand to the said interpretation and arrive at a correct

and reliable determination as to whether or not a person has suffered a violation of 'human rights' or has been the subject of a violation of 'humanitarian law'. We are of the view that the function of making a judgment based on an objective examination, assessment and evaluation of facts placed before the Office for Reparations, and the parallel task of interpreting a complex body of law, in the present circumstances, amounts to a judicial function.

Furthermore, although clause 25 excludes the imposition of civil or criminal liability on '*any person*' pursuant to a determination by the Office of Reparation, unarguably, the effect of such a determination will result in imposing liability on the State to make monetary payments. That liability will arise consequent to a determination by the Office of Reparation that there has been a commission of a violation of Human Rights or a violation of Humanitarian Law *within the State of Sri Lanka.* A finding of such nature entails far reaching consequences to the State and the People of Sri Lanka. Especially so, in the case of a determination that there has been a violation of Humanitarian Law or a determination made under sub clause 27 (a) (iii) of the Bill. In the present circumstances, it must be noted that, this determination which will give rise to such consequences are not necessarily dependent on an evaluation and determination by a Court established under the Constitution and Law of Sri Lanka.

Accordingly, we are of the view that clause 27 (a) read with clause 11 (c) vests judicial powers in the Office for Reparations, and thereby attracts Article 4 (c) of the Constitution. In light of previous determinations by this Court where it has been held that Article 4 is intrinsically linked with Article 3, we are also of the view that clause 27 (a), as it now stands, violates Article 3 of the Constitution and could only become law if 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), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

By the same token, we are of the view that, Clause 27 (a) (iii) as it now stands also vests judicial power in the Office of Reparations since it requires a determination by the Office of Reparations that, a *"systematic gross violation of the rights of individuals, groups or communities of people of Sri Lanka"* has occurred. Accordingly, we are of the view that clause 27 (a) (iii) as it now stands, violates Article 4 (c) and Article 3 of the Constitution and could only become law if 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), is approved by the

People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

However, the said inconsistencies will cease if the following amendments are made;

Clause 27 (a) is amended by removing the words "*persons who have suffered a violation of human rights or humanitarian law (as contained in the First, Second, Third and Fourth Geneva Conventions of 1949) as applicable*" and substituting in their place the words "***persons who have suffered damage as result of loss of life or damage to their person or property***"

Clause 27 (a) (iii) is amended by removing the words "*in the course of systematic gross violations of the rights of*" and substituting in their place the words "***such damage being in the nature of prolonged and grave damage suffered by.***"

We also note that, in the event of such amendment being made, there will be no necessity to retain the interpretation given to the term 'human rights' in clause 27.

Additionally, clause 27 (a) (i) in the Bill in the English language requires the insertion of the word "***armed***" before the word 'conflict' to align it with the word "සන්නද්ධ" in clause 27 (a) (i) of the Bill in the Sinhala language.

Submissions were also made that clause 13 of the Bill violates Article 14A of the Constitution as it allows the Office for Reparations to function in secrecy without maintaining transparency. It was also argued that the wording 'notwithstanding anything to the contrary in any law' ousts the application of the Right to Information Act No. 12 of 2016 which enjoys quasi-constitutional protection by virtue of its genesis in Article 14A.

However, a careful examination of the words in clause 13 disproves these concerns. The words expressly stipulate that the Office is only required to maintain confidentiality with regard to matters which are communicated to them in confidence, and that the Office for Reparations must in every other circumstance, particular in the exercise of its exercise and performance of its powers and functions must act in a transparent manner. "*Notwithstanding anything to the contrary in any other written law, except in the exercise and performance of its powers and functions under this Act, every member, officer and servant, appointed to the Office for Reparations shall preserve and aid in preserving confidentiality with regard to matters communicated to them in confidence, except to the extent that the requirement of confidentiality is waived by the person providing such information.*" We also observe that the

requirement to maintain confidentiality is an exception recognized in section 15(1)(i) of the RTI Act itself.

Learned counsel for the Petitioners also submitted that clauses 4 (1), 5 (1) and 7 (2)(b) of the Bill violate Articles 3, 4 (b) and 30(1) of the Constitution as they take away the President's power to appoint and remove members from the Office for Reparations. It was submitted that insofar as the power of appointment and also removal from office are executive functions, the said clauses leave the President with little or no discretion in the selection process of the members of the office as the said powers are to be exercised with the concurrence of the Constitutional Council, the Prime Minister, the Speaker and Leader of the Opposition.

We are not inclined to agree with this argument. Contrary to what the Petitioners have claimed, clauses 4(1), 5(1), 5 (2) and 7(2)(b) in no way erode the executive power of the President entrenched in Article 4 (a) of the Constitution. Clause 4 (1) provides that the Office for Reparations shall consist of five members appointed by the President on the recommendation of the Constitutional council. This is not hostile to the executive powers, but in fact reflects a Constitutional mechanism that already finds expression in Article 41B of the Constitution which reads; "*No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Council.*" This process of consultation in relation to power of appointment was introduced by the 19th Amendment to the Constitution in the determination of which this Court clearly opined that "*seeking the views of different stakeholders can in no way be offensive to the exercise of the powers of appointments. In fact, a consultative process will only enhance the quality of the appointments concerned.*" In a similar fashion, clauses 5 (1) and (2) which state that members shall stand appointed to the Office where the President fails to make the necessary appointment within 14 days, are identical to Article 41B (4) of the Constitution. It is also important to note that under Article 41B (5), the President's power to remove the appointees is subject to the prior approval of the Constitutional Council. In those circumstances, we observe that clause 7(2)(b), which requires the President to seek the concurrence of the Prime Minister, the Speaker and the Leader of the Opposition, aligns with the constitutional framework. We also wish to reiterate this Court's words in SC SD 4-19/2015 that "[...] *the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance*".

Accordingly, we hold that the clauses 4(1), 5(1), 5 (2) and 7(2)(b) are not inconsistent with the Constitution.

The learned counsel for the Petitioner in SC SD 19/2018 also argued that clause 16 of the Bill which permits the Office for Reparations to 'have its own fund', violates the Constitution as it defies Parliamentary control over public finance under Article 148. It was pointed out that the reporting obligations under clause 19 and the power exercised by the Auditor General under clause 18 (3) would be insufficient to ensure accountability of the Office for Reparations and would leave room for financial mismanagement.

While we agree with the Petitioner's concerns that parliamentary control over public finance must be maintained, we nevertheless observe that the parliamentary oversight of the finance of the Office for Reparations remains intact. This is reflected cumulatively in clauses 18 (2), 18 (3), clause 19 clause 22 (4) which oblige the Office for Reparations to maintain proper accounts of its income and expenditure, and assets and liabilities. These accounts must in turn be audited by the Auditor General in terms of Article 154 of the Constitution. Clause 22 (4) provides that polices on reparations and guidelines authorizing disbursement of funds shall be placed before Parliament for approval and duly gazetted within 3 months. It also provides that "*any disbursement in terms of such Policies on reparations and guidelines shall only be effected after such approval.*" We also observe that all foreign funds which the Office for Reparations shall receive must be channeled through the External Resources Department under clause 16 and would thus be subject to the ministerial oversight.

Thus, the Bill has put in place adequate safeguards to guard against any mismanagement or misuse of the Office's funds. In the event any action taken by the Office for Reparations escapes these safeguards, they would still fall under the purview of the fundamental rights and writ jurisdictions of the superior Courts by virtue of clause 21 (2) of the Bill. In view of these factors, we are of the opinion that clause 16 of the Bill is not inconsistent with the Constitution.

For the aforesaid reasons, we determine in terms of Article 123 (1) of the Constitution that clause 27 (a) and clause 27 (a) (iii) are inconsistent with Article 4 (c) and Article 3 of the Constitution and could only become law if 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), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

However, if these clauses are amended as opined by this Court, the said inconsistency would cease and may be passed with a simple majority in Parliament.

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

We place on record our deep appreciation of the assistance given by all learned Counsel for the Petitioners and learned Counsel who appeared on behalf of the Hon. Attorney General.

B. P. Aluwihare PC. J.,
Judge of the Supreme Court

Priyantha Jayawardena PC. J.,
Judge of the Supreme Court

Prasanna Jayawardena PC. J.,
Judge of the Supreme Court