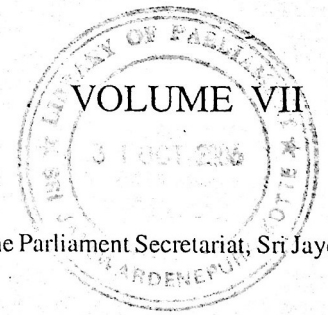
DECISIONS OF THE SUPREME COURT ON PARLIAMENTARY BILLS

1991 – 2003



VOLUME VII

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DECISIONS OF THE SUPREME COURT OF THE REPUBLIC OF SRI LANKA UNDER ARTICLES 120, 121 AND 122 OF THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA FOR THE YEARS 1991 TO 2003



VOLUME VII

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PREFACE

The determinations of the Supreme Court on Parliamentary Bills are regularly published in the Hansard along with the rest of the Parliamentary proceedings. However, due to the large number of requests for a separate publication containing their determinations, our Secretariat took steps to issue this publication and hope to continue doing so.

All credit for this compilation is due to the Officers of the Parliamentary Bills Office who did this spadework. Our special thanks is also due to the Government Printer and his staff for the unfailing co-operation he has always extended to us in our work.

Finally, our appreciation is also due to Hon. Speaker for the guidance and encouragement given to us.

PRIYANEE WIJESEKERA
Secretary-General of Parliament

Parliament of Sri Lanka
Sri Jayewardenepura Kotte,
12th February, 2004.

1991

1. NOMINATIONS COMMISSION BILL

A

BILL

to establish a Nominations Commission; and to Provide for Matters Connected therewith or Incidental Thereto.

NOMINATIONS COMMISSION BILL

AN ACT TO ESTABLISH A NOMINATIONS COMMISSION; AND TO PROVIDE FOR MATTERS CONNECTED THERE WITH OR INCIDENTAL THERETO

In the matter of a Reference under Article 122(1)(b) of the Constitution

S. C. Special Determination No. 1/91
(PPA/6/Parl/61)

Present:
Bandaranayake, J.,
Fernando, J.,
Amerasinghe, J.,
Kulatunga, J., and
Dheeraratne, J.,

Counsel:
Sunil de Silva, P.C., Attorney-General, with
S. Harsoof, S.S.C.

The Court assembled for the hearing at 10.40 a.m. on 15th January, 1991.

A Bill titled "An Act to establish a Nominations Commission; and to provide for matters connected therewith or incidental thereto" ["the Nominations Commission Act, No. of 1990"] was referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Attorney-General assisted this Court in the determination of this matter.

The purpose of the Bill is to establish a Nominations Commission consisting of twenty members appointed by the President (clause 2); these persons will be selected by a Panel of twenty Members of Parliament, eleven of whom will be appointed by the Prime Minister and the remaining nine "selected from the *other* political parties represented in Parliament, so however that such political parties are represented on such Panel in proportion, as far as practicable, to their representation in Parliament" (clause 3). Clause 4 provides for the disqualifications of members of the Commission, their period of office, resignation, removal from office, vacancies, and remuneration, while clauses 5 and 6 deal with the Chairman and the procedure for meetings of the Commission. Clauses 9 to 11 make incidental provision in regard to offences in connection with the Commission, and clauses 12 and 13 are interpretation clauses.

Clause 7 porvides as follows:

"7(1) Before making any appointment to the governing body of a specified institution, appointing authority shall inform the Commission in writing that he proposes to make such appointment.

(2) On receipt of an information under subsection (1) in relation to a specified institution, the Commission shall, after consulting any relevant organisations and having regard to the provisions of law establishing such specified institution, and the need to provide representation to all relevant interests and ethnic groups, prepare a list containing names of persons suitable, in its view, for appointment to the governing body of such specified institution and shall submit the lists to the appointing authority. Such list shall contain such number of names as is equal to the number of members required to be appointed to such governing body, increased by one-third of that number. Where one-third of the number of members required to be appointed is a fraction of an integer and fraction, the integer immediately higher to that fraction or that integer and fraction, as the case may be, shall be deemed to be the one-third for the purposes of this subsection.

(3) Notwithstanding anything to the contrary in any other law, the appointing authority shall appoint to the governing body of a specified institution only from among persons whose names are included in the list with respect to such specified institution submitted to him under subsection (2).

(4) Nothing in this Act shall be read or construed as prohibiting the Commission from including the name of a member of the Commission in any list prepared by it under subsection (2);

Provided that a member of the Commission whose name is to be included in any such list shall not participate in any decision of the Commission relating to the inclusion of his name in such a list.

A "specified institution" means an institution specified in the Schedule, which refers to three institutions: the Public Service Commission, the National Youth Services Council and the University Grants Commission. Clause 8 enables Parliament *by resolution* to amend the Schedule by adding any institution (defined as "any public corporation, board or other body created by or under any written law") thereto, or by deleting any institution therefrom.

The principal question of inconsistency which we have to determine arises in regard to clauses 7 and 8 in relation to Article 56(1) of the Constitution. Under that Article, in appointing the members of the Public Service Commission, the President is entitled to select from an unrestricted class of persons, namely the entire population. Clause 7 (specifically, clause 7(3) restricts his choice: if he wishes to appoint six persons to that Commission, the Nominations: Commission will submit a list of eight nemes, and the President's choice will be confined to these. We appreciate that the purpose of this provision is to ensure a greater degree of consultation and participation in the exercise of certain executive functions, for the greater good of the nation; however, the Constitution vests certain powers and functions in the President, as the Head of the Executive directly elected by the People, and the question that arises is whether Parliament by ordinary law can impose fetters and restrictions on such powers and functions; or whether this can only be done by a Constitutional amendment or a law passed by the special majority required by Article 84(2). Similar questions have been considered in *R V Liyanage.* (1962) 64 N. L. R. 313, 350-352, which also discussed the Canadian case of *A. G. for Ontario v A. G. for Canada,* [1925] A. C. 750; two decisions of the Constitutional Court, dealing with the *Administration of Justice Bill,* (1973) volume 1, Decisions of the Constitutional Court,

page 57, and the *National Prices Commission Bill,* (1975) volume 3, Decisions of the Constitutional Court, page 1; and the *Thirteenth Amendment to the Constitution Bill,* (1987) volume 3, Decisions of the Supreme Court on Parliamentary Bills, page 19, at 32, 58-60, 78, 84, 32).

These decisions indicate that the powers of appointment conferred by the Constitution on the Executive– Head of State, Head of Government, or Cabinet of Ministers – cannot, by means of an Act of Parliament passed by a simple majority, (a) be vested in or exercised by the Legislature, or (b) be vested in other persons or bodies, or (c) be subject to mandatory directions or restrictions given or imposed by other persons or bodies. The unfettered discretion, or the area of choice, guaranteed by the Constitution cannot be whittled down except by a Constitutional amendment or by an Act passed with the special majority required by Article 84(2). Clause 7(3) of the Bill does not totally divest the President of the power of appointment, conferred by Article 56(1), of members of the Public Service Commission, but it clearly restricts his freedom of choice. It was no doubt for these reasons that the learned Attorney-General stated at the outset that clauses. 7 and 8 were inconsistent with Article 56(1) of the Constitution.

We therefore determine that clause 7(3) of the Bill, read with the Schedule, is inconsistent with Article 56(1) of the Constitution and may only be passed by the special majorty required by Article 84(2).

It would, however, be perfectly constitutional and proper to make provision enabling the President to consult, or to receive advice or recommendations from, appropriate persons or bodies in regard to matters such as appointment. Such a practice or convention can be established even without legislation, It would not be inconsistent with Article 56(1) if clause 7 were to provide that in exercising his power of appointment under Article 56(1) the President shall take into consideration the recommendations of the Nominations Commission, his discretion not being fettered by such recommendations. If the Bill is amended either by the deletion of "the Public Service Commission" from the Scehdule, or as outlined above, clause 7(3) of the Bill will cease to be inconsistent with the Article 56(1) of the Constitution.

Clause 8 purports to authorise Parliament, *by resolution,* to add any institution to the Schedule. It is not clear whether "written law" in the definition of "institution" refers only to Acts of Parliament, or whether it includes the "Constitution". Since the Bill includes the Public Service Commission, as being an "institution", the intention of the Bill seems to be that "written law" includes the Constitution. Clause 8 thus purports to permit institutions provided for in the Constitution (such as the Cabinet of Ministers and the Judicial Service Commission, in relation to their powers under Article 55(1) and Article 114(1) to be added to the Schedule. A legislative provision inconsistent with the Constitution would thereby be brought into force, without a constitutional amendment and without an Act of Parliament passed by the special majority required by Article 84(2). Clause 8 thus purports to authorise Parliament to do by resolution that which it cannot do by an Act of Parliament, and is therefore inconsistent with the Constitution. This inconsistency would cease to exist if clause 8 is amended by adding the words "Subject to the provisions of the Constitution" at the commencement of that clause, so as to eliminate the possibility of institutions provided for by the Constitution being brought within the purview of this enactment. Even after such amendment, clause 8 would authorise Parliament *by mere resolution* to amend an Act of Parliament, and this appears to be contrary to Article 76(1), in that plenary legislative

power is sought to be exercised otherwise than in the manner provided in the Constitution. We entertatin a doubt whether clause 8 would even then be consistent with Article 76 of the Constitution. We therefore determine that clause 8 of the Bill, in its present form, is inconsistent with the provisions of the Constitution and may only be passed by the special majority required by Article 84(2), and approved by the People at a Referendum. If the Bill is amended by the addition of the words "Subject to the provisions of the Constitution" at the commencement of clause 8, a referendum will not be required. If the Scehdule is omitted from the Bill, and provision is made for "scheduled institutions" to be determined (subject to the provisions of the Constitution) by subordinate legislaiton, the special majority will not be required.

Since clause 7(2) empowers the Commission to consult "relevant organisations" and to have regard to the need to provide representation to relevant interests, it would seem quite proper for such organisations and interests to make submissions to "influence" the decision of the Commission; the provisions of clause 11 penalising all those who (otherwise than in the course of "duty") influence or attempt to influence any decision of the Commission appears to be violative of the freedom of speech and expression; clause 11 prohibits even a "proper" attempt to influence the Commission although the marginal note suggests that what is prohibited is interference, meaning improper influence. The proviso to clause 11 permits a certificate or testimonial being given to an applicant or candidate for "public office", but since a member of the Public Service Commission is expressly excluded from the definition of "public officer" in Article 170, and since members of the governing bodies of other institutions will probably not be "public officers". clause 11 would even penalise the giving of a character certificate to an applicant or candidate for such office. We entertain a doubt whether clause 11 is inconsistent with Article 14(1)(a) of the Constitution, and hence may only be passed by the special majority required under Article 84(2).

Clause 3(2) confers rights of representaion only on political parties, and not on independent groups, Article 99 of of the Constitution contemplates that "recognised political parties" and "independent groups" may contest parliamentary elections, and gain representation in Parliaments; the expression "political parties" in clause 3(2) would thus include "recognised political prties" and such "independent groups" as are political parties. but would exclude such "independent groups" as are not political parties. If independent groups are entitled to contest and be represented in Parliament, there is no rational basis for excluding them from the Panel. Clause 3(2) is thus violative of Article 12 in that members of "independent groups" are not treated equally with members of "political parties", although they are, for the purpose of the Panel contemplated in clause 3(2), members of the same class. We therefore determine that clause 3(2) of the Bill is inconsistent with Article 12 of the Constitution and may only be passed by the special majority required by Article 84(2).

In the course of the hearing, several other ambiguities and difficulties of implementation were brought to the notice of the learned Attorney - General, which do not raise a question of inconsistency with the Constitution. Clause 3(2) does not specify clearly by whom, and in what manner the nine nominees of "the *other* political parties" are to be selected. It would seem desirable, as indicated by the learned Attorney-General, that this matter be clarified by specifying that these nine nominees are to be selected from the political parties and independent groups, other than those in the Government Parliamentary group, and that the members of the latter grou- will not vote on the selection of these nine nominees. Clause 7(2) fails to provide for the eventuality that the Nominations Commissions either

refuses, or fails within a reasonable time, to submit its recommendations; or that some of the names submitted are of persons of disqualified for appointments. It would seem necessary that a reasonable time limit be specified and a default provision made. In regard to clause 7(4), the learned Attorney-General stated that it was not intended that a member of the Commission who was later appointed by the President to the governing body of a specified institution should continue as a member of the Commission, but clause 4 does not give effect to this intention.

Apart from clauses 3(2), 7(3), 8, and 11, none of the other provisions of the Bill are inconsistent with the provisions of the Constitution.

G. R. T. D. Bandaranayake
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

A. R. B. Amerasinghe
Judge of the Supreme Court

K. M. M. B. Kulatunga
Judge of the Supreme Court

R. N. M. Dheeraratne
Judge of the Supreme Court

Bill was Presented to Parliament on : **30.01.1991**
Bill No. : **147**
Decision of the Supreme Court Conveyed to Parliament on : **22.01.1991**
The Bill was not proceeded with.

1991

2. AGRARIAN SERVICES (AMENDMENT) BILL

A

BILL

to Amend the Agrarian Services Act. No. 58 of 1979

AGRARIAN SERVICES (AMENDMENT) BILL

AN ACT TO AMEND THE AGRARIAN SERVICES ACT, NO. 58 OF 1979

S.C. Special Determination No. 2/91

In the matter of a petition under Article 121 of the Constitution filed by Somaweera Chandrasiri of No. 7/15, Kirula Road, Colombo 5.

Petitioner

S.C. Special Determination No. 4/91

In the matter of a petition under Article 121 of the Constitution filed by Hollu Pathirage Mervin Calderah of 1st Lane, Jambugasmulla Mawatha, Nugegoda.

Petitioner

Present :

Fernando, J.,
Amerasinghe, J., and
Wadugodapitiya, J.

Counsel :

K. N. P. Rajaratne with P.Dissanayake for the Petitioner in S. C. No. 2/91;
A. A. de Silva for the Petitioner in S. C. No. 4/91;
P. L. D. Premaratne, Deputy Solicitor - General, for the Attorney - General.

Determination :

The court assembled for the hearing at 10.00 a.m. on 7th February 1991.

A Bill titled "An Act to amend the Agrarian Services Act, No. 58 of 1979" ["the Agrarian Services (Amendment) Act, No. of 1990"] was presented to Parliament on 22.1.1991.

Two petietions were presented to this Court, in respect of this Bill, in terms of *Article 121 (1) of* the Constitution, by the above-mentioned Petitioners, and were taken up together, Learned Counsel appearing for the petitioners and learned Deputy Solicitor-General made oral submissions in regard to the constitutionality of the Bill. Several questions of inconsistency with the Constitution were raised.

1. *Clauses 4.5 and 31 of the Bill.* Clauses 4 and 31 provide for inquiries in respect of evictions of tenant-cultivators (section 5(3), as well as certain other inquiries, to be held by a new category of "Inquiry Officers" (section 42A); for Appeals from these and other decisions to a new Board of Review (section 5(6)), instead of the Court of Appeal; and for the members of that Board to be appointed in terms of section 42B. Clause 5 empowers the Commissioner of Agrarian Services, after inquiry, to grant exemptions (sections 5A and 5B from the application of section 2 of the principal enactment, the effect of which would be that tenant-cultivators would lose their *ande* rights and receive compensation therefor; an appeal is given to the Board of Review from any such decision. Section 39(1) provides for the appointment of the Commissioner, and section 39(2) and (4) provides for the appointment of Deputy Commissioners and Assistant Commissioners, and authorises them to exercise all or any of the powers of the Commissioner.

Neither section 39(1) and (2), nor the proposed new section 42A and 42B specify the appointing authority in respect of the Commissioner, Deputy and Assistant Commissoners,

Inquiry Officers, and members of the Board of Review. Each of the relevant provisions runs thus:

"There may be [or shall be] appointed....."

It is contended (and perhaps correctly, although we do not have to decide this now) that some or all the functions of these officers under the Act, as amended, would be judicial functions. It is contended that the aforesaid clauses are inconsistent with Articles 4(c) and 114(1) of the Constitution, (which require appointment by the Judicial Services Commission). In both petitions it was averred that the Bill empowers the Commissioner to appoint Inquiry Officers and members of the Board of Review, but when it was pointed out to Counsel that clause 31 is silent as to the appointing authority, it was then contended that the provisions of section 39(1) and 39(2), and the proposed sections 42A(1) and 42(B)(1), were vague, and should specify the appointing authority.

If the functions of any of the aforesaid officers are such that he is a "Public Officer", as defined in the constitution, the constitutional provisions governing the appointment of public officers would apply. If on the other hand, these functions bring him within the definition of "judicial officer" or "scheduled public officer", then Article 114(1) requires the Judicial Service Commission to appoint him. Article 170 of the Constitution also recognises the possibility that an officer, who is otherwise a public officer, may also be required to perform certain functions of a judicial nature; it excludes him from the definition of "Judical officer" if his "principal duty or duties is or are not the performance of functions of a judical nature"; that Article also empowers the Judicial Service Commission to decide any question as to whether or not a person is a judicial officer. It was then contended that the Commissioner was the Head of the Department, and that by virtue of Article 55(2) it was the Cabinet of Ministers alone which could appoint him. This provision is subject to Article 170; if the Commissioner by virtue of his functions falls within the definition of "judicial officer" he will thereupon be outside the definition of "public officer"; Article 55 will then have no application to him. Hence the aforesaid clauses of the Bill are not inconsistent with the Constitution. There is of course the possibility that an attempt might be made to implement the Bill, after enacment, in a manner inconsistent with the Constitution. Our jurisdiction does not extend, *quia timet*, to make pronouncements intended to prevent or restrain possible future violations, particularly by persons or bodies other than the legislature; our jurisdiction is confined to determining whether the Bill as it stands would constitute an infringement of the Constitution.

Confident submissions were made to us on this question without any reference to the previous decisions of the Supreme Court and the Privy Council which conclusively determine this very questions more than a quarter of a century ago. In the Bribery Tribunal cases of the early 1960's there was at first some uncertainty as to what was unconstitutional- the legislation in its entirety, or the establishment of the tribunals, or the provision as to the manner of appointment of the Tribunals. In *Jailabdeen V Danina Umma.* (1962) 64 N.L.R. 419, 420-421, 425, having discussed the previous decisions, Fernando, J, (as he then was)expressly disagreed with the view that the Bribery Tribunals had no jurisdiction, or that they were unconstitutional bodies, and held that the proper challenge was not against the legal validity of the tribunal itself, but rather against the validity of the appointment of the persons who functioned as members. We express the same view in *Ranasinghe V Bribery Comission.* (1962) 64 N. L.R. 449, 450, (1964) 66 N.L.R. 73, 83 (P.C.), and this view was upheld by the Privy Council.

Consistently with these decisions, the Bill "merely provides for the constitution of a [panel or the appointment of officers] and makes no mention of the appointing authority", leaving it to those charged with the implementation of the law to obey the consititutional provisions in regard to appointment.

A further submission relating to judicial power and entrenched jurisdictions was made. Section 5(6) originally permitted an appeal from the Commissioner's decision (upon a complaint of eviction) to the Court of Appeal; it was submitted that such an appeal now lies to the High Court of the province, under the High Court (Special Provisions) Act, No. 19 of 1990; that by virtue of Article 154P(3) of the Constitution this jurisdiction is now entrenched in the High Court; that accordingly the proposed section 5(6) will be inconsistent with Article 154P (3) in that it would divest the High Court of this jurisdiction and vest it in the Board of Review. It was submitted that this cannot be done by simple majority. When and what jurisdictions are entrenched was considered in *Anthony Naide V Ceylon Tea Plantations Co,* (1966) 68 N.L.R. 558. Fernando, S.P.J. (as he then was) referred to the submission that –

> "..... while the recognition in our Constitution of the exclusive vesting of judicial power in the Judicature is now a matter beyond debate, there is not in the Constitution any limitation of the power of the Legislature to define or restrict the jurisdiction of the Courts."

Apart from jurisdictions constitutionally vested in a Court directly or indirectly, or recognised and adopted and thus incorporated in the Constitution.

> "..... there appears to be much force in the contention that the Legislature has power to abolish the jurisdiction of the Civil Courts of original jurisdiction and thus indirectly to abolish the appeallate jurisdiction of the Supreme Court, provided of course that the Legislature does not attempt to arrogate such jurisdiction to itself or to transfer such jurisdiction to some authority not holding judicial office."

The 1978 Constitution has made no change in this respect except in regard to jurisdictions entrencheed by the Constitution. It is open to Parliament to abolish amend or transfer jurisdictions, so long as such jurisdictions remain vested in and exercisable by judicial officers. Articles 4(c) and 105(2) recognise the power of Parliament to establish Courts and other institutions for the administration of justice and the exercise of judicial power, and its right to replace, abolish and amend their powers and jurisdictions. A comparison of Article 138 with Articles 111 and 154P reveals that the jurisdictions conferred on the Court of Appeal and the High Court are not enternched (unlike many of the jurisdictions vested in this Court). Article 111 enables Parliament *by law* to determine the jurisdiction of "the High Court of the Republic of Sri Lanka"; no special majority is required.

Article 154P created a High Court for each province, whereupon the all-Island jurisdiction of the High Court of Sri Lanka had to be provincially exercised. Article 154P (3) (a) stipulated that the place of commission of an offence would be the test of (local) jurisdiction; that provision did not in any way freeze the jurisdiction of the High Court of Sri Lanka or of the provincial High Courts. Article 154P (3) (b) conferred appellate and revisionary jurisdiction on provincial High Courts in relation to certain Courts ***within*** the province, and that jurisdiction is "subject to any law" (compare Article 138(1)), so that it can be altered by Parliament by ordinary law. Finally, Article 154P (3) (c) empowers Parliament by law to confer other jurisdictions (compare Article 138 (2)) but does not restrict Parliament's power

to alter such jurisdictions. The exercise by Parliament of powers conferred by Articles 111, 138 or 154P to confer jurisdictions on the Court of Appeal or the High Court does not automatically entrench such jurisdictions; not only is this apparent from those provisions, but it is put beyond debate by Article 105 (2). What is enacted by an ordinary law may be amended or repealed by an ordinary law (compare Article 84 (3) unless there is express constitutional provision to the contrary.

2. *Clause 7 of the Bill.*– Section 7 of the principal enactment empowers a tenant-cultivator of a paddy land to nominate a member of his family (defined as a spouse or child, and failing such spouse or child, a parent, borther or sister) to succeed to his rights upon his death; detailed provision is made as to the manner and form of such nomination, and the cancellation and registration thereof. Section 8 provides for the devolution of his rights, if there is no such nomination, on the surviving spouse; failing such spouse, on one child, the eldest being preferred; failing children, on a parent, brother or sister. Any such successor must be a person whose main occupation is cultivation, and whose *only* source of income is derived from that paddy land.

Clause 6 of the Bill seeks to repeal section 7, so that a tenant-cultivator will cease to have a right of nomination. No complaint is made in this respect. Clause 7 seeks to make a necessary and unobjectionable consequential amendment, by deleting from section 8 the words;

> "and he has not nominated a successor under section 7 or the successor nominated by him under that section is dead."

Clause 7 also deletes the provision for devolution on a parent, brother or sister, in the absence of spouse and children. It is within the power of Parliament to define what rights are assignable, or transmissible on death, and to whom, and these amendments are therefore not inconsistent with the Constitution, although opinions may differ as to their desirability.

In the petition in S. C. 4/91, one complaint is that –

> " .... under the provisions of section 7 [clause 7?] of the Bill , the wife and children of the deceased cultivator are deprived of their right to succeed to the deceased's rights which provision is inconsistent with Article 12 as there is an element of discrimination against women and children. "

Article 27 was also relied on. This is misconceived and farfetched; the reference is to "spouse", and not to "wife" or "widow", and clause 7 is thus gender-neutral. Other than a spouse, no one is given preference over children. Further, while section 7 now allows a tenant-cultivator to by-pass spouse and children, section 8 ensures a compulsory devolution on spouse or child. The amendment affects the position of spouse and children to their benefit, and not to their detriment.

At the hearing learned Counsel contended that clause 7 imposes a new and harsh condition, that a successor must be "a person who is not permanently employed" this, he said, is inconsistent with the freedom of occupation guaranteed by Article 14(1) (g). Previously, a successor had to be a person whose only source of income was derived from that particular paddy field: not only were persons in permanent employment excluded, but even persons employed temporarily, intermittently or casually, self employed persons, and persons deriving an income, however small,from any other source whatsoever, were debarred from succeeding. So far from interfering with any right or fundamental right, the proposed

amendment relaxes the stringency of the existing disqualifications. The foundation of the objection thus crumbles, and there remains no question of unconstitutionality for consideration.

3. Clause 21 of the Bill. – This clause seeks to add a new sub-section (2) to section 30, which will make a debt due to a prescribed bank or institution, by an owner-cultivator or occupier of agricultural land , a first charge upon the crops or agricultural produce and cattle, cattle fodder or agricultural implements, produced, raised or obtained by such borrower; but this would occur *only* where such crops, produce, cattle, fodder or implements were produced, raised or obtained by utilising a loan from such bank or institution. Learned Counsel for both Petitioners contended that this clause would deprive a tenant-cultivator of his rights under section 218(b) of the Civil Procedure Code, which confers upon a judgement – debtor, an exemption from seizure in execution of *a decree to pay money* in respect of –

> " tools, utensils and implements of trade or business, and in the case of an agriculturist his implements of husbandry, and such cattle and seed grain.....etc".

Reference was made to the extent of bank loans made to the agricultural sector in the past without security, resulting in a high proportion of irrecoverable loans; it was then submitted that no bank would lend to the small farmer without security. At the same time it was contended that the creation of a charge of this nature would result in a cultivator being deprived of the necessary implements to earn his livlihood, contrary to a Article 14(1) (g). This submission is not only contradictory but ignores realities. So long as crops, implements and the like cannot be seized in execution, the tenant-cultivator has little or nothing to offer as security for (often concessional) bank loans; he must then choose between submitting to the usurious money lender and attempting to survive without credit. Even the owner-cultivator has only his land to offer as security; is it better to lose virtually irreplaceable land, or to lose crops and implements ? thus making crops, cattle and implements available as security seems far more likely to make the fundamental right under Article 14(1) (g) fruitful, rather than to curtail it. Parliament is entitled to define what property may be made the subject of a mortgage or charge, and clause 21 does no more than to specify that certain assets purchased with the proceeds of a loan are subject to a first charge in favour of the lender; it is similar to a mortgage of movables without delivery, or a tacit hypothec. If a landlord has under the common law, a tacit hypothec over movables brought on to the leased premises, to secure rent due from the tenant, there is nothing strange or unsual in an unpaid lender having a similar charge over such of the assets of the borrower as were obtained with the proceeeds of the loan.

Section 218(b) and clause 21 do not deal with comparable situations. The former deals with the execution of decrees, and not with the creation of obligations, securities or charges (or exemptions therefrom); the latter deals with the creation of a charge and not with its enforcement or execution (or exemptions from execution). A Judgement-debtor in execution of a decree *to pay money* enjoys an exemption. It does not follow that he would enjoy the same exemption in execution of a decree to enforce a mortgage, hypothec or charge. The judgement-debtor contemplated by section 218(b) and the borrower whose assets are subjected to a charge by clause 21 are thus not in the same class; they may therefore be treated differently, without any infringement of Article 12.

The constitutionality of very similar provisions was considered in our determination, in respect of another Bill to amend the Agrarian Services Act (S.D. 9/90 determined on 8.1.90). For all these reasons, we hold that clause 21 is not inconsistent with the Constitution.

4. *The Bill in its entirety is not an "amendment".*– Learned Counsel for the Petitioner in S. C. 2/91 contended that the principal enactment was intended to provide security of tenure to tenant-cultivators of paddy lands; that this bill, though described as an amendment, seeks to destroy security of tenure; that almost half the paddy land in Sri Lanka were under one acre in extent, yet section 5B sought to empower the Commissioner to deprive tenant-cultivators of such land of their existing *ande* rights; that the Bill sought to bring in new matter, particularly by the expansion of the definition of agriculture to include the totally unrelated subject of "inland fisheries". The "amendment" thus goes to the root of the principal enactment, and this, it was submitted, could not be done except by a special majority.

In answer to us, learned Counsel submitted that Parliament could by an ordinary law, passed without a special majority, repeal the entirety of the principal enactment. This concession was unavoidable, and illustrates the fallacy of his contention. Parliament can repeal a law passed with the special majority required by Article 84(2), with a simple majority (see Article 84(3)). A *fortiori*, a law passed with a simple majority can be repealed, altered or added to in the same manner. An "amendment" in this context does not mean an alteration in minor respects, not affecting the basic principles of the principal enactment; an "amendment" includes repeal, replacement, alteration, addition, and any other change whether express or implied; any exercise of Parliament's legislative power under Article 75, in relation to a pre-existing enactment. This objection too is wholly unfounded.

5. *Inconsistency with Article 154G.*– Several objections were taken on the ground of inconsistency with the Thirteenth Amendment. First it was contended that the Bill was for the amendment or repeal of Chapter XVIIA, or of the Ninth Schedule, and required reference by the President to *every* Provincial Council, and thereafter a special majority, unless every Council agreed to it. The Provincial Council established for the Northern and Eastern Provinces had been dissolved, and accordingly the President could not comply with the requirement of reference to "*every*" Council; it therefore could not be passed at all, without such Council being first resurrected or resuscitated. However, "*every*" Council may well mean every Council in existence, so that reference to a dissolved Council is unnecessary (unless perhaps such dissolution is being challenged as being a nullity). However, we do not have to decide that question, because Article 154G(2) has no application for the reason that the Bill does not seek to amend or repeal Chapter XVIIA or the Ninth Schedule. Even if, as contended, the Bill is an attempted exercise of legislative powers contrary to the procedures laid down in Article 154G(3) or (5), it remains an attempted contravention of those provisions, and does not thereby become an amendment of Article 154G(2). Secondly, it was contended that the Bill is in respect of a matter, in the Provincial Council List ("List I" in the Ninth Schedule), and that there was a contravention of Article 154G(3) –which requires such a Bill to be referred by the President, before it is placed on the order Paper of Parliament, to every Provincial Council – in that there was no reference of the Bill to the North Eastern Provincial Council; and that in any event the Bill required a special majority. Thirdly, it was contended that the Bill is in respect of a matter on the Concurrent List ("List III" in the Ninth Schedule), and that there was a contravention of Article 154G(5)(a), which required "such consultation with all Provincial Councils as Parliament may consider appropriate in the circumstances of each case". Reference was made to (Parliament's) Standing Order 46A, which requires such a Bill to be forwarded to each Provincial Council, after the Bill is presented to Parliament, to enable each Council to express its views within one month, and permits Parliament to proceed with the Bill only thereafter. These two contentions need to be considered together.

There was some confusion in the petitions and in the submissions on behalf of the Petitioners as to whether the Bill dealt with a matter on List I or List III, or both, and the learned Deputy Solicitor General's submissions did little to clarify the position. It was submitted.–

(*a*) That the Bill dealt with a list I matter, because List I contains the following entry :

"9. Agriculture and Agrarian Services –

9.1 Agriculture, including agricultural extension, promotion and education for provincial purposes and agricultural services (other than in interprovincial irrigation and land settlement schemes, State land and plantation agriculture) :

9.2 Rehabilitation and maintenance of minor irrigation works :

9.3 Agricultural research, save and except institutions designated as national agricultural research institutions."

(*b*) that the Bill dealt with a matter which is within both List I and List III, because List III contains the following entry :

"8. Agriculture and Agrarian Services –

8.1 Establishment and promotion of agro-linked industries, the establishment and maintenance of farms and supervision of private nurseries;

8.2 Soil conservation ;

8.3 Plant pests."

(*c*) by the learned Deputy Solicitor - General, but not by Counsel for the petitioner, that the Bill dealt with a List I matter, not only because of item 9 but because by item 18 the entirety of " Agrarian Services" became a Provincial Council subject:

" 18. Land - Land, that is to say, rights in or over land, land tenure, Transfer and alienation of land. land use, land settlement and land improvement, to the extent set out in Appendix II,"

We drew the attention of the Learned Deputy Solicitor-General to the fact that " Agrarian Services " was also included in the heading of List III, item 8, and thus seemed to be a Concurrent subject, and invited him to address us as to the proper method of interpreting the headings and descriptions in the three Lists. According to him , items 9.1 to 9.3 did not deal with or refer to agrarian services, and therefore by virtue of the heading the entirety of "agrarian services" was a List I subject. He explained List III item 8 on the basis that agrarian services to the extent that such services were included in items 8.1 to 8.3 were Concurrent subjects. This created the anomaly that the whole subject was a provincial subject, but a part was a Concurrent subject. He further submitted that " land tenure" was a Provincial subject, by virtue of List I, item 18, and that as the Agrarian Services Act dealt with land tenure, the Bill in its entirety dealt with a List I subject. It seemed to us that this submission involved the corollary that other matters, such as partition of land (and formalities of transfer, registration of deeds, inheritance, ceiling on owneresh ip etc.) would be Provincial subjects, opening the door to the multiplication of legal systems, but he was not able to clarify the consequences of his submission.

In this situation, it becomes incumbent on us to examine these Lists, as a whole, and to see to what extent they can be interpreted consistently, and without creating gaps, anomalies or contradictions.

A comparison of the Reserved List (" List II") with the other two Lists reveals that the headings in that List are significantly different. In List II, the headings are followed by the phrase "This would *include*" ; what is reserved is the subject set out in the heading; if a heading is followed by a description or an elaboration, this is not for the purpose of defining or restricting the ambit of the subject reserved, but only for the purpose of specifying some of the matters "included". The sole exception is the first item, "National Policy on *all* Subjects and Functions", and this is because "all" needs no further clarification as to what it includes. It is also important that List II includes " All Subjects and Functions not specified in List I or List III" as this indicates that what is devolved is only what is expressly specified in List I or List III.

The headings in List I and III are quite different. In a few instances, they refer to a subject or function, with no elaboration of any kind (e.g. List I, item 10 " Rural Development" also List I, items 15, 16 and 31, and List III, items 6, 18 and 24); the entire subject is thus devolved. Apart from these, the headings, are not comprehensive or all - inclusive, and the descriptions which follow do not purport to be inclusive definitions of the headings. In some instances, this is expressly stated: thus in List I, item 1 and 3, we find the expression " to the extent set out in Appendix . . . ."; clearly, the entire subject is not devolved, but only what is specified in the Appendix. Similarly, there are exclusions occurring in the detailed descriptions which again indicate that the headings are not comprehensive - e.g. List I, item 5.1, " Other than National Housing Development Authortity Projects" ; item 11.1 " Other than teaching hospitals . . . "; 25.2 " Other than those . . . . . of national importance"; also List III, item 34. It is also clear that List I has necessarily to be compared with and correlated to List III, thus comparing List I, item 3, with List III, items 2 and 3, Education to the extent set out in Appendix II is a List I subject, and all other aspects of Education come within List III; similarly, some aspects of Planning are within List I, other within List III.

We are therefore of the opinion that it is not possible to determine whether a matter is a List I or a List III subject by merely looking at the headings in those Lists. Nor can it be assumed that the title of an enactment conclusively establishes that its subject matter falls within an item, bearing a similar heading, in one of the Lists. When the subject-matter is examined, it is seen that the Agrarian Services Act, and the Bill, confer rights of appeal to judicial tribunals. That is not a matter falling within List I, item 9, or List III, item 8, but probably within List II ("Justice in so far as it relates to the judiciary and the courts structure "). The creation of a charge on movable property acquired with the proceeds of a loan does not come within "Agriculture and Agrarian Services" or "Land"; loans to agriculturisits, fishermen, health workers, or transport workers, cannot (by reference to the borrowers' occupations) be classified under four separate items of "agriculture", " fisheries", "health" or "transport."

The Bill quite clearly does not deal with any of the matters referred to in List I, items 9.2 and 9.3, or List III, items 8.I. to 8.3. Turning to List I, item 9.1, the Bill does not deal with " Agriculture, including agricultural extention, promotion and education for provincial purposes." or " Agricultural services". It deals with the rights of tenant - cultivators, the determinations of disputes, the devolution of the rights of the tenant, the transfer of the rights of the landlord, the liability of tenants to eviction, the payment of rent, loans, surveys, information and statistics, farmer orgnisations and the like.

It was perhaps these aspects which led the learned Deputy Solicitior - General to submit that the Bill related to rights in or over land, or land tenure, and therefore within List I, item 18. That item does not seem to make land rights or land tenure a Provincial subject. What is devolved is " Land to the extent set out in Appendix II, and " Land" is described: " That is to say, rights in or over land, land tenure ..... .etc." It is therefore necessary to scrutinize Appendix II to ascertain whether all aspects of land (formalities of transfer, registration, inheritance, partition and the like) have been devolved. Appendix II also states that subject to certain exceptions land shall be a Provincial Council subject, but the context appears to suggest that, it is land settlement and land use which is covered. However, without the benefit of a full agreement it is not desirable that we should decide that question now. It is sufficient for present purposes that the matters dealt with in the Bill are all matters of national policy in regard to the rights and liabilities of owners and tenant - cultivators, and thus fall within List II.

It is therefore unnecessary to decide the question whether the procedural provisions of Articles 154G(3) and/or 154G(5) (a) have been complied with. We must observe, however, that the procedures required by Article 154G(5)(a), read with Standing Order 46 A, do not have to be complied with before a Bill is placed on the Order Paper; and therefore need not have been complied with at the time our jurisdiction under Article 121 is invoked. We also express no opinion as to whether our jurisdiction under Articles 121 to 123 extends to such matters.

We therefore determine that none of the provisions of the Bill are inconsistent with the Constitution or any provision thereof.

M. D. H. Fernando,
Judge of the Supreme Court.

A. R. B. Amerasinghe,
Judge of the Supreme Court.

S. W. B. Wadugodapitiya,
Judge of the Supreme Court.

Bill was Presented to Parliament on: 22.01.1991
Bill No.: 146
Decision of the Supreme Court Conveyed to Parliament on: 19.02.1991
Passed on: 22.02.1991
Speaker's Certificate Endorsed on: 23.02.1991
Title: **Agrarian Services (Amendment) Act No. 4 of 1991.**

1991

3. SRI LANKA TELECOMMUNICATIONS

A

BILL

to provide for the Appointment of a Director-General of Telecommunications; for the transfer of all Property, Rights and Liabilities of the Department of Telecommunications to a Corporation named 'Sri Lanka Telecom' Established by order under Sec. 2 of the State Industrial Corporations Act. No. 49 of 1957; for the Repeal of the Telecommunications Ordinance (Cap. 192) and for Matters connected therewith or Incidental thereto.

SRI LANKA TELECOMMUNICATIONS BILL

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

A bill to provide for the repeal of the Telecommunications Ordinance and for the establishment of a Corporation named Sri Lanka "Telecom" and for matters connected therewith or incidental thereto.

In the matter of a citizen's petition under Article 121(1) of the Constitution.

S. C. Special Determinations Nos. 5/91, 6/91 and 7/91.

Present:
Bandaranayake, J.,
Kulatunga, J &
Wadugodapitiya, J.

Councel:
In 5/91 – A. A. de Silva with N. V. de Silva & Prasanna Dissanayake for *Petitioner.*
In 6/91 & 7/91 – A. A. de Silva with N. V. de Silva, Prasanna Dissanayake and Tissa Jayawardane for *Petitioners.*
M. S. Azis, President's Counsel, Additional Solicitor-General with K. Sripavan, Senior State Counsel and R. Palihawadana, State Counsel for *Attorney-General.*

The Court assembled for the hearing on 19.03.91.

A Bill titled 'Sri Lanka Telecommunications Bill" to provide for the appointment of a Director-General of Telecommunications; for the transfer of all property, rights and liabilities of the Department of Telecommunications to a Corporation named "Sri Lanka Telecom" established by Order under s. 2 of the State Industrial Corporations Act No. 49 of 1957; for the repeal of the Telecommunications Ordinance (Cap. 192) and for matters therewith or incidental thereto was presented to this Court along with citizens petitions Nos. 5/91, 6/91 and 7/91 for the determination of this Court whether the Bill or any provision thereof was inconsistent with the Constitution and whether the Bill needs to be passed by a two thirds majority in Parliament.

Of consent all three petitions were taken up for hearing together. The petitions had been filed in the Supreme Court Registry on 12.03.91.

At the very outset it was pointed out by Court to learned Counsel for the petitioners that the averments in the petitions did not contain the averment that copies of the petitions had been delivered to the Hon. Speaker at the same time as the petitions were presented to this Court in terms of Article 121(1) of the Constitution.

Learned Counsel for the petitioners at this stage tendered to Court a registered postal article receipt issued by the Sri Jayawardenapura Kotte Post Office bearing the date-stamp 13.03.1991., Counsel stated that copies of all three petitions were placed in one cover and posted to Mr. Speaker.

The Bill had been placed on the order paper of Parliament on 05.03.91.

Article 121 of the Constitution reads as follows:

"Article *121*. (1) The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid 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. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament, and a copy thereof shall at the same time be delivered to the Speaker. In this paragraph "Citizen" includes a body, whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.

(2) Where the jurisdiction of the Supreme Court has been so invoked no proceedings shall be had in Parliament in relation to such Bill until the determination of the Supreme Court has been made, or the expiration of a period of three weeks from the date of such reference or petition, whichever occurs first.

(3) The Supreme Court shall make and communicate its determination to the President and to the Speaker within three weeks of the making of the reference or the filling of the petition, as the case may be."

The Bill having been placed on the Order Paper of Parliament on 05.03.1991 the period of one week from that date would elapse on 12.03.91. Both the petitions presented to the Supreme Court and the delivery of copies thereof to the Speaker should have been done on or before 12.03.1991. Although the petition to the Supreme Court has been presented within one week (on 12.03.91) the copy to the Speaker has however been posted on 13.03.1991. The Court considered one week to be a period of 7 days.

The principal question that the Court considered upon the foregoing facts was wheather the jurisdiction of the Court had been duly invoked by the petitioners. It was submitted on behalf of the petitioners that the requirement that a copy of the petition should be delivered to the Hon. Speaker at the same time as the petition is presented to the Court should be regarded as being directory and not mandatory. Learned Counsel for the petitioners relied on the determination of the Supreme Court in the case of *K. Vishvalingam and others v. Don John Francis Liyanage* – S. C. Application No. 47/83 FRD Vol. 2, p.452. Learned Counsel for the petitioners argued that what was mandatory in Article 121(1) was that the petition should be filed before the Supreme Court within seven days but that the requirement that a copy should be delivered to the Hon. Speaker at the same time was only directory. Counsel also submitted that his instructions were that *Hon. Speaker had acknowledged receipt of the postal article and had suspended proceedings in Parliament in regard to this Bill pending the determination of the Supreme Court.* Learned Counsel urged this Court to take the view that the petitioners had substantially complied with the requirements of Article 121(1).

The learned Additional Solicitor-General contended that all the provisions of Article 121(1) were mandatory and should be strictly complied with. He pointed out that this Article provided for the jurisdiction already with the Supreme Court to be invoked in the given manner. In the instant case, as the copy of the petition had not been delivered to the Hon. Speaker at the same time as the petition was presented to the Supreme Court there had

been no proper invocation of the jurisdiction of the Supreme Court to hear and determine the matters in the petitions.

Article 121 of the Constitution whilst providing for the Supreme Court to determine a citizen's petition as to the constitutionality of a Bill also places a fetter on the process of legislation as the legislature is prevented from proceeding to legislate for a period of three weeks.

Although the approach has sometimes been adopted that constitutional provisions are mandatory unless by express provision or necessary implication a different intention is manifest the Courts in Sri Lanka have considered this approach as too wide and instead have sought to interpret provisions having regard to their aims, scope and objects – vide *K. Vishvalingam and others v. Don John Francis Liyanage* (Supra). The legal principles embodied in Article 121 are:

(i) that the constitutional jurisdiction of the Supreme Court may be invoked for the purpose of adjudicating on the constitutionality of a Bill;
(ii) the persons who may invoke such jurisdiction;
(iii) the manner by which such jurisdiction may be invoked;
(iv) the period of time within which such jurisdiction may be invoked;
(v) the consequences of such invocation (ie) suspension of considering the Bill by Parliament for a period of 3 weeks within which the Supreme Court should convey its decision.

These principles spell out the aims and scope of the provision. The aim of the Article in general terms is to ensure that in given circumstances what may be regarded as a constitutionally valid Bill is placed before Parliament. Once the opinion of the Supreme Court is known Parliament is more advantageously placed in proceeding with the process of legislation. This purpose of the Article cannot be achieved unless the provisions designed to secure such result are regarded as mandatory. The Article also provides for the suspension of the Ordinary legislative powers of Parliament for a period of 3 weeks when a Bill is referred to the Supreme Court for its adjudication – Article 121(2). The aims of the Article will be defeated unless its scope is wide enough to prevent Parliament from debating or proceeding with the Bill whilst the Supreme Court is engaged in deliberating its constitutionality. This provision which requires Parliament to be informed that the Bill is before the Supreme Court - Article 121(1) must be regarded as mandatory. Likewise the Supreme Court is enjoined to make and communicate its determination to His Excellency the President and to the Hon. Speaker within 3 weeks of its jurisdiction being invoked. This time limit must also be regarded as mandatory or else the object of the Article would be defeated. It is pertinent to note that the word "shall" is repeatedly used in the provision in dealing with the different aspects.

It is our view that all the provisions in this Article as to the manner in which the jurisdiction of the Court could be invoked are mandatory. To take the view that the requirement that a copy of the petition be delivered to the Hon. Speaker at the same time the petition is filed by a citizen is merely directory could in our opinion lead to mischief and even a possible confrontation between the Parliament and the Court which needless to say must be avoided. That could be the possible result of a non-compliance with the scheme of the provision. The plain language of the provisions of s. 121 leave no room for an interpretation in accordance with that sought to be given by Counsel for the petitioners. The case cited by the petitioners can be distinguished on this question as to whether a provision is mandatory

or directory because in that case what was held to be directory was an Article which did not impose sanctions on a failure to comply strictly with the terms of that Article, as against an Article which did.

In passing it must also be said that the provisions of s. 8 of the Interpretation Ordinance, Chapter II, Legislative Enactments have no relevance to a decision in this matter.

The petitioners have failed to comply with the mandatory provisions of Article 121(1) of the Constitution in that they have failed to deliver to the Speaker a copy of the petition presented to the Supreme Court within 1 week of the Bill being placed in the Order Paper of Parliament. This being so this Court has no jurisdiction to proceed further with the petitions before it as the jurisdiction of the Court has not been duly invoked. We accordingly reject all three petitions.

G. R. T. D. Bandaranayake,
Judge of the Supreme Court.

K. M. M. B. Kulatunga,
Judge of the Supreme Court.

S. W. B. Wadugodapitiya,
Judge of the Supreme Court.

Bill was Presented to Parliament on: 05.03.1991
Bill No.: 154
Decision of the Supreme Court Conveyed to Parliament on: 23.04.1991
Passed on: 15.05.1991
Speaker's Certificate Endorsed on: 03.07.1991
Title: **Sri Lanka Telecommunications Act, No. 25 of 1991.**

1991

4. NATIONAL TRANSPORT COMMISSION

A

BILL

to provide for the Establishment of a National Transport Commission to advise the Government on the National Policy Relating to Passenger Transportation by Omnibus and the Implementation of such policy; to provide for the Reorganisation of Passenger Transport by Omnibus in the public sector; to Promote for Financial Support for certain Passenger Transport Services; to repeal the Private Ominibus Services Act No. 44 of 1983; to amend The Motor Traffic Act (Chapter 203); and to provide for matters connected therewith or incidental thereto.

NATIONAL TRANSPORT COMMISSION BILL

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

In the matter of a citizen's petition under Article 120 (1) of the Constitution.

S.C. S.D. No. 8/91.

Don Mahindapala Jayasinghe, General Secretary – All Ceylon Motor Workers Union, 7/15, Kirula Road, Colombo 15.

Present :
G. P. S. de Silva J., Bandaranayake J. *and* Kulatunga J.

Counsel :
A. C. Gunaratne Q. C. with Nihal Singaravelu, D. A. Ranawaka, Tissa Jayawardena Yapa and Kanthi Fonseka for petitioner.

Douglas Premaratne, Addl. Solicitor-General with K. C. Kamalasabayson Deputy Solicitor-General and K. Sripavan Senior State Counsel for the Attorney-General.

The Court assembled for the hearing on 09.08.1991.

A Bill titled "National Transport Commission Bill" to provide for the establishment of a National Transport Commission to advise the Government on the National Policy relating to passenger transportation by omnibus and the implementation of such policy; to provide for the reorganisation of passenger transport by omnibus in the public sector; to provide for financial support for certain passenger transport services; to repeal the Private Omnibus Services Act, No. 44 of 1983; to amend the Motor Traffic Act (Chapter 203) and to provide for matters connected therewith or incidental thereto was presented to this Court along with citizen's petition No. S.C. (SD) 8/91 for the determination of this Court whether the Bill or any provision thereof was inconsistent with the Constitution.

Mr. A. C. Gunaratne Q.C., learned Counsel for the petitioner informed us at the hearing of this petition that he would confine his submissions to Article 12(1) of the Constitution in relation to clauses 8(h) (ii) and 18 of the Bill.

Clause 18 is the central provision in the Bill the object of which is to vest wholly in the private sector the ownership and operation of services relating to passenger transport by omnibus. The preamble to the Bill emphasises this object.

Clause 18 reads–

"No passenger service permit shall be granted under this Act or under any written law authorizing the use of a omnibus for the carriage of passengers at separate fares, if the registered owner of such omnibus is the State, a Provincial Council or a Local Authority or any body corporate in which, the state, a Provincial Council or a Local Authority holds shares, or has any financial interest :

Provided that, nothing in this section shall be deemed to prohibit that grant of a passenger service permit in respect of an omnibus, the registered owner of which is a peoplised company."

Mr. Gunaratne Q.C. submits that the exclusion of a Local Authority or any body corporate in which, the State, a Provincial Council or a Local Authority holds shares, or has any financial interest from engaging in passenger transport by omnibus would be inconsistent with Article 12(1) of the Constitution. He contends firstly that Article 12 (1) is an absolute bar to such discrimination; and secondly that in any event the impugned exclusion is not referable to a reasonable classification based on intelligible differentia having a rational relation to the object of the Bill, namely the better conduct of transport services without prejudice to the rights of persons having interests in this sphere; and that as such this clause denies the right to equality before the law guaranteed by Article 12(1).

The principle of equality before the law recognises the right of Parliament to enact class legislation but requires that rights and liabilities created by such legislation should be reasonable where it discriminates between different persons or groups of persons. Viewed in this light Aricle 12(1) does not impose an absolute bar against class legislation as was submitted by Mr. Gunaratne Q. C. Parliament is competent to enact such legislation. The only issue then is whether the exclusion of a Local Authority or any body corporate referred to in Clause 18 is based on a reasonable classification having a rational relation to the object of the Bill.

The object of the Bill is to vest wholly in the private sector the ownership and operation of services relating to passenger transport by omnibus. Hence the exclusion of the State and organs of decentralised Government such as a Provincial Council or a Local Authority would be rational. In addition to them the Bill excludes any body corporate in which, the State, a Provincial Council or a Local Authority holds shares or has any financial interest. The exclusion of a body corporate in which the State or any other organ of Government holds shares would advance the object of the Bill in that it would preclude any possibility of State control in the matter of passenger transport by omnibus. Such exclusion is therefore not inconsistent with Article 12(1). However, the exclusion of any body corporate in which the State, a provincial Council or a Local Authority has any financial interest raises difficulty for the reason that the expression "financial interest" is not defined. The learned Additional Solicitor-General for the Attorney-General submitted that the expression "financial interest" in Clause 18 is in relation to the ownership of the body corporate referred to therein. It is our view that as the expression "financial interest" stands it cannot be limited to interests in ownership; in the absence of further provision for clarifying what the experession means so much of Clause 18 as relates to the exclusion of any body corporate on the ground of financial interest would be inconsistent with Article 12(1) of the Constitution. However, if the expression "financial interest" is defined this clause would cease to be inconsistent with the Constitution.

Clause 8(h)(ii) of the Bill reads –

> to Liaise with Government Departments, Institutions and Authorised Persons, in respect of omnibus services required by such Department, and Institution including –
>
> (i) .....
>
> (ii) the provision of school services on concessionary rates, for school children and for students of Universities and Technical Institutions;

Mr. Gunaratne Q. C. submits that this provision would exclude the provision of school services to students of Institutions such as students of Pirivenas including the Bhikkus and that such exclusion would deny the right to equality before the law enjoyed by such students. We are of the view that the strict limitation of the facility contemplated in Clause 8(h)(ii) to school children and to students of Universities and Technical Institutions is inconsistent with the provisions of Article 12(1) of the Constitution. However, it would cease to be inconsistent with the Constitution if it is amended to extend the facility provided thereby to students of other similar Institutions.

We have examined the other provisions of the Bill in the light of the submissions made by learned Councel for the parties and we determine that they are not inconsistent with any of the provisions of the Constitution.

G. P. S. de Silva,
Judge of the Supreme Court

G. R. T. D. Bandaranayake,
Judge of the Supreme Court

K. M. M. B. Kulatunga,
Judge of the Supreme Court

Bill was Presented to Parliament on: 23.07.1991
Bill No: 183
Decision of the Supreme Court Conveyed to Parliament on: 20.08.1991.
Passed on: 23.08.1991.
Speaker's Certificate Endorsed on: 17.09.1991
Title: **National Transport Commission Act No. 37 of 1991.**

1991

5. SOCIAL SECURITY BENEFITS BILL

A

BILL

to provide for the Establishment of the Social Security Board of Sri Lanka, to vest the Board with powers necessary and to provide a scheme by which to provide pensions and other benefits; and matters connected therewith or incidental thereto.

SOCIAL SECURITY BENEFITS BILL

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

A Bill to provide for the establishment of the Social Security Board of Sri Lanka to vest the Board with powers necessary and to provide a scheme by which to provide pensions and other benefits; and matters connected therewith or incidental thereto.

In the matter of a Citizen's Petition under Article 121 (1) of the Constitution.

S. C. Special Determination : No. 13/91:

Present:

Bandaranayake, J., Amerasinghe, J., & Dheeraratne, J.

Counsel:

Batty Weerakoon with Chamantha Weerakoon and Kusal Subasinghe for petitioners

K. C. Kamalasabayson, Deputy Solicitor-General with K. Sri Pavan, Senior State Counsel for Respondent.

Court assembled for the hearing on 11.11.1991.

A Bill titled "Social Security Benefits" to provide for the establishment of the Social Security Board of Sri Lanka; to vest the Board with powers necessary and to provide a scheme by which to provide pensions and other benefits; and matters connected therewith or incidental thereto was presented to this Court along with Citizen's petition No. 13/91 for the determination of this Court whether the Bill or any provision thereof was inconsistent with the Constitution and whether the Bill needs to be passed by a 2/3rd majority in Parliament.

The petition had been filed in the Supreme Court Registry on 31.10.1991.

At the commencement Court pointed out to learned Counsel for the petitioners, the Ceylon Federation of Labour, that the averments in the petition did not contain an averment that a copy of the petition had been delivered to the Hon. Speaker within one week of the Bill being placed in the Order Paper of Parliament. Nor was there any other proof of delivery of a copy of the petition to the Speaker.

Learned Counsel for the petitioners at this stage tendered to Court the Registered Post Article Receipt issued by the Supreme Agency Post Office, Hulftsdorp, bearing the date stamp 7.11.1991.

The Bill had been placed in the Order Paper of Parliament on 25.10.1991. Although the petition had been filed within one week there of a copy to the Speaker has been posted only on 7.11.91. Article 121(1) of the Constitution requires that the petition and its copy to

the Speaker should be filed within one week of the Bill being placed on the Order Paper of Parliament. The Court has considered one week to be a period of 7 days. On the foregoing facts if would appear that the jurisdiction of this Court has not been duly invoked by the petitioners. The time limit had been regarded by this Court to be mandatory.

In S.C. Special Determinations 5/91, 6/91 and 7/91 the Court held that failure to deliver a copy of the petition to the Speaker within time was fatal to the invocation of the jurisdiction of this Court.

As the jurisdiction of this Court has not been duly invoked the petition is rejected.

Sgd. G. R. T. D. Bandaranayake,
Judge of the Supreme Court.
Sgd. A. R. B. Amerasinghe,
Judge of the Supreme Court.
Sgd. R. N. M. Dheeraratne,
Judge of the Supreme Court

Bill was Presented to Parliament on: 25.10.1991
Bill No.: 196
Decision of the Supreme Court Conveyed to Parliament on: 14.11.1991.

Bill was not proceeded with.

1992

1. GREATER COLOMBO ECONOMIC COMMISSION (AMENDMENT) BILL

A

BILL

to amend the Greater Colombo Economic Commission Law, No. 4 of 1978

GREATER COLOMBO ECONOMIC COMMISSION (AMENDMENT) BILL

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

An act to amend the Greater Colombo Economic Commission Law, No. 4 of 1978

In the matter of an application under Article 121(1) of the Constitution

Supreme Court S. D. No. 1/92 Piyasena Dissanayake, Secretary, Mahajana Eksath Peramuna, 7/15, Kirula Road, Colombo 5.

Petitioner

Present: Fernando, J.,
Amerasinghe, J., and
Ramanathan, J.

Counsel: P. A. D. Samarasekera, P.C., with A. L. M. de Silva and Prithiraj Perera for the Petitioner;
Tilak Marapana, P. C., Attorney-General, with K. C. Kamalasabayson, D. S. G., and Y. Kodagoda, S. C. for the Attorney-General.

Argued on: 14th October, 1992.

Decided on: 21st October, 1992.

DETERMINATION:

A bill titled "An act to amend the Greater Colombo Economic Commission Law, No. 4 of 1978" ("The Greater Colombo Economic Commission (Amendment) Act, No. ..... of 1992") was placed on the Order Paper of Parliament on 25.09.92. On 01.10.92 the Petitioner exercised his right as a citizen to present this petition to this Court under Article 121(1) of the Constitution, alleging that Clauses 7 and 8 of the Bill were inconsistent with the provisions of Article 154G read with List one of the Ninth Schedule, and Article 12, and with Articles 3 and 4 of the Constitution.

The Bill is prefaced by a statement setting out its objects and reasons in great detail. Reference is made to the Report of the Presidential Commission on Youth, especially in regard to the need for industrialisation in rural areas; of the need to strengthen the institutional framework of the Greater Colombo Economic Commission, and to enable it to exercise certain of its powers and functions in respect of "Licensed Enterprises" situated outside its Area of Authority and "Licensed Zones (as defined in the principal enactment); and of considerable delays and difficulties experienced in relation to the approval of building plans and the issue of licenses.

Clauses 1 to 6 and 9 to 10 of the Bill are not controversial. Apart from formal provisions, they seek to change the name of the Commission to "The Board of Investment of Sri Lanka"; to alter the composition of the Board, and to create the post of Additional Director-General; and to validate prior acts of the Additional Director-General in pursuance or supposed pursuance of a delegation by the Board.

Only Clauses 7 and 8 are challenged. Clause 7 seeks to introduce a new Section 20A:

"(1) It shall be lawful for the Board to exercise, perform and discharge, in relation to any licensed enterprise, all powers, duties and functions conferred or imposed on, or assigned to, any person, body or authority, by any written law, relating to the approval of plans for buildings required for the business of such licensed enterprise or the issue of any licence, permit or authority required for the setting up, commencement or carrying on, of the business of such licensed enterprise, as though the references in such written law to the person, body or authority empowered to exercise, perform or discharge such powers, duties or functions were references to the Board.

(2) The Board may, in addition to the powers, duties and functions referred to in Sub-section (1), exercise, perform, and discharge, in relation to licensed enterprises outside a licensed zone, all powers, duties and functions conferred or imposed on, or assigned to, any person, body or authority by the written law specified in Schedule C and Schedule D hereto as though the references in such written law to the person, body or authority empowered to exercise, perform and discharge such powers, duties and functions were references to the Board.

Provided that no power, duty or function under the National Environmental Act shall be exercised, performed or discharged by the Board except in consultation with, and the concurrence of the Central Environmental Authority established by that Act."

Clause 8 seeks to introduce a new section 26A:
"No enjoining order shall be issued under section 664 of the Civil Procedure Code (as amended by Act No. 79 of 1988). against –

(*a*) the Board, staying or restraining the Board from proceeding with any matter or thing in the exercise, performance or discharge, or the pruported exercise, performance or discharge of any power, duty or function conferred or imposed on, or assigned to, the Board, by this Law; or

(*b*) a licensed enterprise or the proprietor, partner, Director, Manager, agent, officer or servant such licensed enterprise or any person or body performing any service or work for such licensed enterprise, staying or restraining such licensed enterprise, proprietor, partner, Director, Manager, agent, officer, servant, person or body from proceeding with any matter or thing which such licensed enterprise has been authorized, licensed or permitted to do by the Board in the exercise, performance or discharge, or the purported exercise, performance or discharge, of any power, duty or function conferred or imposed on, or assigned to the Board, by this law,

except after notice to, and hearing the Board, licensed enterprise, proprietor, partner, Director, Manager, agent, officer, servant, person or body, as the case may be. +

Clause 8: The petitioner complains firstly that clause 8 is inconsistent with Article 12; that the proposed section 26A *(a)* confers on the Board an immunity from the grant of *ex parte* enjoining orders under section 664 of the C. P. C. as amended by Act No. 79 of 1988 and that section 26A*(b)* confers a like immunity on licensed Enterprises, their officers, agents, and servants, etc., which is not conferred on other persons or bodies; that this immunity will exist even if a court is satisfied beyond doubt that irreparable loss and damage will result unless an *ex parte* enjoining order is granted; that "purported exercise..... of power" covers even *mala fide* acts of the Board; that although the Court of Appeal has

jurisdiction under Article 143 of the Constitution to grant *ex parte* enjoining orders, that remedy appears to be available only where prompt injunctive relief cannot be obtained from an original court because of a bar on the institution of an action, but not where an action can be instituted but injunctive relief is barred; that in any event that remedy will not be efficacious where the acts complained of are done in places distant from Colombo; that the grant of *ex parte* enjoining orders against the Board and Licensed Enterprises would not casuse significant loss or prejudice because any such order would be in force only for 14 days in the first instance, and the defendant would be entitled then – and even earlier – to show cause why such order should be set aside, or suspended; that the proposed section 26A(b) confers immunity not only in respect of matters and things expressly authorised in licenses granted by the Board, but in respect of other acts incidental merely thereto – and two examples were given: namely –

(1) a Licensed Enterprises desiring to put up buildings on its land for its authorised business might engage a contractor, whose operations on the site could give rise to an anticipation of imminent and irreparable loss and damage to and adjoining land owner (such as the deprivation of lateral support to his land and buildings); and

(2) an enterprise licensed to manufacture pharmaceuticals might discharge noxious waste products into an adjacent stream.

It is contended that this classification (i e. as between the Board and Licensed Enterprises, and all other persons) is not based on intelligible different, having a clear and reasonable relationship to the objectives sought to be achieved by principle enactment (as set out in section 3) an/or by the Bill.

In order to determine whether clause 8 is constitutional, it is necessary first to determine its precise meaning and scope. Being a provision which tends to detract from the rights of the citizen, and to curtail the jurisdiction and powers of the courts, that immunity should be narrowly, rather than broadly, construed. Consistenty with this approach, the learned Attorney-General submitted that cause (b) would extend only to acts, matters and things expressly authorized licensed or permitted by the Board in the excercise of its statutory powers, or necessarily included therein, but not to merely useful, connected or incidental acts, matters or things; that the Board could not expressly or impliedly authorise, license or permit unlawful acts; that the word "purported" in both clauses *(a)* and *(b)* neither included, nor was intended to include, *mala fide* acts, and that a "purported exercise" of power would be protected only where, despite some irregularity, informality or error, such exercise was *bona fide*. We agree that is what the provision meant and the learned Attorney-General agreed that the matter might be put beyond doubt by the addition of the words "*bona fide*" after the words "purported exercise, performance or discharge" in clauses *(a)* and *(b)*.

That being the proper interpretation of clause 8, the classification, so far as the Board is concerned, is based on intelligible differentia, and has a clear and reasonable relationship to the objective of rapid rural industrialisation. If immunity was conferred only on the Board, some acts of the Board could indirectly have been restrained by *ex parte* enjoining orders against Licensed Enterprises – thus defeating the objectives of that clause. Accordingly, the extension of the immunity to Licensed Enterprises was necessary, and clause (b) seeks to exclude enjoining orders only in respect of acts done under the authority of the Board in the proper exercise, or the purported and *bona fide* exercise, of its statutory powers. That provision too is therefore unobjectionable. In balancing the competing

interests of the general public and the interests of individuals in certain cases, the Legislature may adopt a classification, even if it causes some detriment to the latter. It is of some relevance that the Legislature has in the past legitimately accorded preferential treatment to the State and public institutions, e.g. in regard to notice of institution of actions (section 461, C . P. C., section 307 (1), Municipal Councils Ordinance), with the consequence that injunctions could not be obtained promptly from an original court even after notice to and hearing the defendant a remedy was available only under Article 143 (and its legislative predecessors). Such a privilege is not inherently violative of Article 12 (see *Liyanage v. Municipal Council, Galle* S.C. Appeal No. 9/92, S.L.M. 27.5.92). Here the detriment to the individual is not only unlikely but minimal because he is not totally denied a remedy – for Article 143 continues to be applicable. Although the typical case to which Article 143 applies is where the *institution* of an action in an original court is precluded by, for instance, a provision requiring prior notice of action, yet it applies to all cases where the irremediable mischief complained of *cannot be prevented* by bringing an action. Although it is an attractive argument that an *ex parte* enjoining order will be in force "only for 14 days", yet the reality is that the complexities and delays of legal proceedings will impede the administration of the Board, and clog the machinery of business and industry, for much longer; and hence even the possibility of *ex parte* orders may well serve as a digincentive to investment . In any event, taking all the circumstances into consideration, even if there had been some infringement of Article 12, that "discrimination" would have been a reasonable restriction permitted by Article 15(7).

Clause 7: The Petitioner also complaints that clause 7 is inconsistent with Article 154G(3); that the Bill is in respect of a matter set out in List 1 of the Ninth Schedule; that after its publication in the Gazette, and before it was placed on the Order Paper, it was not referred by the President to every Provincial Council for the expression of its views; that "written law"-includes statutes passed by a Provincial Council (by reason of the definition in Article 170 of the Constitution, as amended by the 13th Amendment); that the Board is thus vested with the powers conferred on various persons, bodies and authorities, whether under Acts of Parliament or statutes of Provincial Councils or subordinate legislation,; that such enactments are not specified and the provision is therefore vague and uncertain in scope; that in exercising such powers the Board would have a wider discretion than the body or authority to whom Parliament originally entrusted such powers, that such power; extend to the approval of building plans and the issue of licences, permits and authorities of all kinds required for the business of a Licensed Enterprise, even if only incidental tc such business; by way of example, if an enterprise was authorised to produce handicrafts out of ivory, the Board would then have the power (under other relevant enactments) to grant licences to import ivory and to kill elephants, because such licences would be "required for the carrying on of the business" of that enterprise.

List 1 in the Ninth Schedule contains the following items:

"4. Local Government–

4.1 Local authorities for the purpose of local government and village administration, such as Municipal Councils, Urban Councils and Pradeshiya Sabhas, except that the constitution, form and structure of local authorities shall be determined by law;

4.3 Local Authorities will have the powers vested in them under existing law. Municipal Councils and Urban Councils will have the powers vested in them under the Municipal Councils Ordinance and the Urban Councils Ordinance. Pradeshiya

Sabhas will have the powers vested in them under existing law. It will be open to a Provincial Council to confer additional powers on local authorities but not to take away their powers;

5. Provincial Housing and Construction–
   5.3 Construction activity in respect of subjects in this List.

21. Subject to the formulation and implementation of National Policy in regard to development and planning, the power to promote, establish and engage in agricultural, industrial, commercial and trading enterprises and other income-generating projects, within the Province without prejudice to the power of the Government and public corporations to have such enterprises and projects.

(This would include the promotion of scientific and industrial research within the Province and the preparation, co-ordination and the implementation of industrial development plans for the Province)".

The Petitioner's contention must be considered in the context of the mischief which the amendment is intended to deal with–the elimination or delays and difficulties in relation to approvals and licences. Hence the "approval of plan....." and the "issue of any licence....." must not be given an extended meaning. When the Board licences an enterprise, there is a need to avoid a situation where another authority delays or unreasonably refuses to approve a building plan or to grant a licence to commence (or subsequently, to continue) such business. The purpose of the amendment was to enable the Board to exercise these statutory powers, and no more. The example given by the Petitioner is misconceived; a licence to import ivory would be a facility to procure the raw materials necessary for the business, and not the conferment of a privilege empowering an applicant to set up or to carry on the business. The learned Attorney-General submitted that this was what section 20A meant, and submitted that nothing else was intended. For the same reasons, the words "It shall be lawful for the Board to exercise...." do not take away, as suggested by the petitioner, the power of the relevant statutory authorities, and confer them on the Board, but only enable the Board to exercise those powers concurrently. Nor does this section, as the Petitioner fears, confer on the Board an arbitrary or unfettered discretion to approve plans or issue licences contrary to the policy, or the spirit, or the letter, or such other enactments. As submitted by the learned Attorney-General, all statutory conditions and provisions will have to be observed by the Board and the enterprise, and the Board will have no power to disregard, or to authorise the disregard of, the law.

The petitioner relies on the heading "Local Government" in Item 4 as proof of devolution of that entire subject on the Provincial Councils. However the "headings" in the three Lists are of different kinds, as this Court pointed out in the matter of the Agrarian Services (Amendment) Bill (Supreme Court S. D. Nos. 2 & 4/91: 7.2.91). In Lists I and III it is only where there is a "heading" with no description that the entire subject can be regarded as devolved; in other cases, the "heading" merely serves to identify the subject, but not to define it. Thus several items in Lists I and III have the same "heading". But different descriptions, and obviously the content of the devolved subject has to be determined from those descriptions. "Local Government" is not devolved in its entirety. Item 4.3 indicates that the powers of local authorities are derived from Acts of Parliament, and may not be reduced or taken away by a Provincial Council statute. If Parliament were to take away a power conferred by an Act of Parliament upon a local authority, there would be no

infringement of or encroachment into the lawful sphere of authority of Provincial Councils; *a fortiori.* If Parliament merely authorises the Board to exercise such a power concurrently, without taking away the power of the local authority, the position must be the same. The Petitioner sought to rely on item 5.3 to support a submission that the approval of building plans is a matter intrinsic to "construction activity", and therefore not a matter for Parliamentary legislation. The approval of building plans is quite distinct from and anterior to, construction; in any event, item 5.3 must be interpreted in a manner which will not conflict with, or take away, local authorities' powers of approving building plans and granting licences to commence and continue business. Item 21 too does not help the Petitioner; it does not confer on Provincial Councils any such powers in respect of building plans and licences in the case of enterprises of, or licensed by, the Government. Thus none of the powers sought to be conferred on the Board are in respect of matters set out in the Provincial Council List. The petitioner's contention that "written law" includes Provincial statutes also fails because the definition in Article170 is for the purposes of the Constitution; it is obviously inapplicable to section 20h(l) of the principal enactment which was passed before the 1978 Constitution, and in that section "written law" refers to Acts of Parliament (and perhaps also to delegated legislation thereunder). The proposed section 20A(2) uses the phrase in the same sense. It must therefore be presumed that it has the same meaning in the proposed section 20A(1).

Had clause 7 dealt with Provincial Council matters, it would have been necessary to consider whether our jurisdiction under Articles 121 to 123 extends to determining whether the procedural requirements of Article 154G(3) had been complied with; and in doing so perhaps also to consider whether the exclusionary provisions of Article 80(3) are inapplicable to a Bill passed in contravention of those requirements, on the basis that it did not " become law" and is therefore not immune from judicial scrutiny. However, as it was in the matter of the Agrarian Services (Amendment) Bill, we do not need to consider those questions now in relation to the Bill before us.

We therefore determine that none of the provision of the Bill are inconsistent with the Constitution or any provision thereof. Clause 8 may usefuly be clarified, to accord with the learned Attorney-General's submission, by adding the words "*bona fide*".

(Sgd.) M. D. H. Fernando,
Judge of the Supreme Court

A. R. B. Amerasinghe,
Judge of the Supreme Court

P. Ramanathan
Judge of the Supreme Court

Bill was Presented to Parliament on : 25.09.1992
Bill No. : 275
Decision of the Supreme Court Conveyed to Parliament on : 22.10.1992
Passed on : 03.11.1992
Speaker's Certificate Endorsed on : 04.11.1992
Title : **Greater Colombo Economic Commission (Amendment) Act No. 49 of 1992.**

1992

2. APPROPRIATION

A

BILL

to provide for the service of the Financial Year 1993, to authorize the raising of loans in or outside Sri Lanka for the purpose of such service, to make Financial Provision in respect of certain activities of the Government during that Financial Year, to enable the payment by way of advances out of the consolidated fund or moneys of, or at the disposal of, the Government, of moneys required during that financial year for expenditure on such activities there to provide for the refund of such moneys to the consolidated fund, and to make provision for matters connected therewith or incidental thereto, the aforesaid matters.

APPROPRIATION BILL

In the matter of a petition under Article 121(1) of the Constitution.

S.D. 2/92

Present :
Fernando, J.
Amarasinghe, J and Ramanathan, J.

Counsel :
Petitioner in person

Shibly Aziz, P.C., Solicitor-General
with K. Siripavan, Senior State Counsel
for the Attorney-General

Argued on :
23rd October, 1992.

Decided on :
2nd November, 1992.

The petitioner is L.O.H. Wanigasekera, of 134/1, Bandarawela Road, Badulla who alleges that the Appropriation Bill is unconstitutional for various reasons.

The petitioner appearing in person made oral submissions.

Mr. Shibly Aziz, P.C., Solicitor-General raised a preliminary objection that the jurisdiction of the Court had not been duly invoked, as the petition to the Supreme Court had not been filed within one week of the Bill being placed on the Order Paper of Parliament. He cited S.C. Special Determination Nos. 5/91, 6/91 and 7/91. We drew his attention to *Nanayakkara* v. *Pa..a* 64 NLR 193 in regard to which he wished to submit written submissions.

The Bill had been placed on the Order Paper of Parliament on the 6th of October, 1992. The petitioner had posted his petition on the 12th of October, 1992 which according to the date stamp of this Court, had been received on 15th October 1992. Even if that judgment is applicable, despite the exclusion of one intervening public holiday, the petition is out of time and must be rejected.

The petitioner submitted that the Appropriation Bill for 1993 had failed to make provision in the first Schedule for the on going war in the Northern and Eastern Provinces. It was the petitioner's contention that there should be a heading "Defence of Sri Lanka" and also another sub heading "Expenditure for the North East war".

The petitioner's main contention is the lack of specificity in the various heads of votes referred to in the Bill.

This contention does not affect the constitutionality of the Bill. The only consequence, if the petitioner is right, is that any attempt by the Executive to spend money on matters not covered by those paid would be unlawful. But that would not make the Bill unconstitutional.

The petitioner also contended that there was a similar failure to make provisions in the first schedule for a number of other matters, viz. the cost of living allowance of Rs. 250 to pensioners, the Mahapola, Gam Udawa and the Presidential Mobile Service programmes. This contention fails for the same reason.

The petitioner also contended that votes for the Ministries of the Buddha Sasana, Hindu Affairs & Islamic affairs were unconstitutional in the absence of legislation defining "Buddha Sasana" "Hinduism" and "Islam". In view of Article 9 of the Constitution. Parliament is not debarred from making financial provision of religious matters.

The petitioner further contended that by "re-voting". Parliament is attempting to use the approval granted for the previous year's allocations, which had now lapsed, without fresh approval in terms of the present Bill. However we find that the item complained of is covered by a specific head (namely head 270 Programme 2) although these items might also have been included and approved in previous years.

We have considered the provisions of the Bill and we determine that the Bill or any of its provisions are not inconsistent with any provision of the Constitution.

M. D. H. Fernando,
Judge of the Supreme Court.

A. R. B. Amerasinghe,
Judge of the Supreme Court.

P Ramanathan,
Judge of the Supreme Court.

Bill was presented to Parliament on : 06th October, 1992
Bill No.: 276
Decision of the Supreme Court Conveyed to Parliament on : 04th November, 1992
Passed on 16 December, 1992
Speaker's Cetificate Endorsed on : 24 December, 1992
Title : **Appropriation Act No. 67 of 1992**

1993

1. PROVINCIAL COUNCILS ELECTIONS (AMENDMENT)

A

BILL

to amend the Provincial Councils Elections Act, No. 2 of 1988

PROVINCIAL COUNCILS ELECTIONS (AMENDMENT) BILL

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, COLOMBO 12

A Bill to amend the Provincial Councils Elections Act No. 2 of 1988
In the matter of a reference under Article 122 (1)(*b*) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Supreme Court Special Determination No. 1/93, (PPA/6/Pari/62).

Present:
Bandaranayake, J.,
Fernando, J. and Kulatunga, J.

Counsel:
K. C. Kamalasabayson, Deputy Solicitor General with Kumar Paul, S.C., for the Attorney-General.

R. Balasupramaniam with Mrs. S. Kugatharan on behalf of M. Savasithamparam.

The Court assembled for the hearing at 10.00 a.m. on 25th January, 1993.

A bill titled "An act to amend the Provincial Councils Elections Act, No. 2 of 1988" ("The Provincial Councils (Amendment) Act, No..... of 1993") was referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof was inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. K. C. Kamalasabayson, Deputy Solicitor General, assisted the Court in this matter.

Mr. B. Balasubramaniam applied for and was granted permission to make submissions on behalf of Mr. M. Sivasithamparam, Attorney-at-Law, a citizen.

Section 15(3) of the Provincial Councils Elections Act, No. 2 of 1988 provides for one forfeiture of the deposit made in respect of the candidates of an independent group if that group polls less than one-eighth of the total number of votes polled in a district i.e. even if one or more of its candidates did secure election. Clause 2 of the Bill seeks to substitute a new provision whereby such forfeiture would occur only if none of the candidates of such group are elected. This provision thus avoids the anomalous situation in which an independent group forfeits its deposit even though one of its candidates is elected. It is identical to the provision which by virtue of Section 128A(*a*) applied to first elections held under the Act. It is also consequential to the repeal of Section 58(i)(*b*) and (*c*) by Act No. 55 of 1988, whereby the cut-off point of one-eigth was removed, and a new paragraph (*b*) substitutes. It therefore enhances the franchise and is not inconsistent with any of the provisions of the Constitution.

Clause 3 of the Bill seeks to insert a new Section 128A enacting any registered elector, who reasonably fears that due to conditions prevailing in the area within which his polling station is situated he may be unable to cast his vote at such polling station, to apply to the

Commissioner of Elections to allow him to cast his vote at another polling station determined by the Commissioner in his absolute discretion; the Commissioner is empowered to allow or disallow such application. The learned Deputy Solicitor-General drew our attention to Section 127B of the Parliamentary Elections Act, No. 16 of 1988, and Section 119B of the Presidential Elections Act, No. 18 of 1988, which are identical to Clause 3. Although the Bills in respect of those two Acts were referred to this Court, the Court did not rule on the constitutionality of those sections, which were not in the original Bills, and were only introduced at the Committee stage.

We had some doubt as to whether Clause 3 was consistent with Article 12(1) of the Constitution, on account of the lack of guidelines. However, the learned Deputy Solicitor-General informed us that the object of this provision was to provide for displaced persons living outside the relevant area, and for no others. He agreed that if this provision was amended as follows the object of the amendment would be fully achieved.

125A(i) notwithstanding the provisions of any other law, any registered elector who is compelled by conditions prevailing in the areas within which his polling station is situated to reside outside such area and who reasonably fears that he would be unable to cast his vote at such polling station, may make an application to the Commissioner of Elections within one week of the notice of nomination, requesting that he may be allowed to cast his vote at another polling station determined by the Commissioner, in his absolute discretion.

Clause 3 is so amended would not be inconsistent with any of the provisions of the Constitution.

Mr. Balasubramaniam submitted that Clause 3 of the Bill was unconstitutional, and that provision should have been made for displaced persons to be entitled to be treated as postal voters by appropriate amendments to Section 24 of the Act. However in view of the statement made by the learned Deputy Solicitor-General as to the object of the Clause 3, and the suggested amendment agreed to by him. Mr. Balasubramaniam informed us that he did not wish to press this submission.

We therefore, determine that if Clause 3 is amended as aforesaid neither the Bill nor any of its provisions would be inconsistent with the Constitution or any provision thereof.

G. R. T. D. Bandaranayake,
Judge of the Supreme Court.

M. D. H. Fernando,
Judge of the Supreme Court.

K. M. M. B. Kulatunga,
Judge of the Supreme Court.

Presented to Parliament on: 09.02.1993
Bill No: 307
Decision of the Supreme Court Conveyed to Parliament on: 09.02.1993
Passed on: 10.02.1993
Speaker's Certificate Endorsed on: 18.02.1993
Title: **Provincial Councils Elections (Amendment) Act No. 7 of 1993**

1994

1. ANTIQUITIES (AMENDMENT)

A

BILL

to amend the Antiquities Ordinance (Cap. 188)

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

S.D. No. 1/94

A Bill to amend the Antiquities Ordinance
In the matter of a citizen's petition under Article 121(1) of the Constitution.

Lamappu Hewage Chandrasena Wickremasinghe, President of the Sanskruthika Urumaya Rakaganieme Sanvidanaya, 15/7, Kirula Road, Colombo 05.

Petitioner

vs.

The Republic of Sri Lanka.

Respondent

Before : G. P. S. de Silva C. J.
Kulatunga J. and
Wadugodapitiya J.

Counsel : W. P. Gunatilleke with K. Karunaratne, Tissa Yapa, Upali Sooriyarachchi, Piyasena Dissanayake and Kaniska Witharana for the petitioner.

Asoka de Silva, D. S. G. for the Attorney–General.

The Court assembled for the hearing on 27.04.1994

A Bill titled "Antiquities (Amendment) Bill" to amend the Antiquities Ordinance (Cap.188) was presented to this Court along with citizen's petition No. S. C. SDI/94 for determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The petitioner seeks a determination that Clauses 12 and 14 of the Bill are inconsistent with the Constitution particularly with Article 9 thereof and hence it is required to be enacted by the special majority required by Article 84; and further it requires the approval of the People at a Referendum by virtue of the provisions of Article 83.

Clause 12 of the Bill seeks to enact a new Section 32A to the Antiquities Ordinance empowering the Minister to declare "protected areas" in the same manner as "Protected monuments" are declared under Section 18 of the Ordinance and for applying to such "protected areas" mutatis mutandis, the provisions contained in the Ordinance for regulating activities in respect of "protected monuments". Clause 14 seeks to amend Section 40 of the Ordinance to empower the Archaeological Commissioner to exercise control over "protected areas".

The proposed new Section 32A reads:

32A(1) –

"Where it appears to the Minister that any area of private or State land is of historical, national, religious, or cultural importance though no antiquity may be found in or on that area and that it is in the public interest that such area should be protected he may, subject to the provisions of section 19, by Order published in the Gazette, declare such area to be protected area and from the date of the publication of the Order the area to which the Order relates shall be protected area for the purposes of this Act.

32A (2) –

The provisions of section 20, 21, 22, 23, 25, 26, 27, 28, 29, 30 and 34 shall, mutatis mutandis, apply to and in relation to such protected area"

The learned Deputy Solicitor General informed us that by an oversight, the proposed new Section 32A(2) omits reference to Section 24 of the Ordinance and that this will be rectified at the Committee stage.

The proposed new Section 40(e) empowers the Archaeological Commissioner:

"to exercise such control over protected areas as may be necessary for the proper maintenance of such areas"

It has been submitted that the application of the regulatory provisions referred to in the proposed new Section 32A(2) and the exercise of the power of the Archaeological Commissioner under the proposed new section 40(e) would –

(a) take away the rights of Viharadhipathis of Buddhist temples and Trustees of Buddhist temples and other Buddhist establishments and is hence inconsistent with Article 9 of the Constitution;

(b) violative of the freedom of religion under Article 14(1) (e) of the constitution; and

(c) violative of the right to equality before the law and equal protection of the law under Article 12(1) of the Constitution.

These objections can best be understood in the light of the existing provisions of the Ordinance relating to "protected monuments". of them, Section 18 reads–

"Where it appears to the Minister that any ancient monument situated on any land other than State land is in danger of destruction or removal, or damage from neglect or injudicious treatment, and that it is in the public interest that such monument should be protected, he may, subject to the provisions of Section 19, by Order published in the Gazette, declare such monument to be a protected monument; and from the date of the publication of such order, the monument to which the order relates shall be a protected monument for the purposes of this ordinance".

Under, Section 48 "monument" means inter alia, any temple, church, building, tomb or any part or remains of the same. "Ancient monument" in general means a monument reasonably believed to date from a period prior to 2nd March 1815. The Bill seeks to amend this period to a period of hundred years.

An order under Section 18 may be made only after due notice to the public and hearing objections thereto as provided by Section 19. This section is being amended to apply it to the making of an order under the proposed Section 32A (1).

Once an order under the proposed new Section 32A(1) is made, Section 32A(2) provides inter alia, that Sections 20, 21, 22, 23 and 34 of the Ordinance shall, mutatis mutandis, apply. This means that Conservation and protection in such areas will be subject to control by the Archaeological Commissioner. A permit from the Commissioner is required for "restoration, repair, alteration or addition" in such area. Such work would be subject to the Commissioner's supervision. The Commissioner may refuse or revoke a permit for any work in the area. Finally, the Commissioner is himself empowered to enter such area and effect "restoration, repair, alteration or addition" therein. The proposed new Section 40(e) vests the Commissioner with powers of general control over protected areas. Under Section 34 it would be an offence to cultivate, build, fell trees or otherwise encroach in such area.

Learned Counsel for the petitioner submits that the power of the Minister under the proposed new Section 32A(1) is wide and unguided in that the guidelines for classification of any area for purpose of making of an order thereunder are vague and inadequately defined. Such order may be made in respect of private or State land. As such, temples, churches and even lands which are privately owned for residential and business purposes will become subject to the stringent statutory regulations referred to above. He submits that in the case of an order under Section 18 for declaring a monument to be a "protected monument" there are adequate guidelines. But the guildelines under the proposed new Section 32A(1) consists of the subjective opinion of the Minister that the area concerned is "of historical, national, religious or cultural importance".

We agree that the proposed new Section 32A(1) vests the Minister with wide and unguided powers and that the effect of the proposed new Section 32A(2) and Section 40(e) would be to interfere with the rights presently exercised by Buddhist temporalities and hence clauses 12 and 14 of the Bill would be inconsistent with Article 9 of the Constitution which requires the State to give to Buddhism the foremost place and to protect and foster the *Buddha Sasana*. The expression "Buddha Sasana" is wider than "Buddhism" and includes the entire establishment together with objects and places of religious practices and worship of Buddhists. The making of an order under the proposed new Section 32A(1) and the imposition of the kind of control and regulation imposed by virtue of the proposed new Section 32A(2) would be inconsistent with the duty to protect and foster the Buddha Sasana. These clauses are also inconsistent with Article 12(1) of the Constitution as the classification of an area for declaring it a protected area is not based on reasonable criteria having a rational relation to the object sought to be achieved and would hence deny to citizens living in such area equality before the law and equal protection of the law. The said clauses are also inconsistent with Article 14(1) (e) of the Constitution in that the imposition of the proposed restrictions would interfere with the freedom of the citizens to manifest religion guaranteed by that Article.

We accordingly determine that clauses 12 and 14 of the Bill are inconsistant with Articles 9, 12(1) and 14(1) (e) of the Constitution and cannot be enacted except with the special majority and the approval of the People at a Referendum by virtue of the provisions of Articles 83.

G. P. S de Silva,
Chief Justice

K. M. M. B. Kulatunga,
Judge of the Supreme Court

S. W. B. Wadugodapitiya,
Judge of the Supreme Court.

Bill was Presented to Parliament on: 06.04.1994
Bill No.: 383
Decision of the Supreme Court Conveyed to Parliament on: 03.05.1994
Bill was not proceeded with.

1995

1. PUBLIC ENTERPRISES REFORM COMMISSION OF SRI LANKA

A

BILL

to Provide For The Establishment of The Public Enterprises Reform Commission of Sri Lanka; and For Matters Connected Therewith or Incidental Thereto.

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

A Bill To Provide for the Establishment of the Public Enterprises Reform Commission of Sri Lanka; and for matters connected therewith or Incidental thereto.

In the matter of a Citizen's petition under Article 121(1) of the Constitution.

S.C. (SD) No. 1/95

D. D. Somaweera Chandrasiri,
General Secretary,
Samajawadi Lanka Kamkaru Samithiya,
31/27, Narahenpita Road,
Nawala, Rajagiriya.

Petitioner

The Republic of Sri Lanka.

Respondent:

Present
G. P. S. de Silva C. J.,
Kulatunga J. and
Ramanathan J.

Counsel:
W. P. Gunatilake with Canishka Witharana, Tissa Yapa Jayawardena and P. G. Somaratne for Petitioner.

M. S. Aziz P. C. A. G. with K. C. Kamalasabayson D. S. G.,

The Court assembled for hearing on 05.12.1995 at 10.00 a.m.

A Bill titled "A Bill to provide for the Establishement of the Public Enterprises Reform Commission of Sri Lanka; and for matters connected therewith or incidental thereto", was presented to this Court along with Citizen's petition No. S. C. (SD) 1/95.

The Petitioner states that Clauses 12, 17 and 20 of the Bill are inconsistent with Articles 12(1), 14(1)(*a*) and 14(1)(*d*) of the Constitution; and that Clause 20 is also inconsistent with Articles 3, 4 and 148; hence the Bill requires to be passed by the special majority required under Article 84(2) and approved by the people at a Referendum by virtue of the provisions of Article 83.

The proposed Commission shall be a body corporate having perpetual succession and a common seal and may be sued in its name. It shall consist of one ex-officio member namely, The Secretary to the Ministry of the Minister in charge of the subject of Finance; and not less than five and not more than seven members appointed by the minister referred to as the "appointed members" (Vide Clause 3).

The functions of the Commission shall be to advise and assist the Government on the reform of public enterprises with the objects inter alia, of improving their efficiency, upgrading of production and services and motivating the private sector (Vide Clause 4) Under Clause 23 "public enterprise" includes a public corporation or a government owned business undertaking or a company where all the shares or the majority of the shares of such company are held by the Government.

The powers and duties of the Commission are set out in Clause 5. These include inter alia, making recommendations to the Government on the continuation, and efficiency of public enterprises, selection of public enterprises for conversion into public companies under Act No. 23 of 1987; and the sale or disposal to the public of shares in, or assets of, companies registered under Act No. 23 of 1987. It also has the power to monitor the performance of companies so registered, and the majority of the shares in which are owned by persons other than the Government.

The Commission has its own Fund; and the provisions of Article 154 of the Constitution will apply to audit or accounts of the Commission (Clauses 6 and 8). Clauses 9, 10 and 11 provide for the appointment of the Director General of the Commission and other officers and servants of the Commission, respectively.

Thus, the purpose of the Bill appears to be the provision of proper control, regulation and guidelines for the management and progress of public enterprises including privatisation. It would appear from the petition that from about 01.03.95 these matters had been in the charge of a non-statutory Special Task Force for implementation of the programme of Public Enterprise Reform, appointed by the President.

The petitioner states that he is an employee of the Ceylon Steel Corporation Ltd., a company registered under Act No. 23 of 1987; that he along with other employees of the said company are members of a Trade Union called The Samastha Lanka Kamkaru Samithiya; that some of these employees hold shares in the said company; that the aforesaid Special Task Force has participated in calling for offers from the public and prospective bidders for the purchase of shares of the said company; and that the petitioner and another gave a notice of action dated 09.11.95 to the Attorney-General stating that they intend to institute an action against the members of the said task Force for a declaration that they have no right to so function without Parliamentary sanction.

In the meantime, the proposed Bill had been published in the Gazette on 27.10.95 and it was presented to Parliament by the relevant Minister on 17.11.95. The proposed Bill appears to, inter alia, correct the very defect complained of by the petitioner in his notice of action, which has been produced, marked P1.

Provision regarding the first issued shares in a company established under Act No. 23 of 1987 including their disposal are as follows. Section 2(3) of the Act requires that upon the publication of the order of incorporation of the company, Registrar of the Companies shall allot all the shares into which the share capital of the company is divided to the Secretary to the Treasury for and on behalf of the State. However, the Articles of Association of the Company empower the Secretary to the Treasury, after such allotment, to sell or dispose of the entirerty or any part of such shares at any given interval on the basis of a written directive received from the Minister in charge of Finance of the State; subject, however, to

the condition that the State shall at all times hold ten percentum of the issued capital of the company. Admittedly, it is pursuant to this provision that some of the employees of the Ceylon Steel Corporation Ltd. became shareholders of the company.

The petitioner states that Clauses 12 and 17 of the Bill create legal obligations on persons, which are inconsistent with rights protected by Articles 14 (1) (a) and 14(1)(d) (viz. the freedom of speech and freedom to join a Trade Union); and that these clauses vest the Commission with unfettered power to interfere with Trade Unions, authorised publishers and media and their right to maintain confidentiality of their acts and sources of information.

The petitioner next states that Clause 20 is intended to validate with retrospective effect all unauthorised acts done by the Special Task Force; that by reason of such validation all unlawful and unauthorised acts done by the members of the said Task Force are immune from judicial review; hence it deprives citizens of the equal protection of the law, with regard to such acts. Clause 20 is therefore, inconsistent with Article 12(1). Mr. W. P. Gunatilake, Counsel for the petitioner added that in any event Clause 20 does not sufficiently identify the Task Force under reference; that too would result in the said clause being inconsistent with Article 12(1).

Mr. Gunatilake reiterated the above objections. He added that the power conferred on the Commission by Clause 5 (f) to manage companies registered under Act No. 23 of 1987 is too wide, unlike other powers which are only advisory. The exercise of such wide power will encroach on the rights of non-governmental shareholders of such companies who will thereby be deprived of the right to equal protection of the law. Hence, Clause 5(f) is inconsistent with Article 12(1).

It was also submitted that Clause 5 and the entirety of the Bill are inconsistent with Article 148 as the Commission has been vested with wide powers under that clause. Counsel submitted that such power would erode the power of Parliamentary control over public finance in respect of public enterprises.

We are of the opinion that powers under Clause 5 except for those under paragraph (f) are essentially advisory and further enable the Commission to assist the Government in respect of matters concerning public enterprises. There are also powers which are incidental to the exercise of such powers. There is no usurpation of the power of Parliamentary control over public finance. Thus, public corporations will condtinue to be subject to the laws under which they have been established and the Finance Act No. 38 of 1971, whilst government owned business undertakings will continue to be governed by the provisions of Business Undertakings (Acquisition) Act No. 35 of 1971, as amended by Act No. 21 of 1980. Hence, there is no inconsistency with Article 148.

We, however, agree that Clause 5(f) which empowers the Commission to manage companies registered under Act No. 23 of 1987 the shares in which are owned by the Secretary to the Treasury is inconsistent with Article 12(1). The reason is that there is a doubt as to whether such power is limited to managing such companies in which the entirety of the shares are owned by the Secretary to the Treasury. If any shares in such a company are owned by non-governmental persons, a power in the Commission to manage such company may deprive such shareholders of their rights. This would be a negation of their right to equal protection of the law, there being no rational basis for such deprivation. Hence, Clause 5(f) is deemed to be inconsistent with Article 12(1) by virtue of

paragraphs 3 and 4 of the Article 123. The Attorney-General agreed with this view. However, if this clause is amended to make it clear that the reference therein is to a company in which the *entirety* of the shares is owned by the Secretary to the Treasury, it would cease to be inconsistent with Article 12(1).

As regards the objection to Clauses 12 and 17, Clause 12(1) empowers the Commission, for the purpose of exercising, performing and discharging any of its powers, duties and functions under Clause 5 to require by notice in writing any person to furnish to the Commission all such returns or information as shall be specified by in such notice. Clause 12(2) makes it obligatory on any person so required to comply with the notice except where such person is precluded from making such return or from divulging such information under the provisions of any law. Clause 12(3) prohibits the Commission from disclosing any information so obtained except when required to disclose the same by a Court of Law or for the purpose of achieving the objects of the Commission.

Even though the above power to obtain information is guided by reference to Clause 5, the power is not sufficiently guided as regards the nature of the information any person may be required to furnish. We are of the opinion that sufficient guidelines should be included, particularly in view of the penal provisions of Clause 17 which can be applied against certain acts and omissions by any person who has been required under Clause 12(1) to furnish information. The Attorney-General himself drew our attention to the need for adequate guidelines in the absence of which, Clauses 12 and 17 would be inconsistent with Article 12(1). It will also be inconsistent with Article 14(1)(a). Clause 12(1) will, however, cease to be so inconsistent with the Constitution if it is amended to limit the power of the Commission by empowering it to require any person to make only such returns or information pertaining to any business affairs or transactions of any public enterprise as are known to or in the possession of any such person as shall be specified in such notice.

Clause 20 of the Bill reads thus:-

> *"Any act done by the Special Task Force for the implementation of the programme of Public Enterprise Reform, appointed by the President, during the period commencing on March 31, 1995 and ending on the appointed date shall be deemed not to have been, or to be invalid by reason only of the fact that such Task Force was not lawfully authorised to do such act"*

We are of the opinion that Clause 20 does not validate "all authorised and unlawful acts" of the members of the Special Task Force as urged by the petitioner. It merely precludes challenge to any act of the Special Task Force by reason only of the fact that the Task Force was not lawfully authorised to do such act. In other words, the only ground of challenge which is precluded is a challenge based on the ground that the task force was a de facto body of persons, not established by law. Any acts which are otherwise unlawful are not indemnified against judicial remedies. This is also confirmed by the fact that acts sought to be validated are acts done "for the implementation of the programme of Public Enterprise Reform".

We are unable to accept the submission that there is a doubt as to the identity of the body referred to in Clause 20. The petitioner himself has by the averments contained in his petition and the annexed documents including certain newspaper notices published by the Special Task Force clearly identified the body referred to. He has also produced marked X2, the Presidential directive which appointed the Special Task Force. As per X2, the said Task

Force was appointed "pending the establishment of a Public Enterprise Reform Commission". We are, therefore, of the opinion that there is no inconsistency with any provision of the Constitution, in that regard. It is noted that X2 is dated 1st March, 1995 but Clause 20 refers to acts of the Special Task Force commencing March 31, 1995. The Attorney-General informed us that he would verify this discrepancy and advise the Government to amend the date referred to in Clause 20, if it is necessary to achieve accuracy.

As regards the alleged inconsistency of Clause 20 with Articles 3 and 4 of the Constitution, we are of the opinion that the circuitous invocation of the said Articles by the petitioner is untenable and that Clause 20 is not inconsistent with Artiles 3 and 4.

In the result, we are of the opinion, and determine that subject to the amendment of Clauses 5(f) and 12(1) specified above, neither the Bill nor any provision thereof is inconsistent with the Constitution.

G. P. S. de Silva,
Chief Justice.

K. M. M. B. Kulatunga,
Judge of the Supreme Court.

P. Ramanathan,
Judge of the Supreme Court.

Bill was Presented to Parliament on: 17.11.1995
Bill No.: 93
Decision of the Supreme Court Conveyed to Parliament on: 12.12.1995
Passed on: 19.12.1995
Speaker's Certificate Endorsed on: 09.01.1996
Title: **Public Enterprises Reform Commission of Sri Lanka Act No. 1 of 1996**

1996

1. PRADESHIYA SABHAS (AMENDMENT) BILL

A

BILL

to Amend the Pradeshiya Sabhas Act. No. 15 of 1987

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

A BILL TO AMEND THE PRADESHIYA SABHAS ACT NO. 15 OF 1987

In the matter of a citizen's petition under Article 121 (1) of the Constitution.

SC (SD) No. 2 of 95

Gamini Atukorale, General Secretary, United National Party, "Sirikotha", 400, Kotte Road, Pitakotte.

Petitioner

V.

The Attorney - General, Attorney General's Department, Hulftsdorp, Colombo 12.

Present :

G. P. S. de Silva C. J.,
Kulatunga J. and
Ramanathan J.

Counsel :

K. N. Choksy PC with Daya Pelpola, D. H. N. Jayamaha, Luxman Perera, A. L. B. Brito Mutunayagam and Anil Rajapakse for petitioner.

Shibley Aziz PC. A. G. with S. Sri Skandarajah S. S. C. and Uditha Egalahewa S. C. for State.

The court assembled for hearing on 28.12.1995 at 10.00 a.m.

A Bill titled " A Bill to amend the Pradeshiya Sabhas Act" was presented to this court along with citizen's petition SC (SD) No. 2 of 1995.

Clause 2 of the Bill seeks to add two new sections to the principal enactment. Of them, the proposed Section 9A reads:

> 9A. The Minister may at any time by order published in the Gazette -
>
> (a) vary the limits of any Pradeshiya Sabha area;
>
> (b) vary the number of members determined under section 4 for any Pradeshiya Sabha;
>
> (c) dissolve any existing Pradeshiya Sabha and direct that it shall be replaced by new Pradeshiya Sabha to be constituted in lieu of such existing Sabha, whenever it appears to him to be expedient so to do upon any variation of the limits of the Pradeshiya Sabha area for which the existing Sabha was constituted;
>
> (d) dissolve any Pradeshiya Sabha for the purpose of Constituting any other local authority in its place.

The proposed Section 9B makes the new Sabha the successor of the dissolved Sabha; transfers the property, rights, powers, duties, debts, liabilities and obligations of such dissolved Sabha to the new Sabha so far as such property is situated within the administrative limits of the new Sabha or such rights etc. So far as the same relate to any area within the administrative limits of the new Sabha; and requires all references in any enactment, order, rule, regulation or by law etc. to such dissolved Sabha to be construed as though they were references to the new Sabha, for the purpose of any area within the administrative limits of such dissolved Sabha, which shall be included within the administrative limits of the new Sabha.

The petitioner avers that the power vested in the Minister to vary the limits of Pradeshiya Sabhas declared under Section 2 of the Act and to vary the number of members determined under S.4 of the Act affects the franchise and hence Clause 2 of the Bill is inconsistent with Article 3; that there are no guidelines for the exercise of such power or to regulate the power to dissolve a Pradeshiya Sabha; hence Clause 2 is inconsistent with Article 12 (1). The petitioner further complains that the provisions of Article 154G (3) which requires the President to obtain the views in respect of this Bill before placing it on the order paper has not been complied with.

The petitioner avers that for the foregoing reasons, the Bill is inconsistent with the Constitution and cannot be passed except with the special majority required by Article 84 (2) and approval by the People at a Referendum in terms of Article 83.

Pradeshiya Sabhas were constituted in terms of S.2(1) of the Act which requires that the limits of every Pradeshiya Sabha area correspond, as far as possible, to the limits of an Assistant Government Agent's division excluding any area comprised in a Municipal Council or a town (within the meaning of the Urban Councils Ordinance). It would seem, therefore, that Pradeshiya Sabhas were substituted in the place of Village Councils and Town Councils. In terms of S.4 the Minister determines the number of elected members of a Pradeshiya Sabha, having regard to the extent, population and the level of economic development of the pradeshiya Sabha area.

Under S.5, the term of office of each member of a Pradeshiya Sabha shall, unless such member vacates office earlier by resignation or removal be for a period of 48 months. S.5(2) empowers the Minister to curtail or to extend the term of office of members so however, that such curtailment or extention shall not exceed one year.

The term of office of each member of a Pradeshiya Sabha shall, in the case of a first General Election, commence from the date specified by the Minister under S.6, which section empowers the Minister to appoint the date of commencement of the term of office of each Pradeshiya Sabha by Order published in the Gazette which date shall also be deemed to be the date of the Constitution of such Pradeshiya Sabha.

At the hearing before us, Mr. Choksy P. C. for the petitioner informed us that he would limit the objections to the Bill by confining himself to the submissions based on Articles 3 and 12(1) of the constitution.

Mr. Choksy's principal submission was that Clause 2 of the Bill which seeks to enact a new Section 9A is inconsistent with Article 3 of the Constitution in that the exercise of the powers thereby conferred on the Minister would adversely affect the franchise of the voters

who elected the existing Pradeshiya Sabhas or who will be voting at future elections. He argued that the expression "franchise" should not be limited to voting at the election of the President and of Members of Parliament and at a Referendum (which are the occasions when franchise is exercisable in terms of Article 4 (e) of the Constitution). Mr. Choksy submitted that the constitution should be liberally interpreted in the context of contemporary circumstances. Vide Jain "Indian Constitution" 4th Ed. p. 834; Minister of Home Affairs V. Fisher (PC) (1979) 3 All E. R. 21; that this Court should give the expression 'franchise' in Article 3 a wider construction in view of the preamble to the Constitution which inter alia ratifies "the immutable republican principles of REPRESENTATIVE DEMOCRACY" and specially in view of directive principles of State policy, Article 27 (4) which reads:

> *"The state shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government".*

Article 3 contains provisions relating to sovereignty of the people. It reads:

> *"In the Republic of Sri Lanka Sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".*

This Article vests sovereignty in the People and proceeds to enlarge the concept of sovereignty by adding to it fundamental rights and the franchise. Article 4 provides for the manner of exercising sovereignty. Article 4 (e) states:

> *"The franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors".*

It would appear from the above provisions that having extended the concept of sovereignty by adding fundamental rights and the franchise, Parliament in prescribing the manner of exercising the franchise, limited it to voting at the occasions referred to in Article 4(e). The wider meaning of franchise which would include voting at other elections such as election of local bodies or Provincial Councils has not been adopted.

It was held in Re The Thirteenth Amendment to the Constitution (1987) 2 Sri L. R. 312, 324 that Article 4 is not entrenched and is open to amendment provided that such amendment has no prejudicial impact on the sovereignty of the People. Therefore, if Parliament desires an expansion of Article 4(e) by including the franchise exercisable at elections not specified therein, it can be appropriately amended. It is significant that no such amendment has been effected.

Mr. Choksy strongly urged that Article 4(e) is not exhaustive of the manner in which the franchise is excercisable and that the franchise is mentioned in Article 3 without any limitation. In support, he relied on the dicta of Wanasundera J. in the Thirteenth Amendment case (p.339) where he said *"..... it should be noted that fundamental rights and the franchise are specifically mentioned in Article 3 without any limitation"*. It should be

noted that Wanasundera J. was there considering the extent to which Article 4 is linked to Article 3 and the possible situations in which any amendments to Article 4 may impinge on Article 3. He has not attempted to extend the manner of exercising the franchise.

For the foregoing reasons, we hold that Clause 2 of the Bill is not inconsistent with Article 3 of the Constitution. Accordingly, the Bill will not require the approval by the People at a Referendum.

Mr. Choksy next submitted that Clause 2 of the Bill is inconsistent with Article 12(1) in that the exercise of the powers vested in the Minister by the proposed new Section 9A would, in the absence of appropriate guidelines, result in discrimination and thereby deprive the persons affected equality before the law and equal protection of the law. It is settled law that in enacting legislation Parliament is bound to ensure equality before the law and equal protection of the law for persons or classes of persons who are similarly circumstanced.

The Attorney General submitted that the amending Bill has become necessary in consequence of a revision of the administrative limits of Assistant Government Agent's divisions and that from about 1989 the Cabinet of Ministers had been considering the question of redefining the boundaries of existing Pradeshiya Sabhas to make them co-terminus with the revised administrative limits of the AGA devisions. This as well as the other changes indicated in the Bill have not been possible due to the absence of appropriate provision in the Pradeshiya Sabhas Act.

The Attorney-General does not deny the need for adequate guidelines for the exercise of the powers vested in the Minister. He informed us that the intention is to exercise the powers under the proposed Section 9A(a) and (b) subject to the guidelines contained in Sections 2 and 4 respectively and to exercise the powers under Section 9A(d) subject to the relevant guidelines found in the Urban Councils Ordinance and the Municipal Councils Ordinance, as the case may be. He also informed us that it is intended that any orders that may be made under the proposed Section 9A will take effect upon the expiry of the term of office of existing Pradeshiya Sabhas and hence there is no intention to interfere with existing rights; and that such intention is implicit in the proposed new Section 9A.

We appreciate the submissions made by the Attorney General but note that as the Bill is presently worded the guidelines referred to by him are not evident in the proposed new section. There is no provision for suspending the operation of any order that may be made under the proposed new Section 9A. We are of the view that the guidelines and the date on which any Order under the proposed new Section 9A shall come into operation should be expressly set out. It is not sufficient for such matters to be implicit. Hence, we are of the opinion, and determine that Clause 2 of the Bill is inconsistent with Article 12(1) and can only be passed with the special majority required under paragraph 2 of Article 84.

The Attorney-General, however, informed us that if this Court were to take the view that Clause 2 of the Bill is inconsistent with Article 12(1), the proposed new Section 9A will be amended so as to *Expressly* provide for:

(A) that as regards Orders that may be made in terms of paragraphs (a) and (b) of that Section, such Orders shall be made in accordance with the principles set out in Sections 2 and 4 of the Pradeshiya Sabhas Act, as the case may be, and the provisions of the said Sections 2 and 4 shall mutatis mutandis, apply:

(b) that as regards any order that may be made under paragraph (d) of that section, the Minister shall in the event of constituting an Urban Council, comply with the principles contained in Section 2 of the Urban Councils Ordinance; in the event of constituting a Municipal Council, the Minister shall comply with the provisions of Section 2 of the Municipal Councils Ordinance and shall also have regard to the development or the amenities of the area for which such Municipal Council is constituted.

As regards the date on which any order under the proposed new Section 9A will come into operation, the Attorney-General assured us that provision will be included to the effect that no such Order will come into effect until the expiration of the terms of office of the members of any existing Pradeshiya Sabha which may be affected by such Order. Mr. Choksy suggested that no such Order should come into effect until the expiration of the term of office of any existing Pradeshiya Sabha which may be affected by such Oder.

(c) We are of the opinion that it is necessary to include provision to the effect that no Order made under the proposed new Section 9A shall come into effect during the term of office of any existing Pradeshiya Sabha which may be affected by such Order.

If Clause 2 of the Bill is amended in the manner specified at (A), (B) and (C) above, clause 2 of the Bill will cease to be inconsistent with Article 12(1) of the Constitution.

We wish to place on record our deep appreciation of the assistance given by the Attorney-General and Mr. Choksy in the consideration of the Bill.

SC (SD) No. 2/95

G. P. S. de Silva,
CHIEF JUSTICE

K. M. M. B. Kulatunga,
Judge of the Supreme Court.

P. Ramanathan,
Judge of the Supreme Court.

Bill was Presented to Parliament on: 08.12.1995
Bill No.: 104,
Decision of the Supreme Court Conveyed to Parliament on: 11.01.1996
Passed on: 21.04.1999
Speaker's Certificate Endorsed on: 15.06.1999
Title: **Pradeshiya Sabhas (Amendment) Act No. 14 of 1999**

1996

2. SRI LANKA TELECOMMUNICATIONS (AMENDMENT) BILL

A

BILL

to Amend the Telecommunications Act No. 25 of 1991

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

In the mat.er of a reference under Article 122 (1) (b) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S. C. Special Determination. No. 1/96

Present:

G. P. S. de Silva, Chief Justice, Dr. A. R. B. Amerasinghe, Judge of the Supreme Court, and P. Ramanathan, Judge of the Supreme Court.

Counsel:

Hon. S. N. Silva, Attorney-General with Ms. Anus Navaratne, Senior State Counsel.

The Court assembled for the hearing at 11.00 a.m. on 31st day of July, 1996.

A Bill titled "Sri Lanka Telecommunications (Amendment) Act, No. of 1996" was referred to this Court by Her Excellency the President in terms of Article 122, (1) (b) of the Constitution of the Democratic Socialist Republic of Sri Lanka for the special determination of this Court on whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Hon'ble the Attorney General assisted this Court at the hearing of this matter.

Clause 4 and the succeeding clauses in part 1 of the principal enactment deal mainly with the establishment and constitution of the Telecommunications Regulatory Commission of Sri Lanka and matters connected with and incidental thereto. Part II A deals with the staff of the Commission. Part II B estatblishes the fund of the Commission, and Part VI.A provides for the Commission to exercise and perform powers and duties of the authority formerly exercised and performed by the Director of Telecommunication.

We have examined the provisions of the Bill and we are of the opinion that neither the Bill nor any provision thereof is inconsistent with the Constitution.

G. P. S. de Silva,
Chief Justice.

Dr. A. R. B. Amerasinghe,
Judge of the Supreme Court.

P. Ramanathan,
Judge of the Supreme Court.

Presented to Parliament on: 08.08.1996
Bill No: 150
Decision of the Supreme Court Conveyed to Parliament on: 07.08.1996
Passed on: 04.09.1996
Speaker's Certificate Endorsed on: 23.10.1996
Title: **Sri Lanka Telecommunications (Amendment) Act No. 27 of 1996**

1997

1. SRI LANKA BROADCASTING AUTHORITY BILL

A

BILL

to provide for the establishment of an Authority to be called and known as the Sri Lanka Broadcasting Authority to regulate the establishment and maintenance of Broadcasting stations; to provide for the issue of licences for the purposes; and to provide for matters connected therewith or incidental therto.

IN THE SUPREME COURT OF THE SOCIALIST REPUBLIC OF SRI LANKA

SRI LANKA BROADCASTING AUTHORITY

In the matter of an application under Article 12 (1) of the Constitution.

Supreme Court
S.D. No.1/97-15/97 Gamini Athukorale,
"Srikotha"
400, Kotte Road,
Pitakotte.

Petitioner

Mihikatha Institute,
11, Sri Saranankara Road,
Dehiwela.

Petitioner

1. Free Media Movement,
   No. 73/28, Sri Saranankara Place,
   Dehiwela.

2. W. M. Lucien G. F. Rajakarunanayake,
   No. 73/28, Sri Saranankara Place,
   Dehiwela.

Petitioners

The Maharaja Organisation Limited,
146, Dawson Street,
Colombo 2.

Petitioner

S. N. Wickremasinhe,
No. 9D, Tower Building,
25, Station Road,
Colombo 04.

Petitioner

E. A. P. Network (Pvt.) Ltd.,
No. 676, Galle Road,
Colombo 3.

Petitioner

Jeewaka Hemal Edrisinghe,
No. 676, Galle Road,
Colombo 3.

Petitioner

Telshan Network (Pvt.) Ltd.,
No. 9D, Tower Building,
25, Station Road,
Colombo 04.

Petitioner

Dynavision Broadcasting Company,
(Pvt.) Ltd.,
No. 451A, Kandy Road,
Kelaniya.

Petitioner

I. W. Senanayake,
No. 1, 23rd Lane,
Bagatelle Road,
Colombo 03.

Petitioner

Dinesh Gunawardene,
31/27, Narahenpita Road,
Nawala,
Rajagiriya.

Petitioner

Upali Tennekoon,
No. 223, Bloemendhal Road,
Colombo 13.

Petitioner

Senarath Lamkasha Brahmadatta,
Kapukotuwa,
4/4, Welikadawatte,
Rajagiriya.

Petitioner

Bede Dayananda Augustine Fernando,
89/1, Galle Road,
Mt. Lavinia.

Petitioner

Rishanthi Niroshani Rathnayake,
No. 2, Pubudu Pura,
Anuradhapura.

Petitioner

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

Respondent

G. P. S. de Silva, Chief Justice
Amerasinghe, J,
Ramanahan, J.
Present:
Councel:

K. N. Choksy, P. C. with Daya Pelpola,
D. H. N. Jayamaha and Methsiri Cooray for
Petitioner in S. D. 1/92.

Dulinda Weerasuriya with
N. Ladduwahetty, Jayantha Fernando,
S. Kularatne and D. Jayanetti for Petitioner
in S. D. 2/97

R. K. W. Goonasekera, Suriya,
Wickremasinghe, J. C. Weliamuna and Lilanthi
de Silva for Petitioners in S. D. 3/97

Ben Eliathamby, P. C., Ronald Perera,
and Miss R. Balasubramaniam
for Petitioner in S. D. 4/97.

L. C. Seneviratne, P. C., with K. K. Wickremasinghe,
and Lakshman Perera for Petitioner in S. D. 5/97;
S. D. 6/97; S. D. 7/97 and S. D. 8/97.

D. S. Wijesinghe, P. C. with Ronald,
Perera for Petitioners in S. D.
9/97 and S. D. 10/97.

W. P. Gunatillaka with M/S. Nihal Senaratne,
Kanishka Vitharana and
Tissa Yapa, P. J. Senaratne,
Piyasena Dissanayaka for Petitioner
in S. D. 11/97.

Shibly Aziz P. C. with Nigel Hatch,
S. Srikantha and Lasantha,
Hettiarachchi for Petitioner in S. D. 12/97

Ben Elithamby, P. C. Ronald Perera and
Miss R. Subramaniam
for Petitioner in
S. D. 13/97

Manohara R. de Silva with
Miss Balasubramaniam for Petitioners
in S. D. 14/97 and S. D. 15/97.

K. C. Kamalasabayson, P. C., Addl. S-G.,
with Janak de Silva, S. C., and
C. H. U. Fernando for the Attorney-General.

Petitions Filed: 15 and
16, April 1997.

Hearing: 28 and 29 April.

Determination: 5 May 1997.

A Bill entitled "Sri Lanka Broadcasting Authority" was published in the Government Gazette of 21 March 1997 and was placed on the Order Paper of Parliament on 10 April 1997.

Fifteen "citizens", including incorporated bodies, by their petitions dated the 15th and 16th of April invoked the jurisdiction of the Supreme Court to determine whether the Bill or any of its provisions are inconsistent with the Constitution. They attacked the constitutional validity of the Bill along many frontiers.

The Ceylon Broadcasting Corporation Act No. 37 of 1966 established the Ceylon Broadcasting Corporation, hereinafter referred to as the Sri Lanka Broadcasting Corporation (SLBC) for the purpose of radio broadcasting. Section 3 (1) (b) of the Ceylon Broadcasting Act states it to be a function of the Corporation "to exercise, supervision and control over programmes broadcast by the Corporation". Section 3 (2) of the Act states that "For the exercise of its functions under paragraph (*b*) of sub-section (1), it shall be the duty of the Corporation to satisfy itself that, as far as practicable, the programmes by the Corporation comply with the following requirements:

(*a*) that nothing is included in any such programme which offends against good taste or decency or is likely to incite to crime or to lead to disorder or to offend any racial or religious susceptibilities or to be offensive to public feelings;

(*b*) that the programmes maintain a proper balance in their subject-matter and a high general standard of quality; and

(*c*) that any news given in the programmes (in whatever form) is presented with due accuracy and impartiality and with due regard to the public interest."

The Sri Lanka Rupavahini Corporation Act No. 6 of 1982 established the Sri Lanka Rupavahini Corporation (SLRC) for the purpose of carrying on the service of television broadcasting. Section 7 (1) (c) of the SLRC Act states it to be a function of the corporation "to exercise, supervision and control over television programmes broadcast by the Corporation." Section 7 (2) states that "For the exercise of its functions under paragraph (c) of sub-section (1), it shall be the duty of the Corporation to satisfy itself that as far as practicable, the programmes broadcast by the Corporation comply with the following requirements:

(*a*) that nothing is included in any such programme which offends against good taste or decency or is likely to incite to crime or to lead to disorder or to offend any recial or religious susceptibilities or to be offensive to public feelings;

(*b*) that the programmes maintain a proper local, regional and international balance and a balance in their subject-matter and high general standard of quality;

(*c*) that any news given in the programme (in whatever form) is presented with due accuracy and impartiality and with due regard to the public interest.

It is stated in the long title of the Sri Lanka Broadcasting Authority Bill that the proposed legislation is "for the establishment of an Authority to be called and known as the Sri Lanka Broadcasting Authority to regulate the establishment and maintenance of broadcasting stations; to provide for the issue of licenses for the purpose; and to provide for matters connected therewith or incidental thereto".

Clause 7 (1) of the Sri Lanka Broadcasting Authority Bill states that from and after the appointed date no person shall establish or maintain (*a*) a broadcasting station for the provision of radio broadcasting services; or (*b*) a television broadcasting station for the provision of television broadcasting services, except under the authority of a licence issued in that behalf by the Authority. Clause 7 (5) of the Bill states that every licence issued under sub-section (1) shall be subject to the conditions set out in the First Schedule. The First Schedule states as follows:

Terms and Conditions of Licence

(1) The licensee to refrain from including in programmes produced by him–

(a) matters which offerred against public morality or is likely to incite crime or to lead to public disorder or to lead to racial or religious disharmony; or

(b) matters tending to jeopardize the sovereignty or national Security of Sri Lanka.

(2) The licensee to maintain a proper balance in programm(e)s presented by him in relation to their subject matter and quality of production, with a view to meeting the just requirements of the general welfare of a democratic society.

(3) The licensee to ensure that news programmes produced by him are presented with impartiality and with due regard to accuracy and the public interest, with a view to securing due recognition and respect for the rights and freedom of all citizens.

The Second Schedule to the Sri Lanka Broadcasting Authority Bill sets out certain proposed amendments to the Sri Lanka Broadcasting Corporation Act No. 37 of 1966. However, there is no amendment proposed to section 3 (1) (b) or to section 3 (2) of the SLBC Act.

The Third Schedule to the Sri Lanka Broadcasting Authority Bill sets out certain proposed amendments to the Sri Lanka Rupavahini Corporation Act No. 6 of 1982. However, there is no amendment proposed to section 7 (1) (c) or to section 7 (2) of the SLRC Act.

Should it be assumed that the provisions of the proposed Sri Lanka Broadcasting Authority Bill, if enacted, should be taken to have been intended by Parliament to repeal by implication section 3 (1) (b) and section 3 (2) of the SLBC Act and section 7 (1) (c) and section 7 (2) of the SLRC Act on the basis that *leges posteriors priores contrarias abrogant* – later laws abrogate earlier contrary laws?. *Exfacie*, the provisions of clauses 5 (e) (f) (g) read with clause 7 (7) of the Sri Lanka Broadcasting Authority Bill are inconsistent with and repugnant to the provisions of section 3 (1) (b) and section 3 (2) of the Sri Lanka Broadcasting Corporation Act of 1966 and section 7 (1) (c) and section 7 (2) of the Sri Lanka Rupavahini Corporation Act of 1981. Since these provisions cannot stand together, it might be assumed that Parliament by implication repealed the earlier provisions. Cf. *West Ham Church wardens and Overseers V Fourth City Mutual Building Society* [1892] 1 QB 654 at p. 658. On the other hand, courts must presume that Parliament does not intend an implied repeal. *See the India* (1864) brown and Lush 221 at p. 224; *West Ham church wardens and Overseers v Fourth city Mutual Building Society* (Supra). In determining whether a repeal should be intended by implication, we must have regard to the fact that the Sri Lanka Broadcasing Authority Bill, in the Second and Third Schedules, specifically and precisely, indentifies the provisions of the Sri Lanka Broadcasting Corporation Act and the Sri Lanka Rupavahini Corporation Act that are intended to be repealed. In the circumstances, we should proceed on the basis that had it been intended that a repeal of section 3 (1) (b) and section 3 (2) of the SLBC Act and section 7 (1) (c) and section 7 (2) of the SLRC Act should take place, Parliament would make itself plain by express words. There are no such words in the Sri Lanka Broadcasting Authority Bill, and therefore there is still room for section 3 (1) (b) and section 3 (2) of the SLBC Act and section 7 (1) (c) and section 7 (2) of the SLRC Act.

Moreover, the Principle that later laws abrogate earlier contrary laws is subject to the countervailing maxim *general specialibus non deragant* – a general provision does not derogate from a special one. On the one hand, we have before us the Sri Lanka Broadcasting Authority Bill containing provisions of general applicability to all broadcasters. Clauses 4 (c), 4 (d), 4 (e), 4 (g), 5 (e), 5 (f), 5 (g), 7 (1), 7 (5), 7 (7), 10, 11, 17, 19 (1), 19 (2) (c) and The first Schedule of the Bill are of general applicability. Read together, those clauses have the effect, of enabling the proposed Sri Lanka Broadcasting Authority to supervise, direct and control the content of programmes to be broadcast. They are inconsistent with the provisions of the Ceylon Broadcasting Corporation Act and the Sri Lanka Rupavahini Corporation Act, particularly with regard to the powers of supervisions direction and control over programmes, which specifically deal with their situations on these matters. We cannot properly hold that the general provisions set out in the Bill alter or derogate from the Specific earlier Provisions enacted in sections 3 (1) (b) and section 3 (2) of the Ceylon

Broadcasting Act of 1966 and section 7 (1) (c) and section 7 (2) of the SLRC Act of 1982, since there is no indication of a particular intention to do so. In Seward v *The Vera Cruz* (1884) 10 App. Cas 59 at p. 68 the Lord Chancellor, the Earl of Selborne, said:

".....Where there are general words in a latter Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."

Since section 3 (1) (b) of the Ceylon Broadcasting Act and section 7 (1) (c) of the Sri Lanka Rupavahini Corporation Act remain in force, the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation continue to exercise supervision and control over the programmes broadcast by these Corporations, And since section 3 (2) of the Ceylon Broadcasting Act and section 7 (2) of the Sri Lanka Rupavahini Corporations act continue to be in force, there is, in the case of each of these Corporations, no duty for it to satisfy any person or body other than itself that the programmes broadcast by the Corporation meet the requirements specified, in the case of the Sri Lanka Broadcasting Corporation in section 3 (2) (a) - (b) of the SLBC Act, and in the case of the Sri Lanka Rupavahini Corporation in section 7 (2) of the SLRC Act.

On the other hand, if the proposed Bill is enacted, other radio or television broadcasters will not have the privilege of self-regulation enjoyed by the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation concerning the content of their programmers; for they are to be, in that respect, subject to the supervision, direction and control of the proposed Sri Lanka Broadcasting Authority. That is the cumulative effect of clauses 4 (c), 4 (d), 4 (e), 4 (g), 5 (e), 5 (f), 5 (g), 7 (1), 7 (5), 7 (7), 10, 11, 17, 19 (1), 19 (2) (c) and The First Schedule of the Sri Lanka Broadcasting Authority Bill.

The Sri Lanka Broadcasting Authority Bill establishes distinctions between the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation on the one hand other broadcasters both with regard to expected standards of performance, as well as accountability for the maintenance of those standards. The distinction drawn between the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation and other broadcasters is invidious and offensively discriminating; what is the basis for differentiating between the requirements prescribed for broadcasters generally in the Third Schedule of the Bill and the requirements of the SLBC in section 3 (2) of the Ceylon Broadcasting Corporation Act and for the SLRC in section 7 (2) of the SLRC Act? The Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation are at liberty to conforms to the prescribed norms "as far as practicable"; they are therefore required to do what is capable of being carried out in action in accordance with their obligations to the public in conformity with the principles applicable to responsible publication; other broadcasters, however, are treated grudgingly in the matter of conforming to standards; In terms of section 7 (7) of the proposed Act, the Authority may suspend or cancel a license issued to a broadcaster "if it is satisfied that the person to whom such license was issued has contravened or failed to comply with the conditions subject to which such licence was issued...." If directions issued by the Authority aimed at securing compliance with the

conditions of the licence are not complied with, the licensee is in addition, in terms of Clause 17 quility of an offence, The learned Additional Solicitor-General did say that Clause 17 should be deleted. However, as far as we are concerned it is a provision of the Bill before us. Even if Clause 17 were to be deleted, the differences in required standards and the question of accountability remain.

The learned Additional Solicitor-General submitted that the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation were different and were not similarly circumstanced with other broadcasters. There is nothing intrinsically wrong with distinguishing between one class of persons and others; indeed, justice sometimes requires that distinctions should be made.

However, there must be some rational basis for doing so. The learned Additional Solicitor-General did not suggest any reason why the Sri Lanka Broadcasting Corporation or the Sri Lanka Rupavahini Corporation should be treated differently with regard to the expected standards and accountability.

In the circumstances, we have formed the opinion that there is no rational basis for treating the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation with special favour on those matters. There is no rational explanation why the law should only be being in operation to those two broadcasters, why the Authority should act generously only in relation to those institutions, while looking upon others with "an evil eye" with regard to required standards governing the content of programmes, the manner of complying with those standards, and the consequences of failing to comply with those standards. The unjustified discrimination is manifest. There is a clear violation of the principles of equality. In the circumstances, we hold that clauses, 4 (c), 4 (d) 4 (e), 4 (g), 5 (g), 7 (1), 7 (5), 7 (7), 10, 11, 17, 19 (1), 19 (2) (c) and the First Schedule of the Sri Lanka Broadcasting Authority Bill read and construed together in their context, rather than as standing alone, which is the way an Act or other legislative instrument must be construed by a Court, are inconsistent with Article 12 (1) of the Contitution and cannot become a part of the Law of Sri Lanka unless they are passed by a special majority in terms of Article 84 of the Constitution.

The learned Additional Solicitor-General, responding to an inquiry by the Court, stated that the proposed legislation did not apply to the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation. Attention is drawn to the views of ARTICLE 19 – the International Centre Against Censorship – that took its name and purpose from Article 19 of the Universal Declaration of Human Rights which provides that "Everyone has the right to freedom of opinion and expression: this right includes the freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."

In its publication entitled "XIX" on the subject of "Broadcasting Freedom – International Standards and Guidelines", the importance of uniform standards for public and private broadcasting, administered by an independent, single authority, is underlined. It is stated at p. 13 as follows:

"The body that allocates licences must be independent of government. The body may be the one which manages public broadcasting or a separate authority. However, a single authority with jurisdiction over public and private broadcasting is recommended because if facilitates the development and implementation of broadcasting policy, including a coordinated strategy to ensure that pluralism is achieved in broadcasting as a whole.

The independent licensing body should also have responsibility for the allocation of frequencies and other technical aspects of broadcasting."

The emphasis by ARTICLE XIX on the need to achieve "pluralism" for the sake of promoting freedom of though, and the need for an independent authority to regulate broadcasting acquires special significance in the light of the following observations of the U. S. Supreme Court in *Grosjean v American Press* Co. 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660.

"Judge Cooley has laid down the test to be applied- 'The evils to be prevented were not the censorship of the press merely, but any action of government by means of which it *might* prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens' 2 Cooley's Constitutional Limitation, 8th ed., P. 886.

.....The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and *since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgements of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.*

The emphasis is ours.

The purpose or object of the Sri Lanka Broadcasting Authority Bill is something we might legitimately consider in construing the Bill, for it may enable us to understand the mischief to which the proposed enactment is directed and its remedy. In the end, it is the legal meaning of the Bill that matters to this Court. The petitioners allege that the Bill as a whole, and its clauses, duly interpreted, are inconsistent with Article 10, Article 12 and Article 14 (1) (a) of the Constitution which, respectively, guarantee the fundamental rights of freedom of thought, equality before the law, and freedom of speech and expression. In determining whether the Sri Lanka Broadcasting Authority Bill or its clauses under consideration, are inconsistent with articles 10, 12 and 14(1) (a) of the constitution, we must consider the effect of that legislative instrument and its clauses. "The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. If the effect of the impugned law is to abridge a fundamental freedom, its object or subject matter will be irrelevant. "Per Gubbay, CJ of Zimbabwe in Re Munhumeso and Others, [1994] 1 LRC 282 at p. 292.

As stated in the long title of the Bill, which we have morefully set out above, the object or purpose of the Bill is to provide for the establishement of a body to regulate the establishment and maintenance of broadcasting stations, and to provide for the issue of licences for the purpose.

Learned counsel for one of the petitioners advanced the view that any attempt to regulate broadcasting by a system of licensing would deprive broadcasters of their fundamental right of the freedom of speech and expression including publication guaranteed by Artilce 14 (1) of the Constitution and their freedom to engage in any lawful occupation, profession, trade, business or enterprise guaranteed by Article 14 (1) (g) of the Constitution and must be struck down as being unconsititutional.

We do not agree. Sharvananda, CJ in *Joseph Perera alias Bruten Perera v The Attonery-General and others* [1992] 1 SLR 199 at pp. 212-213 said :

> "Article 14 of the Constitution deals with those great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country. Freedom of speech ..... Goes to the heart of the natural right of an organized freedom-loving society to impart and acquire information ..... This freedom is not absolute. There is no such thing as absolute or unrestricted freedom of speech and expression, wholly free from restraint; for that would amount to uncontrolled licence which would tend to disorder and anarchy. Abosolute and unrestricted individual rights do not and cannot exist in a modern State. The welfare of the individual, as a member of collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs ..... Our Constitution has rightly struck a proper balance between the varying competing social interests, and has ..... set forth the restrictions to which the fundamental right of speech and expression may be subject to ....."

Private broadcasting is a relatively new phenomenon even in the most developed countries. State owned organizations had been the exclusive means of broadcasting because of several reasons, including (1) the major capital investment required in building transmitters : (2) the limited number of available frequencies and the national and international need to make a rational and orderly use of the spectrum; (3) political concerns that required broadcasting, on account of its great impact on public opinion, to be the preserve of the State. Technological progress, including microwave transmission and the appearance of cable transmissions, the willingness of private entrepreneurs to invest in the business of broadcasting, and more liberal attitudes on the part of States have resulted in an increase in the number of private broadcasters.

However, although advances in technology have led to more efficient utilization of the frequency spectrum, uses for that spectrum have also grown apace. As the U.S. Supreme Court observed in *Red Lion Broadcasting Co. V.F.C.C.* 395 U.S. 367, 89 S.C. 1794, 23 L. Ed. 371 (1969):

> "Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have emerged between such vital functions as defence preparedness and experimentation in methods of averting midair collisions through radio warning divices. "Land mobile services' such as police, ambulance, fire department, public utility and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum ..."

Scarcity is not entirely a thing of the past, and therefore States have a continuing and compelling need to regulate the use the frequency spectrum. The U.S. Senate (S.Rep. No. 562, 86th Cong. 1st Sess. 8-9 (1959) U.S. Code Cong. & Adm News P.2571) said that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." That observation was cited with approval by the U.S. Supreme Court in *Red Lion Broadcasting Co.* (supra). The Supreme Court of India too has endorsed the view that airwaves/frequencies are limited and must be regarded as "a public property" with regard to which the State must exercise control so that they will be used for the public good; See *Secretary Ministry of Information and Broadcasting v Cricket Association of Bengal* (1995) 2 SCC 161 spe. paras. 78, 185, 192, 193, 194,. It is recognized that States "have a right and a duty to ensure the orderly regulation of communications, and this can only be achieved by a licensing system": Per Judge Bernhardt in *Groppere Radio AG and others v Switzerland,* (1990) 12 E.H.R.R. 321 at 350. Because of the public property nature of frequencies, licences to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them during a specified time : See *Red Lion Broadcasting* Co. (supra).

Radio and television because of their pervasive and wide reach and influence on members of the public, constitute a most important means of mass communication. In order to play its role in advancing freedom of speech, the State, because of the limited availability of frequencies, must endeavour to ensure that the medium continues to be effective. Because of the limited availability of frequencies, chaos would ensus if the spectrum is uncontrolled and the usefulness of radio and television as a meane of communication would soon come to an end, with unfortunate consequences for the right of free speech and independent thought. If there is to be effective communication, only a few can be licensed and the rest must be barred from the airwaves. The matter was explained in *Red Lion Broadcasting* Co. (supra) in the following words :

> "Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized public speech, so may the Government limit the use of Broadcasting equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace the right to snuff out the free speech of others ..... when two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is probably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of these resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is *utilized* in the present state of commercially accepatable technology. It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made the enactment of the Radio Act of 1927 necessary ....."

The Court had earlier explained the need for a regulatory authority :

"Before 1927 the allocation of frequencies was left entirely to the private sector and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without Government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently the federal Radio Commission was established .....

Learned counsel for a petitioner submitted that, while the regulation of "airwaves" may, for technical reasons, be regulated, no other restrictions could legitimately be placed on broadcasting, except those that are a part of the general law of the land, such as those relating to defamation. Our attention was drawn to the fact that, although the third sentence of Article 10 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 stated that the right to freedom of expression was subject to the qualification that States were not prevented "from requiring the licensing of broadcasting, television or cinema enterprises", that qualification was omitted from article 19 of the International Covenant on Civil and Political Rights of 1966 which entered into force in 1976. It was argued that, since Sri Lanka had aceeded to the Covenant, recognition should be given to the fact that the qualification had been omitted in the Covenant and no restrictions should be imposed on licenses.

In *Groppera Radio AG v Switzerland,* (1990) 12 E.H.R.R. 321, the European Court of Human Rights stated at p. 339 paragraph 61 as follows :

"The Court observes that Article 19 of the 1966 International Covenant on Civil and Political Rights does not include a provision corresponding to the third sentence of Artilce 10(1). The negotiating history of Article 19 shows that the inclusion of such a provision in that Article had been proposed with a view to the licensing not of the information imparted but rather of the technical means of broadcasting in order to prevent chaos in the use of frequencies. However, its inclusion was opposed on the ground that it might be *utilized* to hamper free expression, and it was decided that such a provision was not necessary because licensing in the sense intended was deemed to be coverd by the reference to "public order" in paragraph 3 of the Article.

This supports the conclusion that the purpose of the third sentence of Article 10 (1) of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole."

Judge Matsche (approved by Judge Bindschdler – Robert) at p. 345 however said:

"to my profound regret, I cannot accept paragraph 61 of the judgment. In my opinion, it is unacceptable to reason on the basis of drafting history of a later instrument drawn up within a different community (the United Nations), not within the Council of Europe. The third sentence is there ; it has a meaning and authorizes the methodical regulation of broadcasting in Switzerland. To make licensing measures subject to the

requirements of paragraph (2) would render the content of the third sentence nugatory. The fact that the sentence was not included in the International Covenant is of no importance when interpreting paragraph (1) of Article 10 of the European convention on Human Rights in which it does occur."

In *Informationsverein Lentia v Austria,* (1993) 17 E.H.R. R. 93, referring to the Clause of Article 10(1) permitting licensing, the European Court of Human rights stated as follows at p. 112 paragraph 32:

> "As the Court has already held, the purpose of that provision is to make it clear that States are permitted to regulate by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects. Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments."

The European Commission on Human rights in *Lential* (supra) at p. 105 had referred to the fact that in the matter of licensing there was "a margin of appreciation" left to each State. It stated :

> "In the Commission's opinion, this margin of appreciation is of particular relevance in the area as complex and fluctuating as that of radio and television broadcasting. Article 10 of the convention itself confirms the need for a broad margin of appreciation in that it envisages in the third sentence of paragraph 1 a licensing system for broadcasting enterprises."

In secretary Ministry of Information & Broadcasting v Cricket Association of Bengal. (1995) 2 SCC161 at 226. Sawant, J said that "The right to use the airways and the content of the programmes, therefore needs regulations . . ."

In *Groppera* (supra) Judge de Meyer at pp. 351 -352) said that the licensing power of States "can only be justified in as much as the exercise of it is necessary in order that the over-the-air communications may function in as efficient and orderly manner *and above all, in order that freedom of expression should be secured as fully as possible.*" (The emphasis is ours.)

Having regard to the limited availabitity of frequencies, and taking account of the fact that only a limited number of persons can be permitted to use the frequencies, it is essential that there should be a grip on the dynamic aspects of broadcasting to prevent monopolistic domination of the field either by the government of by a few, if the competing interests of the various sections of the public are to be adequately served. If the fundamental rights of freedom of thought and expression are to be fostered, there must be an adequate coverage of public issues and an ample play for the free and fair competition of opposing views. The imposition of conditions on licences to ensure that these criteria should be observed do not transgress the right of freedom of speech, but they rather *advance* it by giving listeners and viewers the opportunity of considering different points of view, of thinking for themselves and making personal choices. It was stated as follows in *Red Lion Broadcasting Co.* (supra) :

> "It does not violate the First Amendment to treat licensees give the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licences on a willingness to present community views on controversial issues is consistent with the ends and purposes of those consitutional provisions forbidding the abridgement of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licences to ignore the problems which beset the people or to exclude form the airways anything but their own views of fundamental questions.."

In *Secretary Ministry of Information and Broadcasting v. Cricket Association of Bengal,* (ibid), Sawant, J said :

> "There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of society and this can be done either by a central authority by establishing its own broadcasting network of regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audiovisual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the progrmmes, therefore, needs regulaion for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/ telecast in the hands either of a central agency or a few private affluent broadcasters. That is why the need to have *a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society."*

The Emphasis is ours.

While a regulatory authority is, for the reasons explained, necessary, it is imperative that such an authority should be independent : See per Sawant, J in *Secretary of Ministery of Information and Broadcasting* supra),. As we have seen, the body known as ARTICLE XIX stated that "The body that allocates licences must be independent of government." The ultimate guaranter that the limited airwaves/ferquencies shall be utilized for the benefit of the public is the State. This does not mean that the regulation and control of airwaves/ frequencies should be placed in the hands of a government in office for the time being. The airways/frequencies, as we have seen, are universally regarded as public property. In this area, a government is a trustee for the public : its right and duty is to provide an independent statutory authority to safeguard the interests of the people in the exercise of their fundamental rights : No more and no less. Otherwise the freedoms of thought and speech, including the right to information will be placed in jeopardy.

Clause 3 of the Sri Lanka Broadcasting Authority Bill states that the administration, management and control of the Authority shall be vested in a Board of Directors consisting of six *ex officio* and five other members appointed by the Minister. Five of the *ex officio* members are Secretaries to Ministries or their representatives; (A Secretary to a Ministry is appointed by the President and is subject to the direction and control of his Minister : Article 52 (1) and (2) of the Constitution); The sixth *ex officio* member is the Chairman of the National Film Corporation of Sri Lanka. (He is appointed by the Minister; See section 19 of the National Film Corporation of Sri Lanka Act No. 47 of 1971. Of the five members

appointed by the Minister, " at least two" "shall be persons who have had experience in the field of broadcasting". No other criterion for selecting the appointed members is laid down. Clause 3 (4) states that "An appointed member of the Board may be removed from office by the Minister, by Order published in the Gazette...." Clause 3(11) states that "The Minister may remove the Chairman by Order published in the Gazette". Clause 11 states : (1) The Minister may from time to time issue to the Authority such general or special directions in writing as to the exercise, discharge and performance of the Authority of its powers, functions and duties under this Act;(2) It shall be the duty of the Authority [to] give effect to any direction issued to it under subsection (1)".

The Minister is empowered by clause 19 to make regulations, *inter alia*, prescribing "the guidelines to be followed by persons licensed under this Act in the presentation of programmes including commercial advertisements". Contrary to the usual practice- e.g. see section 46 of the Ceylon Broadcasting Corporation Act and section 31 of the Sri Lanka Rupavahini Corporation Act the Minister is neither required to publish the regulations in the *Gazette* nor is he required to bring the regulations to Parliament for approval.

The Authority is empowered by clause 5 (g) to issue directions to licence holders. Clause 7(7) empowers the Authority to suspend or cancel any licence issued to a licence holder who fails to comply with directions issued by it. Clause 17 makes it an offence for a person to fail to comply with the directions given by the Authority.

Having ragard to the composition of the Board of Directors of the Authority, the lack of security of tenure in office either of the Chairman or of the appointed members, and having regard to the power of the Minister to give directions which the Authority is obliged to follow, the Authority, it was said by learned counsel for one of the petitioners is "no more than an arm of the Government". We agree that the Authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.

Since, in terms of clause 5 (e), it is a power of the Authority "to determine as to whether the programmes and activities of the licence holders for television and radio broadcasts are detrimental to the development of the local film industry and take appropriate corrective measures", the participation of the Chairman of the National Film Corporation of Sri Lanka as an *ex officio* member of the Board of the Authority might – a petitioner who is a viewer of television, complained – give raise to a conflict of interests that was likely to adversely affect the rights of viewers. Learned counsel for that petitioner emphasized the fact that the Authority had the power not only to determine whether programmes were detrimental to the local film industry but also to determine whether the activities of the licence holders were detrimental. Therefore, even the acquisition of suitable materials for broadcasting by a licence holder could be prevented: It opened the door to interference that would be incompatible with the effective and efficient exercise of a licensee's right of publication in the public interest and would jeopardize the right of the public to balanced programmes taking account of the diverse nature and interests of our population. The learned Additional Solicitor -General was in agreement with the view that the word "activities" does have that effect.

The Minister, with his unbridled power to make regulations, is placed in a position where he might, through "guidelines", interfere with the presentation of programmes and thereby undermine the principle of fairness, which is at the heart of the responsible broadcasting. Similarly, the Minister may interfere with commercial advertisements and thereby infringe the right of the public to have information to enable them to make independent judgements on what they may choose, and also on a legally unaccepatable discriminatory basis deprive certain broadcasters of income from sponsorship that might adversely affect the viability or economic feasibility of their enterprises. Having regard to the fact interference with broadcasters by the Minister through the Authority is a real, and not a merely speculative possibility or likelihood, the submission of several learned counsel that the proposed Sri Lanka Broadcasting Authority is not an independent body, is not without merit. In the circumstances, a licensee may be unable to discharge the duty of impartiality referred to in paragraph 3 of the First Schedule of the Bill.

Licences may be suspended or cancelled for failure to comply with the terms of the licence or for failure to comply with the directions of the Authority. Attention should also be drawn to the fact that clause 7 (5) makes a licence renewable on an annual basis, the chilling effect of provisions of that kinds is obvious. On the other hands, for the reasons explained, license holders have the responsibility of meeting the requirments imposed on them to ensure that the interest of the public at large may be safeguarded. Perhaps the period of one year may inhibit the investment of large amounts of money in establishing stations. Yet, as we have seen, a licence to broadcast is a temporary privilege and while in issuing a licence the authority must, among other things, consider the needs of competing communities and the programmes offered by competing stations to meet those needs, the authority must have the right, where the public interest requires it, to alter its allocations of frequencies, to reflect changing needs and circumstances. However, decisions of that kind ought, for the reasons explained, be made by an Idependent Authority. Our attention was drawn to the Prasar Bharati (Broadcasting Corporation of India) Act 1990 and the Public Broadcasting Services Bills 1995, of the Republic of South Africa and to the Composition and manner of operation of the Federal Communications commission in the United States to illustrate what might be regarded as an "independent" regulatory body and how it should operate. The differences between the Sri Lanka Broadcasting Authority and those bodies are substantial and significant.

Admittedly, an aggrieved licence or potential licence may have recouse to the Appeals Tribunal proposed in clause 10 of the Bill. However, that is a Tribunal appointed by the Minister. There are no criteria laid down for the choice of the members of the Tribunal. Moreover that clause provides that the powers and functions of the Tribunal "shall be as prescribed". "Prescribed" is not defined, but if the usual practice is followed, the prescribing authority will be the Minister. A right of appeal to the court of Appeal is given by clause 7(1) of the Bill, but in the absence of legal provisions settings out the standards with regard to certain matters, and with regard to those that have been set out, for instance in clause 4(d), clause 4(e), clause (4) (g) the word "activities" in clause 5(e), and paragraphs 2 and 3 of the First Schedule, on account of their vagueness, such a right is, in our opinion, of limited value. In Osborne v Canada (Treasury Board) [1993] 2 L.R.C. 1 at 17, Sopinka, J said:

"Vagueness can have constitutional significance in at least two ways..... A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.... A Law.... may.... by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine that invasion of a [fundamental] right within reasonable limits. In this sense vagueness is an aspect of over-breadth".

Since the proposed Authority, for the reasons explained, lacks independence and is susceptible to interference by the Minister, both the right of freedom of speech and freedom of thought are placed in jeopardy by clause 3(1) read as it must be, with clause 3(4), clause 5 (g), clause 7(7) clause 10, clause 11, clause 17 and clause 19. We are therefore of the opinion that clause 3 (1) read with clause 3 (4), clause 5 (g), clause 7 (7), clause 10, clause 11, clause 17 and clause 19 are inconsistent with Article 10 and Article 14 (1) (a) of the Constitution and in terms of Article 83 of the Constitution requires to be passed by a special majority of Parliament and approved by the People at a Referendum.

While we do not accept the view that licensing must be confined to regulating the technical aspects of broadcasting, and do concede that, in the matter of licensing the State is permitted a margin of appreciation, we are of the view that "the principle of pluralism, of which the State is the ultimate guarantor. "as the European Court of Human Rights said in Lentia (Supra), must be safeguarded in order to ensure that freedom of thought and expression may not only survive but thrive and flourish vigorously. Article 4 (d) of the Constitution states that "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of government, and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided. "We have explained why the regulation of Broadcasting is not inconsistent with the freedom of thought and speech; and why such regulation secures, promotes, and advances these rights.

On the other hand, due to the lack of independence and the power to retract what may be broadcast in ways, and for purposes, that the Constitution does not permit, the right to information, which was described by Fernendo, J in *Wimal Fernando v. the Sri Lanka Broadcasting Corporation and Others* S. C. Application No. 81/95 as "the staple food of thought", could be seriously jeopardized unjustifiably. In *Joseph Perera (Supra),* Sharvananda, C. J. said at pp. 221-224:

"Freedom of speech and expression consists primarily not in the liberty of the citizen to speak and write what he chooses, but in the liberty to hear and read what it needs. No one can doubt if a democracy is to work satisfactorily that the ordinary man and woman should feel that they have some share in Government. The basic assumption in a democratic polity is that Government shall be based on the consent of the governed. The consent of the governed implies not only that the consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources. The crucial point to note is that freedom of expression not only politically useful but that it is indispensable to the operation of a democratic system.

"Public opinion plays a crucial role in modern democracy. Freedom to form public opinions of great importance. Public opinion, in order to meet such responsibilities, demands the condition of virtually unobstructed access to and diffusion of ideas. The fundamental principle involved here is the people's right to know. The freedom of speech guarateed by the Constitution embraces at the least the liberty to dicuss publicly all matters of public concern without restraint or fear of subsequent punishments." *Thornhill v. State of Alabama* 310 U. S. 88.

Without free political discussion, no public education, so essential for the proper functioning, of the process of popular government is possible. The welfare of the community requires that those who decide shall understand them. The right to hear is within the concept of freedom of speech..."

It is of paramount importance that programmes should be balanced so that viewers may freely form their own opinions. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marked place of ideas that had only sellers and no buyers", *Lamont v. Postmaster General of the United States* 381 U. S. 301. 85 S. Ct. 1493, 14 L Ed. 2d 398, (1965).

Two things need to be mentioned: the right to infomation is not a recent invention. In our part of the world, it has been a basic right for quite some time: The *Rigveda*, 1–89–1, said: "Let noble thoughts come to us from every side."

The other point to be made is that man does not live by bread alone: Although the electronic media formation of political opinion, its role in satisfying other public needs, including intellectual, spiritual and emotional needs, ought not to be ignored or underrated. In *Stanley v. Georgia*, 394 U. S. 557, 89 S. Ct. 1243, 22L., Ed. 542, (1969), the Supreme Court of the United States said that it was "now well established that the Constitution protects the right the receive information and ideas.... Regardless of their social worth. "The fact that a film was devoid of ideological content was regarded by the Court as irrelevant. It said that "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.... whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. "The court had earlier stated as follows: "If the First Amendment means anything it means that a State has no business telling a man, sitting alone in this house what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.... " In *Red Lion Brodcasting Cov. F.C.C.* (supra), the U.S. Supreme Court said that "It is the right of the public to receive suitable access to social, political, aesthetic moral and other ideas and experiences."

Any abridgement, restriction or denial of a fundamental right can be legally made only (1) in the manner and (2) to the extent provided by the Constitution: See Article 4 (d) of the Constitution. As far as the fundamental right of freedom of thought is concerned, no abridgement, restriction or denial is possible except by an Act of Parliament passed by not less than two-thirds of the whole number of Members (including those not present) and approved by the People at a referendum: See Articles 10, 3 and 83 of the Constitution. However, the right of freedom of speech and expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by

public authority, guaranteed by Article 14 (1) (a), since it carries with it duties and responsibilities, may be subject in its exercise to some restrictions. We do not share the view of Helveticus that "It is necessary to think and to be able to say everything." Nevertheless, in our view, a licensing system cannot be used for imposing censorship and cannot justify the suppression of otherwise legally permitted information and ideas, except in the manner and to the extent provided by the Constitution.

The only restrictions on the freedom of speech that are permitted by the Constitution are those referred to in Article 15 (2), Article 15 (7) and Article 15 (8) of the Constitution.

Article 15 (2) states as follows: "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 in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court or incitement to an offence."

Article 15 (7) provides that the excercise and operation of certain fundamental rights, including those declared and recognized by Article 14, to be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purpose of this paragraph 'law' includes regulations made under the law for the time being relating to public security."

Article 15 (8) provides that the exercise and operation of certain fundamental rights, including those declared and recognized by Article 14, "shall in their application to members of the Armed Forces, Police Force and other Forces charged with the maintenence of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and discipline among them."

Clause 19 of the Sri Lanka Broadcasting Authority Bill empowers the Minister by regulations to provide guidelines to be followed by persons "licensed under this Act in the presentation of programmes including commercial advertisements." Restrictions, even if they are permitted by Article 15 (2) and Article 15 (7) cannot be imposed *in that manner*; Restrictions can only be imposed by law. "Law" does not include regulations. For the purpose of Article 15 (7) regulations made under the law for the time being relating to public security do come within the meaning of the word "Law", but that is a different matter.

Clauses 5 (g) and 11 enable the Minister and the Authority to impose restrictions by executive fiat. Restrictions can in terms of Article 4 (d) and Article 15 (2) and 15 (7) only be imposed by law; *See Indira Jaising v Union of India.* AIR 1989 Bombay, 25 1987 at para 15. A failure to comply with the directions of the Authority, which is subject to the directions of the Minister, makes the licensee an offender who is liable to penal consequences, including imprisonment. See Clauses 17 and 18 of the Bill. To the extent that the provisions of the proposed law are vague and relate to fundamental constitutional rights, they might have an "in terrorem" effect and deter licencees from engaging in their constitutionally protected right of freedom of speech as potently as the application of sanctions. Consequently it might interfere with the exercise of the equally delicate and vulnerable but precious right of the freedom of thought of the members of the audience addressed by the licencee.

In the circumstances clause 19(1) read with clause 19 (2) (c) and clauses 5(g) and clause 11 of the Bill are inconsistent with the Constitution and cannot become law unless passed by a special majority and approved by a referendum in terms of Article 83 of the Constitution: Cf. *Licensing of Produce Brokers Bill S.C.* No. 3 of 1978. Decisions of the Supreme Court on Parliamentary Bills, 1978 – 1983 Vol. I, pp. 29 – 33 where Article it was not involved.

The provisions of Clause 4 (c), (d), and (e); clause 5 (e); clause 19 (2)(c); and paragraphs (2) and (3) of the First Schedule are too wide, general and imprecise; they are vague in character and confer unrestrained power. Article 14(1) (a) needs breathing space and governmental at regulation that may be accepted as tolerable must be drawn with narrow specificity: See *NAACP* v *Button.* 371 U.S. 415, 433, 83-S.C.t. 323, 337, 338, L. Ed. 2d. 405 (1963) .The grant of such wide powers are in excess of, and cannot be justified by, the power to make restrictions under Article 15 (2) and Article 15 (7) of the Constitution and are therefore inconsistent with Article 4 (d) of the Constitution. Cf, *Licensing of Produce Brokers Bill* (supra). See also the observations in *Osborne* (supra) quoted above. Vauge provisions cannot be permitted, for they undermine the basic, principles of fair notice and warning; people must be clearly and simply told what they are not supposed to do, so that they may so adjust their lives and work. Every sitaution cannot be anticipated and provided for; but the law must set reasonably clear general guidelines for Ministers officials, law enforcement officials and triers of fact,including judges, to prevent arbitrary action: Cf. *Smith* v *Goguen*. 415 U.S. 566. 94S. Ct.1242. 39L. Ed. 2d 605 (1974). Without clear guidelines prescribed by law, the Minister and/or the Authority have discretion to act on an irrational selective basis, including a selective basis referable to race, religion, language, caste, gender or political opinion, and therefore in violation of Articles 12(1p and/or 12(2) of the Constitution. Licencees are exposed to the risk of having their licences cancelled or suspended or even being prosecuted because they disagree with the Minister/and or Authority, albeit,for some constitutionally suspect reason. There is a very real protential for the arbitrary suppression of the freedoms of thought and free speech. In our view clause 4(c) (d) and (e); clause 5 (e); clause 19 (2) (c) and paragraphs (2) and (3) of the First Schedule read and construed together, as they must be are inconsistent with Article 12 of the Constitution and cannot become law unless passed by a special majority in terms of Article 84 of the Constitution.

It was urged by learned counsel for one of the petitioners that the fundamental right of freedom of thought enshrined in Article 10 of the Constitution was the "womb" in which some other fundamental rights, especially those protected by Article 14 of the Constitution developed. The matrix theory is not a new one: E.g. see *Joseph Perera* v A. - G. (supra) at 212, *Channa Pieris* and *others* v A - G (1994) 1 SLR 1 at 143-144. In those two cases reference was made in passing to a dictim of Justice Cardozu in *Palko Connecticut,* 302 U.S. 319, 58.S -Ct. 149,82L. Ed 288 (1937) in which he categorized the freedom of speech not the freedom of thought - as ".....the matrix, the indispensable condition of nearly every other form of freedom". Nothing turned in either *Joseph Perera* (supra) or *Channa Pieris* on the dictum; It merely served, harmlessly in those cases, to underescore the importance of the relationship between the freedom of speech and certain other freedom. On the other hand, the theory has sometimes provoked bitter public controversy. As Justice Holems observed in his dissenting opinion in *United States* v Schvimmer, 279 U.S. 644, 654-655, 49 S.Ct. 448,451, 73 L. Ed. 889 (1929) ".....it is.....not free thought for those who agree with us, but freedom for the thought that we hate which gives the theory its most enduring value."

Although the freedom of speech and the freedom of thought are related, cognate rights, they have their separate indentities. The freedom of speech and the freedom of thought are general, independent constitutional rights. The right of free speech is not merely one that is keyed to the freedom of thought. In the circumstances of a case there may be a violation of the right of free speech and a violation of the right of freedom of thought: in another that may not be so. The rights are district and violation must be independently established.

Coke (I Co. Inst. 381) observed that is the most natural and genuine exposition of a legislative instrument to construe one part by another, "for that best expresseth the meaning of the makers ..... and this expression is *ex. visceribus act*-from the guts of the Act. In our opinion, the course of meaning that holds through the basic clauses of the Sri Lanka Broadcasting Authority Bill, namely clauses 3 (1), 3(4), 4(c) 4 (d), 4 (f), 4(g), 5(e), 5(f), 5(g), 7(1), 7 (2), 7 (5), 7(7), 10, 11, 22 and the First, Second and Third Schedules, their drift and effect, is that they have a real, as distinguished from a fanciful, capacity to accommodate, a propensity or likelihood to encourage or permit, the violation of the fundamental right of freedom of thought protected by Article 10 of the Constitution; These things may not happen, but they *might* happen because they are permitted. The evils to be prevented are those that might happen: Cf. *Gros-jean (supra.)* In our view the Sri Lanka Broadcasting Authority Bill as a whole is inconsistent with Article 10 of the Constitution. We determine that the Sri Lanka Broadcasting Authority Bill requires to be passed by not less than two-thirds of the whole number of Members of Parliament (including those not present), and approved by the People at a Referendum in accordance with Article 83 of the Constitution.

G. P. S. de Silva,
Chief Justice.

A. R. B. Amarasinghe,
Judge of the Supreme Court.

P. Ramanathan,
Judge of the Supreme Court.

Bill was presented to Parliament on: 10.04.1997
Bill No.: 189
Decision of the Supreme Court Conveyed to Parliament on: 06.05.1997
Bill was not proceeded with.

1997

2. INLAND REVENUE (AMENDMENT) BILL

A

BILL

to Amend the Inland Revenue Act, No. 28 of 1979

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

INLAND REVENUE (AMENDMENT) – A BILL TO AMEND THE INLAND REVENUE ACT, No. 28 OF 1979

In the matter of a Reference under Article 121 of the Constitution.

S. C. Special Determination
No. 17/97.

Sri Lanka Dental Association
Professional Centre,
275/75, Bauddhaloka Mawatha,
Colombo 7.

Petitioner

vs

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

Respondent

Present: G. P. S. de Silva, C.J.,
Ramanathan, J., and
Wijetunga, J.,

F. N. Goonewardena with Upendra Gunasekera for the Petitioner.

K. Sripavan, D. S. G. for Attorney General

The Court assembled for the hearing: At 1.15 p.m. on 10th June, 97.

A Bill entitled "Inland Revenue (Amendment)" was published in the Government Gazette of 9th May, 1997 and was placed on the Order Paper of Parliament on 28th May, 1997. The petitioner, the Sri Lanka Dental Association, by its petition dated 3rd June, 1997 has invoked the jurisdiction of the Supreme Court in terms of Article 121 of the Constitution to determine whether clause 16 of the Bill is inconsistent with Article 12(1) of the Constitution.

The petitioner avers that clause 16 of the Bill which seeks to add section 31A to the principal enactment is inconsistent with the provisions of Article 12(1) of the Constitution, "in so far as the members of the petitioner have been denied investment allowances whilst persons engaged in the wholesale and retail trade and those mentioned in clause 16(8) (a), in particular hospital services, are being granted such allowances". This is the first ground upon which the petitioner seeks to challenge the Bill. The object of clause 16 is to grant "an Investment Tax Allowance" deductible from the assessable income of any person for

any year of assessment in respect of every "qualifying investment" referred to in sub-clause (2). Sub-clause 2(a) (ii) identifies the categories of undertakings to which "Investment Tax Allowances" is granted, provided certain other conditions are satisfied. The categories set out are, "any undertaking" (1) for the production or manufacture of any goods or commodities or (2) in any wholesale or retail trade or (3) for the "provision of any specified service." The expression "provision of any specified service" is defined in clause 16(8) and includes "hospital services." It was submitted by Mr. F. N. Goonawardena for the petitioner that the classification of the retail and wholesale trade together with the manufacturing sector and the services specified in clause 16(8) (a) is not founded upon any intelligible differentia; it has no nexus with the object sought to be achieved by the grant of the allowance; the retail and wholesale trade generates little employment opportunity and its classification with the manufacturing and service sector is discriminatory and arbitrary.

It is to be noted, however, dental surgeons do not claim to fall within any of the categories identified in clause 16(2) (ii). The classification is based on fiscal policy objectives including such matters as the generation of employment opportunities. The expression "hospital services" which occurs in the definition of "specified services" is not designed for the benefit of an individual dental surgeon. It clearly contemplates a range of services.

Mr. Sripavan, Deputy Solicitor General cited the decision of the Supreme Court of India in the case of S. K. Dutta, Income Tax Officer, Salary-Cum SIB Circle Assam and others vs Lawrence Singh Ingty, Treasury Officer, State of Nagaland, (Income Tax Reports Vol. 68, p.272). The principles that govern the approach of the court to a taxing statute, where the basis of classification is challenged, were lucidly set out by Hedge J. in the following terms:

> "It is not in dispute that taxation laws must also pass the test of article 14. That has been laid down by this court in Moopil Nair v State of Kerala (1961 3 SCR 77). But as observed by this court in East India Tobacco Co. vs State of Andhar Pradesh (1963 1 SCR 404, 409), in deciding whether the taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of article 14. It is well settled that a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably."

Mr. Goonewardena cited the decision of the Supreme Court of India. Kerala Hotel Restaurant Association vs State of Kerala and others, 1990 S.C. cases (Tax 309) where Verma J. stated "The extent to which the revenue is required from a particular source is a matter of fiscal policy and if the legislature chooses to be satisfied with the raising of that amount alone which can be recovered from the affluent, it cannot be faulted for not dragging the impecunious also in the tax net. *Even otherwise* the play in the joints permitted to the legislature for making classification in a taxing provision is greater.....". In the course of his judgment Verma J. cited the following passage from the judgment of Venkatachaliah J. in the case of P. M. Ashwathanarayana Setty vs. State of Karnataka (1989 Supp (1) SCC 696):– "Though other legislative measures dealing with economic regulations are not outside article 14, it is well recognised that the State enjoys the widest latitude where measures of economic regulations are concerned. These measures for fiscal and economic regulations involve an evaluation of diverse and quite often conflicting economic criteria

and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways."

On a consideration of the principles set out above we hold that the classification is neither arbitrary nor unreasonable.

The next ground of challenge set out in the petition is that the absence of guidelines in clause 16(8) (a) (ii) of the Bill which provides for the exercise by the Minister of his powers to specify "other services" renders the power inconsistent with Article 12(1) of the Constitution. We agree with this submission that the power conferred is unguided and unfettered and is therefore inconsistent with Article 12(1) of the Constitution. It is right to add that Mr. Sripavan submitted that the Attorney General had advised the relevant authorities to delete the words "or such other services as may be specified by the Minister" which appear in clause 16(8) (a) (ii).

Subject to the deletion of the words "or such other services as may be specified by the Minister" appearing in clause 16(8) (a) (ii) of the Bill, we determine that none of the other provisions of the Bill are inconsistent with the Constitution.

We wish to place on record our deep appreciation of the assistance given by Mr. Sripavan, Deputy Solicitor General and Mr. F. N. Goonewardene, Counsel for the petitioner

G. P. S. de Silva,
Chief Justice.

P. Ramanathan,
Judge of the Supreme Court.

A. S. Wijetunga,
Judge of the Supreme Court.

Bill was presented to Parliament on: 28.05.1997
Bill No: 197
Decision of the Supreme Court Conveyed to Parliament on: 17.06.1996
Passed on: 09.07.1997
Speaker's Certificate Endorsed on: 04.09.1997
Title: **Inland Revenue (Amendment) Act No. 24 of 1997**

1997

3. PARLIAMENT (POWERS AND PRIVILEGES) (AMENDMENT)

A

BILL

to amend the Parliament (Powers and Privileges) Act

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

PARLIAMENT (POWERS AND PRIVILEGES) AMENDMENT BILL

In the matter of a Reference under Article 122(1) (*b*) of the Constitution.

S. C. Special Determination
No. 18 of 1997.

Present :
G. P. S. de Silva, Chief Justice,
S. W. B. Wadugodapitiya, Judge of the Supreme Court, and
Shirani A. Bandaranayake, Judge of the Supreme Court.

Counsel :
Sarath N. Silva, P.C. Attorney General with
Janak Silva, State Counsel.

The Court assembled for the hearing at 1.20 p.m. on 19th August, 1997.

A Bill entitled "An Act to amend the Parliament (Powers and Privileges) Act" has been referred to the Chief Justice by Her Excellency the President in terms of Article 122 (1) (*b*) of the Constitution for the special determination of this court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view, the Bill is urgent in the national interest.

The learned Attorney-General appeared before us and assisted us in the consideration of the provisions of the Bill. The object of the Bill is to restore to the Supreme Court the jurisdiction it originally had in terms of the Parliament (Powers and Privileges) Act No. 21 of 1953 (Chapter 383 of the 1956 revised edition of the Legislative Enactments) in respect of the breach of the privileges of Parliament. This is clear from the proposed amendments to sections 22, 27 and Part A of the Schedule and the repeal of Sections 27A, 28 and 32 of the said Act. Clauses 6 and 7 of the Bill re-enact section 28 and Section 32 respectively of the Act as they originally stood.

The learned Attorney-General submitted that the provisions of the Bill are not inconsistent with any provision of the Constitution. With this submission, we agree.

Accordingly the determination of this court is that neither the bill nor any of the provisions thereof, is inconsistent with the Constitution.

(Sgd.) G. P. S. de Silva,
Chief Justice.

(Sgd.) S. W. B. Wadugodapitiya,
Judge of the Supreme Court.

(Sgd.) Shirani A. Bandaranayake,
Judge of the Supreme Court.

Presented to Parliament on : 09th September, 1997
Bill No.: 202
Decision of the Supreme Court Conveyed to Parliament on: 21st August, 1997
Passed on: 11th September, 1997
Speaker's Certificate Endorsed on: 21st October, 1997
Title: **Parliament (Powers and Privileges) (Amendment) Act No. 27 of 1997**

1998

1. PROHIBITION OF RAGGING AND OTHER FORMS OF VIOLENCE IN EDUCATIONAL INSTITUTIONS BILL

A

BILL

to Eliminate Ragging and other forms of Violence and Cruel, Inhuman and Degrading Treatment from Educational Institutions

PROHIBITION OF RAGGING AND OTHER FORMS OF VIOLENCE IN EDUCATIONAL INSTITUTIONS BILL

Supreme Court of the Democratic Socialist Republic of Sri Lanka, Colombo 12.

An Act to eliminate Ragging and Other Forms of Violence, and Cruel, Inhuman and Degrading Treatment, from Educational Institutions

SC Special Determination No 6/98 (SD)	In the matter of a petition under Article 121 of the Constitution by the Inter-University Students Federation of the University of Sri Jayawardenapura, Gangodawila, Nugegoda. *Petitioner*
SC Special Determination No 7/98 (SD)	In the matter of a petition under Article 121 of the Constitution by Adikari Mudiyanselage Priyantha Chandana Thilak Bandara, of No. 70, Jayawardenapura, Ampara. *Petitioner*
Before:	Fernando, J., Gunawardana, J., and Gunasekera, J.
Counsel:	Manohara de Silva for the Petitioners; Upawansa Yapa, P. C., SG, with A. Obeyesekere, S. C. for the Attorney-General.

DETERMINATION:

The two Petitioners filed these petitions alleging that sections 2, 3, 4, 5, 6, 7, 8, 9, 10 and 17 of the Bill entitled "Prohibition of Ragging and Other Forms of Violence in Educational Institutions" ["An Act to eliminate Ragging and Other Forms of Violence, and Cruel, Inhuman and Degrading Treatment, from Educational Institutions"] were inconsistent with Articles 12(1) and 14(1)(a) of the Constitution. Both petitions were taken up for consideration together on 30.3.98.

It is common ground that the Bill is a response to the increase in the ragging, and the brutality of the ragging, that takes place in many educational institutions.

Recently this Court, after considering an outbreak of ragging in a training College for teachers, observed (in *Navaratne v Chandrasena*, SC 172-179/97, SCM 16.12.97):

> "Ragging is sometimes sought to be justified as being a necessary part of orientation to life in Universities and other institutions of higher learning. Such ragging may be tolerated, if at all, if it is clean fun; but it is totally unacceptable if it causes pain or suffering, or physical, mental or emotional distress, to the victims. No normal person could possibly have considered what happened in this case to be fun: on the contrary, it was cruel, inhuman and degrading to ill - treat for torment Persons to the point of pain

and exhaustion requiring hospitalization, not to mention the possible long-term adverse mental effects, even on the victims who did not need hospitalization.....the ragging took place in the College premises openly, and for some time, and the fact that persons in authority did not intervene indicates that what took place was a form of terrorism .....ragging is easily done, but difficult to prove; victims are afraid to complain, because reprisals are likely; those in authority often fear to get involved, whether by intervening, reporting, or otherwise. The disciplinary authorities are sometimes intimidated into mitigating or even cancelling punishments. In these circumstances, the public interest demands deterrent, rather than lenient, punishment for admitted or proven misconduct....."

At the outest Mr. de Silva stated that the Petitioners do not in any way support, encourage or condone ragging in the ordinary sense of the term, or inflicting injury on any person.

Relevant provisions

Section 17 contains the following definitions:

"ragging" means any act which causes, or is likely to cause, physical or psychological injury or mental pain or fear or *embarrassment* to a student or a member of staff of an educational institution and includes verbal abuse;

"sexual harassment" means the use of criminal force, words or actions to cause sexual annoyance or harassment to a student or a member of the staff, of an educational institution;

"verbal abuse" means the use of words which are in *contempt* of the dignity and personality of a student or a member of the staff, of an educational institution. [emphasis added throughout.]

Section 2 creates the offence of "ragging";

2(1). Any student or a member of the staff of an educational institution who commits, or *participates* in, ragging, within or outside an educational institution, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable, to rigorous imprisonment for a term not exceeding two years and may also be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

2(2). A student or a member of the staff, of an educational institution who, whilst committing ragging causes sexual harassment or grievous hurt to any other student or a member of the staff, of an educational institution shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to imprisonment for a *term not less than five years* and not exceeding ten years *and shall also be ordered to pay compensation* of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

Sections 3, 5 and 6, create offences of "criminal intimidation", "wrongful restraint", and "unlawful confinement" - which broadly correspond to similar offences under the Penal

Code, though perhaps more serious. What is relevant to the matter now before us is the great disparity in punishments;

Section 486, PC, (criminal intimidation)	: imprisonment *upto* two years
Section 3, Bill.	: *minimum* term of two years
Section 332, PC, (wrongful restraint)	: simple imprisonment *upto* one month
Section 5, Bill.	: *minimum* term of three years
Section 333, PC, (unlawful confinement)	: imprisonment *upto* one year
Section 6, Bill.	: *minimum* term of three years
Section 345, PC, (sexual harassment)	: imprisonment *upto* five years
Section 2(2), Bill.	: *minimum* term of five years

Section 8 penalizes the failure of a member of the administrative staff to investigate and report complaints of ragging:

8. Any member of the administrative staff of an educational institution who fails or neglects, without reasonable cause, to investigate and report, a complaint made to him that an act constituting the offence of ragging has been committed by, or in respect of, a student or a member of the staff of such educational institution shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding ten thousand rupees.

Section 9 of the Bill prescribes further penalties and disabilities;

9. Where a person is convicted of an offence under this Act, *other than an offence referred to in section 8,* such person shall –

(a) if he is a student of -

(i) an educational institution, not being a Higher Educational Institution, be deemed to have been *expelled* from such institution, with effect from the date of such conviction:

(ii) a Higher Educational Institution be deemed to have been *expelled* from such institution with effect from the date of such conviction *and shall not be admitted to any other higher educational institution or other institution for tertiary education;*

(a) if he is *a member of the staff* of an educational institution be deemed to have been *dismissed* from such educational institution with effect from the date of such conviction, by the authority empowered by law to dismiss him.

Section 10 severely restricts the right to release on bail:

10 (1). Notwithstanding anything to the contrary in any other law, a person *suspected or accused* of committing an offence under subsection (2) of section 2 or section 4 of this Act *shall not be released on bail* except by the judge of a High Court established by Article 154P of the Constitution, as provided in subsection (2).

10 (2). A judge of the High Court established by Article 154P of the Constitution, may in exceptional circumstances, release on bail a person suspected or accused of committing an offence under subsection (2) of section 2 or section 4 of this Act, *who has been in remand for a continuous period of six months or over after his arrest.*

10 (3). Where a person is convicted of an offence under subsection (2) of section 2 or section 4 of this Act, and an appeal is preferred against such conviction, the Court convicting such person may, taking into consideration the gravity of the offence and the antecedents of the person convicted, either release or refuse to release, such person on bail.

Considerations

1. Section 17: The Petitioners contend that the definition of "ragging" in the Bill is much too wide, so that minor acts or omissions could result in enormous punishments. They argue that "personality" embraces a host of factors: everything which is involved in or contributes to the understanding of the individual, including his habits, character, temperament and personal opinions; and that "contempt" means disobedience or disrespect. So, they conclude, that acts or words critical of the conduct or opinions of a student or a member of the staff, would constitute "ragging"; and that is an infringement of Article 14(1) (a), and does not fall within the restrictions permitted by Article 15(2) or 15(7) of the Constitution. Mr de Silva submitted that Article 15(2) permitted restrictions in relation to "defamation" and said that the definition of "verbal abuse" would have been acceptable if it had read "and which are *defamatory* of a student or a member of the saff".

It appeared to us that not only is the impugned definition referable to the law of defamation, but it is in fact narrower than the formulation which Counsel finds acceptable. We drew Counsel's attention to the *actio injuriarum,* in relation to which Mckerron (Law of Delict, 6th ed, p.51) says:

"There are two essentials of liability in the *actio injuriarum:* first, an act constituting an impairment of the plaintiff's personality; and, secondly, *dolus* (wrongful intent), or as it is usually termed in this connection, *animus injuriandi.*

IMPAIRMENT OF PLAINTIFF'S PERSONALITY

The interests of personality protected by the *actio injuriarum* are those interests which every man has, as a matter of natural right, in the possession of an unimpaired *person, dignity* and reputation. The plaintiff must therefore show that the act complained of constituted an impairment of his person, his dignity, or his reputation."

Mr. Yapa agreed that the definition seeks only to prohibit words which violate rights in respect of dignity and personality (but not reputation), and do not restrict the legitimate exercise of the freedom of speech; and that those expressions must be construed in criminal proceedings for ragging in the same way in which the Courts will interpret them in a civil action for defamation. Students, especially newcomers, are entitled to have their personality respected by not being subjected even towords which affect their dignity and personality - whether those words are obscene, abusive, derogatory, humiliating, degrading or contemptuous. He submitted further that the word "contempt"also had the effect of making necessary a mental element - fo the same character as *animus injuriandi* but even

stronger; not just an intention to infringe another's rights of "person and dignity"but a contemptuous intention, such as and intention to humiliate or to degrade, or malice. We agree that this is what that definition means. If students use words which satisfy those requisites, punishment will be no violation of their freedom of speech.

We must observe also that one of the restrictions on Article 14(1) (a) which Article 15(7) permits is "for the purpose of securing due recognition and respect for the rights and freedom of others"; and if section 17 does place restrictions on speech and expression they are reasonably necessary to ensure the peace of mind which new students, in particular, need in order to benefit from their stay in educational institutions.

We drew Mr Yapa's attention to the inappropriateness of including the word "embarrassment" in the definition of "ragging". Embarrassment can result from acts and words which are hostile or malicious, as well as from those which are friendly and well-intentioned-such as a sincere compliment, or a genuine expression of admiration. It includes awkwardness and self-consciousness. The mischief which the Bill seeks to prevent is embarrassment which brings tears to the eye or distress to the mind, but not that which merely brings a blush to the cheek-for which any punishment would be too harsh. Mr Yapa agreed that a more appropriate word should be substituted. We suggest that "humiliation", "suffering" and/or "distress" be substituted.

Subject to the omission of the word "embarrassement" we hold that section 17 is not inconsistent with any provision of the Constitution.

We asked Mr Yapa whether the purpose of the Bill was to deal with the ragging of students, and if so whether the inclusion of "members of the staff" was appropriate. He replied that (in addition to hostage taking, which section 4 deal with) ragging of members of the staff may also be a real problem. The inclusion of that phrase is not inconsistent with the Constitution.

2. Section 2(1): Mr de Silva submitted that the word "participates" would make criminal even mere presence, while ragging was going on. Mr Yapa submitted that "commits, or participates in, ragging" requires proof of active, deliberate, participation, and that the section is intended to cover only "*participatory* presence". We agree.

Section 2(1) is not inconsistent with any provision of the Constitution.

3. Sections 2, 3, 4, 5, 6, 7 and 8: Equality before the law: The Petitioners also complained that the Bill exposes students to criminal liabilty for certain acts, which would not attract any liability if done by others who are not in educational institutions, thereby denying students the equal protection of the law guaranteed by Article 12(1).

Even assuming that there is some difference in treatment, the simple answer to that contention is that there is no comparable problem of ragging in such other institutions. Further, although the problem is more in higher educational institutions than in primary and secondary schools, the provisions of the Bill are applicable to the entire class of educational institutions.

These provisions are not inconsistant with Article 12(1) on that ground.

4. Sections 2(2), 3, 4, 5, 6, and 7(2): Mandatory minimum sentences; and Section 9: Automatic Expulsion and Disability: Several issues arise for consideration.

(*a*) Mr. De Silva submitted that mandatory minimum sentences were unconstitutional. A Mnadatory minimum sentence involves a legislative determination of punishment and a corresponding erosion of a judicial discretion; and what is more, it is a general determination, in advance, of the appropriate punishment, without a consideration of relevant factors which proper sentencing policy should not ignore: such as the offender, and his age and antecedents, the offence and its circumstances (extenuating or otherwise), the need for deterrence, and the likelihood of reform and rehabilitation.

Although the legislative prescription of a minimum sentence seems inconsistent with the entrustment - by Article 4(c) - of the judicial power (which includes the power to determine both guilt and punishment) to the Judiciary. Article 13(6) seems by implication to recognise a legislative power to prescribe a minimum penalty. However, Article 13(6) only provides that a minimum penalty does not contravene that Article: it certainly does not purport to provide that a minimum penalty will necessarily be constitutional even if it contravenes other Articles, such as Articles 4(c), 11 or 12(1). It is not necessary to determine in this case whether a mandatory minimum sentence is per se unconstitutional, for there are other reasons for holding that the mandatory minimum sentences which this bill imposes are inconsistent with the Constitution.

(*b*) Mr. de Silva urged that the Bill will necessarily result in a gross disparity in the punishments imposed for offences which are very similar in nature. Thus while sexual harassment (however serious) in an office, work place, bus or in a public place attracts a maximum punishment of five years under the recent amendment to section 345 of the Penal Code, he submitted that much less serious harassment ("sexual annoyance" as specified in section 17), where it also involves ragging of a student, would attract a mandatory minimum term of five years. Likewise the maximum punishment under section 332 of the Penal Code for wrongful restrain is simple imprisonment for one month, while section 5 of the Bill lays down a minimum of three years for similar conduct. He contended that this was unequal treatment infringing Article 12(1).

Section 2(2) operates to compel unequal treatment of offenders in another way as well. A person guilty of ragging is liable to a maximum sentence of two years under section 2(1). The circumstances of a particular case may be such that a Magistrate may consider six moths appropriate. However, another person guilty of identical conduct, but aggravated by words causing mild sexual annoyance - which amounts to sexual harassment for the purpose of section 2(2) _ will receive a grossly disproportionate mandatory sentence, as to which the Magistrate has no discretion. Even if he considers that an additional six or twelve months will be more than enough, he will be forced to impose a minimum sentence of five years.

Likewise, despite greatly differing circumstances of aggravation, a Magistrate will be obliged to impose identical sentences of five years both in cases where he thinks five years appropriate, as will as in others where he thinks it is most inappropriate. Section 2(2) thus compels a Magistrate to treat unequals as if they were equals, in violation of Article 12(1).

We note that these provisions apply not only to undergraduates in their twenties, but also to school-children not yet in their teens. Age is an important factor in relation to sentencing-but section 2(2) requires youth and children to be treated as if they were euqal in maturity and responsibility. Indeed, a school-child who is guilty of less serious conduct will have to be given the same minimum sentence as a youth twice his age.

The cumulative affect of all this will be an erosion of an essential judicial discretion in regard to sentencing. There will be gross disparities in sentences, which will not only violate the principles of equal treatment, but may even amount to cruel punishment.

If the background to the Bill had been that persons guilty of ragging had been charged and convicted under various provisions of the Penal Code, and that the judiciary had displayed undue lenieny, thereby seemingly condoning ragging, there might have been a need for legislative fetter on judicial discretion in the form of mandatory sentences. But there is no suggestion of any such leniency.

(c) We intend to rule on the issue of mandatory minimum sentences not in isolation, but in conjunction with the penalties and the disabilities which by virtue of section 9 will automatically result upon conviction.

In order to appreciate their gravity, we list below the punishments which must inevitably result upon a conviction under sections 2(2), 3, 4, 5, 6 and 7(2):

(i) a mandotary minimum sentence, without any discretion to impose a fine;
(ii) automatic expulsion from the educational institution of which he is a student;
(iii) life-long disability for admission to any higher educational institution, if he is a student of such an institution.

That disability, however, will not apply upon conviction of school-children.

Section 2(2) further provides for a mandatory order for compensation, while Section 7(2) prescribes a mandatory fine of Rs. 5,000, or three times the amount of the loss or damage caused, whichever is higher. Convictions under Section 2(2) and 4 will often be preceded by six-month remand orders which, as we note later in this Determination, are punitive in nature.

It is only Sections 2(1) and 7(1) which do not provide for mandatory minimum sentences. We willl refer later to section 8 which provides for relatively very lenient punishments for the defaults of administrative staff (a fine not exceeding Rs. 10,000).

Not only does the Bill take away the judicial discretion to consider the antecedents of the offender (particularly age), and the nature and circumstances of the offence, but it "piles up punishment on punishment": mandatory minimum sentence and expulsion for school-children, regardless of age, and mandatory sentence, expulsion and disability for other students. That raises the question whether they constitute "cruel and inhuman punishment" within the meaning of Article 11.

In considering the enormity of the punishments, we take account both of the exclusion of sections 303 and 306 of the Code of Criminal Procedure Act (section 11) and of the provision for mandatory remand (section 10).

A similar question was considered in the Determination of this Court, dated 2.10.79, in respect of the Essential Public Services Bill (*Ratnasiri Wickramanayaka v The State*, Sc Application No. 58/79), to which we drew Mr. Yapa's attention during the oral hearing. That Bill sought to impose severe punishments – though less severe than those which this Bill imposes – on persons engaged in essential public services, for offences such as the refusal to work:

(i) imprisonment for not less than two years *OR* a fine of not less than Rs. 2,000 *OR* both;

(ii) a mandatory order of forfeiture of all property movable and immovable; and

(iii) if the offender's name was registered in any register maintained under any written law as entitling such person to practise any profession or vocation, a mandatory order that his name be erased from such register.

An offender who was not so registered, and who had no property, might have ended up with only a fine, if that was what the trial Judge thought fit.

While there is undoubtedly a difference between the forfeiture of property and the denial of entry to higher educational institutions, yet for students likely to be affected by the Bill the latter, life-long, disability is probably far more serious than the forfeiture of all their property. For those with little or no property, the right to education is far more precious, and may be their only means of acquiring property.

We note that the conclusion which this Court reached in that matter was despite the fact that *that Bill did not provide for a mandatory sentence of imprisonment*: for it left intact the discretion of the trial Judge to impose only a fine. Nevertheless, it was held:

> "..... This piling up of punishment on punishment makes these penal provisions one of extreme severity ..... covering all offenders, irrespective of the kind of offence they are involved in, or their degree of blameworthiness."

The Court rejected the Attorney-General's contention that those were forms of punishment recognized by Article 16(2), and that therefore Article 11 did not apply. (We would add that Article 16(2) refers to subjection of any person on the order of a competent court to a punishment – the Bill with which we are dealing does not provide for a punishment to be imposed by the order of a court, but provides instead for a penalty which is a consequence of a conviction.)

The Court concluded :

> " . . . . . the piling of punishment on punishment indiscriminately, as in this case, whether they be old forms of punishment or new, must pass the test of Article II, if they are to be valid. In our view, this is not a case of the mere excessiveness of the punishment, but one of inhuman treatment and punishment. The learned Attorney-General stated that these terms suggested some wrongful and wicked application of force on the prisoners. We are unable to agree . . . . . In *Trop v Dulles*, 356 US 86, ... The U.S. Supreme Court held that a statutory provision for forfeiture of citizenship, on conviction by a Court Martial for desertion in time of war, could not be validly applied to a citizen

by birth, whose Court Martial conviction was based solely on one day's absence without leave from his base. The Court said that the sole purpose of forfeiting citizenship was to punish for desertion, and punishment of such magnitude was 'cruel and unusual' . . . . . In *Robinson v California*, 370 US 660, the U.S. Supreme Court . . . . . said . . . . . 'a punishment out of all proportion to the offence may bring it within the bar against cruel and unusual punishment'."

The Court stressed that the punishments were not inherently bad, and that they could all be applied together in a serious and fit case :

" . . . . . Our objection is to their mandatory nature and to their indiscriminate application *ad terrorem*, irrespective of the nature of the offence or the culpability of the offender."

This Court suggested in that case that all the punishments be left to the discretion of the trial judge ; and Parliament substituted "may" for "shall" in the relevant provision.

We find those observations and conclusions to be even more applicable to this bill. Ragging has for too long been cruel, inhuman and degrading. Our society has been unable to deal with, the root causes of raging, and the anxieties, fears and frustrations of youth on which ragging has fed and flourished. Ragging warrants severe and deterrent punishments. However, such punishments must be just and commensurate with the offence, and not a cruel or inhuman over–reaction to the problem.

The provisions of Sections 2(2), 3, 4, 5, 6, 7(2) and 9 insofar as they require mandatory minimum sentences, and automatic penalties and disabilities, are inconsistent with Articles 4(*c*), 11 and 12(1).

We suggest that mandatory minimum sentences should not be prescribed, and that the imposition of different disabilities and penalties should be left to the discretion of the trial judge.

5. *Section 9 : Equality before the law*: Upon conviction for an offence under Sections 2 to 7, Section 9 (*a*) (ii) provides in addition to expulsion or dismissal, for a disability – but that only applies in regard to students of higher educational institutions, and not to school-children and members of the staff. As between such students and school-children, there is a reasonable basis for the difference in treatment, because young offenders ought in general to be more leniently treated. However, there is no justification for adult staff members guilty of ragging and the like to be more leniently treated – being put in the same class as school-children! – by not being subjected to any disability comparable to that imposed on a student convicted of similar offences. That is an additional reason why the automatic disability is contrary to Article 12 (1).

6. *Section 8 : Equality before the law*: Mr. de Silva submitted that the exemption of members of the administrative staff convicted of offences under Section 8 from the penalties and disabilities prescribed by Section 9 was discriminatory.

As Mr. Yapa pointed out, those liable to the penalties and disabilities under Section 9 were persons *actively* involved in ragging and the like, while Section 8 applied to those guilty of *inaction* : failing to investigate and report complaints of ragging. We hold that classification on that basis is not inconsistent with Article 12 (1). However, it then transpired

that the Bill makes no provision at all as to the liability of administrative staff members guilty of more serious defaults – as, for instance, being present when a student (or even a staff member) engages in ragging, but failing to exercise their authority in order to stop it, and/or failing to report it. In that respect, Section 8 is inconsistent with Article 12 (1).

7. *Section 10 : Mandatory remand : Articles 4(c), 12(1), 13(2) and 13(4)*: Although the petitions contain a bare allegation that Section 10 is unconstitutional, that point was not elaborated either in the written submissions or in the oral arguments. As we later realised that a serious question arose, we directed both Counsel to file further written submissions, which they did.

Section 10 takes away the discretion of a Magistrate – and indeed, of a Judge of the High Court or of a Superior Court – to release suspects on bail. There may be no material on which a person can be reasonably suspected of an offence ; the investigations may not be hampered by his release on bail, and, indeed, they may be over ; the police may be dawdling about whether to prosecute, and may even have decided not to ; and the Attorney-General himself may consent to his release on bail. Nevertheless, Section 10 says, he "shall not be released on bail" by the Magistrate not just for six months, but even thereafter. It is the High Court alone which can grant bail, and that, too, only in "exceptional circumstances", and only after he has been in remand for a continuous period of six months after his arrest.

Article 13(2) provides that an arrested person "shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of (a) judge made in accordance with **procedure established by law**".

Article 13(4) provides that no person shall be punished with death or imprisonment except by order of a competent court, made in accordance with **procedure established by law;** and that the arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

In Mr. Yapa's written submissions he acknowledged that a provision similar to Section 10 does not appear in any other enactment in Sri Lanka. He conceded that:

> "Clause 10 of the Bill, worded as it is, *appears to have the effect of compelling a judicial officer to remand a person for six months* (in the aggregate). Therefore, it will be suggested that the Clause be amended so that the High Court may in exceptional circumstances grant bail, and in any case shall grant bail after the expiry of six months."

He further submitted that the relevant provisions of the Code of Criminal Procedure Act, provide "adequate safeguards . . . . . to cover situations where there isn't sufficient evidence or reasonable grounds of suspicion"; and make it clear that a Magistrate "*need not make an automatic order of remand*" because it is his duty to examine the report and summary of statement produced by the police before making his order. "If he is *satisfied* that it is expedient to detain the suspect in custody pending further investigations, (he) may after recording his reasons authorise the detention". It is implicit in these submissions that if the Magistrate is *not* satisfied, he should not order remand. And that is, without doubt, what Article 13(2) and respect for personal liberty demands.

However, even if the Magistrate does go through that procedure, and is then satisfied that the suspect should *not* be detained, nevertheless the provisions of Section 10, as they stand, contain a binding direction to the Magistrate not to release him on bail, resulting in a deprivation of liberty without a judicial decision that detention is really necessary.

Some consideration is necessary of the meaning of the phrase "upon and in terms of the order of (a) judge made in accordance with **procedure established by law**." Clearly, that phrase includes an order (authorising further deprivation of liberty, with or without conditions) made by a judge after judicially considering the material before him; and also an order imposing a punishment after exercising a judicial discretion: But does it also include an order made by a judge **without** any attempt to exercise his judicial discretion – an order which he makes not because he thinks it right, but simply because he has no choice but to make it? A "procedure established by law" does not mean or include a direction to the Court as to how it should exercise its judicial power; it refers only to the framework within which judicial power is to be exercised – i.e. the criteria, the guidelines, the procedural form and steps, etc., which Parliament must prescribe. As the Supreme Court of India said in *Manekha Gandhi v. Union of India,* AIR 1978 SC 597, 624, the procedure "must answer the test of reasonableness . . . . . it must be right and just and fair, and not arbitrary, fanciful or oppressive".

Parliament could not have enacted a law stipulating that the police, after producing an arrested person before a judge, shall (or may) hand him over to the Remand prison for detention for six months; nor a law empowering an officer of the Executive to decide whether he should be further detained. That would plainly violate of Article 13(2).

The fundamental right under Article 13(2) (and the judicial discretion which is implicit therein) can only be restricted to the extent permitted by Article 15(7). See, for instance, the Determination of this Court, dated 21.05.79, in respect of the Proscribing of the LTTE and other Similar Organisations Bill, (SC Special Determination No. 5/79):

> ". . . . . This provision confers on the Minister power to detain persons for periods of 3 months at a time. . . . . (Article 13(2) was then quoted) . . . . . Prima facie, Section 11 appears to be in conflict with Article 13(2) but Article 15(7) of the Constitution provides that . . . . . Article 13(2) shall be subject to such restriction as may be prescribed by law in the interests of national security, public order, etc. . . . . We are therefore of the view that Section 11 is not inconsistent with the Constitution."

What Parliament cannot do directly, it cannot do indirectly. Section 10 is inconsistent with Article 13(2) because it compels a Magistrate to refuse release on bail, even in cases in which he would have allowed bail if the matter had been left to his discretion. Mr. de Silva cited the Determination of this Court, dated 23.02.84, in respect of the Bill to amend the Poisons, Opium and Dangerous Drugs Ordinance (SC No. 1/84 SD), which examined a provision that bail cannot be granted "except with the sanction of the Attorney-General":

> "This is a fetter on, and in effect a power of control over, Judicial Power of the Court. The granting of bail is an exercise of judicial power which can only be controlled or reviewed by a higher court. Such a power cannot be given to the Attorney-General or a non-judicial body."

If a fetter cannot be placed on the judicial power to release on bail, it follows that the power itself cannot be taken away altogether – unless the Constitution allows it.

We have therefore to consider whether Section 10 constitutes a restriction permitted by Article 15(7). It is possible that there may be circumstances in which an order for remand is in the interests of national security, public order, or the protection of public morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. However, Section 10 goes far beyond what is reasonably necessary for any of those purposes, for it extends to all who are suspected of offences under Sections 2(2) and 4, even where manifestly none of those considerations arise. And, we must repeat, those are provisions which apply even to school children.

The Bail Act, No. 30 of 1997, is of some relevance. It recognizes that the grant of bail shall be the rule, and the refusal to grant bail the exception, subject to the exceptions specified in that Act. One exception is that the Act shall not apply to any person accused or suspected of offences under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, Emergency Regulations, and any other written law which makes express provision in respect of the release on bail of persons accused or suspected of offences under such written law. If Section 10 is valid, then this Bill, when enacted, would be one of those exceptions. Section 14 of the Bail Act provides that the Court may refuse bail if the Court *has reason to believe* that the suspect may abscond or interfere with witnesses (etc.), or may commit an offence while on bail, or that "the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet"; and Section 15 compels the Court to state its reasons for refusal in writing. Those are reasonable restrictions on personal liberty.

There is no doubt that some – perhaps even many – persons suspected or accused of offences under Section 2(2) or 4 might properly have been refused bail under the provisions of the Bail Act. It would have been permissible for Section 10 of this Bill to have imposed similar restrictions on Article 13(2). (Those would probably have fallen within the scope of Article 15(7).) But Section 10 denies bail to *all* persons suspected or accused of offences under Section 2(2) or 4: even to those who would have been entitled to bail if the Bail Act applied. They are treated differently to other persons accused of similar offences (or even of far more serious offences) to whom the Bail Act applies.

We turn now to Article 13(4). The detention which results from a remand order which Section 10 compels a Magistrate to make, is not necessarily a detention "pending investigation or trial", for as already noted, a remand order can be renewed even if investigations are complete, and if no trial is pending. That detention will not be in terms of a statutory provision constituting a reasonable restriction on Article 13(2). Our attention has not been drawn to any provision authorising any restriction on Article 13(4), and such detention cannot be justified on that basis. Without expressing any opinion as to the nature of such a detention for a few days, we hold that such a detention for six months, without any provision for a prior judicial decision, or subsequent judicial review, amounts to punishment contrary to Article 13 (4).

Article 123(2) empowers, but does not oblige, this Court to "specify the nature of the amendments which could make the Bill or such provision cease to be inconsistent" with the Constitution. Notwithstanding the limited time available, we have given some consideration to Mr. Yapa's suggestion – which he says would be similar to the provision which Parliament made after the Determination in respect of the Bill to amend the Poison, Opium and Dangerous Drugs Ordinance. We find that formulation inadequate. Mr. Yapa's submission seems to accept the need for the safeguards in the Code of Criminal Procedure Act: if so, to allow bail only "in exceptional circumstances" is to restrict unduly the right to bail (and the right to personal liberty); and it seems inconsistent with his submission to take away from the Magistrate the power to grant bail, and to vest it in the High Court. Finally, the provision that in any case bail shall be granted after six months, seems to go too far the other way, because it gives suspect an automatic right to release on bail after six months even if there are sound reasons why he should not be (while Section 16 of the Bail Act gives such a right only after *twelve* months, and that too subject to Section 17).

Conclusion

For the above reasons, we determine that;

1. Sections 2(1) and 7(1) are not inconsistent with any provision of the Constitution.

2. Section 17, subject to the omission of the word "embarrassment" and, if desired, the substitution of some other appropriate word or words, is not inconsistent with any provision of the Constitution.

3. Sections 2(2), 3, 4, 5, 6, and 7(2) insofar as they require mandatory minimum sentences, and Section 9 insofar as it provides for automatic penalties and disabilities, are inconsistent with Articles 4(c) and 12(1) of the Constitution, and are required to be passed with the special majority prescribed by Article 84(2). They are also inconsistent with Article 11 of the Constitution, and are required to be passed with the special majority prescribed by Article 84(2) and approved by the People at a Referendum by virtue of the provisions of Article 83.

If amended, so that punishment including orders for expulsion, dismissal and disability, are left to the trial Court to be imposed at its discretion in fit cases, those Sections will cease to be inconsistent with Articles 4(c), 11, 12(1).

4. Section 9, insofar as it imposes a disability on students not imposed on members of the staff, is inconsistent with Article 12(1) of the Constitution, and is required to be passed with the special majority prescribed by Article 84(2). It will cease to be inconsistent if that difference in treatment is eliminated.

5. Section 8, insofar as it fails to penalise acts and omissions of members of the administrative staff of an educational institution in whose presence ragging is committed, is inconsistent with Article 12(1) of the Constitution, and is required to be passed with the special majority prescribed by Article 84(2). It will cease to be inconsistent if they too are made liable.

6. Section 10 is inconsistent with Articles 4(c), 12(1), 13(2) and 13(4) of the Constitution, and is required to be passed with the special majority prescribed by Article 84(2). It will cease to be inconsistent if the discretion whether to remand a person suspected or accused of an offence, or to release him on bail, is vested in a judicial officer such discretion being subject to reasonable restrictions permitted by Article 15(7).

7. None of the other provisions of the Bill are inconsistent with any provision of the Constitution

M. D. H. Fernando,
Judge of the Supreme Court.

A. de Z. Gunawardana,
Judge of the Supreme Court.

D. P. S. Gunasekera,
Judge of the Supreme Court.

Bill was presented to Parliament on : 17.03.1998
Bill No.: 233
Decision of the Supreme Court Conveyed to Parliament on: 21.04.1998
Passed on: 22.04.1998
Speaker's Certificate Endorsed on: 29.04.1998
Title: **Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No. 20 of 1998**

1998

2. Appropriation (Amendment) Bill

A

BILL

to Amend the Appropriation Act, No. 36 of 1997

AN ACT TO AMEND THE APPROPRIATION ACT, No. 36 OF 1997

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

In the matter of a Reference under Article 122(1) (*b*) of the Constitution.

S. C. Special Determination
No. 08 of 1998.

Present :

G. P. S. de Silva, Chief Justice,
P. R. P. Perera, Judge of the Supreme Court, and
Shirani A. Bandaranayake, Judge of the Supreme Court.

Counsel :

K. Sripavan, Deputy Solicitor General, with
A. Gnanadasa, Senior State Counsel,
for the Attorney-General.

The Court assembled for the hearing at 1.20 p.m. on 29th October, 1998.

A Bill entitled "An Act to amend the Appropriation Act, No. 36 of 1997" has been referred to the Chief Justice by Her Excellency the President in terms of Article 122(1)(*b*) of the Constitution for the special determination of this court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view, the Bill is urgent in the national interest.

Mr. K. Sripavan, Deputy Solicitor-General with Mr. A. Gnandasan, Senior State Counsel, appeared on behalf of the Attorney-General and assisted this Court in the consideration of the provisions of the Bill.

The Bill seeks to amend Section 2(1)(*b*) of the Appropriation Act, No. 36 of 1997 in order to increase the aggregate amount of proceeds from loans to rupees one hundred and twenty six thousand million. Mr. Sripavan submitted that the provisions of the Bill do not violate any Article of the Constitution.

We have considered the provisions of the Articles set out in chapter 17 of the Constitution, and also the relevant provisions of the 13th Amendment. We are of the opinion that the amendment sought to be made is within the legislative powers of Parliament and do not violate any of the provisions of the Constitution.

We accordingly determine that neither the Bill nor any provision thereof is inconsistent with the Constitution.

G. P. S. de Silva,
Chief Justice.

P. R. P. Perera,
Judge of the Supreme Court.

Shirani A. Bandaranayake,
Judge of the Supreme Court.

Bill was presented to Parliament on: 06th November, 1998
Bill No.: 278
Decision of the Supreme Court Conveyed to Parliament on: 4th November, 1998
Passed on: 19th November, 1998
Speaker's Certificate Endorsed on: 28th December, 1998
Title: **Appropriation (Amendment) Act, No. 63 of 1998.**

1998

3. PROVINCIAL COUNCILS ELECTIONS (SPECIAL PROVISIONS)

A

BILL

to make provision enabling the Commissioner of Elections to fix a new date of poll for Western, Uva, Sabaragamuwa, Central and North Central Provincial councils elections

AN ACT TO MAKE PROVISION ENABLING THE COMMISSIONER OF ELECTIONS TO FIX A NEW DATE OF POLL FOR WESTERN, UVA, SABARAGAMUWA, CENTRAL AND NORTH CENTRAL PROVINCIAL COUNCILS ELECTIONS

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

In the matter of a Reference under Article 121 of the Constitution.

S. C. Special Determination
No. 9/98 (SD)

Janatha Vimukthi Peramuna,
198/9, Panchikawatte Road,
Colombo 10.

Petitioner:

S. C. Special Determination
No. 10/98 (SD)

Pethigama Kuruwitage Piyasena Perera ,
265/B, Thalawathugoda Road,
Mirihana, Kotte.

Petitioner:

S. C. Special Determination
No. 11/98 (SD)

Nuwan Kodikara ,
Attorney-at-Law,
257, High Level Road,
Kottawa.

Petitioner:

S. C. Special Determination
No. 12/98 (SD)

Erantha Priya Sudesh de Silva ,
176, Pothuwil Road,
Moneragala.

Petitioner:

S. C. Special Determination
No. 13/98 (SD)

Wijekoon Mudiyanselage Tikiri Banda ,
"Wijaya", Wewewatta,
Palugama, Keppetipola.

Petitioner:

S. C. Special Determination
No. 14/98 (SD)

Gunamuni Halowitage Sumanawathi,
Idangoda, Kiriella.

Petitioner:

vs.

The Attorney-General,
Attorney-General's Department,
Colombo.

Respondent:

Before :
Fernando, J.
Gunawardana, J. and
Weerasekera, J.

Counsel :
R. K. W. Goonasekera with J. C. Weliamuna for the Petitioner in SD 9/98;
A. A. de Silva, PC. with Tissa Yapa, Piyasena Dissanayaka, Nihal Senaratne and Mahanama Dissanayaka, for the Petitioner in SD 10/98;
Shibley Aziz, PC. with V. Wimalachandran, A. P. Niles, Miss Priyanthi Gooneratne and Miss Nazly Buhari for the Petitioner in SD 11/98;
A. S. M. Perera with Gamini Senanayake and Mrs. Shaheeda Barrie for the Petitioners in SD 12 – 14 / 98;
K. C. Kamalasabayson, PC, SG. with A. Gnanadasan, SSC. and M. Gopallawa, SC. for the Attorney-General.

Determination :
Six petitions were filed, on 10.11.98 and 11.11.98, alleging that Clauses 2 and 3 of the bill entitled "Provincial Councils Election (Special Provisions) Bill" ("An Act to make provision enabling the Commissioner of Elections to fix a new date of poll for Western, Uva, Sabaragamuwa, Central and North Central Provincial Councils Elections") were inconsistent with Articles 3, 4, 12, 154A(2) and 154Q(*a*) of the Constitution. The petitions were taken up for consideration together on 16.11.98.

Background :
The five-year terms of office of five Provincial Councils came to an end about six months ago. After the conclusion of the nomination process for elections to those Councils (in terms of Part II of the Provincial Councils Elections Act, No. 2 of 1988) the returning officers of the several administrative districts concerned published notices, all dated 15.7.98, under Section 22(1) of the Act, specifying 28th August 1998 as the date of poll for the several administrative districts of those five Provinces.

On 4.8.98 H.E. the President issued a Proclamation, under Section 2 of the Public Security Ordinance, bringing the provisions of Part II of that Ordinance into operation throughout Sri Lanka, and made the following Regulation under Section 5 :

"For so long, and so long only, as Part II of the Public Security Ordinance is in operation in a Province for which a Provincial Council specified in Column I of the Schedule hereto has been established, such part of the Notice under Section 22 of the Provincial Councils Elections Act, No. 2 of 1988, published in the Gazette specified in the corresponding entry in Column II of the Schedule hereto, as relates to the date of poll for the holding of elections to such Provincial Council shall be *deemed*, for all purposes, to be of no effect," [emphasis added throughout].

Counsel informed us that similar Proclamations have been issued every month thereafter. The Regulation did not purport to cancel or invalidate the notices under Section 22(1), but only to suspend their operation; and that, too, "so long only as Part II of the Public Security Ordinance is in operation in [the] Province". Further, that suspension was not of the notices in their entirety, but only of that part which related to the date of poll. Accordingly, the rest of each notice, and especially that part which related to the nominations (the names of the candidates, the symbols, etc.) remained valid and operative.

The poll was not taken on 28th August 1998. It is necessary, for the purpose of this Determination, to ascertain whether the Provincial Councils Elections Act, No. 2 of 1988, makes provision for fixing another day for the poll, Section 22(6) of the Act provides :

"(6) Where at an election of members of a Provincial Council from the administrative districts within the Province for which that Provincial Council is established, *due to any emergency or unforeseen circumstances the poll in any such administrative district cannot be taken* on the day specified in the notice published under subsection (1), *the Commissioner [Elections] may, by notice published in the Gazette, appoint another day for the taking of the poll* in such administrative district and in every other administrative district within that Province, such other day being a day not earlier than the fourteenth day after the publication of the notice in [the] Gazette."

If for any reason, which falls within the ambit of "any emergency or unforeseen circumstances", the poll cannot be taken on the day specified by the returning officer under Section 22(1), Section 22(6) gives the Commissioner the power to appoint another day. It is clear that he may do so either *before* the appointed day, or *on* or *after* the appointed day; for instance, if one week *before* that day widespread floods (or a serious epidemic) make it evident that a proper poll cannot be held on that day, or if *on* that day, any "emergency or unforeseen circumstances" prevent the taking of the poll. Here, on 4.8.98, the Commissioner was faced with an Emergency Regulation purporting to suspend the notices issued under Section 22 in relation to the date of poll. If the Proclamation had ceased to be operative before 28.8.98 (in all five Provinces or even in one Province) – by virtue of revocation, or disapproval by Parliament, or otherwise – then some or all of those notices would once again have become unquestionably operative, and the poll could have been taken on 28.8.98. But that did not happen, and *ex facie* the Proclamation continued to be operative: and so the poll was not taken on the due date. As far as the Commissioner was concerned, on and after 28.8.98 the position (whether the Regulation was valid or not) was that the poll had not been taken on the due date because of "emergency or unforeseen circumstances". Section 22(6 was therefore applicable. He had therefore the power to appoint another day for the poll. And if he had done so, a poll would have been taken on the basis of (i) the notice which *he* then issued under Section 22(6), which notice could not have been affected in any way by the Emergency Regulation previously made on 4.8.98, and (ii) the nominations already published in the "nominations" part of the notices issued by the returning officers on 15.7.98, which part the Emergency Regulation had not touched.

Although section 22(6) provided that the Commissioner "may" appoint another day, thereby conferring a discretion, it is arguable that, in the context of elections, that was not a pure discretion but a power coupled with a duty. But it is enough for the purpose of this Determination that it was the Commissioner who had the power to fix another date.

While the Commissioner had the power to fix another date, up to now he has not exercised that power.

Counsel informed us that the validity of the Proclamation and the Regulation has been challenged in other proceedings now pending both in this Court and in the Court of Appeal.

That is the background in which the impugned Bill was placed on the Order Paper of Parliament on 4.11.98.

PROVISIONS OF THE BILL

The Bill is as follows:

AN ACT TO MAKE PROVISIONS ENABLING THE COMMISSIONER OF ELECTIONS TO FIX A NEW DATE OF POLL FOR WESTERN, UVA, SABARAGAMUWA, CENTRAL AND NORTH CENTRAL PROVINCIAL COUNCILS ELECTIONS

WHEREAS nomination papers were submitted for elections to the Western, Uva, Sabaragamuwa, Central and North Central Provincial Councils, in response to a Notice published under section 10 of the Provincial Councils Elections Act, No. 2 of 1988, by the Commissioner of Elections, indicating his intention to hold such elections;

AND WHEREAS by Notices published under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, August 28, 1998, was specified as the date of poll for such elections;

AND WHEREAS by regulation made under section 5 of the Public Security Ordinance, and published in Gazette No. 1039/5 of August 4, 1998, the date so specified was *declared* to be of no effect;

AND WHEREAS it has now become *necessary* to make provision enabling the Commissioner of Elections to fix a new date of poll for such elections;

Now, therefore, be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:

1. This Act may be cited as the Provincial Councils Elections (Special Provisions) Act,No. of 1998.

2. (1) The Commissioner of Elections shall, within four weeks of the date of commencement of this Act, appoint, by Notice published in the Gazette and having regard to the periods specified in section 22(i)(c) of the Provincial Councils Elections Act, No. 2 of 1988, a date of poll for elections to every Provincial Council set out in column 1 of the

Schedule to this Act, In lieu of the date of poll specified in the Notice published under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, in respect of such Provincial Council, and published in the Gazette set out in the corresponding entry in Column 11 of the Schedule to this Act; and the provisions of the Provincial Councils Elections Act, No. 2 of 1988 relating to the taking of a poll shall apply to a poll taken in compliance with the first mentioned Notice.

(2) The validity of a poll taken on the date appointed under subsection (1) shall be deemed not to be affected by reason only of the fact that the date so appointed was after the expiration of eight weeks from the date of publication of the second mentioned Notice.

3. (1) the Secretary of a recognized political party or the group leader of an Independent group who has submitted a nomination paper for election to a Provincial Council set out in column 1 of the Schedule to this Act, in respect of an Administrative District, may apply to the Returning Officer of such Administrative District, within two weeks of the date of commencement of this Act, to substitute for the name of a candidate appearing in such nomination paper, the name of another candidate (in this section referred to as "the substituted candidate").

(2) Every application made under sub section 1) shall be accompanied by the written consent of the substituted candidate and an oath or affirmation, as the case may be, in the form set out in the Seventh Schedule to the Constitution, taken and subscribed, as the case may be, by the substituted candidate.

(3) On receipt of an application under sub-section (1), accompanied by the documents referred to in sub-section (2), the Returning Officer shall substitute in the relevant nomination paper, the name of the substituted candidate in place of the other candidate referred to in the application, and the name of the substituted candidate shall be deemed to have been included in the nomination paper submitted by such recognized political party or Independent group for such Administrative District and the name of the other candidate omitted therefrom, for all purposes, to be valid and effectual notwithstanding the fact that it has not been endorsed by the substituted candidate or that the names of the other candidates are not in alphabetical order.

(4) After the substitution of (a) candidate in a nomination paper submitted by a recognized political party or independent group in respect of an Administrative District as provided for in this section, the Returning Officer for such Administrative District shall cause the Notice published under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, in respect of such Administrative District to be amended, including the name specified in such Notice, and omitting the name of the other candidate therefrom.

4. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

The Schedule sets out the names of the five Provincial Councils and the numbers and the dates of the Gazettes in which the notices under section 22 had been published.

CLAUSE 2 OF THE BILL

All the Petitioners, with the exception of the Petitioner in No. 10/98, challenged the validity of clause 2 on various grounds, which fall into three broad categories.

The petitioners' first subsmission is that the Bill is a legislative instrusion into an area which, constitutionally, is the exclusive preserve of the Commissioner of Elections; the power and the discretion to fix a new date of poll in respect of a pending electoral process. It is more than an interference with a purely *statutory* power or process, because Article 104 of the Constitution requires the Commissioner to "exercise, perform and discharge all such powers, duties and functions as may be conferred or imposed on or vested in him by the law for the time being relating to elections to the office of President..... *or by any other written law*"; and the Provincial Councils Elections Act is one such "wriitten law". The Power to fix a new date of poll is presently vested in him under section 22(6), and clause 2 seeks to interfere with that discretion – it seeks to compel the Commissioner to exercise his discretion in a manner different to all other Provincial Councils Elections, past and future. while the position might have been different if clause 2 had been a *general* provision, amending section 22(6), clause 2 does not purport to make a general amendment to section 22(6) or to any other provision of the Act; it is not prospectively applicable to future elections, or to future elections as well as these five elections; but applies *only* to these five elections, the resulting position is that the fixing of a new date of poll for all elections, past and future, was and will be a matter for the Commissioner, to be dealt with under section 22(6); but clause 2 requires the Commissioner's power and discretion to be exercised otherwise than in the manner prescribed by section 22(6) only for these five elections – not even for any other election which may take place during the same period. That is also violative of Article 12(1), An improper motive is alleged for this difference in treatment. If the Commissioner had been allowed to fix a new date under section 22(6), the election would have proceeded on the basis of the nominations already received, and the contest would have been between the candidates already on the respective lists. What clause 2 seeks to permit is a contest of a completely different character. As clause 3 shows, the Bill attempts to allow the substitution of new candidates, in place of old, even against their will; and so the resulting contest could well be one between completely different candidates – a result which could not have been achieved under section 22(6). Further, if the Commissioner had been allowed to retain his discretion under section 22(6), he might opt to allow the minimum period of 14 days' notice. But that would not be sufficient to accommodate the desired process of substitution. Accordingly, the exclusion of the general discretion under section 22(6), and the stipulation of new time frames became necessary. Thus, under the guise of giving the Commissioner of the "necessary" power to fix a new date of poll, the Bill attempts to permit a virtually new nomination process – and only for these five elections.

It was pointed out that the fourth preambular clause of the Bill is misleading, because it wrongly asserts that it is "necessary" to make provision enabling the Commissioner to fix a new date of poll; there is no such necessity, because the existing law makes adequate provision.

Not only is clause 2 inconsistent with Articles 12(1) and 104 as aforesaid, but it also interferes with the franchise, contrary to Article 4(e). Although that Article does not mention elections to Provincial Councils, that is because Provincial Councils were only introduced subsequently by the Thirteenth Amendment; Article 4(e) must now be interpreted to cover Provincial Councils Elections as well. Further, the franchise is not restricted to merely voting at elections; it includes standing for elections, and, indeed, the entire election process from nomination to poll.

It has also been submitted that, despite the lapse of more than two months after the original date of poll, the Bill has not been classified as an "urgent" Bill; there is thus no assurance that it is intended to be passed quickly and brought into operation promptly thereafter, and that would further delay the elections. By contrast, if the Commissioner is permitted to act under section 22(6), a new date of poll can be fixed with just 14 days' notice. While Article 154E provides for the automatic dissolution of a Provincial Council upon the expiry of its five year term of office, no provision is made for a "caretaker" administration. The necessary implication of that, it is urged, is that the Constitution requires prompt elections; to hold otherwise would be to devalue the devolution of power.

A second submission was that clause 2 was ambiguous as to the extent of the Commissioner's discretion. While section 22(6) allows the Commissioner to fix different dates for the poll for different Councils, where in his opinion the circumstances – such as the availability of staff, vehicles and equipment, or security considerations, and the like – require it, clause 2 appears to require that one single date be fixed for the elections to all five Provincial Councils (in lieu of 'the' date of poll already specified). That is a further interference with his discretion.

The Petitioners' third main submission was that the Bill, in its third preambular Clause, purports to legitimize the Emergency Regulation of 04.08.98, the validity of which is presently under judicially review. It is for the Courts to determine that question. It was suggested, relying on *R. v Liyanage,* (1962) 64 NLR 313, and *Liyanage v. R.*, (1965) 68 NLR 265, that the Bill is not a true exercise of legislative power within the meaning of Articles 4(a) and 75, and is an interference with pending electoral processes and judicial proceedings, because the Bill contemplates alterations in the law not intended for the generality of cases, or the improvement of the general law, but limited to one particular situation, leaving all future similar situations to be governed by the pre-existing law.

It is unnecessary to examine the Petitioners' submissions in detail. It is sufficient for the purpose of this Determination to say that Clause 2 is inconsistent, at least, with Article 12(1) of the Constitution.

CLAUSE 3 OF THE BILL

Counsel for all the Petitioners submitted that, for the elections for these five Provincial Councils only, Clause 3 permitted the Secretary of a party and the group leader of an independent group to replace a candidate, whose name was properly on the nomination paper and the notice under Section 22(1), without his consent and even without notice to him, although the general law contained in the Provincial Councils Elections Act, does not permit replacement of a candidate even in case of death (cf. Section 23) or withdrawal (cf. Section 116). Clause 3 is therefore inconsistent with Article 12 as well as an interference with the franchise.

It is unnecessary to refer to the various anomalies and injustices which result from such involuntary substitution, especially to members of independent groups. Mr. Kamalasabayson did not contend that such substitution was consistent with Article 12(1), but submitted that what had really been intended was to permit the withdrawal of candidates who – discouraged by the long delay in taking the poll – no longer wished to contest. Such an intention does not appear at all from the language of Clause 3. Clause 3 plainly confers on the Secretary of a party and the group leader of an independent group the power, arbitrarily or capriciously, to remove a candidate from a valid nomination paper without his consent, without a valid reason, and even without notice; it is a gross violation of the right to equal treatment of candidates standing for election.

DECISION

In the course of the oral submissions it appeared to us that there were formidable questions of inconsistency between Clauses 2 and 3 of the Bill, and several provisions of the Constitution particularly Article 12(1). Counsel for all the Petitioners were agreed that delay in the taking of the poll should be minimised. Leaving aside Clause 3, we inquired from Counsel whether their objections to the constitutionality of Clause 2 would persist if the fourth preambular clause was deleted, and the third preambular clause and Clause 2 amended to read as follows:

AND WHEREAS *the said poll has not been taken;* . . . . . .

2. (1) The Commissioner of Elections shall, within four weeks of the date of commencement of this Act, appoint, by Notice published in the Gazette and having regard to the periods specified in Section 22(1)(c) of the Provincial Councils Elections Act, No. 2 of 1988, a date *or dates for the taking of the poll* for elections to every Provincial Council set out in Column I of the Schedule to this Act, in lieu of the date of poll specified in the Notice published under Section 22 of the Provincial Councils Elections Act, No. 2 of 1988, in respect of such Provincial Council, and published in the Gazette set out in the corresponding entry in Column II of the Schedule to this Act, *unless he has, in the exercise of his power under Section 22(6) of the Provincial Councils Elections Act, No. 2 of 1988, appointed a date or dates for the taking of the poll for such elections;* and the provisions of the said Act relating to the taking of a poll shall apply to a poll taken in compliance with the first mentioned Notice.

(2) The validity of a poll taken on a date appointed under Subsection (1) shall be deemed not to be affected by reason only of the fact that the date so appointed was after the expiration of eight weeks from the date of publication of the second mentioned Notice.

Such an amendment would acknowledge the undoubted power of the Commissioner to fix a new date of poll under Section 22(6), and continues to leave him free to exercise that power. It is only in the event that an election cannot be held because he has failed to exercise that power that he would be compelled to fix a new date under Clause 2. It would

then be, not an interference with the franchise or the electoral process, but a remedy for the interruption which has occurred between nomination and poll; and, further, it would not prejudice any pending litigation.

Mr Kamalasabayson stated that these amendments were acceptable, and that the Bill would be amended accordingly.

We determine that Clauses 2 and 3 of the Bill are inconsistent with, *inter alia*, Article 12(1) of the Constitution, and can only be passed with the special majority prescribed by Article 84(2). However, Clause 2 will cease to be inconsistent if amended as suggested above.

30th November, 1998.

M. D. H. Fernando,
Judge of the Supreme Court.

A. de Z. Gunawardana,
Judge of the Supreme Court.

L. H. G. Weerasekera,
Judge of the Supreme Court.

Bill was presented to Parliament on: 04.11.1998.
Bill No.: 277.
Decision of the Supreme Court Conveyed to Parliament on: 01.12.1998.
Bill was not proceeded with.

1999

1. SRI LANKA POSTAL CORPORATION

A

BILL

to provide for the establishment of a corporation named the Sri Lanka Postal Corporation; for the Transfer of All Property, Rights and Liabilities of the Department of Posts to the corporation; for the repeal of the Post office ordinance (Chapter 190); and for matters connected therewith or incidental thereto.

SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA COLOMBO 12.

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF A CORPORATION NAMED THE SRI LANKA POSTAL CORPORATION; FOR THE TRANSFER OF ALL PROPERTY, RIGHTS AND LIABILITIES OF THE DEPARTMENT OF POSTS TO THE CORPORATION; FOR THE REPEAL OF THE POST OFFICE ORDINANCE (CHAPTER 190); AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

In the matter of Applications under Article 121 of the Constitution.

S. C. (S. D.) No. 1/99

Suranjith R. K. Hewamanna,
530/7, Havelock Road,
Colombo 6.

Petitioner

vs

The Attorney-General,
Attorney-General's Department,
Colombo 12.

Respondent

S. C. (S. D.) No. 2/99

1. Muditha Karunamuni,
   10, Government Flats,
   St. Anthony's Mawatha,
   Colombo 3.
2. Weliwita Liyanarachchilage
   Harinda Weliwita,
   Nedurana, Erepola.
3. Udaya Kumara Kashyapa,
   Weerawardhana,
   10, Horatuduwa, Polgasovita.

Petitioners

vs

The Attorney-General,
Attorney-General's Department,
Colombo 12.

Respondent

S. C. (S. D.) No. 3/99

A. J. S. Vidanagamage,
239 6/18, Horagolla,
Ganemulla.

Petitioner

vs

The Republic of Sri Lanka

Respondent

Before:

Fernando, J,
Amerasinghe, J, and
Gunawardana, J.

Counsel:

R. K. W. Goonasekera with J. C. Weliamuna and Ms. Kishali Jayawardene for the Petitioner in SC (SD) 1/99;
A. S. M. Perera, P. C., with J. C. Weliamuna, Ms. Shamila Daluwatta and Neville Ananda for the Petitioners in SC (SD) 2/99;
Ran Banda Seneviratne with Roshan Dayaratne for the Petitioner in SC (SD) 3/99;
K. Sripavan, DSG, with M. Gopallawa, SC, for the Respondent.

Argued on:
22nd February, 1999

Determination:

Three petitions were filed alleging that clauses 13, 36, 51 and 70 of the Bill entitled "The Sri Lanka Postal Corporation Bill" ("An Act to provide for the establishement of a corporation named the Sri Lanka Postal Corporation; for the transfer of all property, rights and liabilites of the Department of Posts to the Coporation; for the repeal of the Post Office Ordinance (Chapter 190); and for matters connected therewith or incidental thereto") were inconsistent with Articles 10, 12, 14 (1) (a), 14 (1) (g), 15 (7), and 84 of the Constitution.

These petitions were referred to this Bench by His Lordship the Chief Justice, and were taken up for consideration together on 22. 2. 99. In the course of the hearing, questions arose as to the constitutionality of certain other clauses as well. We have therefore to determine the constitutionality of clauses 7(1) (c), 13 and 69, 14 and 15, 23 and 28, 36 (3) and (5), 51 and 70.

CLAUSE 7 (1) (C)

Clause 7 (1) provides that:

".....the Corporation shall have the exclusive right to provide the following services (hereinafter referred to as "reserved services") –

(*a*) convey standard articles within Sri Lanka and between Sri Lanka and places outside Sri Lanka;.....

(*c*) convey letters sent by any government department including letters sent by the Commissioner of Elections containing ballot papers of poll cards....."

Clause 7 (1) (*c*) grants the Corporation the exclusive right to "convey.....letters sent by the Commissioner of Elections containing ballot papers and poll cards". In the course of the hearing, the question arose whether this was inconsistent with Articles 4 (e), 93, 103 and 104 of the Constitution.

In considering that question we have to take into account other clauses of the Bill as well. Clause 64(1) provides that "the Minister may give from time to time to the Board general or special directions in writing, and it shall be the duty of the Board to comply with the same". Clause 5(2) requires the Board "in achieving the object of the Corporation [to] act in accordance with the general or special directions given by the Minister; writing is not stipulated. Clause 70 provides for Presidential directives in regard to the interception, detention and delivery to the Government, of any postal articles, or any class of postal articles.

Such directives and directions could be given in respect of postal ballot papers and poll cards.

It may well be argued that it is improbable that such statutory powers would ever be exercised in respect of ballot papers or poll cards. But the constitutionality of the enabling provisions cannot be determined by speculating on the possibility, or probability, or likelihood, of the exercise of such powers.

If such directives or directions are given, they may prevent the safe or the timely delivery of ballot papers and poll cards; and the Corporation, as well as its directors, officers and servants who give effect to them, would enjoy extensive exemptions from civil and criminal liability, and immunity from civil suit and criminal prosecution (by virtue of clauses 13 and 69, which are considerded later in this Determination).

The question we have to decide is whether granting the Corporation the exclusive right to convey ballot papers and poll cards, subject to such directives and directions, is inconsistent with Articles 4(e), 93, 104 and 105.

It is true that the only constitutional provision which makes express reference to the powers of the Commissioner of Elections is Article 104, which empowers and requires him to "exercise, perform and discharge all such powers, duties or functions as may be conferred or imposed on or vested in him by the law relating to elections to the office of President . . . or by any other written law". There is no constitutional provision in regrad to the delivery of postal ballot papers and poll cards, "Written law" provides for delivery "by post", namely, by means of the existing postal service provided by the State.

But that does not mean that at present the Commissioner of Elections has no residual power or discretion if he finds that a situation has arisen in which delivery by post will not ensure the safe or timely receipt of ballot papers or poll cards. If there is a postal strike, or if in some area post offices have been taken over by armed gangs, he is not helpless. He has the power and the duty to devise an alternative method of delivery. Although the relevant Acts of Parliament may be silent, and may taken in isolation – suggest that there is no alternative to delivery by post, those enactments have to be understood and interpreted in the context of the Constitutional provisions contained in Articles 4(e) and 93, in particular. If delivery by post is not possible, in that ballot papers would not reach those entitled to vote by post, and poll cards would not reach the rest, there can neither be an "exercise of the franchise" within the meaning of Article 4(e), nor "free, equal and secret" voting, within the meaning of Article 93. Those provisions cannot be regarded as pious aspirations, conferring no powers and imposing no obligations. On the contrary, they necessarily confer rights on

the Commissioner of Elections and impose correlative duties on the appropriate officials of the State, in regard to all aspects of an election, which are reasonably necessary to ensure a free, equal and secret election at which the franchise may be duly exercised.

The Commissioner of Elections does not have within his direct control, premises required for polling booths and counting centres; the personel to man them; vehicles for the transport of personnel, ballot boxes, etc; personnel to provide security for polling booths, counting centres, and election staff, and to prevent the intimidation of voters in the vicinity of polling booths; nor does he have the infrastructure and the personnel to deliver ballot papers and polling cards. For all these, he must depend on State officers and State services. If what is made available to him will not suffice to ensure a free and fair election, he is entitled to insist on reasonable alternatives necessary to ensure a free, equal and secret election, and the due exercise of the franchise.

Can clause 7(1)(*c*) be similarly interpreted as recognising such implied powers and discretions of the Commissioner of Elections, having regard to Articles 4(e) and 93? There are at least two reasons which militate against such a construction. The phrase "exclusive right" seems to exclude the right of the Commissioner of Elections to make alternative arrangements even where that is necessary to ensure a free and fair election. While section 3(1) of the Post Office Ordinance gave the Government the exclusive privilege of conveying by post all "letters", at the time that provision was enacted postal voting was not recognised, and "letters" would not have included ballot papers and poll cards. There is sufficient reason for interpreting "letters", now, as not including such documents. But even otherwise, it is now the privilege of *the Government* not of the Postmaster-General or the Postal Department – and that is quite compatible with the implied rights of the Commissioner of Elections. A second reason is that the express provisions made by clauses 5(2), 64(1) and 70 – in unrestricted terms – for Presidential directives and Ministerial directions, attract the principle *expressio unius, exclusio alteris,* leaving no room to infer an implied power or discretion of the Commissioner of Elections to give necessary directions to ensure a free and fair election.

Clause 7(1)(*c*) is inconsistent with Articles 4(*e*), 93 and 104 of the Constitution insofar as (*a*) it does not recognise the power and discretion of the Commissioner of Elections in relation to the delivery of ballot papers and poll cards, and (*b*) it is subject to Presidential directives and Ministerial directions.

CLAUSES 13 AND 69

Clause 13 provides:

"(1) Subject to the provisions of subsections (2) and (3), no liability shall accrue to the Corporation, a director, or any officer or servant of the Corporation in respect of any injury, loss or damage suffered by any person by reason of–

(*a*) any loss, misdelivery, delay in delivery of or damage caused to any postal article in the course of its transmission by post;

(*b*) any failure to provide or delay in providing any postal service or any equipment associated therewith or service ancillary thereto;

(*c*) any failure, interruption, suspension or restriction of any postal service or service ancillary thereto, or delay of or fault in, any communication by post;

(*d*) any loss of secrecy in communication arising from the use of any postal service ; or

(*e*) any wrongful payment or delay in payment in connection with any remittance of money or any other irregularity in any document used in connection with such remittance:

Provided that no director or officer or servant of the Corporation shall be exempt from liability in relation to any matter specified in this subsection, where it is due to the misconduct, deliberate omission or any other malicious act of such director or officer or servant as the case may be.

(2) Notwithstanding the provisions of subsection (1), the Corporation may, in the event of loss or damage to any article enclosed in, or forming part of a parcel or insured postal article or the loss of any registered postal article while in the custody of the Corporation, pay an indemnity in accordance with the provisions for the time being in force of the Statute of the Universal Postal Union or any other international agreement to which Sri Lanka is a signatory . . . ."

Clause 13(1) excludes the "liability" (not distinguishing between civil and criminal liability) of the Corporation, and of its directors, officers and servants, in respect of the numerous acts and omissions which are listed in paragraphs (a) to (e), although many of those would be in violation of the fundamental obligations of the Corporation – whose principal; object as set out in clause 5(i) is "to ensure the provision of a *reliable and efficient* postal service". This exemption from liability militates against accountability; and is a disincentive to the attainment of "such performance standards as would reasonably meet the social and economic needs of the community" (see clause 5(i)(c).

The Corporation will enjoy this sweeping exemption from liability, not only for acts and omissions which are negligent or accidental, but even for those "due to the misconduct, deliberate omission or any other malicious act" of a director, officer or servant. It is little consolation that, in the latter case, the director, officer or servant is not exempt from personal liability; and that clause 13(3) empowers the Corporation, at its discretion, to pay compensation "in respect of any delay, loss or damage cause *to a postal article*" – a discretion that does not extend to the many other acts and omissions specified in paragraphs (b) to (e).

Learned Counsel for all the Petitioners contended that the grant of such an extensive exemption from liability was arbitrary and unreasonable, and was inconsistent with Article 12(i).

To reinforce, as it were, that exemption from liability, clause 69 further confers on the Corporation, its directors officers and servants, a wide immunity from suit or prosecution.

To appreciate the extent of the exemption from liability and immunity from suit which the Corporation will enjoy, it must be noted that all five directors of the Corporation will be appointed by the Minister; four (i.e. all except the Managing Director) are summarily

removable by the Minister without assigning any reason (schedule, rule 2). Besides, the Minister may give the Board general or special directions in writing (clause 64(i)), or it seems, even otherwise than in writing (clause 5(2) (*b*), and the Board will be obliged to comply with such directions. Thus however unlawful, unreasonable or improper such directions. (and the consequential acts or omissions of the Board) may be, the Corporation would be exempt from liability under clause 13(1). Even if the act or omission of a director, officer or servant, pursuant to such directions, might in some instances fall outside the scope of paragraphs (*a*) to (*e*) nevertheless clause 69 would grant, to those who carry out such directions, immunity from any "suit or prosecution . . . for any act which in good faith is done, or purported to be done or on the direction of the Board". Arguably, acts done by directors on the direction of the Minister, and acts done by employees on the directions of the Board, would in most cases be "in good faith", thus falling under clause 69.

It is unnecessary to consider whether such exemptions and immunities might have been justified if the Corporation was a service agency of the State, not at all concerned with viability or profit. However, the Bill manifests an intention that the Corporation should be viable, "providing a basic letter service . . . .at the lowest price, consistent with meeting the cost (thereof)" (clause 5(i)(*d*); and in due course, generate "sufficient revenue to cover all its operational expenses and the capital expenditure required to maintain and develop existing operations" (clause 23(b)); and thereafter, generate profits, sufficient, after tax, to make payments to the Government (clauses 23(c) and 28).

Although certain services are, by clause 7(1), reserved exclusively for the Corporation, it is nevertheless contemplated that there would be "other providers of postal services" besides the Corporation (clause 75 (d)) engaged in providing non-exclusive services. The functions of the Regulator, under clause 74, include, among other things, ensuring the provision of efficient and reliable postal services, satisfying the reasonable demands for such services; protecting and promoting the interests of consumers and users with respect to charges, quality and variety of services; and promoting effective competition with a view to ensuring quality, etc.

Clauses 13(1) and (3) deny equal treatment to other providers of postal services by denying them similar exemptions and immunities. The denial of such exemptions and immunities would not only confer an unfair advantage on the Corporation, but would inhibit effective competition in the interests of consumers. Clauses 13(1) and (3) also confer special privileges on the Corporation *vis-a-vis* other persons and bodies, public and private, providing public utility services in other spheres, which must inevitably lead to distortions in the comparative evaluation of the performance of comparable institutions.

We must now turn to the provision in clause 13(2), that the Corporation "may" pay an indemnity, in the event of loss or damage to any article enclosed in, or forming part of an insured postal article. This confirms that the exemption from liability granted by clause 13(1) would extend even to insured articles.

Clause 6(b) empowers the Board to determine the prices, and terms and conditions, for registration and insurance of postal articles. "Insurance" necessarily contemplates an obligation of the insurer to compensate the insured if the event insured against occurs. Clause 55(1) proceeds to make it an offence, punishable by imprisonment not exceeding two years, to send certain valuables "except in an insured package". The combined effect of

clauses 6(b), 13(2) and 55(1) is that the consumer would be legally bound to insure certain valuables sent by post (and *may* insure other articles); the Corporation would be entitled to insist upon a premium for such insurance; and although the consumer will expect in return for that premium indemnity in the event of loss or damage, the Corporation will be under no obligation to compensate him for loss or damage, and thereby fulfil his legitimate expectations. The combined effect of clauses 6(b), 13(2) and 55(1) would be to permit the right to extort premia without the corresponding duty of assuring protection. No other insurer enjoys such a protection.

The amplitude of clause 69 is also alarming. A prosecution for various offences committed by a director, officer or servant would be barred by clause 69(b) if committed "in good faith on the direction of the Board". Examples of offences which could thus be rendered immune from prosecution, are: opening a postal article in the course of transmission by post, where the stipulated exceptions do not apply (clause 47(1)); damaging, destroying, delaying, intercepting, etc, a postal article (clause 49(1)); falsifying a document relating to postal services provided by the Corporation (clause 50(1) (a)); disclosing the contents or existence of a postal article where the stipulated exceptions do not apply (clause 52(1)). Article 15(7) affords no justification for such unequal treatment.

Clauses 13 and 69 of the Bill are inconsistent with Article 12(1) of the Constitution.

CLAUSES 14 AND 15

Clause 14 provides:

"(1) The Board may appoint any member of the staff of the Corporation by name or by office, to be an inspector for the purposes of this Act.

(2) Every person appointed under subsection (1) as an inspector shall be furnished with a certificate of appointment as an inspector by the Managing Director. The certificate shall be in such form as may be determined by rules made under this Act, and shall, if so required, be produced by the inspector to the occupier or person holding a responsible position in any place or establishment or to the person in charge of any vehicle which such inspector intends to inspect in the performance of his duties under this section.

(3) In the performance of his duties an inspector shall have the power to obtain the assistance of the police, if he has reason to believe this an offence under this Act is about to be committed, is being committed or has been committed.

(4) An inspector may, if he has reason to believe that any offence under this Act has been or is being committed, seize and detain –

(*a*) any postal article in connection with which the offence is believed to have been committed or is being committed;

(*b*) any book, register, record or other document which in his opinion will be necessary or useful for the prosecution of any person for an offence under this Act.

(5) Where an inspector seizes any postal article under subsection (4), such article shall be kept in the custody and control of the Corporation, pending its disposal as hereinafter provided."

Clause 14 would empower the Corporation to appoint any member of its staff to be "an inspector", and clause 14(4) would confer on an inspector wide powers of seizure and detention (if need be, after entry into and search of "any place or establishment" or vehicle – see clause 14(2)).

In respect of a postal article seized under clause 14 (4) (a), clause 15 empowers an inspector to declare the article forfeited to the States, if he is satisfied, after inquiry, that the article "was used for the commission, or in connection with the commission, of an offence". That forfeiture would stand even if no prosecution was instituted in respect of that offence; and even if a prosecution was unsuccessful. Thus a seizure and forfeiture made even on the basis of an unfounded suspicion that an offence had been or was being committed would nevertheless remain effective. The right of seizure and forfeiture is made to depend on the subjective appraisal of the inspector. It is true that clause 15 (3) gives the person aggrieved a right to challenge the forfeiture in the District Court. However, in those proceedings, the burden of providing that the seizure and forfeiture was unlawful is cast (by clause 15(5)) upon the claimant. Accordingly, the forfeiture would stand, not because the Corporation or the inspector proved that an offence had been committed, but only because the claimant failed to prove the negative. It is only the person who arrived at the decision who would be aware of the circumstances which warranted his conclusion, and unless the duty is cast upon him to disclose and substantiate his grounds the inspector's powers would be grossly excessive and would open the door to abuses enabling the transgression, with impunity, of the rights of citizens under the ordinary law.

Thus seizure and forfeiture of an article on the basis that an offence had been committed would be legitimized, without proof of that offence either beyond reasonable doubt in criminal proceedings, or even on a balance of probability in civil proceedings.

In respect of goods seized and detained under clause 14(4)(b), the aggrieved party is left even without that inadequate remedy. Although seizure is on the basis that the thing seized would be necessary or useful *for a prosecution,* even if no prosecution is instituted, there is no right, and no procedure, to claim restoration. If a prosecution is instituted, but is unsuccessful, the position is the same.

Mr. Sripavan was unable to suggest any reason why the provisions of the ordinary law should not apply to the search of premises, and to the seizure, detention and disposal of such articles. The conferment of such powers – which are essentially powers exercised by the police – on a person who is not even a public officer, denies those whose property is seized and detained, the equal protection of the ordinary law, for which Article 15(7) affords no justification.

Clauses 14 and 15 are inconsistant with Article 12(1) of the Constitution.

CLAUSES 16 TO 18

Clause 16 provides for the automatic vesting of "all of the assets, *property,* rights and liabilities *of the Department of Posts*" in the Corporation upon the "transfer date" to be

appointed by the Minister. Clauses 17 and 18 make certain consequential and transitional provisions. There is, an inconsistency between clause 16, and clause 17(*c*)(i). The latter provides that "*immovable*" property *of the Department of Posts* required or used to maintain or supply the postal services of the Department of Posts .... shall be deemed *to have been leased* to the Corporation by the State for such period [etc.] as may be agreed to between the Corporation and the State". It is, therefore, not clear whether land *vests* in the Corporation, or is only deemed to have been *leased.*

Had it been provided in the Bill, by definition or otherwise, that by immovable property, or property, "of the Department of Posts" was meant *State* land, then the question might have arisen whether clauses 16 and/or 17 were inconsistant with the constitutional power of the Executive President under paragraph 1:3 of Appendix II to list I ("the Provincial Council List") in the Ninth Schedule to the Constitution:

> "Alienation or disposition of State land within a Province . . . to any organisation shall be *by the President, on the advice of the relevant Provincial Council,* in accordance with the laws governing the matter."

Since the Bill provides only for the vesting of property "of the Department of Posts", we express no view on the question of inconsistency with paragraph 1:3.

CLAUSES 23 AND 28

Clauses 23 and 28 provide:

> "23. The financial objectives of the Corporation –
>
> (*a*) for the period of five years from the transfer date, shall be the progressive reduction of its operational losses;
>
> (*b*) from the sixth year until the eighth year after the transfer date, shall be the generation of sufficient revenue to cover all its operational expenses and the capital expenditure required to maintain and develop existing operations, taking one year with the other; and
>
> (*c*) from and after the eighth year after the transfer date, shall be to generate sufficient profit after deducting all expenses, to be able to pay the Government such sum as may be determined by the Minister under section 28".
>
> "28. The Corporation may, after deducting any amount paid as tax under the Inland Revenue Act, No. 28 of 1979, pay to the Government out of its profits, such sum of money as may be determined by the Minister, in consultation with the Minister in charge of the subject of Finance, having regard to the cost that the Corporation is required to bear in providing uneconomical service in achieving the principal object of the Corporation under section 5."

Clause 23 has two different aspects: subclauses (*a*) and (*b*) would require the Corporation to become financially *viable* and self-sufficient in two stages, within eight years. Subclause (*c*) would require the Corporation thereafter to become *profitable,* almost as if it were a commercial enterprise, and able to pay a portion of its profit, after tax, to the Government.

Mr. Goonasekera on behalf of one of the Petitioners contended that the postal service, as presently provided by the Department of Posts, was essentially a service to the public; however, it was different from other public services because it was directly a means of "securing and advancing" (within the meaning of Article 4(*d*)) the freedom of speech and expression and the freedom of thought – by conveying postal articles for citizens who wish to communicate with each other, and also by disseminating information and knowledge among citizens.

He referred to the provisions for the registration of news papers for transmission by post contained in section 9 of the Post Office Ordinance and submitted that at present concessional rates of postage are allowed for newspapers and educational material. Since clause 23 required the Corporation to become viable and thereafter profitable, he argued, the Corporation would have no option but to increase rates of postage very considerably and to withdraw existing concessions. He could see no harm in the Department of Posts running at a financial loss and being subsidized by the Government; and he urged that the Corporation should also be subsidized similarly, as it was intended to provide the same public service which the Postal Department now provides. *He cited Indian Express Newspapers vs union of India,* AIR 1986 SC 515, and *T & T newspaper Publishing Group vs. Central Bank of Trinidad and Tobago,* [1990] LRC Const) 391.

We acknowledge that the postal service plays, and will continue to play, an important part in promoting the freedom of speech and the dissemination of information and knowledge, despite increasing competition from radio, television, computers and other means of transmitting information. However, we cannot agree either, that attaining financial viability is a constitutionally impermissible goal for the postal service or that increasing prices is the only way to achieve financial viability. The financial objectives specified in clauses 23(*a*) and (*b*) can be achieved by more efficient utilization of human and other resources, improving productivity, better technology, and other strategies designed to achieve cost-efficient objectives. Further, if losses have to be subsidized for the benefit of citizens who are users of the postal service, ultimately such losses have to be met out of the taxes paid by them and their fellow-citizens. A policy decision that those citizens who use the postal services should themselves directly meet the costs of the services they use, without requiring other citizens to meet a part of those costs indirectly, through a process of cross- subsidization, cannot be regarded as unconstitutional.

The two decisions cited held that the total withdrawal of the exemption from customs duty and the imposition of a high rate of import duty on newsprint imported from abroad, and the drastic reduction in the allocation of foreign exchange for the import of newsprint, respectively, were in violation of the freedom of speech and expression; however, both decisions recognized that a reasonable rate of import duty and a reasonable reduction in the allocation of foreign exchange, respectively, would have been permissible. Clauses 23(a) and (*b*) do not contemplate such drastic reductions in operational losses as would necessitate a sudden, steep escalation in prices; rather, a gradual reduction of losses over a period of five years is the stipulation and the expectation is of structured, progressive, and therefore moderate increases in prices.

We hold that clauses 23(*a*) and (*b*) are not inconsistent with any provision of the Constitution.

However, clause 23(*c*) raises a different issue. Although clause 6(b) empowers the Corporation to determine the prices of postal services, in respect of the reserved services it

is the Minister who would have the power (under clause 8) to determine either the prices or the formula in accordance with which the Board may determine such prices. The Minister's power in respect of the seven years period covered by clause 23(*a*) and (*b*) is subject to implied limitations; e.g. he cannot raise prices in order to eliminate operational losses in two years instead of five. But from and after the eighth year there is no such implied limitation on the Minister's power to raise prices. Further, clause 28 would give the Minister power to determine what sum shall be paid by the Corporation to the Government out of its profits (after tax), but prescribes no guidelines. Accordingly, from the eighth year onwards there would be no restraint on the Minister's power under clause 8.

Although clause 75(*b*) provides that one of the functions of the Regulator shall be to protect and promote the interests of consumers and other users of postal services with respect to charges for postal services, clause 74 provides that the Secretary to the Ministry shall be the Regulator. It would be an awkward task for the Secretary to question the prices fixed by the Minister, and we cannot regard this as a realistic restraint on the Minister's power to increase both prices and the contribution payable to the Government.

In these circumstances, the unbridled power of the Minister to determine prices and profits could affect the fundamental rights of users of postal services.

Clauses 23(*c*) and 28 are inconsistent with Articles 10 and 14(1)(*a*) of the Constitution.

CLAUSES 36(3) AND (5)

Clause 36 provides:

"(1) The Corporation may engage any public officer who is in the service of the Department of Posts (in this section referred to as the "Department") and who seeks employment with the Corporation, and the provisions of this section shall apply in respect of such employment.

(2) Every public officer serving in the Department who is appointed to the Corporation under subsection (1) and who has not less than ten years pensionable service on the last date of his service in the Department, shall be deemed to have retired from the public service on that date and shall be eligible for such a pension under the Minutes on Pensions, as would have been awarded to him had he retired on the ground of abolition of office on that date.

(3) Where a public officer serving in the Department who has not less that ten years pensionable service and is not appointed to the Corporation under subsection (1), he shall be deemed to have retired from the public service on the last date of his service in the Department and shall be eligible for such a pension under the Minutes on Pensions as would have been awarded to him had he retired from the public service on the ground of abolition of office on that date and may be paid an additional bonus of the prescribed amount.

(4) Where a public officer who has less than ten years pensionable service is appointed to the Corporation under subsection (1), he shall be deemed to have left public service on the last date of his service in the Department and shall be eligible for such gratuity as would have been awarded to him under the Minutes on Pensions

had he retired on the ground of abolition of office on that date and may be paid an additional bonus of the prescribed amount.

(5) Where a public officer has less than ten years pensionable service and is not appointed to the Corporation, under subsection (1), he shall be deemed to have retired from the public service on the last date of his service in the Department and he shall be eligible for such a gratuity as would have been awarded to him under the Minutes on Pensions had he retired on the ground of abolition of office on that date and may be paid an additional bonus of the prescribed amount ....."

The effect of clauses 36(2) and (4) is that public officers serving in the Department of Posts may apply for employment in the Corporation. If the Corporation accepts them, they will thereupon become employees of the Corporation, and will be deemed to have retired from, or to have left, the public service, depending on whether or not they had ten years pensionable service. They would be entitled to a pension or a gratuity (computed as if they had retired upon abolition of office) depending on the length of their period of service. Clause 36(6) makes consequential provisions.

However clauses 36(3) and (5) provide that those who are *not* appointed to the Corporation will also be deemed to have retired from, or to have left, the public service – even though they may have no wish to leave the public service – with a pension or a gratuity computed on the same basis; and they "*may* be paid an additional bonus of the prescribed amount". If these provisions become law, the employment of such public officers would be terminated by virtue of an exercise of *legislative power*, namely the enactment into law of clauses 36(3) and (5); and not by reason of any decision by the *Executive* to terminate their services.

Under chapter IX of the Constitution, the power to dismiss public officers is vested in the Cabinet of Ministers (Article 51(1)); and in the Public Service Commission insofar as the Cabinet has delegated that power (Article 55(3)); and in public officers to whom the Commission may have delegated that power (Article 58(1)). Further, Article 55(4) empowers the Cabinet of Ministers to determine the procedure for the exercise of the powers of dismissal of public officers.

Mr. Sripavan conceded that neither the Establishments Code nor any other rules made under Article 55(4) provide for the automatic termination of the services of a public officer when the Department in which he is working ceases to function, or when his post is abolished. He also drew our attention to section 14(*f*) of the Interpretation Ordinance.

Learned Counsel for the Petitioners also referred to Part IV of the Sri Lanka Telecommunications Act, No. 25 of 1991, by which Sri Lanka Telecom was established. That Act did not provide for a legislative termination of the services of the public officers serving in the Department of Telecommunications.

Under chapter IX, the power of dismissal is neither unfettered nor unreviewable. In particular, it is subject to the fundamental rights jurisdiction of this Court under Article 126. Clauses 36(3) and (5) would not only treat public officers serving in the Department of Posts differently to other public officers in regard to dismissal, and would also deny them the protection of that jurisdiction, for which Article 15(7) affords no justification.

Clauses 36(3) and (5) are inconsistent with Articles 12(1), 55 and 58 of the Constitution.

CLAUSE 51

Clause 51 provides:

"(1) A director or an officer or servant of the Corporation or any other person shall not disclose any information concerning commercial dealings of the Corporation, employee records, plans, finances or performances of the Corporation to any person, except under the following circumstances –

(*a*) where it is his official duty to do so;

(*b*) where he is compelled under any law to furnish such information; or

(*c*) where he is compelled as a witness in any court proceedings to furnish such information.

(2) Where a director or officer or servant of the Corporation act in contravention of subsection (1), the Minister in the case of a director or the Board in the case of any officer or servant, may take such disciplinary action as the Minister or the Board as the case may be seems [sic] fit and proper.

(3) Where a person other than a director or an officer or servant of the Corporation acts in contravention of the provisions of subsection (1), he shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding fifty thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and imprisonment."

Clause 51 prohibits (subject to very limited exceptions) the disclosure of any information pertaining to an extremely wide range of matters concerning the affairs of the Corporation.

Counsel for the Petitioners contended that clause 51 is inconsistent with Articles 10, 12(1) and 14 (1) (*a*).

A distinction is made between "directors, officers and servants" and "other persons."

In regard to "other persons", the prohibition is plainly too wide, and the exception much too narrow. The Corporation is intended to be a public Corporation, with capital provided out of public funds (clauses 24 and 25), whose principal object is to provide a reliable and efficient, and viable, service. It is an institution that must necessarily be regarded as publicly accountable. The public has a legitimate interest, and indeed a right, to know about the activities of the Corporation – it s commercial transactions and activities, its finances, its plans, and its past performance. Certainly, there can be, and perhaps should be, certain restrictions on that right, as, for instance, where the disclosure (or premature disclosure) of information might prejudice the successful operation of the Corporation or affect its competitiveness. But the prohibition imposed by clause 51 goes far beyond that Clause 51 makes not even a pretence of indentifying what should reasonably be kept confidencial, and instead would impose virtually a total prohibition on disclosure of information; not only of, innocuous information but even of information concerning unlawful and improper acts and omissions, corruption and inefficiency, extravagance and waste, and the like: e.g. borrowing contrary to clause 27; the grant to directors of excessive remuneration contrary to Schedule, Rule 10, or of improper financial benefits, by way of gifts, loans and other

accommodation; the participation of directors and others in decisions notwithstanding financial interest (clauses 48 and 72); unsatisfactory performance below the required standards or adverse to the interests of consumers (clauses 5(1) and 75) ; and the formulation of plans which would result in any of the foregoing. The prohibition on the disclosure of information would effectively inhibit transparency and discussion, and would consequently prevent or frustrate investigations of wrongdoing and misconduct.

Even disclosure to the Commission to Investigate Allegations of Bribery and Corruption, the Auditor-General, the Parliamentary Committee on Public Enterprise, the Parliamentary Commission for Administration, or a Presidential Commission of Inquiry, would be prohibited, on pain of prosecution. The exceptions are so narrowly framed that disclosure would Cease to be a Criminal offence only if it is under *Compulsion* - arising from official duty, or an express statutory provision, or a summons issued by a Court. A witness giving evidence or information to a tribunal which is not a Court – such as the institutions mentioned above- would not be exempt; not even a party to legal proceedings in a Court, or a witness in such proceedings, giving evidence without a summons would be exempt. Thus a former employee, dismissed by the Corporation for reporting corruption to his superiors, would not be entitled to disclose such information in his own application to a Labour Tribunal, or in his own evidence in that Tribunal; nor could he furnish to the Supreme Court an Affidavit in a fundamental rights application made by him, or by another who was the immediate victim of such corruption. The Corporation's competitors, customers, and ex-employees, Journalists, political parties, taxpayers, trade unions, and ordinary citizens, have a legitimate interest in disclosing and receiving such information. Mr. Sripavan was unable to cite any comparable prohibition in any other statute.

Finally, an outsider who discloses information would be liable to a fine not exceeding Rs. 50,000 and/or to imprisonment for a term not exceeding six months. But a director (or employee) who is guilty of an identical breach, commits no offence! The only sanction for them is that the Minister (or the Board, as the case may be) *may* take disciplinary action. If indeed the disclosure of information can be regarded as misconduct, disclosure by an "insider" would be far more reprehensible than disclosure by an "outsider" - but the latter is made liable to a criminal penalty, while the former may escape even without censure.

Even the prohibition upon disclosure by directors, officers and servants, is too wide in so far as it applies to matters which cannot reasonably be treated as confidential, and is too narrow in regard to the exceptions.

All these prohibitions do not come within the scope of the restrictions permitted by Articles 15 (2) and 15 (7).

Clause 51 is inconsistent with Articles 10, 12 (1) and 14 (1) (a) of the Constitution.

CLAUSE 70

Clause 70 provides :

"(1) Where on a Proclamation made by the President the provisions of Part II of the Public Security Ordinance (Chapter 40) are brought into operation and it appears to the President that it is expedient or necessary that any postal article or class or

description of postal articles in the process of transmission by post should be intercepted or detained or should be delivered to the Government, the President may by a directive issued in writing in respect of any postal service provided in any place in Sri Lanka, prohibit the transmission or reception of any postal article or class or description of postal article or intercept or detain any such article with the assistance of such officers of the Corporation as the Managing Director may assign for such purpose, and of any police officer.

(2) The Corporation shall provide all necessary assistance to a police officer in discharging any function under subsection (1).

(3) The provisions of this section shall apply, mutatis mutandis, to any postal article which may be in the process of transmission by any person other than by the Corporation."

Clause 70(1) empowers the President to issue a directive for the interception and detention, or the delivery to the Government, of any postal articles (widely defined in clause 84 as meaning "an article that *may* be carried by post") or class of postal articles, subject only to two conditions :

(*a*) that a Proclamation has been made bringing part II of the Public Security Ordinance ("PSO") into operation, and

(*b*) that the president considers such action to be "expedient or necessary".

Clause 70(1) makes no reference to the ground on which the proclamation has been made; does not require the president's opinion as to the expediency or necessity to be related to that ground ; and does not indicate any need for a nexus between that ground and the postal articles intercepted, and detained or delivered to the government.

Indeed, clause 70 (1) would, for instance, authorise interception, etc, of a postal article despatched by a person in the Southern Province to an addressee in the Western Province, even where part II, PSO, has only been brought into operation in the Northern Province.

Learned Counsel for the petitioners contended that postal articles would include letters, newspapers, magazines, political pamphlets, and the like - which are all different modes of exercising the freedom of speech and expression ; and that clause 70 (1) purports to authorise extensive and unfettered interference with that fundamental right without any guidelines. It was submitted that such restrictions are not permitted by Articles 15 (2) and (7). Further, by preventing the receipt of information, the freedom of thought of the intended recipients would also be affected.

A Proclamation can be made under section 2 of the PSO for different reasons - not only in the interests of national security or the preservation of public order, but even on account of a natural disaster, "for the maintenance of supplies and services essential to the life of the community".

Since clause 70 (1) would neither require the President's opinion as to expediency or necessity to be related to one or more of the grounds on which the Proclamation was made, nor require the specification of any ground or reason constituting the basis of such

expediency or necessity, the power conferred would be unbridled and unfettered. It would be exercisable even despite the absence of any suspicion of unlawful and improper conduct, based on reasonable grounds. Clause 70 (1) would thus authorise arbitrary, capricious and unreasonable interference with the right of communication, and would therefore constitute a denial of the equal protection of the law.

Since the President's opinion need not relate to any consideration of national security or public order, or any of the grounds specified in Articles 15(2) and (7), clause 70(1) cannot be treated as a permissible restriction on fundamental rights.

Presidential directives given under clause 70(1) may even affect the conveyance of postal ballot papers and poll cards under clause 7(1)(c), in which event there would be a conflict with the provisions of Article 104 (in regard to the powers, duties and functions of the Commissioner of Elections). Article 93 (the conduct of a "free, equal and secret" poll), and Article 4(e) (the exercise of the franchise). The question is not whether a President *would* do so, but whether a President is *legally enabled* to do so.

By virtue of clause 70(3) the power to issue such directives would extend, even to "other providers of postal services" besides the Corporation.

Clause 70 is therefore inconsistent with Articles 4(e), 10, 12(1), 14(1)(a), 93 and 104 of the Constitution.

Drafting Errors

The Bill contains numerous errors, omissions, ambiguities and inconsistencies, some of which we remarked upon in the course of the hearing. The brevity of the period allowed for our Determination does not permit us to make a detailed scrutiny of all these (or to suggest amendments), but the following give rise to inconsistencies with Article 12(1) of the Constitution.

Clause 48(1)(*b*) would make it an offence for an employee (defined as including a director, officer, servant, Et al) of the Corporation to participate in a decision to award a contract where he has a direct or indirect financial interest in such contract. In regard to directors, schedule Rule 1(h), reinforces that provision by disqualifying a person from being appointed or continuing as a director if he has any financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a director. These safeguards against loss, damage and harm being caused to the Corporation, and those dealing with it, by reason of a conflict of interests on the part of a director are seriously undermined by clause 72. That clause provides that a director who has a direct or indirect pecuniary interest in a matter being considered by the Board, which is of such a nature that it could conflict with the proper performance of his duties in relation to a matter about to be considered by the Board, could, upon due disclosure, be permitted to participate in that decision notwithstanding his interest. Thus notwithstanding an interest which disqualifies him from continuing as a director, and which exposes him to criminal prosecution, clause 72(2) purports to allow his colleagues to waive the rule against bias insofar as the Board decision is concerned.

Clause 59 would make the contravention of any rule made under the Act an offence, punishable with imprisonment. Some of the clauses (e.g. clauses 35(2), and 51(4) which

empower rules to be made deal with procedural matters, of such a nature that non-compliance does not warrant criminal liability; rules made by the Board are not required to be placed before Parliament or even gazetted (cf. clauses 80 and 81).

Clause 82(2)(*c*) makes a transitional provision which, on its face, would confer an undue advantage on the Corporation: any decree, etc. "in favour of or *against*" the Attorney-General as representing the Department of Posts shall be deemed to be a decree, etc. "*in favour of*" the Corporation.

Schedule Rule 1(*g*), would disqualify a person from being appointed or continuing as a director if he has been "*charged* or convicted of a cirminal offence by a court in Sri Lanka or elsewhere" – impliedly, even if he has been charged and acquitted.

Clause 19(*b*) is an example which does not involve inconsistency with the Constitution. It woud require that, after the "transfer date", "Managing Director" (of the Corporation) be substituted in place of the "Postmaster-General", implying that the Postmaster-General's functions should be performed *by the Managing Director*. However, clause 19(*a*) would require that all functions, etc, of the Postmaster-General be discharged *by the Board*. That would seem to nullify clause 19(*b*), but does nothing to dispel avoidable confusion.

Likewise, clause 63 defines "postage stamp", for the purpose of Part VI (which deals with offences), to include "a money order or any other *postal article*", "Postal article" is defined in clause 84 to mean "an article that *may* be carried by post". Thus "postage stamp" would include both a *money order* and *any* article that *may* be carried by post. The width of these definition, which require "postage stamp" to be read as including money orders and postal articles, would give rise to unexpectd consequences – e.g. in clause 41(1).

Clauses 59, 72(2), 82(2)(*c*), and Schedule Rule 1(*g*), are inconsistent with Article 12(1) of the Constitution.

Conclusion

We determine that:

Clause 7(1)(*c*) of the Bill is inconsistent with Articles 4(e), 93 and 104 of the Constitution.

Clauses 13 and 69 of the Bill are inconsistent with Article 12(1) of the Constitution.

Clauses 14 and 15 of the Bill are inconsistent with Article 12(1) of the Constitution.

Clauses 23(*c*) and 28 of the Bill are inconsistent with Articles 10 and 14(1)(*a*) of the Constitution.

Clauses 36(3) and (5) of the Bill are inconsistent with Articles 12(1), 55 and 58 of the Constitution.

Clause 51 of the Bill is inconsistent with Articles 10, 12(1) and 14(1)(*a*) of the Constitution.

Clause 70 of the Bill is inconsistent with Articles 4(*e*), 10, 12(1), 14(1)(*a*), 93 and 104 of the Constitution, and

Clauses 59, 72(2), 82(2)(*c*), and Schedule Rule 1(*g*), of the Bill are inconsistent with Article 12(1) of the Constitution.

and may only be passed with the special majority prescribed by Article 84(2) of the Constitution.

8th March 1999

M. D. H. Fernando,
Judge of the Supreme Court.

A. R. B. Amerasinghe,
Judge of the Supreme Court.

A. de Z. Gunawardana,
Judge of the Supreme Court.

Bill was presented to Parliament on: 10.02.1999
Bill No.: 285
Decision of the Supreme Court Conveyed to Parliament on: 11.03.1999
Bill was not proceeded with.

1999

2. UNIVERSITIES (AMENDMENT) BILL

A

BILL

to Amend the Universities Act No. 16 of 1978 (as Amended by Acts No. 7 of 1985; 26 of 1988; 3 of 1989 and 1 of 1995.

SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA COLOMBO 12.

AN ACT TO AMEND THE UNIVERSITIES ACT, NO. 16 OF 1978 (AS, AMENDED BY ACTS NO. 7 OF 1985; 26 OF 1988; 3 OF 1989 & 1 OF 1995).

In the matter of Application under Article 121 of the Constitution.

S C (S D) No. 4/99

Universities Executive Officers Association,
94, Kumaratunga Munidasa Mawatha, Colombo 3.

Petitioner

vs.

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

Respondent

S C (S D) No. 5/99

Dr. Neloufer de Mel,
No. 31/3F, Sulaiman Avenue,
Colombo 5.

Petitioner

vs.

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

Respondent

S C (S D) No. 6/99

Dr. Deepika Udagama,
No. 49/1, Gothami Road, Colombo 8.

Petitioner

vs.

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

Respondent

S C (S D) No. 7/99

Dr. Jayadeva Uyangoda,
No. 34/15, 3rd Lane, Kadawatha Road,
Kalubowila.

Petitioner

vs.

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

Respondent

S C (S D) No. 8/99

Madugeta Kumarage Somadasa Kumarage,
C16, North End,
University Park,
University of Paradeniya,
Peradeniya.

Petitioner

vs.

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

Respondent

S C (S D) No. 9/99

Inter University Student Federation,
Sri Jayawardenapura University,
Gangodawila,
Nugegoda.

Petitioner

vs.

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

Respondent

S C (S D) No. 10/99

Madurapperumage Dammika Perera,
Bothale, Ihalagama,
Ambepussa.

Petitioner

vs.

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

Respondent

S C (S D) No. 11/99

Camena Erica Guneratne, 17/27,
Wijayaba Mawatha, Nawala Road,
Nugegoda.

Petitioner

vs.

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

Respondent

S C (S D) No. 12/99

1. The University English Instructors Association,
(UEIA).
2. Nimal Fernando,
Salmal Mawatha, Nedimala,
Dehiwela.

Petitioner

vs.

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

Respondent

Before:

Dheeraratne, J.
Wijetunga, J.
Shirani A. Bandaranayake, J.

Counsel:

Ik. Chula Bandara with D. K. Dhanapala and A. R. Mendis for the petitioner in 4/99;
K. Kanag Iswaran PC. with J. C. Weliamuna, M. A. Sumanthiran, Ms. Kishali Pinto Jayawardena, Sundari de Alwis and Dilshani Wijewardena for the Petitioners in 5/99 and 6/99;

Dr. Jayantha de Almeda Gunaratne with Ms. Kishali Pinto Jayawardena for the petitioner in 7/99.
J. C. Weliamuna for the petitioner in 8/99.
Manohara R. de Silva with David Weeraratne for the petitioners in 9/99 and 10/99.
A. S. M. Perera, P. C., with J. C. Weliamuna for the Petitioner in 11/99.
R. K. Abeynayake for the petitioner in 12/11.
L. M. Wijesurendra, SSC, for the Attorney General.

Argued on:
03rd May, 1999

Determination:

Nine petitions were filed alleging that clauses 2, 3, 4, 5, 6, 7, 8 i (b) , 9 (2A), 11, 12 and 13 of the Bill entitled "A Bill to amend the Universities Act, No. 16 of 1978" were inconsistent with Articles 3, 4, 10, 12(i), 12(2), 14(i) (a) and 14(i) (g) of the Constitution. These petitions were referred to this Bench by His Lordship the Chief Justice and were taken up for consideration together on 03rd May, 1999. In the Course of the arguments, it was submitted that clause 10 of the Bill too was inconsistent with the Constitution.

It was submitted that in determining inconsistency with Articles of the Constitution, we must consider the effect of the Bill and its clauses and not its objects. This has been held so in the decision of this Court in SC (SD) 1/97 to 15/97. We are in respectful agreement with this view.

It was submitted that some of the provisions of the Bill erode "academic freedom" and "autonomy". Our attention was drawn to the Lima Declaration on "academic freedom and autonomy" of institutions of Higher Education. In that Declaration academic freedom was defined to mean "the freedom of members of the academic community, individually or collectively, in the pursuit, development and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing and writing. Autonomy was defined in that Declaration to mean "the independence of the institutions of higher education from the State and all other forces of society, to make decisions regarding its internal government, finance, administration and to establish its policies, research, extension work and other related activities.

We agree that academic freedom and autonomy are essential requisites for the attainment of the objectives of any institution of Higher Education.

The UNESCO, at a meeting in Paris from 21 October to 12 November 1997 in respect of higher education inter alia resolved as follows:

> "17. The proper enjoyment of academic freedom and compliance with the duties and responsibilities listed below requiring the autonomy of institutions of Higher Education. Autonomy is that degree of self-governance necessary for effective decision making by Institutions of Higher Education regarding their academic work, standards, management and related activities, consistent with systems of public accountability, especially in respect of funding provided by the State and respect for academic freedom and human rights. However, the nature of institutional autonomy may differ according to the type of establishment involved.

18. Autonomy is the institutional form of academic freedom and a necessary pre-condition to guarantee the proper fulfilment of the functions entrusted to higher–educational teaching personnel and institutions".

19. Member States are under an obligation to protect higher education institutions from threats to their autonomy coming from any source."

We agree with the submissions made that any erosion made on academic freedom and autonomy would infringe on Article 10 and 14 (1) (*g*) of the Constitution.

CLAUSE 2

Subsection 20(4) of the principal enactment enables the Minister, in event of the work or administration of any Higher Educational Institution being seriously dislocated, to make certain orders like closure, appointment of a competent authority etc. This clause seeks to repeal subsection (5) of section 20 of the principal enactment and substitute therefor new subsections (5) and (6). The principal effect of this amendment is firstly, to enable an order made by the Minister under subsection (4) of section 20 to be in force, unless revoked earlier, for a period of 6 months (instead of three) ; secondly, to enable such an order initially made, not to be tabled before Parliament forthwith or otherwise. Any further order made by the Minister is required to be tabled forthwith in Parliament, which order shall cease to be in force unless approved by Parliament, within one month of such tabling.

This clause would enable the Minister to close an University for 6 months without informing the Parliament of any such closure. We consider this irrational and arbitrary and has no nexus to the objectives of the Act. This clause, therefore is violative of Article 12(1) of the Constitution.

CLAUSE 3

This clause seeks to repeal subsection 34(1) of the principal enactment and substitute there for a new subsection. The effect of the amendment is to enable the President to appoint the Vice-Chancellor of a University on the recommendation of both the Minister and the Commission. (Earlier recommendation of the Commission only was required.) The recommendation, as earlier shall be made from a panel of three names submitted by the Council of that University. The proposed subsection (*c*) requires, where the Minister and the Commission are unable to agree on a recommendation, it shall be the duty of the Council of that University to recommend a further panel of three names for consideration. As regards removal of the Vice-Chancellor, the proposed subsection (*e*) enables the President to remove him, not after consultation only with the Commissoner as before, but after consultation with the Minister as well.

It was submitted that the effect of this clause will be encroachment upon "academic freedom" and "autonomy". The Minister's intervention regarding the appointment of the Vice-Chancellor was submitted as an interference with the University administration. It was also submitted that the Minister's inability to agree with a recommendation submitted by the Council to the Commission could result in a deadlock and bring the University administration to a grinding halt. We find that this clause is inconsistent with Article 10 and 12(1) of the Constitution.

CLAUSES 4 AND 5

Principally, these clauses seek, to amend sections 37 and 38 of the principal enactment, so as to remove the power to appoint the Registrar and the Bursar of an University, from the Council of the University and confer that power on the Commission: the Commission shall appoint those officers upon the recommendation of a Select Committee, the composition of which shall be prescribed by rules.

In terms of section 44(1) of the Universities Act, the Council shall be the executive body and the governing authority of the University. These 2 clauses have removed the appointment of the 2 principal officers of the University from the Council and vested that power with the UGC. Learned Counsel submitted that these 2 principal officers will be compelled to serve two masters. We find that these 2 clauses are irrational and arbitrary and have no nexus to the objectives of the Act. These 2 clauses, therefore are violative of Article 12(1) of the Constitution.

CLAUSE 6

Clause 6(1) seeks to amend section 44 of the principal enactment to enable the Minister to appoint two members to the Council of the University, from Members of Parliament (who have rendered distinguished service in educational, professional commercial, industrial, scientific or administrative spheres) to represent the Government and the opposition. Clause 6(2) seeks to amend subsection (4) of section 44 by adding the Minister as one who is entitled to receive the written resignation of a member of the Council; the words "as the case may be" in that subsection indicate that Minister is only entitled to receive the resignation of the two MPP appointed by him. Proposed amendment to subsection (6) of section 44 provides for the MPP appointed to the Council to be entitled to remuneration.

Learned Counsel submitted that the two clauses are designed to politicize the University Council. It was submitted that the presence of Parliamentarians will inhibit free discussion among members of the Council. The presence of 2 parliamentarians also wil make the Council susceptible to interference by the Minister. We are of the view that this clause is in conflict with Articles 10 and 12(1) of the Constitution.

CLAUSE 7

This clause seeks to amend subsection 48(1A) of the principal enactment (brought in by Act No. 7 of 1985). The purpose of the proposed amendment is to provide for the appointment of Senior Professors and Professors of Departments of study of each Faculty of a University to the Faculty Board of such University; and to Provide for the election of two members to a Faculty Board, by the permanent Lecturers of such Faculty from amongst them.

Although some petitioners in these petitions have objected to clause 7, no submissions were made to us in the course of arguments. We find no inconsistency of clause 7 with the Constitution.

CLAUSE 8 (1B) AND CLAUSE 9 (2A)

Proposed new subsection 49 (1) (*b*) provides that where a Dean resigns his office by writing under his hand addressed to the Vice-Chancellor, he shall continue to function until

a new Dean is elected by the Faculty Board. Likewise proposed new subsection 51 (2A) provides where a Head of a Department tenders his written resignation, he shall continue to function until such time a new Head or a person to act in that post is appointed. It was submitted that compelling a person who has resigned to continue to function is violative of Article 14(1)g, as the freedom to engage oneself in an occupation also contemplates to freedom to disengage himself. We also find that the provision is arbitrary and unresonable. These 2 clauses are inconsistent with Article 12(1) and 14(1) g of the Constitution.

CLAUSE 10

This clause seeks to amend subsection 72 (1) of the principal enactment which subsection was earlier amended by Acts, No. 7 of 1985 and 1 of 1995. The main body of the subsection, which states that every appointment to the post of teacher shall, in the first instance, be for a probationary period of three years, which period may be extended by the governing authority of the Higher Eductional Institution (HEI) to which the teacher is attached, by one year at a time, for a further period not exceeding 5 years, remains unamended. The amendment is proposed to the proviso to the section which presently consists of limbs (*a*), (*b*) and (*c*). The proposed poviso states, " Provided that where the appointment is to a post of teacher and the appointee has been previously confirmed in a post of teacher in a Higher Educational Institution, such appointment shall, in the first instance be for a probationary period of one year."

The law as it is, refers to previous confirmation in a post of teacher in *another* HEI or *another* Department of the HEI to which the appointee is attached, in order to attract a probationary period of one year.

Subsections (*b*) and (*c*) of the proviso are proposed to be removed. These two subsections presently provide that where a teacher and the appointee has been previously confirmed in any post equivalent to the post of teacher in another HEI or has been previously confirmed in any other Department of the HEI to which the appointee is attached, such appointments shall not be subject to any probationary period.

Although submissions were made that removal of subsections b and c are arbitrary, we are unable to agree with his submission as they are not retrospective. There is no inconsistency between the clause and the provisions of the Constitution.

CLAUSE 11 – DEFINITION OF TEACHER

The amendment seeks to add the designation "Senior Professor" to be included in the definition of "teacher" in the interpretation section 147 of the principal enactment.

It was submitted on behalf of the University English Instructors that non inclusion of the term "English Instructors" within the definition of a "teacher" causes them discrimination. There is no doubt in certain circumstances, discrimination could be caused by an act of omission. The real grievance of these petitioners is that, by virtue of the fact that they are not included in the definition, various allowances and benefits like the cost of living

allowance, retirement benefits etc., which from time to time granted by the State to these who come under the definition of a "teacher" are not extended to them. The English Instructors do not fall within the legislative scheme of the Universities Act. For instance, section 46 (2) (*j*) makes provision for 2 "teachers" to be in the Senate of the University; section 64 (1) (*g*) provides 2 "teachers" to be in the Academic Syndicate. The English Instructors should look elsewhere to get their grievances redressed. We are unable to say that this clause is inconsistent with any Article of the Constitution.

CLAUSE 12 (REGISTRARS) AND 13 (BURSARS)

Clauses 12 and 13 are couched in identical terms; 12 refers to Registrars and 13 refers to Bursars; we shall refer to them in common as "officials". Clauses 12 (1) and 13(1) provide that those officials who hold offfice before the commencement of the proposed Act, shall cease to hold office with effect from the date of the Act. Clauses 12(2) and 13(2) provide that the University Grants Commission may offer every such official ceasing to hold office, employment in that same capacity in a University or in an equivalent post in a Higher Educational Institution. Clauses 12(3) and 13(3) provide that the UGC will pay those officials who were not offered employment under subsections (2) of either clause, or those who do not accept an offer of employment under subsections (2) of either clause, reasonable compensation in such amount as may be determined by the Commission.

We observe that clauses 12(2), 13(2) in the Sinhala version of the Bill are different from the English version. Learned Senior State Counsel submitted that the Sinhala version is erroneous and we should ignore those discrepancies.

It was submitted that these clauses are arbitrary. No reasons were adduced by Learned Senior State Counsel as to why all the Registrars and Bursars of the several Universities should cease to hold office. We hold that these 2 clauses are inconsistent with Article 12(1).

Conclusion

We determine that:

Clause 3 of the Bill is inconsistent with Articles 10 and 12(1) of the Constitution;

Clause 6 of the Bill is inconsistent with Articles 10, 12(1) of the Constitution;

and may only be passed with a special majority prescribed in Article 83 of the Constitution and approved by the People at a Referendum.

Clause 2 of the Bill is inconsistent with Article 12(1) of the Constitution;

Clauses 4 and 5 of the Bill are inconsistent with Article 12(1) of the Constitution;

Clauses 8(1) (*b*) and 9 (2) (*a*) of the Bill are inconsistent with Articles 12(1) and 14 (1) g of the Constitution;

Clause 12 of the Bill is inconsistent with Article 12(1) of the Constitution; and

Clause 13 of the Bill is inconsistent with Article 12(1) of the Constitution;

and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution.

11.05.1999

R. N. M. Dheeraratne,
Judge of the Supreme Court.

A. S. Wijetunga,
Judge of the Supreme Court.

S. A. Bandaranayake,
Judge of the Supreme Court.

Bill was presented to Parliament on: 21.04.1999
Bill No.: 296
Decision of the Supreme Court Conveyed to Parliament on: 08.06.1999
Bill was not proceeded with.



1999

3. APPROPRIATION (AMENDMENT)

A

BILL

to amend The Appropriation Act No. 61 of 1998

SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Colombo 12.

AN ACT TO AMEND THE APPROPRIATION ACT, NO. 61 OF 1998

In the Matter of a Reference under Article 122(1) (b) of the Constitution

SC Special Determination No. 13/99
(CPA/6/Parl/69)

Before :
Fernando, J
Wijetunga, J, and
Bandranayake, J.

Counsel :
S. Sripavan, DSG, on behalf of the Attorney-General.

Considered on :
17th August 1999.

Determination :
The Court assembled for the hearing at 10.00 a.m. on 17th August 1999.

A Bill titled "An Act to amend the Appropriation Act, No. 61 of 1998" ("The Appropriation (Amendment) Act, No. of 1999") was referred to this Court by Her Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill Contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. S. Sripavan, DSG, assisted the Court in the consideration of this matter.

Section 2(1) of the Appropriation Act, No. 61 of 1998, provides that the expenditure of the Government for the service of the financial year 1999 shall be met, *inter alia*, from the proceeds of loans thereby authorised to be raised, subject to a maximum amount of rupees *ninety seven thousand twenty seven million*. The only substantive provision of the Bill is clause 2, which seeks to substitute for that figure a higher maximum amount, namely rupees *one hundred and seventeen thousand twenty seven million.*

Article 148 confers on Parliament "full control over public finance." It is clearly within the power of Parliament to stipulate by law the maximum amount which may be raised by way of loans, and to amend that maximum from time to time. That is all that clause 2 of the Bill seeks to do.

The expenditure of any sums raised by means of such loans is governed by Article 150(2) (which requires the sanction of Parliament by law or by resolution), except in the circumstances contemplated by Article 150(3) and (4). Parliamentary control is thereby maintained. The Bill is not inconsistent with those provisions.

We therefore determine that neither the Bill nor any provision thereof is inconsistent with the Constitution or any provision thereof.

M. D. H. Fernando,
Judge of the Supreme Court.

A. S. Wijetunga,
Judge of the Supreme Court.

S. A. Bandaranayake,
Judge of the Supreme Court.

Bill was presented to Parliament on : 09. 09. 1999
Bill No.: 316
Decision of the Supreme Court Conveyed to Parliament on: 20. 08. 1999
Passed on: 12. 11. 1999
Speaker's Certificate Endorsed on: 10. 12. 1999
Title: **Appropriation (Amendment) Act, No. 49 of 1999**

1999

4. EQUAL OPPORTUNITY

A

BILL

to make unlawful discrimination on the ground of ethnicity, gender, religious or political opinion, language, caste, age or disability, in employment, education, access to public places and means of transportation and in the provision of accommodation, goods and services; to provide for the formulation of equal opportunity programmes by Employers; to provide for the establishment of an equal opportunity commission and an equal opportunity tribunal; and to provide for matters connected therewith or incidental thereto.

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

In the matter of an application in terms of Article 121 of the Constitution in respect of the Bill titled "Equal Opportunity Act".

S. D. No. 14/99

Mrs. Hema Jayasinghe,
Consultant, Educationist,
240/3, Kaduwela Road,
Battaramulla.

Petitioner

Vs.

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

Respondents

Before :
Amerasinghe, J.,
Dheeraratne, J.,
Ismail, J.

Counsel :
R. K. W. Goonesekera with Rohan Sahabandu and Manohara de Silva for Petitioner

K. C. Kamalasabeyson, P.C. A.G. with S. Marsoof, P. C. ASG and U. Egalahewa, S.C. for Respondent.

Faiz Musthapha, P. C., with K. P. Jayawardena, J. C. Weliamuna and L. C. M. Suwarnadhipathi for Intervenient — Petitioner

Decided on : 18.10.99

Amerasinghe, J.

Mr. Faiz Musthapha, P.C., on behalf of Ambika Sathkunanathan seeks to intervene in S. D. 14/99.

There are no objections.

Accordingly, Ambika Sathkunanathan is added as an Intervenient Petitioner.

The Hon. Attorney-General gives an assurance to this Court that the Hon. Minister of Justice who has presented Bill No. 326 published in the *Gazette* Supplement on 27.09.99 entitled "Equal Opportunity" to Parliament, as well as the Government of Sri Lanka will not proceed with the said Bill in Parliament.

In the circumstances, the need for the special determination of the matters before us does not arise.

The Attorney-General will take necessary steps to communicate the decision of the Court to the Hon. Speaker, the Hon. Minister of Justice and to the Government.

The decision in S. D. 14/99 applies to the following matters.

S. D. No. 14 – 39/99 and S. D. 40 – 42/99

I agree,

Dheeraratne, J.
Judge of the Supreme Court.

I agree,

Ismail, J.
Judge of the Supreme Court.

True Copy:
M. A. Cyril
Registrar of the Supreme Court.

Bill No.: 326

Decision of the Supreme Court Conveyed to Parliament On: 22.10.1999

Bill was placed on the Order Paper of Parliament on 07.10.1999 for the First Reading and was not presented to Parliament.

2000

1. APPROPRIATION (AMENDMENT) BILL

A

BILL

to amend the Appropriation Act, No. 6 of 2000

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

"An Act to amend the appropriation Act, No. 6 of 2000

In the matter of a reference under Article 122 (1) (*b*) of the Constitution.

S. C. Special Determination No. 01 of 2000.

Present :

S. N. Silva, Chief Justice.

S. A. Bandaranayake, Judge of the Supreme Court.

A. Ismail, Judge of the Supreme Court.

Counsel :

Saleem Marsoof, P.C., A. S.G., with Shavindra Fernando, S.S.C.,for the Attorney-General.

The Court assembled for the hearing at 10.00 a.m. on 10th May, 2000.

A Bill entitled "An Act to amend the Appropriation Act, No. 6 of 2000" has been referred to the Chief Justice by Her Excellency the President in terms of Article 122(1)(b) of the Constitution for the special determination of this Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view, the Bill is urgent in the national interest.

Mr. Marsoof, Additional Solicitor General with Shavindra Fernando, Senior State Counsel, appeared on behalf of the Attorney-General and assisted this Court in the consideration of the provisions of the Bill.

The Bill seeks to amend Section 2(1) (b) of the Appropriation Act, No. 06 of 2000 in order to increase the aggregate amount of proceeds from loans from rupees one hundred and sixty nine thousand twenty three million to rupees one hundred and eighty nine thousand twenty three million. Mr. Marsoof submitted that the Bill does not seek to increase the estimated expenditure as set out in Section 2(1) of the Appropriation Act, No. 6 of 2000. That, the limit of the proceeds of loans that may be raised is being increased by the Amendment to meet a possible shortfall in the estimated income from other sources. He also submitted that the provisions of the Bill do not violate any Article of the Constitution.

We have considered the provisions of the Articles set out in Chapter 17 of the Constitution relevant to finance, and also the relevant provisions of the 13th Amendment. We are of the opinion that the amendment sought to be made is within the legislative powers of Parliament and does not violate any of the provisions of the Constitution.

We accordingly determine that neither the Bill nor any provision thereof is inconsistent with the Constitution.

S. N. Silva,
Chief Justice.

Shirani A. Bandaranayake,
Judge of the Supreme Court.

A. Ismail,
Judge of the Supreme Court.

Bill was presented to Parliament on: 11.05.2000
Bill No.: 355
Decision of the Supreme Court Conveyed to Parliament on : 11.05.2000
Passed on: 11.05.2000
Speaker's Certificate Endorsed on : 21.07.2000
Title : **Appropriation (Amendment) Act, No. 32 of 2000**

2000

2. PRIVATE MEDICAL INSTITUTIONS, (REGISTRATION)

A

BILL

For the registration, monitoring, supervision and inspection of private medical institutions and for all matters connected therewith or incidental thereto.

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

PRIVATE MEDICAL INSTITUTIONS (REGISTRATION) BILL

Present:

S. N. Silva,	Chief Justice.
P. R. P. Perera,	Judge of the Supreme Court.
S. A. Bandaranayake,	Judge of the Supreme Court.

Counsel:

L. C. Seneviratne, P. C., with S. Jayawardena for the Petitioner.
S. Fernando, S. S. C., with U. Egalahewa, S.S. C. for the Attorney-General

Court assembled for the hearing at 10.00 a.m. on 14.07.2000.

A Bill for the Regulation, Monitoring, Supervision and Inspection of Private Medical Institutions and for all matters connected therewith or incidental thereto, bearing the above title was presented to Parliament by the Minister of Health and Indigenous Medicine on 23rd June, 2000.

The jurisdiction of this Court to determine the constitutionality of the said Bill has been invoked in terms of Article 121(1) of the Constitution in the petitions presented to this Court by the Association of Private Hospitals and Nursing Homes, being an unincorporated body and its Secretary.

Learned President's Counsel for the Petitioners made a two-fold submission.

(i) Firstly, he submitted that the entirety of the Bill is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution.

(ii) Secondly, he submitted that specific Clauses in the Bill, identified by him, were inconsistent with Articles 12(1) and/or 14(1)(*g*) of the Constitution.

It was submitted that the entirety of the Bill is inconsistent with the right to equality enshrined in Article 12(i), since it singles out the operators of Private Medical Institutions for discriminatory treatment by subjecting them to a legal regime, which provides for regulation, monitoring, supervision and inspection of their Institutions, whereas those in the State sector who render parallel services are not subject to a similar regime of controls.

The submission is that, if as a matter of policy it is considered necessary to put in place a regime of controls by law, in order to monitor the maintenance of proper standards in the health care system of the country, such controls should apply across the board to cover all institutions of health care, including the State Sector institutions.

We note that equality, as enshrined in Article 12 of the Constitution, permits legislation based on a reasonable classification where the criteria for such classification advances its objectives. The Bill undoubtedly subjects Private Medical Institutions to a different legal regime than the one applicable to State Sector Institutions, as contended by Counsel for

Petitioners. But, we are of the view that there is a reasonable basis for such classification. In this context we have to note that the State Sector health services are carried outlargely as a welfare measure for the people. The State Institutions are distinct and different from Private Medical Institutions being commercial ventures. State sector services come within the purview of the Health Services Act No. 12 of 1952, as amended whereas certain Private Medical Institutions as defined in the Bill, are presently subject to the Nursing Homes (Regulation) Act, No. 16 of 1949, as amended, which is to be repealed by Clause 18(1) of the Bill. Thus historically the two sectors have been classified differently in legislation.

We also note that item 9:2 of the list III in the 9th Schedule to the Constitution provides for:

"the supervision of Private Medical care, control of Nursing Homes and of diagnostic facilities within the province."

This provision in the Constitution itself recognizes the criteria for the classification adverted to above. Hence we do not see any merit in the submission of Counsel that the entirety of the Bill is inconsistent with Article 12(1) of the Constitution.

The submission as to the unconstitutionality of the entirety of the Bill in relation to Article 14(1)(g) is based on the premise that its provisions taken as a whole restricts the freedom of the operators of Private Medical Institutions in engaging in a lawful occupation.

We note that the right to engage in any lawful occupation guaranteed by Article 14(1)(g) of the Constitution is not an unrestricted freedom.

Article 15(7) provides for restrictions in this freedom to be prescribed by law inter alia, for the protection of public health. It is clear from the provisions of Clauses 5 and 6 of the Bill which deals with the objects of the proposed Council and its duties and functions –that the purpose of the Bill is to ensure the quality of patient care services provided by Private Medical Institutions and the maintenance of required standards at such Institutions. Therefore we are of the view that the Bill taken as a whole comes within the ambit the restrictions permitted by Article 15(7) of the Constitution and is not inconsistent with Article 14(1)(g) as contended by Counsel.

Learned President's Counsel for the Petitioners thereafter made submissions with regard to specific provisions of the Bill, that in his view require amendment. In the course of the hearing, learned Senior State Counsel submitted that he has to seek instructions before agreeing to any specific amendment. On that basis, at the end of the hearing, both Counsel agreed to submit to court a list of the provisions that would be amended in Parliament. However, we note that this has not happened and both Counsel have submitted different sets of written submissions implying that there has been no agreement as to any amendment that would be effected in Parliament.

In the circumstances we have to consider the submissions of Counsel with regard to the specific provisions of the Bill that involve issues of constitutionality.

President's Counsel for the Petitioners submitted that Clause 4(1) of the Bill which provides for the constitution of the Executive Council, which will be the functional body, clothed with authority under the proposed law, is inconsistent with Article 12(1) and 14(1)(g) of the Constitution.

It was submitted that the Executive Council would exercise control in respect of Private Medical Institutions as distinct from the State sector institutions. On that premise it was submitted that an Executive Council having a preponderance of State officials and nominees of the Minister would *per se* enable the Council to act arbitrarily, in relation to Private Medical Institutions. It was also submitted that the potentiality of such arbitrary action implicit in Clause 4(1) would also result in a pervasive restriction of the freedom to engage in a lawful occupation guaranteed by Article 14(1)(g).

We have to agree with the submission of learned Council that the constitution of the Executive Council as provided for in Clause 4(1) gives some weightage to the State sector officials and nominees. There is however a balance which comes by means of the representatives of:

(*a*) the Sri Lanka Medical Association;
(*b*) the Independent Medical Practitioners Association;
(*c*) the College of General Practitioners;
(*d*) the Sri Lanka Dental Association; and
(*e*) the Sri Lanka Nursing Association.

These are Associations that comprise of professionals and personnel in the health sector. They cannot be taken as representing the interests of the State as contended by Counsel for the Petitioners.

The submission of Counsel is that Clause 4(1)(a)(ii) which empowers the Minister to nominate 3 persons who have rendered distinguished services in the field of Accountancy, Law or Management would leave room for the inclusion of persons who have no knowledge whatsoever as to the functions of Private Medical Institutions in the Executive Council. Although we were initially attracted by this argument on further reflection it appears that the infusion of persons from the 3 disciplines referred to, would enhance the efficiency of the Council. We cannot assume at this stage that the persons who would be so appointed would otherwise be unfit to serve in such an important body.

Counsel further submitted that in view of the large representation of the State sector and nominees of the Minister in the Council, the 3 representatives of the Association of Private Hospitals and Nursing Homes provided for in Clause 4(1)(a)(iii) would be outnumbered by far. This is a submission with which we have to necessarily agree. The Council which would comprise of about 24 members with a Chairman and Secretary being State officials, would have only 3 representatives from the Institutions that would be subject to the regime of controls that would be effected by the Council. In these circumstances we have to agree with the submission of counsel that there is a Potentiality of arbitrary action and of acts which would unlawfully restrict the rights guaranteed by Article 14(1)(g). Therefore we are of the view that the constitution of the council as provided for in Clause 4(1) would be inconsistent with Article 12(1) and 14(1)(g) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution. This inconsistency could in our view be removed by increasing the representation of the Private Medical Institutions in the Council so that such representation would not be less than 1/3 of the number in the Council. This could be achieved by increasing the number of representatives of these Institutions as provided for in Clause 4(1)(a)(iii) or by reducing the number of ex-officio members as provided in Clause 4(1)(b) or by resorting to both of such

methods. Such an amendment would render the provision to be consistent with the Constitution.

Learned President's counsel for the petitioner submitted that Clause 4(6) of the Bill empowers the Minister at any time to remove an appointed member of the Council from office, vests a power in the Minister without any guidelines which could be exercised in an arbitrary manner. We are inclined to agree with this submission of Counsel. The Executive council should not only be constituted but be perceived as an independent body. It would be inconsistent with such a conception to vest in the Minister an unguided discretion to remove at any time any appointed member of the council from office. Therefore we are of the view that Clause 4(6) is inconsistent with Article 12(1) of the Constitution. However we have to take note of the need to have a power of removal, if there are adequate reasons for such a course of action. In the circumstances the provision would cease to be inconsistent with Article 12(1) if it is amended in the following manner:

"The Minister may at any time after assigning reasons remove an appointed member of the Council from office."

The action of the Minister would thereby becomes subject to judicial review and the potentiality of arbitrary action being the basis of the inconsistency with Article 12(1) would thus be removed.

Learned President's Counsel submitted that Clause 7 of the Bill which provides for the delegation by the Council of its duties and functions would violate Article 14(1)(g) of the Constitution, since such persons could exercise the delegated authority to restrict the freedom of the operators of Private Medical Institutions to engage in a lawful occupation.

The council being a body having over 20 members could not be reasonably expected to exercise its powers directly in every situation. In the circumstances a provision for delegation is necessary. However, the provision for delegation to any officer not being a member of the Council would attract the ground of inconsistency contended for by learned President's Counsel. In the circumstances we are of the view that the Clause as presently constituted would infringe Article 14(1)(g) of the Constitution. The inconsistency could be removed by restricting the provision to permit a delegation to only a member or members of the Council or a Committee consisting of such members of the Council, who shall perform and discharge such duties or functions subject to the directions of the Council.

Counsel for the petitioners submitted that Clause 8 of the Bill which empowers the Minister acting on the advice of the Council, by order, to formulate and enforce schemes of accreditation of Private Medical Institutions, would prevent these Institutions from even rendering emergency health care services where such services would not come within the purview of the accreditation. Senior State Counsel has in his submission indicated that the provision would be suitably amended to exclude emergency health care services from the accreditation criteria in respect of services. In the circumstances it would not be necessary for this Court to consider the matter further since it does not in any event involve any issue of constitutionality.

Counsel for the Petitioners submitted that the provision in Clause 9(1) for any officer, with the authority by the Council to enter any Private Medical Institution for examination

or investigation would be unduly invasive of the activities of the operators of these Institutions and would therefore be inconsistent with Article 14(1)(g) of the Constitution.

At the hearing, Senior State Counsel submitted that he would obtain instructions whether this power of inspection could be assigned only to a Committee of the Council. In his written submission he has stated that it would not be possible to agree to such an amendment, since such a course of action would not be feasible considering the need for prompt inspections and investigations to be carried out into complaints that are received. We are inclined to agree with the submission of the Senior State Counsel that there should be, sufficient flexibility in the provision to enable prompt inspections, examinations or investigations to advance the objectives of the law. The requirement already contained in clause 9(1) which provides that such an officer should be generally or specially authorised by the Council in writing, is in our view an adequate safeguard and the clause would not be inconsistent with Article 14(1)(g) of the Constitution as submitted by Counsel.

President's Counsel for the Petitioners submitted that any prosecution for the offences provided for in clause 10 should be instituted only with the sanction of the Executive Council. Considering the wide ambit of these offences. We are inclined to agree with the submission of Counsel that the absence of a safeguard in relation to the institution of prosecutions would render such a process open to arbitrary action violative of Article 12(1) of the Constitution. In the circumstances, we are of the view that it would be necessary to provide that prosecutions for the offences stated in clause 10 could be instituted only with the written sanction of the Executive Council by a person nominated in that behalf by the Council. In the absence of such a safeguard the provisions of clause 10 and 11 would be inconsistent with Article 12(1) of the Constitution.

President's Counsel for the Petitioner submitted that clause 14(2)(h) of the Bill which empowers the Minister to make regulations in respect of charges for accommodation drugs and services should contain in additional guideline that what should be prescribed by regulation is only the range of such charges and not the specific charge, itself.

This submission does not involve any issue of constitutionality of clause 14(2)(h). It would be open for any person to challenge the vires of any Regulation that may be made under this Law. It appears to us that caluse 14(2) as presently constituted contains adequate guidelines as to the Regulations that may be made by the Minister.

President's Counsel for the Petitioners made submissions with regard to the punishments that have been provided for in clause 11 of the Bill on the basis that these punishments are not comparable with punishments in similar statutes. The laws referred to by Counsel do not relate to the same class of activity. These penalties would be incurred only upon a conviction by court and since no minimum penalty is prescribed, we do not see any issue of unconstitutionality to be considered by Court.

A general submission was made that in several clauses of the Bill the word "Institution" is used without a clear indication as to its applicability. This appears to be a matter of drafting and we would only observe that it may be necessary to have the term "Institution" suitably defined in the Bill.

The determination of the Court as to the constitutionality of the Bill titled "Private Medical Institutions (Regulation," based upon the hearing of the two petitions referred to above is as follows:

(i) The provisions of the Bill taken in its entirety is not inconsistent with Article 12(1) and 14(1)(g) of the Constitution as contended by the Petitioners;

(ii) The provisions of clause 4(1) of Bill are inconsistent with Article 12(1) and 14(1)(g) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

This inconsistency could; however be removed if this clause is amended in the manner stated above.

(iii) The provisions of clause 4(g) of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided in Article 84(2) of the Constitution.

This inconsistency could however be removed if the clause is amended in the manner stated above.

(iv) The provisions of clause 7 of the Bill are inconsistent with Article 14(1)(g) of the Constitution. This inconsistency could be removed if the clause is amended in the manner stated above.

(v) The Provisions of clauses 10 and 11 of the Bill are inconsistent with Article 12(1) of the Constitution in the absence of another provision being included as stated above. If such a provision is included clauses 10 and 11 would cease to be inconsistent with the Constitution.

We note that the subject matter of the Bill comes within List 111 (concurrent list) of the Ninth Schedule to the Constitution. Therefore the Bill would attract the provisions of Article 154 G(5)(a) of the Constitution.

We wish to place on record our appreciation of the valuable assistance rendered to Court by counsel in examining the constitutionality of the Bill.

Sarath N. Silva
Chief Justice.

P. R. P. Perera,
Judge of the Supreme Court.

Shirani A. Bandaranayake,
Judge of the Supreme Court.

Bill was presented to Parliament on: 23.06.2000
Bill No: 359
Decision of the Supreme Court Conveyed to Parliament on: 03.08.2000
Bill was not proceeded with.

2000

3. AGRARIAN DEVELOPMENT

A

BILL

to provide for matters relating to landlords and tenants cultivators of paddy lands, for the utilization of agricultural lands in accordance with agricultural policies; for the establishment of agrarian development councils, to provide for the establishment of a land bank; to provide for the establishment of agricultural tribunals, to provide for the repeal of the Agrarian Services Act No. 58 of 1979; and for matters connected therewith or incidental thereto.

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

In the matter of an Application under Article 121(1) of the Constitution in respect of a Bill titled "Agrarian Development Bill"

S. C. Special Determination No. 6/2000.

Present :

S. N. Silva,	Chief Justice
P. R. P. Perera,	Judge of the Supreme Court
L. H. G. Weerasekera,	Judge of the Supreme Court

Counsel :

Dr. Jayatissa Costa with D. D. P. Dasnayake and Asoka Fernando for the Petitioner

K. Sripavan, D. S. G., for the Attorney General

Court assembled at: 10.00 a.m. on 24th July 2000

A Bill titled "Agrarian Development Bill" was presented to Parliament by the Minister of Agriculture and Lands on 6.7.2000.

The Petitioner being a Buddhist Priest has addressed a petition to this Court on 13.7.2000 as provided in Article 121(1) of the Constitution. He has sought to invoke the jurisdiction of this Court to examine the constitutionality of some of the clauses of the said Bill.

The petition to this Court has been presented within one week of the Bill being placed on the Order Paper of Parliament as provided in Article 121(1). At the commencement of the hearing, learned Deputy Solicitor General raised a preliminary objection that the Petitioner has failed to comply with the requirements in Article 121(1) that when a petition is addressed to this Court "a copy thereof shall at the same time be delivered to the Speaker." It was submitted that the Petitioner should place evidence before this Court of his due compliance with the said requirements.

We note that the practice is to state in the petition that a copy thereof has been delivered to the Speaker and to support this averment in the motion that is filed in Court with evidence of such delivery.

The Deputy Solicitor General relied on the determination of this Court in S. C. Special Determination No. 5/1991, 6/1991 and 7/1991 with regard to the Sri Lanka Telecommunication Bill, wherein this Court specifically held that compliance with the requirements of Article 121(1) of the Constitution referred to above is mandatory and the failure to comply with such requirement will entail a rejection of the petition.

We note that the petitioner has failed to state in his petition and affidavit that a copy of the petition has been delivered to the Speaker at the time it was presented to this Court. He has failed to disclose evidence of such delivery in the motion that has been filed in this Court when presenting the petition. In the circumstances there is merit in the objection raised by the learned Deputy Solicitor General. However since a submission was made by Counsel for the petitioner, without supporting evidence, that there has been due compliance with Article 121(1) of the Constitution, we permitted him to make submissions.

Counsel for the petitioner sought to object to the constitutionality of only three provisions of the Bill. They are:

(i) Clause 2(3)(a) which provides for the determination of the price at which the paddy land would be sold by the owner to the tenant cultivator

(ii) Clause 20 which provides for the acquisition of any paddy land, that is not sold as provided in the Bill.

(iii) Clause 32(6) which empowers an Officer in Charge of a Police Station to take into his custody any implements, instruments, machinery, vehicles or other articles or documents in the course of an investigation into a complaint made to him.

As regards clause 2(3)(a) referred to above, Counsel for the Petitioner did not in fact make any submission as to constitutionality but drew the attention of Court to a difference in the provisions of that clause between the English and Sinhala versions. In the English version it is stated that the price should be determined "having regard to the market value of the paddy lands in the area". It was pointed out by Counsel that this important element with regard to the determination of the price is not contained in the Sinhala version.

Learned Deputy Solicitor General submitted that a suitable amendment would be made in Parliament to correct this inconsistency. However we note that this matter does not involve any issue of constitutionality.

As regards clause 20 Counsel for the petitioner contended that it would be unreasonable to have recourse to the provisions of the Land Acquisition Act to acquire any paddy land which has not been sold to a tenant cultivator in accordance with the provisions of the Bill in a period of 2 years. This matter too does not involve any issue of constitutionality. It is clear that the policy underlying the Bill is to gradually eliminate situations where lands are cultivated by tenant cultivators, either by providing for the sale of such land to the tenant cultivator or failing that by acquiring that land so that it would be vested in the Land Bank, provided for in the Bill. Counsel for the Petitioner conceded that in keeping with the policy of the Bill this clause does not infact involve any issue of constitutionality.

It was submitted that clause 32(6) which empowers the Police to take into custody implements, instruments, machinery and the like used for the commission of an offence would result in these articles being produced in Magistrates Courts and perishing with the lapse of time. It was pointed out to learned Counsel that section 431 of the Code of Criminal Procedure Act No. 15 of 1979 would apply in such event and that the Magistrate would have jurisdiction to make an order in respect of the delivery of such articles to the persons entitled to possession. Counsel did not pursue his submission with regard to this matter which does not in any event involve an issue of constitutionality.

We have to note from the foregoing that the hearing of this Petition did not raise any issue of constitutionality with regard to the entirety of the Bill or any clause thereof. On that basis we make a determination that the Bill and the respective clauses are not inconsistent with the Constitution.

Sarath N Silva
Chief Justice

P. R. P. Perera
Judge of the Supreme Court

L. H. G. Weerasekera
Judge of the Supreme Court

Bill was presented to Parliament on: 06.07.2000
Bill No.: 364
Decision of the Supreme Court Conveyed to Parliament on: 03.08.2000
Passed on: 10.08.2000
Speaker's Certificate Endorsed on: 18.08.2000
Title: **Agrarian Development Act No.: 46 of 2000**

2000

4. CONSTITUTION OF THE REPUBLIC OF SRI LANKA

A

BILL

to repeal and replace the Constitution of the Democratic Socialist Republic of Sri Lanka

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

In the matter of an Application under Article 121 (1) of the Constitution

S. C. Special Determination
No. 7/2000

Present:

S. N. Silva,	Chief Justice
P. R. P. Perera	Judge of the Supreme Court
L. H. G. Weerasekera,	Judge of the Supreme Court

Counsel:

K. C. Kamalasabayson, P.C., Attorney General, C.R. de Silva, Solicitor General, Saleem Marsoof, Addl. Solicitor General, Shavindra Fernando, Senior State Counsel and Uditha Egalahewa, State Counsel appears on notice.

K. N. Choksy, P.C., with Daya Pelpola, Raja Dep, D. N. M. Jayamaha, Luxman Perera and Ronald Perera instructed by Samaratne Associates for the General Secretary, U.N.P

Desmond Fernando, P.C., with Palitha Mathew, Sunil Cooray Rohan Sahabandu and V. Gunaratne and J. Samarasekera for Bar Association of Sri Lanka.

S. L. Gunasekera with N. Ladduwahetty and D. Jayasuriya For Tilak Karunaratne

Gomin Dayasiri with P. Jayawardena for Petitioner S. L. Gunasekera, President, Sihala Urumaya

Shibly Aziz, P.C., with J. C. Weliamuna, Ms Lilanthi de Silva, K. P. Jayawardena, S. D. Dayaratne and Rohan Dehipitiya, D. R. P. Saravanamuthu, R. Edirisinghe for Maha Sanga Sabha

Manohara de Silva with Sunil Watagoda for Janatha Vimukthi Peramuna

A. S. M. Perera, P.C., with Gazali Hussain, Sunil R. de Silva, U. Abeywickrema, C. Mendis, P. Gunasoma, Ms. Shamila Daluwatta, Mrs. M. Malavige for National Organiser of the National Peoples Party and the Secretary for the M.E.P.

J. C. Weliamuna with D. Tilakaratne for Petitioner K. Sunila Abeysekera

S. Perera P.C with Caniska Witharana, Tissa Yapa Piyasena Dissanayake, Nihal Senaratne, Thushara Dissanayake, S. Allegedara for Mahajana Eksath Peramuna for P. Dissanayake - Petitioner

Upul Jayasuriya with R. Radhakrishna for the Chairman, U.N.P.

Court assembled at: 10.00 a.m on 2nd August 2000

Her Excellency the president has made a reference in terms of Article 122(1)(b) of the Constitution in respect of the Bill described in its long title as being "An Act to Repeal and Replace the Constitution of the Democratic Socialist Republic of Sri Lanka." The Bill bears an endorsement of the Secretary to the Cabinet of Ministers made in terms of Article 122(1) of the constitution which states that in the view of the Cabinet of Ministers the Bill is urgent and in the national interest.

The Cabinet of Ministers has also certified in terms of proviso (b) to Article 120 that the Bill described in its long title as aforesaid is intended to be passed with the special majority required by Article 83 and submitted to the People by way of a Referendum.

The Honourable Attorney - General who assisted Court at the hearing submitted that although a reference has been made in terms of Article 122(1)(b) which requires the Court to make a determination whether the Bill or any provision thereof is inconsistent with the Constitution in view of the latter certificate of the Cabinet of Ministers proviso (b) to Article 120 would apply and this Court cannot have and exercise jurisdiction in respect of the Bill.

He relied on the decision of this Court made in Special Determination No. 3 of 1982 in relation to the Bill titled "Fourth Amendment to the Constitution" and the Judgement of this Court in the case of Bandaranaike vs. Attorney - General - 1982 2 SLR page 786.

Mr. K. N. Choksy, P.C., and Mr. Upul Jayasuriya who appeared for the Secretary and chairman respectively of the United National Party agreed with the submission of the Hon. Attorney - General, that in view of the said certificate of the Cabinet of Ministers, the Court will not exercise its jurisdiction in relation to the Bill.

Mr. Desmond Fernando, P.C., who appeared for the Bar Association of Sri Lanka also supported this submission subject to certain reservations which will be referred to in due course.

Of the other Counsel, Mr. S. L. Gunasekera, Mr. Gomin Dayasiri, Mr. A. S. M. Perera, Mr. Manohara de Silva and Mr. J. C. Weliamuna submitted that the decision of the Cabinet of Ministers as evidenced by the endorsement of the Secretary made in terms of Article 122(1), that the Bill is urgent and in the national interest, has not been made *bona fide* and as such the Court should disregard the said decision and the certificate of Cabinet of Ministers and examine the constitutionality of the provisions of the Bill.

Mr. Shibly Aziz, P.C., and Mr. Desmond Fernando submitted that the certificate purported to be issued by the Secretary to the Cabinet of Ministers in terms of Article 120(b) cannot be accepted by Court as evidence of a decision of the Cabinet of Ministers since it has not been signed by the respective Ministers who were party to that decision.

The submissions with regard to the *bona fides* of the decision of the Cabinet of Ministers made in terms of Article 121(1) that the Bill is urgent and in the national interest, cannot in our view be considered in these proceedings. The Court is now exercising its constitutional jurisdiction and it is not within the ambit of such jurisdiction to examine the *bona fides* or the reasonableness of the decision of the Cabinet of Ministers. Article 122(1) empowers the Cabinet of Ministers to make such a decision and an endorsement to that effect being made under the hand of the Secretary to the Cabinet. This Court assembled today by virtue of the said decision which has been referred by Her Excellency the President to this Court in terms of Article 122(1)(b). In the circumstances we see no merit in these submissions.

The submission of learned Counsel that the Secretary to the Cabinet of Ministers cannot certify that the Cabinet of Ministers has made a decision in terms of proviso (b) to Article 120 does not take into account the provisions of Article 51 of the Constitution. This Article provides for the appointment of a Secretary to the Cabinet of Ministers who shall "have charge of the office of the Cabinet of Ministers and shall discharge and perform such other functions and duties as may be assigned to him by the President or the Cabinet of Ministers." In the circumstances we are of the view that the Secretary to the Cabinet of Ministers is the proper functionary who should certify that a given decision was made by the Cabinet of Ministers. In terms of Article 43(1) the Cabinet of Ministers will be collectively responsible for the discharge of its functions and as such it would be inconsistent with the relevant provisions to insist that a decision of the Cabinet Ministers should bear the signatures of the Ministers who infact made that decision. In the circumstances we see no merit in this submission as well.

As noted above the submissions of the Honourable Attorney - General are supported by several Counsels as to the jurisdiction of this Court.

The Constitutional jurisdiction of this Court is set out in Article 120 as follows :

> " 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."

It is seen that the ambit of the constitutional jurisdiction is to examine Bill under review in its entirety and its specific provisions, in relation to the provisions of the Constitution and to determine whether the Bill in its entirety or any of its provisions are inconsistent with any provision of the Constitution. When a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is empowered to make are specified in Article 123(2).

They are to require –

(*a*) That the Bill should comply with Article 82(1) or (2) by being described in the long title as being an Act for the amendment of the Constitution or as an Act for the repeal and replacement of the Constitution.

(*b*) That the Bill or any provision thereof may only be passed by the special majority provided in Article 84(2) namely that it would become law only if the number of votes cast in its favour amounts to not less than two thirds of the whole number of members of Parliament (including those not present) and is thus certified by the Speaker.

(*c*) That the Bill or any provision thereof may only be passed by the special majority stated in (b) above and also approved by the People at a Referendum as provided in Article 83.

The Court is also empowered by to specify any amendment that would have the effect of removing the inconsistency with the Constitution.

Therefore the furtherest the Court could determine in the cxercise of its jurisdiction is to state that the Bill be described in its long title as an Act for the repeal and replacement of the Constitution and to state that it requires to be passed by the special majority in Parliament and submitted to the People at a Referendum, as stated above.

The Bill before the Court is clearly described in its long title as an 'Act to Repeal and Replace the Constitution.' The Cabinet of Ministers has certified that the Bill is intended to be passed by the special majority in Parliament and submitted to the People at a Referendum as stated above. In these circumstances there is no basis for the Court to exercise its constitutional jurisdiction in relation to the Bill.

Considered in this light proviso (b) to Article 120 which states that where the Cabinet of Ministers has certified that a Bill described in its long title as being for the repeal and replacement of the Constitution is intended to be passed with a special majority as required by Article 83 and submitted to the Pepole at a Referendum, this Court shall have and exercise no jurisdiction in respect of such Bill, is both logical and consistent with the scheme of the privisions relating to the exercise of constitutional jurisdiction in Articles 120, 121, 122, 123, 124 and 125 of the Constitution. As noted by this Court in the case reported in 1982 2 SLR p. 787 in such a situation this court is "relieved of the task of determining the same matters".

The determination of this Court in S. D. 3/82 and the Judgment reported in 82 2 SLR 786 relied on by the Attorney- General are in point and both decisions proceed on the basis that this Court will be guided by the Certificate of the Cabinet of Ministers made in terms of proviso (b) to Article 120 of the Constitution and will not exercise its jurisdiction in respect of such Bill which is thus certified.

For the reasons stated above we hold that the Certificate of the Cabinet of Ministers made in terms of proviso (b) to Article 120 which in itself is binding on the legislative process as provided in Article 80(2) has the effect of taking away the jurisdiction of this Court to examine the Bill in relation to any inconsistency with the Constitution.

We accordingly hold that in view of the said certificate of the Cabinet of Ministers made in terms of proviso (b) to Article 120 of the Constitution that the Bill described in its long title as an Act to Repeal and Replace the Constitution of the Democratic Socialist Republic of Sri Lanka, is intended to be passed by a special majority in Parliament as provided in Article 83(b) of the Constitution and submitted to the People at a Referendum, comes within the ambit of Article 82(2) of the Constitution and the course of action as certified by the Cabinet of Ministers for its enactment conforms to the requirements of the Constitution but will not exercise jurisdiction to make any determination in respect of the said Bill.

We wish to place on record our deep appreciation of the assistance given by the Hon. Attorney- General and the Counsel who made submissions in this matter.

Sarath N. Silva,
Chief Justice.

P. R. P. Perera,
Judge of the Supreme Court.

L. H. G. Weerasekera,
Judge of the Supreme Court.

Bill was presented to Parliament on: 03.08.2000
Bill No.: 372
Decision of the Supreme Court Conveyed to Parliament on: 03.08. 2000
Bill was not proceeded with.

2000

5. SEVENTEENTH AMENDMENT TO THE CONSTITUTION

A

BILL

to Amend the Constitution of the Democratic Socialist Republic of Sri Lanka

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

In the matter of an Application under Article 121(1) of the Constitution

S. C. Special Determination
No. 8/2000

Present:

S. N. Silva, Chief Justice
P. R. P. Perera, Judge of the Supreme Court
S. A. Bandaranayake, Judge of the Supreme Court
L. H. G. Weerasekera, Judge of the Supreme Court
Ameer Ismail, Judge of the Supreme Court

Counsel:

K. C. Kamalasabayson, P.C., Attorney-General, C. R. de Silva, Solicitor General and Uditha Egalahewa, State Counsel appears on notice.

H. L. de Silva, P.C., with Gomin Dayasri, Indra Laduwahetty and Dilshan Jayasuriya for S. L. Gunasekera, President, Sihala Urumaya.

K. N. Choksy P.C., with L. C. Seneviratne P.C., P. Wimalachanthiran, Daya Pelpola, Rajah Dep, D. H. N. Jayamaha, S. J. Mohideen, Upul Jayasuriya, A. P. Niles, Lakshman Perera, Ronald Perera, Mrs. Kissen Wijetunga, instructed by Samararatne Associates, for Gamini Atukorale, General Secretary of the UNP.

Desmond Fernando P.C., with Suranjith Hewamanne Instructed by Ms. Lilanthi de Silva for Ven. Maduluwawe Sobitha and Ven. Muruththetuwe Ananda, Joint Presidents of Jathika Sangha Sabha.

A. S. M. Perera, P.C., with Nihal Singaravelu, Mr. Tissa Yapa, Titus Padmasiri and Thushara Dissanayake for Mahajana Eksath Peramuna.

A. S. M. Perera, P.C., with Gazali Hussna, Upali Abeywickrema, Manjula Pathiraja, Chinthaka Mendis, Shamila Daluwatta, Nevil Ananda, Vibavi Ranasinghe and Maduwanthi Malavige for National Solidarity Movement.

L. C. M. Swarnadhipathi for I. I. Kurera.

Manohara de Silva for the Janatha Vimukthi Peramuna Instructed by Sunil Watagala.

J. C. Weliamuna with Priyadarshini Dias and Janaka Samarasekera for Vasudeva Nanayakkara and the Left Democratic Alliance.

A. S. M. Perera, P.C., with G. Hassan, Manjula Pathirana, C. Mendis, Shamila Daluwatta, Neville Ananda, P. Gunaratne, Vibavi Ranasinghe and M. Malavige for the National Peoples Party.

Manohara de Silva with Sunil Watagala for the Janatha Vimukthi Peramuna.

J. C. Weliamuna with P. Dias, J. Samarakone for Vasudeva Nanayakkara and the Left Democratic Alliance.

Kamal Nissanka, Secretary of Liberal Party appeared in Person.

Elmore Perera for W. B. A. Jayasekera and Dr. I. Joel Fernando.

Shibly Aziz, P.C. with Suranjith Hewamanne, A. P. Niles, Ms. Ruwana Rajapakse instructed by Ms. Lilanthi de Silva for Dr. P. Saravanamuttu and Sunila Abeysekera.

Shibly Aziz, P.C. with Suranjith Hewamanne, A. P. Niles, Ms. Ruwana Rajapakse instructed by Ms. Lilanthi de Silva for Ven. Tiniyawela Palitha and Treasurer of Jathika Sangasabhawa.

Dr. Rohan Edirisinghe appeared in person,

Ven. Bengamuwe Nalaka Thero, Secretary, Deshapremi Bhikku Peramuna appeared in person.

Court assembled at: 10.00 a.m. on 7th August, 2000.

Her Excellency the President has made a reference in terms of Article 122(1)(b) of the Constitution in respect of the Bill described in its long title as "An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka." It is the Seventeenth Amendment to the Constitution. The Bill bears the endorsement of the Secretary to the Cabinet of Ministers made in terms of Article 122(1) of the Constitution that the Bill is urgent in the national interest.

In view of the submissions that have been made by the Honourable Attorney-General who assisted Court in this matter and of the other learned Counsel, we would in this determination, at first, outline the content of the five clauses in the Bill and place the different provisions or group of such provisions in the context of their apparent relation to existing and antecedent law.

Clause 2 seeks to amend Article 62 of the Constitution by replacing sub-article (1) which sets out the total number of Members of Parliament. At the time the present Constitution was enacted Article 62(1) fixed the total membership of Parliament at 196. This provision was substituted by the Fourteenth Amendment to the Constitution by increasing the membership to 225. The proposed amendment seeks to increase the figure to 298.

At the time the present Constitution was enacted the 196 members then provided for were to be elected from the several Electoral Districts as provided in the Constitution. The 14th Amendment to the Constitution introduced a new Article numbered as 96A which provided for such an elections to be from Electoral Zones, that appear to be smaller units than Electoral Districts.

This amendment that came into force on 24th May 1988 was repealed by the 15th Amendment which came into force approximately seven months later on 17th December 1988. Thus the unit for electoral purposes reverted to its original form of being Electoral Districts, as determined for this purpose in terms of the Constitution.

'he present Constitution when it was enacted departed from what is described as the 'st Past the Post" (F.P.P.) electoral system which was operative in the country from the : universal suffrage was granted to a system described as 'Proportional Representation '). Under the F.P.P. system the candidate getting the highest number of votes in a given :toral district or seat is declared elected and no account is taken of the votes polled by :r candidate. Under the P.R. system the return of members is in accordance with the)ortion of votes cast in favour of a given Party or Independent Group in the Electoral trict with the exception of the Party or Group getting the highest votes in a District ıg entitled one extra member (bonus seat). Thus it is seen that an element of the F.P.P. em was also, preserved in the P. R. system, that was introduced by the Constitution.

ırticle 99 as it stood at the time of the enactment of the Constitution provided for Parties Independent Groups to submit nomination papers stating the list of its candidates for a :n Electoral District, "setting out the names in order of priority" (vide Article 99(2)). refore the voters were not called upon to indicate their preference of candidates but ending on the number of votes polled by a Party or Group, its candidates were declared :ted in accordance with the pre-determined priority as stated by the Party or Group in its ıination party.

'he entirety of Article 99 which provided for the aforesaid system of P.R. in the Constitution :n it was enacted was repealed by the 14th Amendment to the Constitution. Artcle 99 oduced by this Amendment departed from the pre-determined order of priority of dicates as appearing in the nomination paper, to a system whereby the voters are provided)portunity of indicating their preference of three from the candidates in the Party of r choice. Thus the voter is required to vote for a party and thereafter indicate his ference of three candidates in the list of candidates of that Party.

he 14th Amendment as noted above increased the number of members from 196 to 225. added 29 members are elected in accordance with Article 99A introduced by this endment. In this instance the election is based on the total number of votes polled by Parties and Groups in all the Electoral Districts. The list of candidates who may be ted on this basis has to be separately submitted by the Party or Group to the Commissioner re the General Election. After the number of members that could be returned upon such onal apportionment is known, the Secretary of the Party or the Group Leader could from list of candidates nominate the persons who would then be declared elected on this s.

he proposed Seventeenth Amendment which as noted above increases the total number lembers to 298 provides for the Members to be elected in the following three ways:

i) 168 Members to be declared elected on the FPP system from the several Electoral Districts to be proclaimed upon a division to be done in terms of the proposed Sections 96 and 97 by a Delimitation Commission. In terms of Sections 97(3) and (4) until such a proclamation is made the division in force at the time the present Constitution commenced will become operative and the elections will be held in terms of the Parliamentary Elections Order in Council of 1948.

i) 100 members to be elected from the several Administrative Districts in terms of proposed section 98 on the basis of the PR system. The apportionment of seats in an Administrative District will be on the basis of the votes polled by the Parties in the Electoral Districts referred to in (1) above. A list of candidates for the District PR

election will be submitted by each Party. In terms of Section 98(9) when the apportionment of members is known the Secretary of the Party could nominate the persons from the said list who will then be declared elected.

(iii) 30 members to be elected on the total votes in all the electoral districts obtained by the respective parties in terms of the proposed section 99(1). This system is similar to the present election of "national list members" provided in Article 99A introduced by the 14th Amendment to the Constitution and further amended by the 15th Amendment.

It is thus seen that the Bill under review incorporates elements of all the electoral systems operative in the past and now in operation in the country. It reintroduces the FPP electoral system which was in operation from the time universal suffrage was granted upto the enactment of the present Constitution. It is also to be noted that the FPP system was brought back into force under the present Constitution for limited purposes by the Fifth and Sixth Amendments which introduced a proviso to Article 161 (d)(iii). The District P.R. system as provided in Article 99 as it stood when the Constitution was enacted. But, the proposed amendment removes the preferential system of voting for candidates as signified by numbers, introduced by the Fourteenth Amendment, which the some of the Counsel conceded has been found to be obnoxious in practise. It retains in its entirety the National P.R. system as currently operative.

The principle question that this court has to consider on the basis of the submissions of the learned Counsel is whether the Bill comes within the provisions of Article 83(a) of the Constitution and has to be approved by the People at a Referendum after it is passed by a special majority in Parliament. It is to be noted that the Bill is clearly described in its long title as being "An amendment to the Constitution" as provided in Article 82(1). In terms of Article 82(5) the Bill would become law if it is passed by the special majority in Parliament provided for in Article 82(5). The Articles affected by the Amendment are Articles 62, 95, 96, 97, 98, 99A and 170 of the Constitution. Article 83(a) requires that a Bill should be submitted to a Referendum, where it is for "the amendment or for the repeal or replacement or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11....."

Ex facie the Articles affected by the amendment do not come within the purview of Articles referred to in Article 83(a) that require a Referendum. The submission of Counsel for the Petitioners is that by implication the Bill infringes the franchise referred to in Article 4 of the Constitution an thereby infringes Article 3. In terms of Article 83(a) any amendment "which is inconsistent" with Articles 3 requires to be submitted to a Referendum.

Article 3 of the Constitution reads thus:

In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.

The submission is that franchise which forms part of the sovereignty of the People is exercised in accordance with Article 4 of the Constitution. Article 4(a) and (e) are in point and refer to the legislative power of the People being exercised by a Parliament. "consisting of elected representatives of the People", (4(a)), and that the "franchise shall be exercisable at the election.... of the members of Parliament.... by every citizen who has attained the age of 18 years and who being qualified to be elected as hereinafter provided, has his name entered in the register of electors" 4(e).

Thus it is seen that in relation to the question at issue franchise which forms part of the sovereignty of the People has two elements, firstly that Parliament should consist of elected representatives of the People. Secondly, that any citizen who have attained the age of 18 years, qualified to be an elector having his name entered in the register of electors shall exercise franchise at an election of Members of Parliament.

Learned Counsel submitted that frachise as stated in the said Article is elaborated in Chapter 14 of the Constitution which is linked with the electoral system and that a substantial change in the electoral system would infringe on the franchise which forms part of the sovereignty of the People would be in Article 3. Counsel relied on the determination of this Court in relation to 3rd Amendment to the Constitution Bill (S.C. No. 5/80).

In that determination the Court held that the amendment to Article 161 proposed by the Bill affected franchise referred to in Article 4 of the Constitution and also infringed the sovereignty of the poeple entrenched in Article 3 of the Constitution. The amendment under review in that case represented a curious set of facts. A Member of Parliament of the 1st Parliament under the Constitution, against whom an election petition was pending, absented himself from Parliament prior to the judgment of the Court in the election petition and thereby vacated his seat in Parliament. In terms of Article 161 (d)(iii) in such an event the vacancy could be filled by nomination made by the Secretary of the political party to which such member belongs. Accordingly the Secretary nominated the same person to fill the vacancy. Thereafter the election petition was decided and the election of that person was declared void. Therefore a by-election had to be held in the particular electorate. It was then contended that the member who has now been reappointed is not affected by the decision of the Court declaring the election void and he would not contest the by-election. In that state of facts the Amendment in question was sought to be made to enable the member whose election was declared void and the person elected at the by-election to be seated in Parliament at the same time. Thus the amendment resulted in one electoral district, being a single member constituency, having two members in Parliament. The Court accordingly held as follows:

> "In view of the fact that the effect of this Bill is to seat two members for one and the same electorate, we are of opinion that it contravenes the provisions of Article 161(a) of the Constitution, in that it increases the composition of the first Parliament and thereby affects the franchise referred to in Article 4 of the Constitution and also infringes the sovereignty of the People entrenched in Article 3 of the Constitution."

It was submitted that since the proposed amendment seeks to increase the number of members and bring about a different electoral system the ratio decidendi of that determination should apply to this Amendment as well.

We have given careful consideration to the submissions of learned Counsel. As noted above, the determination referred to related to a curious set of facts where an attempt was made to subvert a decision of the Court declaring an election void. The person whose membership was sought to be secured by the amendment was a person whose election had been declared void. The essence of franchise as described in Articles 3, 4(a) and (e) is that membership of the Parliament could be only of elected representatives. There has to be an election at which the People having the franchise cast their vote pursuant to which members are elected. That Amendment clearly removed the essential link between the process of election and membership in Parliament. Therefore it was held to infringe the franchise.

In the present Amendment we are not considering the question of the election of a single member. It is intended to introduce an electoral system, hence if the argument is to succeed it has to be shown that the electoral system sought to be introduced infringes the franchise of the People as provided in Article 3 and exercised in terms of Article 4(a) and (e).

The extra element that is sought to be introduced by the Amendment to the electoral system that is currently operative is the F.P.P system, in respect of Electoral Districts, as described above.

In this context, we have to note that the present Constitution was enacted by a Parliament which comprised of Members who were elected on the F.P.P electoral system. The preamble to the Constitution itself refers to a mandate granted by the people at the preceding Election which empowered the Members to "draft, adopt and operate a new Republican Constitution." Thus it is seen that the mandate granted at an election held under the F.P.P system is the very basis on which this Constitution was adopted and enacted. The F.P.P electoral system per se therefore cannot infringe the franchise of the People. On the contrary it enhances the franchise of the People, since there would be directly elected representatives for each Electoral District in the country. Further this electoral system that is being introduced has provided for PR representation similar to the form in which it was incorporated in this Constitution at the time of its enactment. Thus the votes secured even by a defeated candidate at the F.P.P election would be taken into account in the electoral process.

It was also contended that the repeal of Article 99 which provided for 3 preferential votes being cast by each voter resulted in the district PR system which is proposed, failing to offer the voters a choice of candidates. On this basis it is submitted that the proposed amendment to repeal Article 99 infringes the franchise of the People. In this context we have to note that section 99 as it stood at the time of enactment of the Constitution provided for the members to be elected on a proportional representation on the basis of a pre-determined list submitted at the time of the nomination. Therefore the absence of an opportunity granted to the voter to indicate their preference in relation to PR system by itself cannot be considered as an infringement of the franchise provided for in the Constitution. The franchise contemplated in the Constitution at the time of its enactment did not provide for such a choice being given to the voters. On the other hand Article 99 on which learned Counsel are relying was infact introduced by the 14th Amendment which in itself was not submitted to the People at a referendum in view of a determination made by this Court.

It would indeed be illogical to contend that the Amendment which was introduced only with a special majority without submission to a Referendum could be repealed only if it is submitted to a Referendum. There are two further matters that militate against the submissions of learned Counsel on this matter. They are, firstly the voters would in terms of the Amendment have a choice of electing candidates to represent their respective Electorate, being a choice not provided as the law stands and which is necessary if franchise is to have its true meaning as provided in Article 3 read as 4 (a) and (e) of the Constitution. Secondly, the names of the candidate nominated for election under the District PR system and the National PR system would be known to the voters at the time of election and could be taken into account when they exercise their franchise.

It was contended that the Bill does not take into account the interest of minor political parties and minority groups. In this context we have to note that the cut off point of 1/8 and later 1/ 20 that has been operative is not included in the proposed Amendment. In the absence of such a "cut off point" there is a greater opportunity for minor political parties to secure the election of their members.

The proposed 96(3) which applies in relation to the delimitation of electoral districts would also provide for the interests of racial and religious groups.

For the reasons stated above we are of the view that the Bill does not in any way infringe the sovereignty of the People in relation to franchise as provided in Article 3 read with Article 4 of the Constitution.

In the course of the submissions it was pointed out that in the proposed section 98 and other sections there is no provision for groups of independent candidates contesting electoral districts within a particular administrative district to band together and submit a nomination paper for the election of members under the District PR system.

Hon. Attorney General submitted that necessary amendments would be effected to the Bill in Parliament to ensure that independent candidates could band together to submit nomination papers for the District PR election and the National List election. The Hon. Attorney General also agreed that an amendment would be made to section 96(3) by deleting the words "or otherwise" in order to ensure that the Delimitation Commission would not take into account other irrelevant and harmful criteria in making their determination. In view of the assurance of the Hon Attorney General, we do not consider it necessary to make a determination in respect of these matters.

Under Article 120 the only question assigned to us for determination in the case of a Bill described as being for the amendment of any provision of the Constitution is whether the Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83.

For the reasons set out above we determine in terms of Article 120 Proviso (a) that the Bill in question does not require the approval of the People at a Referendum.

We wish to place on record our deep appreciation of the assistance given by the Hon Attorney General the Counsel and Citizens who made submissions in this matter.

SARATH N. SILVA
Chief Justice

P. R. P. PERERA
Judge of the Supreme Court

SHIRANI A. BANDARANAYAKE
Judge of the Supreme Court

L.H.G. WEERASEKERA
Judge of the Supreme Court

AMEER ISMAIL
Judge of the Supreme Court

Bill was presented to Parliament on : 08.08.2000
Bill No.: 373
Decision of the Supreme Court Conveyed to Parliament on: 08.08.2000
Bill was not proceeded with.

2000

6. APPROPRIATION (AMENDMENT)

A

BILL

to amend the Appropriation Act, No. 6 of 2000

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

AN ACT TO AMEND THE APPROPRIATION ACT, NO. 6 OF 2000

In the matter of a Reference under Article 122(1)(b) of the Constitution.

S. C. Special Determination No. 09/2000

Present:

S. N. Silva, Chief Justice

P. R. P. Perera, Judge of the Supreme Court

L. H. G. Weerasekera, Judge of the Supreme Court

Counsel:

S. Sripavan, D. S. G., for the Attorney General

The Court assembled for the hearing at 10.00 a.m. on 15th August 2000

A Bill entitled "An Act to amend the Appropriation Act No. 6 of 2000" has been referred to the Chief Justice by Her Excellency the President in terms of Article 122(1)(b) of the Constitution for the special determination of this Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view, the Bill is urgent in the national interest.

Mr. S. Sripavan, Deputy Solicitor General, appeared on behalf of the Attorney General and assisted Court in the consideration of the provisions of the Bill.

The Bill seeks to amend Section 2(1)(b) of the Appropriation Act No. 06 of 2000, which was previously amended by Act No. 32 of 2000, in order to increase the aggregate amount of proceeds from loans from rupees one hundred and eighty nine thousand twenty three million to rupees two hundred and fourteen thousand twenty three million.

Deputy Solicitor General submitted that the provisions of the Bill do not violate any Articles of the Constitution.

We have considered the provisions of the Articles set out in Chapter 17 of the Constitution relevant to finance, and also the relevant provisions of the 13th Amendment. We are of the opinion that the amendment sought to be made is within the legislative powers of Parliament and does not violate any of the provisions of the Constitution.

We accordingly determine that neither the Bill nor any provision thereof is inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

P. R. P. Perera
Judge of the Supreme Court

L. H. G. Weerasekera
Judge of the Supreme Court

Bill was presented to Parliament on: 16.08.2000
Bill No.: 375
Decision of the Supreme Court Conveyed to Parliament on: 16.08.2000
Passed on: 16.08.2000
Speaker's Certificate Endorsed on : 18.08.2000
Title: *Appropriation (Amendment) Act No. 57 of 2000*

2001

1. NATIONAL AGRICULTURAL PRODUCTS MARKETING AUTHORITY BILL

A

BILL

to establish an authority to promote the marketing and distribution of agricultural products by eliminating the difficulties confronted by producers of such products; and for matters connected therewith or incidental thereto.

NATIONAL AGRICULTURAL PRODUCTS MARKETING AUTHORITY BILL

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

An Act to establish an Authority to promote the marketing and distribution of agricultural products by eliminating the difficulties confronted by producers of such products; and for matters connected therewith or incidental thereto.

S. C. Special Determination No. 01 of 2001.

(1) In the matter of reference under Article 122 (*b*) of the Constitution.

Present :

S. N. Silva, Chief Justice
S. W. B. Wadugodapitiya, Judge of the Supreme Court
A. Ismail, Judge of the Supreme Court.

Counsel :

S. Sripavan, Deputy Solicitor-General with M. Gopallawa, State Counsel, for Attorney-General.

The Court assembled for the hearing at 11.00 a.m. on 7th March 2001.

A Bill entitled "National Agricultural Products Marketing Authority Act" has been referred to the Chief Justice by Her Excellency the President in terms of Article 122 (1) (*b*) of the Constitution for the special determination of this Court, as to whether the Bill or any provision thereof is inconsistent with the Constitution.

The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has decided that in its view, the Bill is urgent in the national interest.

Mr. Sripavan, D.S.G., appearing for the Attorney-General assisted this Court in the consideration of the provisions of the Bill.

The Bill seeks to establish an Authority to promote marketing and distribution of agricultural products by eliminating the difficulties confronted by producers of such items.

Clause 3 of the Bill provides for the constitution of the Authority. The Authority will consist of 6 ex-officio members (being Secretaries of related Ministries) 4 members appointed by the President from among persons who have had a wide experience in the fields of agriculture, commerce, marketing and banking and 3 members appointed by the President from among producers of agricultural products.

The objects and functions of the authority are set out in clauses 4 and 5 of the Bill. These objects and functions relate to the matters set out in the long title to the Bill.

Clause 6 sets out the powers of the Authority.

In terms of clause 6(d) the authority has the power to enter into and perform all such contracts as may be necessary, "with the concurrence of the Secretary to the Ministry of the Minister in charge of the subject of Finance."

It is to be noted that the Secretary to the Ministry of Finance is one of the six ex-office members of the Authority. In the circumstances the requirement to obtain the concurrence of the Secretary who is already a member of the Authority and a party to the decision making process would be superfluous. Learned Deputy Solicitor General at the hearing conceded this position and agreed that the words "with the concurrence of the Secretary to the Ministry of the Minister in charge of the subject of Finance" should be deleted from clause 6(d).

Clause 7 and 8 provide for the appointment and licensing of dealers or agents of the Authority.

Clause 7 provides for the appointment of any person as a dealer or agent on terms to be agreed upon between such person and the Authority and for payment to be made to such dealer or agent. On the other hand clause 8 provides for the licencing of persons already engaged in the business of marketing agricultural produces as dealers or agents of the Authority. This would result in there being two categories of dealers or agents of the Authority who are treated differently in the Bill. The Bill does not disclose any reasonable criteria upon which a distinction could be drawn between two categories of dealers or agents functioning under the aegis of the Authority. The object of the Bill does not warrant any such classification. In the circumstances we are of the view that the differentiation sought to be made in respect of dealers or agents in clauses 7 and 8 would offend Article 12(1) of the Constitution and the provision could only be enacted with the special majority as provided for under Article 84 (2) of the Constitution. This inconsistency could be removed by providing for only a single category of dealer or agent operating under the aegis of the Authority. To this end, a decision will have to be taken by the Minister concerned as to whether he wishes to have "appointed" dealers or agents in terms of clause 7, or "licensed" dealers or agents in terms of clause 8. Thereafter, corresponding amendments should be made in the other provisions of the Bill.

Subject to foregoing we have examined the remaining clauses of the Bill.

Clause 8(2)(b) requires that licenced dealers or agents should be "of sound financial standing". This provision is too wide in its ambit and would lend itself to arbitary and discriminatory treatment in its application. In the circumstances it is our view that the provision would be inconsistent with Article 12(1) of the Constitution and would require to be passed by a special majority as stated in Article 84(2).

The inconsistency would cease if guidelines are introduced as to the criteria on which financial standing could be assessed as a requirement of a licenced dealer or agent.

Clause 8(4)(a) provides for both a licence and a certificate to be issued to dealers or agents. It is to be noted that the issuance of a licence and of a certificate contemplates two distinct situations. A certificate contemplates the satisfaction of a specified standard that is laid down. A licence on the other hand can be issued on minimum requirements being satisfied. In this instance there is no basis for a licence and a certificate to be issued to dealers or agents. In the circumstances learned Deputy Solicitor General who assisted the Court agreed that the uncertainty which results in both concepts being used would be eliminated by deleting the provisions regarding the issuance of certificates.

Clause 8(4)(a) also provides for a difference in the period for which a licence would be issued in relation to " a company or a body corporate" on the one hand, and to "persons" on the other. The period in relation to company or a body corporate is 5 years and whereas the period in relation to a person is 2 years. In the interpretation clause (clause 25) a "person" has been defined to include "a company or body of persons." Thus it is seen that a natural person and a corporate body are treated alike for the purposes of the Bill. In such a situation there is no basis to discriminate between the two categories in relation to the period for whicl the licence is to be granted. In the circumstances we are of the view that the provisions as presently worded would be inconsistent with Article 12(1) of the Constitution and would require to be passed by the special majority provided for in Article 84(2) of the Constitution. The inconsistency would cease if a suitable amendment is made which provides for a licence to be granted to a "person" for a (single) fixed period of time. In as much as the word "person" is defined in clause 25 to include "a company or body of persons", there is no necessity to repeat the words "a company or body of persons" in the text in clause 8(4)(a).

Clause 8(5)(a) provides for the cancellation or suspension of a licence granted to a dealer or agent. Sub-paragraph (ii) provides for such cancellation or suspension where the dealer or agent "has ceased to be of good financial standing." It has already been noted in relation to clause 8(2)(b) that the reuqirement in relation to a "sound financial standing" should be subjected to adequate guidelines. In the circumstances we are of the view, for the same reasons, that this provision too would be inconsistent with Article 12(1) of the Constitution and would have to be passed with a special majority as provided for in Article 84(2) of the Constitution. The inconsistency would cease if adequate guidelines are introduced as before.

Sub-paragraph (iii) of clause 8(5) provides for such cancellation or suspension where the dealer or agent "is guilty of malpractice or irregularity in the management of his affairs." Learned Deputy Solicitor General agreed at the hearing, that this provision is too wide in its ambit and that such malpractice or irregularity should be restricted to the business of marketing and distribution of agricultural products by such licensed dealer.

Clause 8(6)(a) provides for an appeal by a person aggrieved by the decision of the Authority in refusing to grant licence or in cancelling or suspending a licence, to the Secretary of the Ministry of Finance. As noted above, the Secretary of the Ministry of Finance is an ex-officio member of the Authority and it would not be in order to provide for an appeal to the same official who was a party to the making of the dicision appealed against. Learned Deputy Solicitor General agreed with this position that the provision with regard to an appeal to the Secretary of the Ministry of Finance should be deleted, and that the person aggrieved should be provided with an appeal direct to the Court of Appeal as already contained in sub-paragraph (c) of that clause, with suitable amendments made thereto. Sub-paragraph (e) of this clause requires the Court to Appeal to pronounce its order within one month of the appeal being filed in that Court. This would in our view amount to an undue fetter on the exercise of Judicial functions of the Court of Appeal in terms of Article 138(1) of the Constitution. The requirement that the matter be determined by the Court within one month is in any event unrealistic. Learned Deputy Solicitor General agreed that the inconsistency would be avoided by a suitable amendment requesting the Court of Appeal to give priority to the hearing and determination of such an appeal.

Clause 8(6)(b) provides that the Secretary, Ministry of Finance who is an ex-officio member of the Authority may require the self-same Authority "to show cause for its decision

to his satisfaction." Thus the Secretary, Ministry of Finance will have to show cause to himself to his own satisfaction. For the reasons given above I am of the view that this clause too cannot stand and should be deleted.

Learned Deputy Solicitor General agreed that clause 12(4) would be amended by incorporating guidelines as to the nature of the powers, functions or duties that may be delegated by the Director General as provided for by that clause. In the circumstances we would not make any observation with regard to this provision.

Clause 14(1) provides for 'complaints' of producers of agricultural products to be considered by a Committee of 3 members of the Authority. The clause as presently worded empowers a Committee to "hear and determine" such complaints. This contemplates the excercise of judicial power by such a Committee. Learned Solicitor General agreed at the hearing that the phrase "hear and determine" would be deleted and the Committee would be vested with power only to inquire into and report to the Authority in respect of such complaints.

Clause 17 (1) provides for the acquisition of any immovable property owned or possessed by public corporation in terms of Land Acquisition Act. It appears that the provision is misconceived since the procedure of the Land Acquisition Act cannot be resorted to in relation to property owned by a public corporation. If what is intended is acquisition of the private property the provision should be suitably amended.

Clause 18(2) provides for movable property of the State to be vested in the Authority. In this context, we are of the view that "vesting" may not be appropriate in relation to movable property.

Learned Deputy Solicitor General agreed that the porvision should be replaced with one permitting such property to be requisitioned.

Clause 19(1)(*a*) has the effect of giving total immunity from legal suits in respect of any action to the Authority in respect of any thing done in good faith. This provision would be inconsistent with Article 12 (1) of the Constitution and could only be passed with the special majority provided for in Article 84(2) of the Constitution.

Clause 22 provides for the compounding of offences by the Authority. It is to be noted that the Bill does not create any offences. In the circumstances no question would arise of any offence being compounded.

Our findings are summarized as follows:

(i) Clause 6(*d*) to be amended as agreed by the Deputy Solicitor General.

(ii) Clauses 7 and 8 which provides for two categories of dealers or agents would be inconsistent with Article 12 (1) of the Constitution. It requires to be passed with a special majority as contemplated by Article 84(1) of the Constitution. Inconsistency would cease if a suitable amendment is made providing for only one category of dealers or agents. If so, corresponding amendments have to be made in other provisions of the Bill.

(iii) clause 8(2)(*b*) is inconsistent with Article 12(1) of the Constitution and this has to be passed by a special majority. The inconsistency would cease if suitable guidelines are introduced.

(iv) Clause 8(4)(*a*) is inconsistent with Article 12(1) of the Constitution. Inconsistency would cease if amendments are made as indicated.

(v) Clause 8(5)(*a*)(ii) requires guidelines as indictated.

(vi) Clause 8(5)(*a*)(iii) requires amendements as agreed by learned Deputy Solicitor General.

(vii) Clause 8(6)(*a*) permitting an appeal to the Secretary, Ministry of Finance is not in order, and should be deleted as agreed by the Deputy Solicitor General.

(viii) Clause 8(6)(*b*) should be deleted for the reason stated.

(ix) Clause 8(6)(*e*) is inconsistent with Artilce 138(1) of the Constitution and should be amended as agreed by the Deputy Solicitor General.

(x) Clause 12(4) to be amended as agreed by the Deputy Solicitor General.

(xi) Clause 14(1) to be amended as agreed by the learned Deputy Solicitor General.

(xii) Clause 17(1) to be amended as agreed by the Deputy Solicitor General.

(xiii) Clause 18(2) to be amended as indicated.

(xiv) Clause 19(1)(*a*) is inconsistent with Article 12(1) of the Constitution and could only be passed by the special majority as provided for in Artilce 84(2) of the Constitution

(xv) Clause 22 is irrelevant and should be deleted as agreed by the Deputy Solicitor General.

Subject to the foregoing the other provisions of the Bill are not inconsistent with the Constitution. We make our determination accordingly. We thank the Deputy Solicitor General and the State Counsel for the valuable assistance rendered to court in examining the constitutionality of the Bill.

(Sgd.) Sarath N. Silva,
Chief Justice.

(Sgd.) S. W. B. Wadugodapitiya,
Judge of the Supreme Court.

(Sgd.) Ameer Ismail,
Judge of the Supreme Court."

Decision of the Supreme Court Conveyed to Parliament on: 12.03.2001
The Bill was not presented to Parliament.

2001

2. CONSUMER PROTECTION AUTHORITY

A

BILL

to provide for the establishment of the consumer protection Authority; For the promotion of effective competition and the protection of consumers; For the regulation of internal trade; For the establishment of a consumer protection council; For the repeal of the Consumer Protection Act No. 1 of 1979, The Fair Trading Commission Act No. 1 of 1987, The Control of Prices Act No. 29 of 1950; And for matters connected therewith or incidental thereto.

CONSUMER PROTECTION AUTHORITY BILL

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

A bill titled "The Consumer Protection Authority Act"

In the matter of a reference under Article 122(1)(b) of the Constitution.

S. C. Special Determination No. 5/2001

Present:

Sarath N. Silva,	Chief Justice
S. A. Bandaranayake,	Judge of the supreme court
Hector Yapa,	Judge of the supreme court

Council:

Shibly Aziz, P. C., with Ms. Kishali Pinto Jayawardena and Athula Perera for the Petitioner.

Shibly Aziz, P. C., with Ms. Kishali Pinto Jayawardena and Kamal Nissanka for Petitioner's Centre for Policy Alternative.

Anil Gooneratne, D. S. G., with Y. Wijayatilake, D. S. G., and Ms. Anusha Nawaratne, S. S. C., for the Attorney General

Mr. Rohan Edirisinghe – Petitioner appears in person.

Court assembled for hearing: At 10.15 a.m. on 1st June 2001.

A Bill entitled "The Consumer Protection Authority Act" has been referred to the Chief Justice by Her Excellency the President in terms of Article 122(1)(b) of the Constitution for the special determination of this Court, as to whether the Bill or any provision thereof is inconsistent with the Constitution.

The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has decided that in its view, the Bill is urgent in the national interest.

Three petitions were presented to this Court in respect of the above Bill. They are by:

(*a*) Mr. Rohan Edirisinghe, 2/3, Sri Maha Vihara Road, Dehiwela

(*b*) Centre for Policy Alternatives (CPA)
No. 32/3, Flower Road, Colombo 7, and

(*c*) The Consumer Protection Society of Sri Lanka
No. 9A 1/1, Nalandarama Road, Nugegoda.

Mr. Anil Guneratne D. S. G., appeared for the Attorney General and assisted this Court in the consideration of the provisions of this Bill.

The Bill seeks to establish a Consumer Protection Authority with two principal functions, they are:

(i) to promote effective competition between persons supplying goods and services;

(ii) promote the interests of consumers, purchasers and other users of goods and services in respect of the Price availability of such goods and services and the variety supplied.

The said functions are to be performed by the Authority that will be established under the Bill. At present these functions are performed under the:

(i) Consumer Protection Act, No.1 of 1979;

(ii) The Fair Trading Commission Act, No. 1 of 1987;

(iii) The Control of Prices Act, No. 29 of 1950.

These enactment are repealed by clauses 77(1)(*a*), 77(2)(*a*) and 77(3) of the Bill.

The provisions of the Bill are substantially drawn from the aforesaid existing legislation, which has been in operation for several years. The general object of the Bill is to bring the functions performed in terms of different enactment under the umbrella of a single piece of legislation to be discharged by one authority.

Part II of the Bill relating to the regulation of trade and is referable to the second function stated above as to the interests of consumers, purchasers and the like.

Part III of the Bill relate to monopolies, mergers and anti-competitive practices and is referable to the first function stated above.

Part IV provides for the establishment of a Consumer Protection Council, with the power to hear and determine all applications and references that may be made to it under the law. Any person aggrieved by an order made by the Council may appeal to the Court of Appeal in terms of clause 43 of the Bill.

Part V provides for the Fund of the Authority.

Part VI provides for the staff of the Authority.

Part VII contains transitional provisions with regard to the persons in employment in the Department of Internal Trade.

The Petitioners have clearly submitted that the objectives of the Bill are "in consonance with the objectives of Consumer Protection Legislation world-wide. They are designed to serve the consumer by promoting effective and fair competition, by way of ensuring quality of product and free and fair trade practices among enteprenuers". It is thus seen that the Petitioners commend the provisions of the Bill in relation to its objectives. In the petitions filed certain objections were raised with regard to clauses 50 and 81, which provide for certain exemptions.

Clause 50 provides for exemption from the provisions of Parts III, and IV of the Bill where the goods and services are supplied by specific categories of institutions. It is seen that the institutions have a public character.

In the circumstances learned President's Counsel appearing for the Petitioners and the Petitioner who appeared in person submitted that it is logical to exempt situations where goods and services are supplied by those institutions from the provisions of Part III of the Bill which deals with monopolies, mergers and anti-competitive practices. It necessarily follows that Part IV of the Bill would also not apply to those institutions. In the circumstances learned President's Counsel and the Petitioner who appeared in person submitted that they do not persist in their objections to the constitutionality of this clause.

The other objection reates to clause 81 of the Bill which exempt certain existing agreements from the provisions of the Bill.

Learned President's Counsel and the Petitioner who appeared in person submitted that since the exemption is limited to agreements that have been validly entered into under the existing law the exemption sought to be granted would not be unconstitutional. Therefore in this instance too, they do not pursue the objection that has been raised. Counsel did not draw the attention of Court to any provision of the Bill which would be submitted would be inconsistent with any provision of the Constitution.

President's Counsel for the Petitioner and the Petitioner appearing in person submitted that this Bill should not have been treated as an urgent Bill in terms of Article 122(1) of the Constitution, considering its contents. It was submitted that there exist no circumstances suggestive of any urgency in the enactment of the Bill.

Whilst we note the submissions made, we have to observe that the matter of deciding whether any Bill is urgent in the national interest is for the Cabinet of Ministers in terms of Article 122(1) of the Constitution.

It is not open for this Court to comment upon the decision of the Cabinet in this respect or to rule on its validity.

Based on the foregoing we make a determination in terms of Article 123(1) of the Constitution that neither the Bill nor any provision thereof is inconsistent with the Constitution.

(*Sgd.*) Sarath N. Silva,
Chief Justice.

(*Sgd.*) Shirani A. Bandaranayake,
Judge of the Supreme Court.

(*Sgd.*) H. S. Yapa,
Judge of the Supreme Court.

Presented to Parliament on: 07.06.2001
Bill No: 29
Decision of the Supreme Court Conveyed to Parliament on: 06.06.2001
Bill was not proceeded with.

2001

3. CHRISTIAN SAHANAYE DORATUWA PRAYER CENTRE (INCORPORATION)
(Private Member's Bill)

A

BILL

to incorporate the Christian Sahanaye Doratuwa Prayer Centre

I N THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application under Article 121(1) of the Constitution

S. C. Determination No. 2/2001

Present:

Sarath N. Silva,	Chief Justice
Shirani A. Bandaranayake,	Judge of the Supreme Court
Ameer Ismail,	Judge of the Supreme Court

Councel:

Manohara de Silva with Prasan Gunasena for Petitioner, Y. J. W. Wijayathilaka, D. S. G., for Attorney General

Court assembled at : 10.00 a.m. on 24.05.2001

A Bill titled "Christian Sahanaye Doratuwa Prayer Centre (Incorporation) has been presented to Parliament as a Private Member's Bill. The Bill was placed in the Order paper of Parliament on 10th May 2001 and the Petitioner has challenged its constitutionality by papers presented to this court on 16th May 2001. He has thereby invoked the jurisdiction of this Court in terms of Article 121 (2) of the Constitution, Due notice of the petition that has been filed was given to the Hon. Attorney General.

The preamble to the Bill states that the association which is sought to be incorporated has been in existence and has carried out and transacted several objects for which it was formed. The objects of the Corporation that is to be constituted by the Bill are set out in clause 3 and its powers are set out in clause 4. The rules of the Corporation are referred to in clause 6. Clause 14 refers to the validity of the provisions of the Bill in relation to the rights of the Republic or any body politic or corporate or of any other person.

To objections raised by the Petitioner relate to the constitutionality of the provisions referred to above:

The Petitioner submitted that the Corporation that is being constituted is a religious body of a particular denomination and that the objects read with the powers of the Corporation provided for in clauses 3 and 4 offend Article 10 of the Constitution.

The objects of the Corportation out in clause 3 are:

"(*a*) to encourage the active observance of the Christianity;

(*b*) to promote the co-operation of the devotees who have faith in the prayer of God;

(*c*) to provide assistance and aid to needy Christians who seek assistance of the Corporation.

(*d*) to cure patients through prayer;

(*e*) to provide assistance to persons in order to solve their problems through prayer.

(*f*) to assist persons in various ways to enable them to obtain job opportunities;

(*g*) to rehabilitate persons who are addicted to drugs or any other misconduct or involved in criminal activities;

(*h*) to train persons in various industries to enable them to engage in self employment;

(*i*) to accommodate the request made by any person to conduct religious and customary rights and rituals at a birth, marriage, death or any such occasion;"

The powers of the Corporation to which reference is made by the Petitioner are set out in clauses 4(a) and (b), which are:

"(*a*) to borrow or raise money for the purposes of the Corporation;

(*b*) to draw, accept, discount, endorse, negotiate, buy, sell and issue bills of exchange, cheques, promissory notes and other negotiable instuments and to open, operate, maintain and close bank accounts in Sri Lanka and elsewhere;"

The submission of the Petitioner is that although the association is being incorporated as a prayer centre, the objects referred to and its powers transcend the observance and practice of a religion. To support this submission the Petitioner relies on the objects stated in sub paragraphs (i) and (h) in clause 3 referred to above. This would give a statutory right to the Corporation to provide assistance to persons to secure job opportunities and to provide training in industries to enable persons to engage in self employment. These are economic and commercial activities as distinct from the observance and practice of a religion which is a fundamental right guaranteed by Article 14(1)(c) of the Constitution.

It was further submitted that when the legislature incorporates a prayer centre of a particular denomination and invests that Corporation with the right to engage in economic and commercial activities referred to above with the powers relating to finance in clauses 4(a) and (b) that would necessarily results in the conversion of persons of other religions and faiths to that of the prayer centre which is being incorporated through allurement or other subtle means. Thus the freedom of thought, conscience and religion of other persons guaranteed by Article 10 would be infringed.

Alternatively, the Petitioner submitted that when the prayer centre is incorporated with the objects of an economic and commercial nature as referred to above with the power to raise money, the legislature would thereby place the prayer centre in a more favourable position than persons and groups of persons, who are engaged in the observance and practice of other religions. It was submitted that this would infringe Article 12(1) of the Constitution which mandates that all persons are equal before the law and are entitled to the equal protection of the law.

We have given careful consideration to the submissions of the petitioner in view of the particular sensitivity which attaches to issues of freedom of thought, conscience and religion and the freedom to practice and observe a religion. The free exercise of these rights is of high emotive significance in a pluralistic society. Any legislative measure which places one religious group at an advantage or which directly or indirectly would permit the conversion by allurement or other subtle means of a person of a particular religion to another would indeed result in social disturbances. The Petitioner has relied on a significant

body of material with regard to the conversion of persons of one religion to another by such means. In our view it is unnecessary to examine this material which may be of social and political content but does not have a direct bearing on the questions of law that arise for consideration. We have confined our deliberations to the strict legal issues that are involved.

The freedom of thought, conscience and religion is a fundamental right guaranteed by Article 10 of the Constitution. In terms of Article 83(a), any Bill which is inconsistant with Article 10 would become law only if it is passed by a two-third majority and approved by the People at a Referendum.

Article 10 of the Constitution reads thus:

"Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice."

It is seen that the freedom of thought, conscience and religion is not only declared as a right to which every person is entitled to, but also that the right is defined to include the freedom to have or to adop a religion or belief of a persons's choice. It follows therefore that there should be no fetter in the path of any person in the choice he makes to adopt a religion or belief. The Constitution guarantees to every person that the basic choice he makes with regard to his religion or belief would be taken with complete freedom without being exposed to any undue influence allurement or fraud.

In India there has been, State legislation in Madhya Pradesh (1968) and Orissa (1967) that prohibit the conversion of persons of one religion to another by force, fraud or allurement. The Supreme Court of India in the case of Rev. Stainislaus vs State of Madhya Pradesh (1977 AIR S. C. page 908) considered the validity of the penal provision where a conviction had been entered against the appellant. The submission of the appellant was that the State legislation was invalid since it was inconsistent with Article 25(1) of the Constitution which guarantees to every person the freedom to "profess, practice and propagate religion." This argument was rejected by the Supreme Court which held that "there can be no such thing as a fundamental right to convert any person to one's own religion." The basis of the judgement was stated by A. N. Ray. C. J. as follows:

"It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom on conscience" guaranteed to all the citizens of the country alike." (at page 911)

In Sri Lanka the Constitution does not gurantee a fundamental right to "propagate" religion as in Article 25(1) of the Indian Constitution. What is gurarranteed here to every citizen is the fundamental right by Article 14(i)(e) to manifest, worship, observe, practice that citizen's religion or teaching. Further, Article 10 referred to above guarantees to every person the freedom of thought and conscience including the freedom to adopt a religion of his choice. The Constitution permits no restriction of the fundamental right guaranteed by Article 10. Hence the reasoning of A. N. Ray, C. J. would apply with greater force to the relevant provisions of our Constitution.

The submissions of the Petitioner is that when a prayer centre which is dedicated to a particular denomination is incorporated by stature and invested with a statutory right to provide assistance to persons through economic measures such as securing job oppotunities and training in industries and other skills to engage in self employment with the power to raise money for those purposes, persons of another religion or belief who come to the prayer centre would be allured to adopt the religion of the prayer centre. This submission is fortified by the inclusion of provisions with regard to commercial and economic activities in the objects of the Corporation together with the practice and observance of religion. In our view the freedom guaranteed to every citizen by Article 14(1)(e) of the Constitution to practice a religion and engage in worship and observance, by himself or in association with others, should be taken as distinct from the freedom guaranteed by Article 14(1)(g) to engage in a lawful occupation, trade, business or enterprise. A prayer centre that seeks special legislative recognition by way of incorporation cannot avail itself of these two freedoms together. If it is sought to be done in that manner there is a likelihood of the fundamental right guranteed by Article 10 being infringed. The freedom guaranteed by Article 10 to every person to adopt a religion or belief of his choice postulates that the choice stems from the free exercise of one's thought and conscience without there being any fetter of allurement which in any way distorts that choice.

In the circumstances we are inclined to agree with the submission made by the Petitioner that clauses 3 and 4 of the Bill as presently constituted would be inconsistent with Article 10 of the Constitution.

The next submission made by the Petitioner is in relation to clause 6 of the Bill. This clause empowers the Corporation to make rules for the matters provided therein. Clause 6(3) states that the rules of prayer centre in force on the day preceding the date of the commencement of this Act shall be deemed to be the rules of the Corporation made under this Act. It is submitted that by virtue of this provision these rules acquire the force of law. Since the rules now in force do not form part of the bill, it is submitted that there is an abdication of legislative power by Parliament, which is violative of Article 76(1) of the Constitution.

We uphold the submission of the Petitioner that rules of the centre which do not from part of the Bill cannot be given the force of law in the manner it is sought to be done by clause 6(3). That, Parliament cannot give the force of law to any rules that have not been placed before it. This provision would therefore be inconsistent with Article 76(1) of the Constitution.

Furthermore, clause 6(2) empowers the Corporation to alter, add or amend the rules. Thereby the Corporation would be empowered even to alter, add, amend, or rescind the rules that are sought to be given the force of the law by clause 6(3). This too would amount to an abdication of legislative power, inconsistent with Article 76(1) of the Constitution.

The final submission made by the Petitioner is in relation to clause 14 of the Bill, which reads as follows:

"Nothing in this Act contained shall prejudice or affect the right of the Republic or of any body politic of corporate or of any other persons except such as are mentioned in this Act, and those claiming by, from, or under them."

It is submitted that the provision as presently worded would have the effect of the matters in respect of which specific mention is made in the Bill prejudicing of the right of even the Republic or of any other corporate body or person.

It is to be seen that the marginal note of this clause states that it is intended to save the rights of the Republic and others. However the manner in which the clause has been drafted would lead to the inference being drawn that the right of the Republic and other corporations and persons are superceded by the provisioin of the Act.

In our view the inconsistency with the Constitution, thus submitted could be avoided if the provisioin is limited to first two lines and would read as "nothing in this Act contained shall prejudice or affect the rights of the Republic or of any body politic or corporation."

Clauses 3 and 4 are the principal provisions of the bill. Since these two provisions are inconsistent with Article 10 of the Constitution we make a determination in terms of Article 123(2) of the Constitution that the Bill comes within the purview of Article 83(1) and hence is required to be passed by the special majority as provided for in Article 84(2) of the Constitution and approved by the People at a Referendum.

Sarath N. Silva,
Chief Justice.

Shirani A. Bandaranayake,
Judge of the Supreme Court.

Ameer Ismail,
Judge of the Supreme Court.

Bill was presented to Parliament on: 10.05.2001 by Mr. John Amaratunga, M.P. for Gampaha District
Bill No.: 23
Decision of the Supreme Court Conveyed to Parliament on: 08.06.2001
Bill was not proceeded with.

2001

4. SEVENTEENTH AMENDMENT TO THE CONSTITUTION

A

BILL

to amend the Constitution of the Democratic Socialist Republic of Sri Lanka

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

In the matter of a reference under Article 121(1)(b) of the Constitution

S. C. Determination No. 6/2001.

Present :

Sarath. N. Silva,	Chief Justice
P. Edussuriya,	Judge of the Supreme Court
H. S. Yapa,	Judge of the Supreme Court

Counsel :

K. C. Kamalasabayson, P. C., Attorney-General, with Saleem Marsoof, P. C., Addl. Solicitor General, Neril Pulle, S. C., and Harsha Fernando, S. C.,

Ranjith Abeysuriya, P. C., with Suranjith Hewamanna, J. E. Weliamuna, Ms. Priyadarshani Dias instructed by Ms. Lilanthi de Silva for Wijeya Publication Ltd., Upali Newspapers Ltd., and Leader Publications Ltd.,

J. C. Weliamuna, Janaka Samaranayake and Lilanthi de Silva for Victor Ivan

Upul Jayasuriya with Ronald Perera for Waruna Karunatilake

Court assembled at : 10.15 a.m. on 21.09.2001

The President has made a written reference addressed to the Chief Justice in terms of Article 122(1)(b) of the Constitution requiring the special determination of this Court as to the constitutionality of the Bill bearing the title –

> "An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka"

In the short title the Act is cited as : "the Seventeenth Amendment to the Constitution."

The Bill bears an endorsement under the hand of the Secretary to the Cabinet made in terms of Article 122(1) that, the Bill is in the view of the Cabinet of Ministers, urgent in the national interest.

The Bill consists of the following parts which could be dealt with separately and are connected *inter se* in certain respects –

(i) CLAUSE 2 – which introduces after Article 41 of the Constitution a new Chapter VIIA titled "The Constitutional Council"

(ii) CLAUSE 3 – which repeals Article 52(7) of the Constitution and substitutes therefor a new provision.

(iii) CLAUSE 4 – which repeals Chapter IX of the Constitution and substitutes therefor a new Chapter IX titled

"The EXECUTIVE
The Public Service"

(iv) CLAUSES 5, 6, 7 AND 8 – contains certain consequential amendments to Articles 65, 89, 91 and a repeal of Articles 103 and 104 of the Constitution.

(v) CLAUSE 9 – which introduces a new Chapter XIVA titled "ELECTION COMMISSION"

(vi) CLAUSE 10 – contains certain consequential amendments.

(vii) CLAUSES 11, 12, 13, 14 AND 15 – which relate to the appointment of Judges of the High Court, a Fiscal for the whole Island and re-numbering of Articles 116 as 111C of the Constitution.

(viii) CLAUSE 16 – which introduces a new Chapter XVA titled "Judicial Service Commission"

(ix) CLAUSES 17, 18 AND 19 – contains a certain consequential amendments and repeals of Articles.

(x) CLAUSE 20 – which introduces a new Chapter XVIIIA titled "National Police Commission."

(xi) CLAUSES 21, 22, 23, 24, 25, 26, 27, 28 AND 30 – contains consequential amendments and for continuance in respect of certain incumbent officers.

The Bill taken in its entirety has the objective of altering the legal regime for the appointment, regulation of service and disciplinary control of Public Officers forming part of the Executive, including Police Officers, Judges and Judicial Officers and of certain Commissions that wield governmental power. It places a restriction on the discretion now vested in the President and the Cabinet of Ministers in relation to these matters and subjects the exercise of that discretion to the recommendations or approval of the new body to be established, known as the "The Constitutional Council". In that respect the provisions relating to the establishment and functions of the Constitutional Council is the core of the Seventeenth Amendment. These provisions are contained as noted above in the new Chapter VIIA with Articles 41A to 41H. The Council is essentially a body that comes within the aegis of Parliament with the Speaker as its Chairman and nine members, to wit ;

(a) The Prime Minister

(b) The Leader of the Opposition

(c) One appointed by the President

(d) Six appointed by the President upon nomination of, three by the Prime Minister and three by the Leader of the Opposition.

The guidelines for the exercise of the power of nomination vested in the Prime Minister and the Leader of the Opposition are contained in Article 41A(3). It provides for a mandatory process of consultation with leaders of political parties and independent groups represented in Parliament. It also provides for the minimum representation of two persons to represent minority communities and one to represent political parties other than that of the Prime Minister and Leader of Opposition. Thus it is seen that although the six members are referred to in Article 41A(1)(e) as ;

> "six persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party,"

they would be nominees of the respective political parties and hold office for a period of three years (*vide* Article 41 A (5)). They would be broadly representative, in a political sense.

Another aspect in relation to the process of nomination as contained in sub Article (3) referred above is that it does not specify from which "allocation" (whether of the Prime Minister's or of the Leader of Opposition), the representatives of the minority parties and of other parties would come. This process envisages a broad consensual approach on the part of the Prime Minister and Leader of the Opposition, which is not uncommon in certain matters of Parliamentary procedure. There is inherent in the guidelines a possibility for the process of consultation with the political parties and minority groups, although being couched in mandatory terms, being ineffective in practice. In terms of Article 41A(1)(e) the President is bound to "forthwith" make the appointments upon receipt of the nominations of the Prime Minister and the Leader of the Opposition. These aspects do not involve questions of constitutionality that require a determination by the Court at this stage. They are matters of legislative policy within the purview of Parliament.

The Bill is described in its long title as being an Act for the amendment of the Constitution. The provisions to be repealed altered or added have been expressly specified in the Bill, as noted above. Hence we are of the view that the, Bill complies with the provisions of Article 82(1) of the Constitution. The Bill will not become Law unless it is passed by the special majority provided for in Article 82(5) of the Constitution. Therefore in effect the only matter for determination by this Court is whether in addition to being passed by the special majority it should be approved by the People at a Referendum as required by Article 83 of the Constitution.

The power of making appointments to the respective Commissions and the appointment of the officers referred to in Article 41B of the Bill is now exercised by the President. In relation to the Public Service the power is vested in terms of Article 55(1) of the Constitution in the Cabinet of Ministers, which too is headed by the President. As noted above the amendment seeks to subject the exercise of this discretion to recommendations and approval of the Constitutional Council.

The question which comes up for consideration and dealt with by the Hon. Attorney General in his submissions is whether the amendment amounts to an erosion of the executive power of the President and is thereby inconsistent with the provisions of Article 3 read with Article 4(b) of the Constitution. In terms of Article 83(a) any Bill which is inconsistent with the provisions of Article 3 would become law only if it is passed by the special majority in Parliament and is approved by the People at a Referendum.

Article 3 of the Constitution reads thus :

> "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the power of government, fundamental rights and the franchise."

The exercise of the sovereignty of the People is provided for in Article 4. In the circumstances the provisions of Article 3 is in certain respects inter linked with the provisions of Article 4. The relevant provision as to the exercise of the sovereignty of the People in relation to executive power is contained in Article 4(b), which reads thus :

> "executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People."

Therefore the executive power of the People including defence is exercised by the President of the Republic who is elected by the People. This power is exercised through public officers and commissions that have been referred to above, it is in this context that the President is vested with the power of appointment, in relation to these officers and bodies.

The question that has to be considered is whether the subjection of the discretion of the President to the recommendation and approval of the Constitutional Council as envisaged by the Bill would amount to an effective removal of the President's executive power in this respect.

The Hon. Attorney General whilst submitting that it is a restriction on the exercise of the discretion by the President, contended that there is no removal of the executive power of the President. We note from the contents of the Bill that there are certain matters which clearly sustain and are consistent with the exercise of the executive power by the President in this regard.

In particular we wish to note the following matters:-

(1) In terms of Article 41A(1)(d) the President is empowered to appoint one member to the Constitutional Council.

The person thus appointed shall hold office for such period as the President may from time to time determine the terms of Sub clause (7). The presence of this member would constitute the link between the President and the Constitutional Council. Hence the President is not removed from the process of the Constitutional Council.

(2) As contended by the Hon. Attorney General, the appointments to the Constitutional Council provided for in Article 41A(1)(e) would in any event be made by the President. Therefore although there is a restriction on the discretion of the President, the appointment as such would be the act and deed of the President.

(3) In terms of clause 3 that is Article 55(3), the appointment, promotion, transfer, disciplinary control and dismissal of all heads of departments is vested in the Cabinet of Ministers, chaired by the President. It is provided that this power will be exercised "after ascertaining the views of the Commission" (PSC).

(4) In terms of clause 4 that is, Article 61E the President appoints the Heads of the Army, Navy and Air Force. Therefore the appointment of the Heads of Forces being an integral part of the defence of Sri Lanka referred to Article 4(b) of the Constitution would be within the purview of the President.

The four matters referred to above taken together, in our view support the inference that the amendment does not remove the executive power of the President in relation to the subjects coming within the purview of the Bill.

Although, there is a restriction in the exercise of the discretion hitherto vested in the President, this restriction *perse* would not be an erosion of the executive power by the President, so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution.

Hon. Attorney General also dealt with certain matters in relation to specific provisions of the Bill. In relation to clause 2 that is Article 41C(2), it was submitted that it would not be feasible to make appointments of persons to act in the offices referred to in instances where the period of absence of the permanent holder of such office is brief. In the circumstances the Hon. Attorney General submitted that of Article 41C(2) would be amended to restrict the application of the provision to a situation where the period for which a person is appointed to act in office exceeds one month. He also submitted that considering the importance and standing of the officers referred to in Article 41C(3), the provision would be suitably amended so that the procedure for removal would be as provided in the Constitution and in accordance with the procedure laid down by law. Thus there should be express legal provision setting out the procedure for such removal.

We note that such a safeguard is necessary considering that the officers referred to should function with a degree of independence and security of tenure necessary for the due discharge of their function. These officers are also denied an opportunity to redress any grievance before the Administrative Appeals Tribunal that will be constituted in terms of the Amendment.

The three petitions that were presented to this Court in relation to the constitutionality of the Bill are from persons representing the media of this country,.

Counsel appearing for the petitioners made their submissions in relation to provisions of clause 9 they are Articles 104 B(5)(a) and 104B(6). Sub-Article (5)(a) relates to a power vested in the Election Commission to give directions to any broadcasting, telecasting operator or any proprietor or publisher of news paper. The Commission is empowered to give these directions to ensure a free and fair election. Sub-Article (6) which is connected states that the directions may be given as provided for in Sub- Article 5(a) will not apply to any operator, proprietor or publisher of a broadcasting or telecasting station or any newspaper, as the case may be, who informs the Commission within 7 days from the date of nomination of candidates, that he would support a particular candidate or political party or an independent group in the forthcoming election.

Therefore in terms of the legislative scheme envisaged the proprietor, operator or publisher is required to declare his support to any particular candidate or party upfront. It was submitted that the element of compulsion introduced thereby and the risk of being subject to directions issued by the Commission would be inconsistent with the freedom of thought and conscience guaranteed by Article 10 of the Constitution.

Hon. Attorney General submitted that sub-clause 6 would be deleted and that sub-clause 5(a) would be suitably amended so that the Commission would only be empowered to give guidelines to the media to ensure a free and fair election.

The amendment the Hon. Attorney General agreed to would in our opinion remove the basis of the objection that has been raised. It would also be necessary to make consequential amendments flowing upon the amendment agreed to by the Hon. Attorney General.

Learned Counsel for the petitioners agreed that the proposed amendment would satisfy the concern of the petitioners.

In the circumstances it would not be necessary to deal with the objections of the petitioners further.

We have examined the remaining provisions of the Bill with the assistance of the Hon. Attorney General and we do not see in any of them any issue that would require consideration by this Court in terms of Article 83 of the Constitution.

Accordingly this Court determines that the Bill titled "The Seventeenth Amendment to the Constitution"–

(a) complies with the provisions of Article 82(1) of the Constitution;
(b) requires to be passed by a special majority specified in Article 82(5) of the Constitution;
(c) that there is no provision in the Bill which requires approval of the People at a Referendum in terms of the provisions of Article 83.

We wish to place on record the valuable assistance given by the Hon. Attorney General and the Counsel who made submissions on behalf of the Petitioners.

Sarath N. Silva
Chief Justice

P. Edussuriya
Judge of the Supreme Court

H. S. Yapa
Judge of the Supreme Court

Bill was presented to Parliament on: 24.09.2001
Bill No: 40
Decision of the Supreme Court Conveyed to Parliament on: 24.09.2001
Passed on: 24.09.2001 Speaker's Certificate Endorsed on: 03.10.2001
Title: Seventeenth Amendment to the Constitution

2002

L. LOCAL AUTHORITIES ELECTIONS (AMENDMENT)

A

BILL

To Amend The Local Authorities Elections Ordinance

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

AN ACT TO AMEND THE LOCAL AUTHORITIES ELECTIONS ORDINANCE

In the matter of a reference under Article 122(1)(b) of the Constitution

S.C. Special Determination
No. 1/2002

Present :

S. W. B. Wadugodapitiya, Judge of the Supreme Court
D. P. S. Gunasekera Judge of the Supreme Court and
Ameer Ismail Judge of the Supreme Court

Counsel :

K. C. Kamalasabayson, P. C., Attorney-General, with Arjuna Obeysekera, State Counsel

The Court assembled for the hearing at 11.00 a.m. on 13th February 2002. A Bill entitled "An Act to amend the Local Auhorities Elections Ordinance" has been referred to the Chief Justice by Her Excellency, the President in terms of Article 122 (1)(b) of the Constitution for the special determination of this Court as to whether the Bill or any provisions there of is inconsistent with the consitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of ministers to the effect that the Cabinet of Ministers has certified that in its view, the bill is urgent in the national interest.

Mr. K.C. Kamalasabayson, P.C., Attorney-General, with Arjuna Obeysekera, State Counsel, assisted this Court in the consideration of the provisions of the Bill.

The Bill seeks to elaborate and spell out the offences that might be committed in connection with Local Government Elections, and makes provisions for the punishment of such offences.

In clause 6, under the heading, "Corrupt Practices" the offence dealt with are, personation, treating, undue influence and bribery. Futher, under the heading, "Illegal Practices" are enumerated certain illegal expenditures, false reports in newspapers, certain categories of employment designated as illegal illegal and the printing , publishing and distribution of certain election publications.

Clause 7 deals with Election Petitions, and vests jurisdiction to hear and determine election petitions in the High Court with a right of Appeal to the Supreme Court.

The Attorney-General rightly submitted that none of the provisions of this Bill was inconsistent with the Consititution. We ourselves, after careful examination of the Bill, agree that the amendments sought to be made to the principal enactment are not inconsistent with the Constitution.

Accordingly, this Court determines that neither the Bill nor any provision thereof is inconsistent with the Constitution.

(Sgd.) S. W. B. Wadugodapitiya
Judge of the Supreme Court

(Sgd.) D. P. S. Gunasekera
Judge of the Supreme Court

(Sgd.) Ameer Ismail
Judge of the Supreme Court

Bill was Presented to Parliament on : 19.02.2002

Bill No.: 4

Decision of the Supreme Court Conveyed to Parliament on : 19.02.2002

Passed on : 21.02.2002

Speaker's Certificate Endorsed on : 13.03.2002

Title : **Local Authorities Elections (Amendment) Act, No. 1 of 2002.**

2002

2. ENERGY SUPPLY (SPECIAL PROVISIONS)

A

BILL

to provide for the constitution of an Energy Supply Committee ; to provide for the exercise by such committee of powers under certain other laws : and for matters connected therewith or incidental thereto.

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

A BILL TITLED "ENERGY SUPPLY (SPECIAL PROVISIONS) ACT"

In the matter of a reference under Article 122(1)(b) of the Constitution.

S.C. Special Determination
No. 3/2002

Present :

Sarath N. Silva, Chief Justice
S. A. Bandaranayake, Judge of the Supreme Court
P. Edussuriya, Judge of the Supreme Court

Counsel :

K. Kamalasabayson, p.c., Attorney General with Arjuna Obeysekera,
State Counsel, assisted this court in the consideration of the provisions of the Bill.

Court assembled for hearing : At 1.00 p.m. on 05th March 2002.

The President has made a written reference addressed to the Chief Justice in terms of Article 122(1)(b) of the Constitution for the special determinination of this Court, as to the constitutionality of the Bill bearing the title "Energy Supply (Special Provisions) Act".

The Bill has an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that Cabinet of Ministers decided that in its view, the Bill is urgent in the national interest.

The Bill as its title discloses contains special provisions that will be in terms of clause 29 in operation for a period of two years from the appointed date.

The Attorney General submitted that the title to the Bill would be appropriately amended to state clearly that it contains temporary provisions.

The Cabinet memorandum submitted by the Prime Minister states that "in view of the crisis faced by the energy supply situation in the country, the Government has considered necessary to create an Energy Supply Committee to deal with all matters in relation to the supply of power and energy"

We have examined the provisions of the Bill, bearing in mind the objective stated by the Prime Minister and the fact that the provisions would operate only for a limited period of time.

Clause 2 of the Bill provides for the constitution of the Energy Supply Committee. It is seen that the Committe will consist of seven (7) members who will function in their official capacity. Three of them are secretaries to the relevant Ministries. The others are:

i. the Chairman of the Ceylon Electricity Bord;
ii. the Chairman of the Ceylon Petroleum Corporation;
iii. the Director General of the Board of Investment of Sri Lanka;
iv. the Chairman of the National Energy Council

The eighth ex official member would be the Energy Regulator to be appointed in terms of clause 8. The Only member who would not function ex officio, is the representative of the Ministry of Policy Development and Implementation, to be nominated by the relevant Minister.

Thus it is seen that the constitution of the Committee is representative in its entirety of the Executive. This is a relevant matter when considering the constitutionality of the powers and functions vested in the Committee.

There is no provision which vests the Committee with legal personality. The powers of the committee as provided in would involve commercial transactions and it would be necessary to enter into contracts and other agreements in relation to these transactions. Whilst appreciating that due to the limited duration of the oaw it may not be feasible to vest legal personality in the Committee, it would nevertheless be necessary to incorporate provisions to enable the Committee to enter into contracts and for the institution of legal proceedings, without it being necessary to name all the members as parties. The Attorney General submitted that suitable provision would be made in this regard. In the circumstances we would not address this question further, since it does not directly, involve any issue of constitutionality.

The contents of clauses 4, 5, 23, 24, 25 and 26 provide inter alia, for the Committee to exercise certain powers and functions, presently vested in other persons and bodies under the, Ceylon Electricity Board Act, Electricity Act. Ceylon Petroleum Corporation Act, Petroleum Products (Regulation and Control of Supplies) Act.

As presently worded, these powers would be exercised by the Committee to the exclusion of the functionaries under the respective laws. On the other hand, clause 27 provide for the Committee with the concurrence of the Minister to give special directions to these functionaries for the purpose of exercising the powers conferred in the Committee by clauses 23, 24, 25 or 26. Such directions could be complied with only if these functionaries also continue to be vested with the respective powers. Since the Ceylon Petroleum Corporation and the Ceylon Electricity Board have been functional for several decades with large administrative machinaries to discharge the respective powers and functions, it may not be feasible to replace these administrative structures by the Committee, which would be functional for 2 years. A sudden removal of these functions would also adversely affect an array of transactions entered into by the Boards that are currently operative. The objective of the Bill can be met by vesting these powers in the Committee to be exercised in addition to the current functionaries, when necessary for the due discharge of its powers and functions in terms of clauses 4 and 5. In such context the power to give special directions as provided for in clause 27 could be retained . The Attorney General agreed with the foregoing and stated that necessary amendments would be made as noted above.

Clause 5(g) empowers the Committee to "supervise and regulate" the activities of persons engaged in certain lines of business. They are not Public Corporations of statutory bodies, but persons engaged in private business. It would be inconsistent with Article 12(1) of the Constitution to vest power in the Committee to supervise such persons without laying down adequate guidelines for its exercise in the law itself. The same objection would not strike at the power to "regulate"since that would be done through Regulations to be made by the Minister, which would be of general application. The Attorney General submitted that the reference to supervision in the sub-clause would be detected.

Clause 9 does not contain any provisions as to the power of appointment of the officers and servants of the Committee. The Attorney-General submitted that the clause would be amended by providing for the power of appointment.

Clause 11 provides for movable property to be requisitioned. This would be inconsistent with Article 12(1) of the Constitution in the absence of a provision for the payment of compensation. The Attorney-General submitted that an appropriate provision would be included for the payment of compensation to persons whose property is requisitioned.

The provision in clause 13 which gives immunity to any member, officer or servant of the Committee in respect of actions or proceedings, is inconsistent with Article 12(1) of the Constitution. The Attorney-general submitted that the immunity would be restricted to prosecutions.

Clause 14, which provides that no writ shall be issued, would amount to an erosion of judicial power and the Attorney-General submitted that this provision would be deleted.

Clause 20(1) which empowers the Minister to notify the Committee not to include any directions given by him militates against the overall Parliamentary control, since the report has to be laid before Parliament by the Minister. The Attorney-General submitted that the relevant sentence would be deleted from clause 21(1).

Clause 22 provides that any action taken in terms of section will have effect notwithstanding anything to the contrary in the Nuisance Ordinance, the National Environmental Act., Section 261 of the Penal Code and Section 98 of the Code of Criminal Procedure Act. The provisions thus made inapplicable are intended to safeguard the people from adverse environmental impact. Such a departure from laws intended to protect people would ordinarily be inconsistent with Article 12(1) of the Constitution. However we note that adequate safeguards are introduced in the Bill itself.

They are contained in clauses 5(1) and 21.

Clause 5(1) empowers a duty on the Committee to take measures necessary to protect the public from dangers arising from specified activities which cover the generality of the functions of the Committee. The duty thus imposed would be enforceable in law.

Further, it is incumbent on the Committee in terms of clause 21 to obtain the approval for any project with regard to specified activity from the Central Environmental Authority . After obtaining such a report it is incumbent on the Committee to consult the Minister and obtain his recommendations. Thus the action of the Committee would be based on the report and the recommendation of the Minister.

These two provisions contain adequate safeguards that would ensure that the inapplicability of the laws as contained in clause 22 would not have an adverse impact on the people so as to constitute an inconsistency with Article 12(1) of the Constitution.

Clause 28 empowers the Committee to adopt "special procedures". This appears to contemplate a departure from the applicable procedure. In that context the provisions would be inconsistent with Article 12(1) of the Constitution. The Attorney-General submitted that adequate guidelines would be introduced so that the special procedures that may be taken are limited to the specific situations as may be necessary in terms of the powers and functions of the Committee.

On the basis of the foregoing examination of the provisions of the Bill, we make a determination that the Bill, amended in the manner submitted by the Attorney-General, would not be inconsistent with any provision of the Constitution.

(*sgd.*) Sarath N. Silva
Chief Justice

(*sgd.*) Shirani A. Bandaranayake
Judge of the Supreme Court

(*sgd.*) P. Edussuriya
Judge of the Supreme Court

Bill was Presented to Parliament on : 7.03.2002
Bill No : 10
Decision of the Supreme Court Conveyed to Parliament on : 07.03.2002
Passed on : 07.03.2002
Speaker's Certificate Endorsed on : 21.03.2002
Title : **Energy Supply (Special Provisions) Act No. 2 of 2002**

2002

3. APPROPRIATION

A

BILL

to provide for the service of the financial year 2002, to authorize the raising of loans in or outside Sri Lanka for the purpose of such service to make financial provision in respect of certain activities of the Government during that financial year, to enable the payment by way of advances out of consolidated fund or any other fund or moneys of, or at the disposal of the Government, of moneys required during that financial year for expenditure on such activities, to provide for the refund of such moneys to the consolidated fund, and to make provision for matters connected therewith or incidential thereto.

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

A BILL TITLED "THE APPROPRIATION ACT OF 2002"

In the matter of a reference under Article 122(1)(b) of the constitution

S. C. Determination
No. 2/2002

Present:
Sarath N. Silva Chief Justice
S. A. Bandaranayake Judge of the Supreme Court
A. Ismail Judge of the Supreme Court

Counsel :
J. C. Weliamuna with Ms. Tarangi Weerapana for the Petitioner. K. Sripavan, A. S. G. with M. Gopallawa, State Counsel, assisted this Court in the consideration of the provisions of the Bill

Court assembled for hearing : At 10.15 a.m. on 07th and 08th March 2002.

The Petitioner being the Project Co-ordinator of the Programme for protection of Public Property of the Institute of Human Rights, which is a nongovernmental organization established under Companies Act, has by his petition dated 25.02.2002 invoked the jurisdiction of this Court in terms of Article 121 of the constitution to determine the constitutionality of the Bill bearing the title given above.

The Petitioner's contention is that clause 6 of the Bill is inconsistent with Article 12(1) of the constitution and amounts to an abdication of the control of public finance vested in Parliament by Article 148.

Clause 6 of the Bill drawn in issue by the Petitioner is as follows:

"6. Where the Minister is satisfied -

(a) That receipts from taxes and other sources will be less that the amounts anticipated to finance authorized expenditure; or

(b) that amounts orginally appopriated for a particular purpose or purposes are no longer required.

he may, with the approval of the Government, withdraw in whole or in part, any amounts previously released for expenditure under the authority of a warrant issued by him from the Consolidated Fund or from any other fund or moneys of, at the disposal of, the Government."

This provision empowers the Minister to withdraw money previously released for one item of expenditure or to use other funds or money at the disposal of Government, to meet a short fall in anticipated revenue.

The contention of the Petitioner is that the Parliament should specifically authorize the Minister to use such voted funds for other expenditure whenever the need arises. Learned Counsel emphasized that Article 148 of the Constitution postulates that Parliament shall

have full control of public finance, and testing power in the manner envisaged in clause 6 would amount to an abdication of this control. Further in the absence of proper guidlines, the Minister could act arbitrarily, which would amount to an inconsistency with Article 12(1) of the Constitution.

It is indeed necessary to have a degree of flexibility in relation to resources from which items of expenditure, will be met, when there is a shortfall in the anticipated revenue. By this clause the Parliament would be vesting that necessary element of flexibility by way of a discretion granted to the Minister. It is clear from the provision that funds thus redirected by the Minister, would be utilized to meet other expenditure authorized by Parliament. Although that appears to be the necessary inference to be drawn from the words used in the clause, learned Counsel for the Petitioner contended that there are no specific words to that effect contained in the clause.

When the hearing before this Court reached that point, learned Deputy Solicitor General sought an adjournment and obtained necessary instruction in the matter. Thereupon he submitted that specific provision would be made to state that such funds would be utilized "to meet any authorized expenditure."

Learned Counsel for the Petitioner submitted that such an amendment would remove the unconstitutionality submitted by the Petitioner.

On the foregoing basis, we make a determination in terms of Article 123(1) of the Constitution, that neither the Bill nor any provisions thereof, is inconsistent with the Consitution.

(Sgd.) Sarath N. Silva
Chief Justice

(Sgd.) Shirani A. Bandaranayake
Judge of the Supreme Court

(Sgd.) Ameer Ismail
Judge of the Supreme Court

Bill was Presented to Parliament : 19.02.2002

BILL NO. 8

Decision of the Supreme Court Conveyed to Parliament on : 22.03.2002

Passed on : 11.04.2002

Speaker's Certificate Endorsed on : 11.04.2002

Title : **Appropriation Act No. 6 of 2002.**

2002

4. SAVE THE NATION CONTRIBUTION (ABOLITION)

A

Bill

to abolish the charging of save the nation contribution, under the Save the Nation Contribution Act, No. 5 of 1996, from persons to whom that Act applies, with effect from October 1, 2001.

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

A BILL TITLED "SAVE THE NATION CONTRIBUTION (ABOLITION) ACT"

In the matter of a reference under Article 122(1)(b) of the constitution

S. C. Determination
No. 4/2002

Present.
Sarath N. Silva Chief Justice
Shirani A. Bandaranayake Judge of the Supreme Court
P. Edussuriya Judge of the Supreme Court

Counsel :
Petitioner absent and unrepresented.
Saleem Marsoof, P.C., A. S. G., with Rajiv Goonetilleke, State Counsel assisted this Court in the consideration of the provisions of the Bill.

Court assembled for hearing : At 10.15 a.m. on 06th May 2002.

The jurisdiction of this Court has been invoked in terms of Article 121(1) of the Constitution by W. M. S. Abeysekera. He has sent a petition dated 11.04.2002 which was received at the Registry of this Court on 17.04.2002. A copy of the petition has been sent to the Honourable Speaker.

The Petitioner has challenged the constitutionality of the above Bill which is intended to discontinue the charge imposed by the Save the Nation Contribution Act, No. 5 of 1996. The abolition of the charge will have effect from October 1, 2001.

The Petitioner has stated that the retrospective effect given to the abolition of the charge is unreasonable and that the abolition should take effect from the date of certification of the Act by the Honourable Speaker.

We note that the Petitioner has not urged any specifc ground of unconstitutionality, but has merely stated that the abolition with retrospective effect is "unreasonable".

In terms of Article 148 of the Constitution Parliament has full control of public finance. It provides that "no tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law." Article 75 of the Constitution empowers the Parliament to make laws including laws having retrospective effect. The combined effect of these two provison is that, it is within the legislative competence of Parliament to repeal a law imposing any tax, rate or other levy, with retrospective effect. We agree with the submission made by the learned Additional Solicitor General that there is no unconstitutionality whatsoever in the Bill.

We find it difficult to comprehend the basis on which the Petitioner has stated that the retrospective effect given, is "unreasonable." The retrospective effect that is given world relieve the tax-payer of the burden imposed by the law with effect from an earlier point of time. This would not be unreasonable.

The Petitioner did not appear in Court when this matter was listed for hearing on 3.05.2002. Thereafter it was listed for today and the Petitioner was served with notice through the Senior Superintendent of Police, Matara. He is absent and unrepresented today as well.

We regret to note that the Petitioner has frivolously invoked a salutary provision of the Constitution.

For the foregoing reason we make a determination that in terms of Article 123(1) of the Constitution that neither the Bill nor any provision thereof is inconsistent with the Constitution.

(Sgd.) Sarath N. Silva
Chief Justice

(Sgd.) Shirani A. Bandaranayake
Judge of the Supreme Court

(Sgd.) P. Edussuriya
Judge of the Supreme Court

Bill was Presented to Parliament on : 11.04.2002

BILL NO. 16

Decision of the Supreme Court Conveyed to Parliament on : 09.05.2002

Passed on : 21.05.2002

Speaker's Certificate Endorsed on : 19.06.2002

Title : **Save the Nation Contribution (Abolition) Act No. 8 of 2002.**

2002

5. VALUE ADDED TAX

A

BILL

to provide for the Imposition and Collection of a Value Added Tax on goods and services supplied in Sri Lanka or imported in to Sri Lanka to Provide for the Abolition of the National Security levy and the goods and services tax and to provide for matters connected therewith or incidental thereto.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA
A BILL ENTITLED, "VALUE ADDED TAX ACT".

In the matter of an Application under Article 121 of the Constitution.

S. C. Determination
No. 6/2002

Present :
S.W. B. Wadugodapitiya, Judge of the Supreme Court
H. S. Yapa Judge of the Supreme Court
Asoka de Silva Judge of the Supreme Court

Counsel :
J. C. Weliamuna with S. Wijetunga, Lavangi Weerapana, Shantha Jayawardene and Indika de Alwis for the Petitioner.

Saleem Marsoof, P. C., A. S. G., with Neil Unambowe, S. S. C. and Riad Ameen, S. C., for the Attorny-General.

Mahinda Katugaha with Omar Yusuni, Chulangani de Silva and M. Kariapper for the Legal Aid Foundation (with permission of Court).

Court assembled for hearing at 10.30 a.m. on 5th July 2002.

The Jurisdiction of this Court has been invoked in terms of Article 121 (1) of the Constitution by the Consumer Protection Society of Sri Lanka (CONPRO), of No. 9A/1/1, Nalandarama Road, Nugegoda. The Petitioner abovenamed has forwarded to this Court a petition dated 25.06.2002 which was received, at the Registry of this Court on the same day. The Hon. Attorney-General has been named as the Respondent.

The Petitioner has challenged the consitutionality of the above Bill which is intended to provide for the imposition and collection of a value added tax on goods and services supplied in Sri Lanka or imported into Sri Lanka, and to provide for the abolition of the National Security Levy and the Goods and Services Tax.

At the commencement of hearing, Mr, Saleem Marsoof, President's Counsel, who appeared for the Attorney-General, submitted to Court a draft of the proposed amendment to Clause 2 (1) of the Value Added Tax Bill which he said had already been approved and agreed to by the Minister of Finance. He stated that a copy of this amendment had already been handed over to Learned Counsel for the Petitioner.

The proposed amendment of Clause 2 (1) is reproduced below :

"2 (1) Subject to the provisions of this Act, a tax, to be known as the Value Added Tax (hereinafter referred to as 'the tax') shall be charged –

(a) at the time of supply, on every taxable supply of goods or services, made by a registered person in the course of the carrying on, or carrying out, of a taxable activity by such person in Sri Lanka.

(b) on the importation of goods into Sri Lanka, by such person,

and on the value of such goods or services supplied or the goods imported, as the case be, at the following rates –

(i) Ten percentum (of which the Tax Fraction is 1/11) on the value of goods and services referred to in the second schedule which are chargeable with the tax other than zero rated supplies ;

(ii) Twenty percentum (of which the Tax Fraction is 1/6) on value of all other taxable goods and services which are chargeable with the tax other than zero rated supplies.

"The tax Fraction referred to above shall be applied to ascertain the amount of tax charged in the case of a tax inclusive consideration."

Mr. Marsoof also stated that consequentially, Clause 2 (2) will have no place and will be deleted and that Clause 2 (3) of the Bill will now become Clause 2 (2).

This disposes of the Petitioner's central complaint that Clause 2 (1) of the Bill sought to empower the Minister and not Parliament in the task of fixing of the two rates of the proposed Value Added Tax, and that as such, the said provision was inconsitent with Article 70(1) read with Article 148 of the Constitution, inasmuch as it amounted to an abdication of the legislative power of Parliament in favour of the Minister.

Thus, since Clause 2 (1) has now been suitably amended, as set out above, the unconstitutionality referred to has been removed and the provisions of the said Clause.

(1) would now cease to be inconsistent with the Constitution. Mr. Weliamuna for the Petitioner agrees that Clause 2(1), as amended, is not inconsistent with the Constitution.

The other contention of the Petitioner was that Clause 20(6) of the Bill read with Clause 20(10) was unconstitutional as it offended against Article 12(1) of the Constitution. Clause 20(6) sought, to enact that, "Notwithstanding the provisions of Section 2, where a registered person makes a taxable supply and the recipient of such supply is not a registered person, such supplier shall issue an invoice giving the total consideration of such supply including the tax charged ....." Non-compliance with this provision attracted the penal provision in Clause 20(10), making an offender liable upon conviction, to a fine not less than Rs. 25000/- for each such contravention.

Learned Counsel for the Petitioner pointed out that this provision would entail the non-disclosure of the actual tax component which was to be paid by the consumer, who would now be prevented from knowing what tax he in fact paid ; which of course, he has a right to know. It would also open the door to an unscrupulous supplier unconscionably and arbitrarily increasing his profits for goods and services and blaming such increases on the undisclosed value added tax, which in turn would result in an increase in the cost of living, thus nullifying the actual purpose of the Bill.

Although no question of unconstitutionality was involved here, Mr. Marsoof for the Attorney-General, agreed that this provision needs amendment, and said that by way of rectification, he would suggest amending Clause 20(6) by the deletion of the word" and the word "including", and by the addition of the word "and" after the words "such supply". It also appers that the words "section 2" is a typographical error and should read, "sub-section 2." The amendment would now read as follows :

"20(6) Notwithstanding the provisions of sub-section 2, where a registered person makes a taxable supply and the recipient of such supply is not a registered person such supplier shall issue an invoice giving the consideration of such supply and the tax charged ....."

Learned Counsel for the petitioner stated that the above amendment suggested by Learned Additional Solicitor-General was in all respects satisfactory and that he was in agreement there with.

None of the other contentions of the Petitioner involve questions of constitutionality. Further, Counsel for the Petitioner and Counsel for Attorney-General agreed that none of the remaining provisions of the Bill was inconsistent with the Constitution. We agree.

We have examined the Provisions of the Bill and are of the opinion that, upon the suggested amendment being effected, the Bill and its provisions will cease to be inconsistent with the Constitution. We accordingly determine that upon such amendment being given effect to, the provisions of the Bill will not be inconsistent with the Constitution.

(Sgd.) S. W. S. WADUGODAPITITYA
Judge of the Supreme Court.

(Sgd.) H. S. YAPA
Judge of the Supreme Court.

(Sgd.) ASOKA DE SILVA
Judge of the Supreme Court.

Bill was Presented to Parliament on : 18.06.2002
Bill No : 33
Decision of the Supreme Court Conveyed to Parliament on : 10.07.2002
Passed on : 24.07.2002
Speaker's Certificate Endorsed on : 26.07.2002
Title : **Value Added Tax Act No. 14 of 2002**

2002

6. WELFARE BENEFITS

A

BILL

to provide for the necessary legal framework for the payment of welfare relief benefits; to set out a transparent selection process by which the recipients of such benefits can be identified; to provide for the termination of such benefits; and to provide for matters connected therewith or incidental thereto.

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

A BILL TITLED "WELFARE RELIEF BENEFITS"

S.C. Special Determination
No. 7/2002

In the matter of an Application under
Article 121(1) of the Consititution

Present : Sarath N. Silva - Chief Justice
Shirani A. Bandaranayake - Judge of the Supreme Court
Hector S. Yapa - Judge of the Supreme Court

Counsel : Thusara Dissanayake for the Petitioner.
Uditha Egalahewa, S.C. with Ms. S. Barrie S. C. for the Attorney General

Court assembled for hearing at 10.15 a.m. on 20th August. 2002.

A Bill titled "Welfare Relief Benefits" has been presented to Parliament by the Hon. Minister of Finance and was placed in the Order Paper of Parliament on 26.07.02.

Mr. Piyasena Dissanayake of No. 265/9, Talawatugoda Road, Mirihana, Kotte, has made an application to this court by way of Petition filed on 02.08.02 challenging the constitutionality of the Bill. He has thereby invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution. Due notice of the Petition has been given to the Hon. Attorney General.

The preamble to the Bill states that it is intended to provide the necessary legal framework for the payment of all "Welfare Relief Benefits". The Bill sets out the selection process for the recipients of benefits and for the termination of such benefits.

Clause 28 of the Bill defines "Welfare Benefits Payments"to mean "a payment to which a person to whom the Act applies is entitled to in terms of the "Welfare Benefits Scheme", "Welfare Benefit Scheme" is defined to mean a scheme formulated in terms of Clause 9.

Clause 9(1) provides' for the Payment scheme to be determined by the Minister in consultation with the Minister in charge of the relevant subject with the approval of the Cabinet of Ministers.

In terms of Clause 9(2) the scheme thus formulated has to specify the following:

(i) the criteria for eligibiity to receive assistance in terms of a scheme:
(ii) the date of commencement of the scheme;
(iii) the financial or other benefits to be granted in terms of such scheme:
(iv) the period for which persons are entitled to receive benefits in terms of the scheme:
(v) the total number of persons who will be recipients under such scheme.

In terms of Clause 9(3) the scheme shall be published in the Gazette and be placed before Parliament for approval prior to the date of its commencement, In the circumstances it is not incumbent on this Court at this stage to consider any specific matter relating to the scheme which has yet to be formulated. Clause 9(2) specifies the matters that should be contained in such a scheme. These matters read together with provisions of Clause 7(1) which provides that the sclection will be made in a non discriminatory manner are adequate safegards to

ensure compliance with Aricle 12 of the Constitution which guarantees to every person equality before the law and prohibits action discriminatory of any citizen on grounds of race, religion, language, caste, sex or political opinion.

Furthermore, clause 10 provides for the selection of recipients to be done by selection committees. Clause 11 provides for the names of those found to be eligible to be published in two daily newspapers in the Sinhala and Tamil languages, requiring persons to raise objections if any, to the selection of the named recipients. Clause 11 (2) and 12 provide for inquiries into the objections and claims that may be received, by Appeals Committees.

Counsel for the Petitioner submitted that recipients would be selected on the basis of political loyalty to the party in power and that there would be favourism in the process. It is not within the jurisdiction of the Court to speculate as to what would happen in the implementation of the scheme. The Provisions of the Bill should be examined objectively to ascertain whether there are sufficient safegards to prevent discrimination on any of the grounds referred to in Article 12(2) of the Constitution and to prevent arbitrariness in the decision making process. The Provisions referred to above are in our view adequate safeguards in this regard.

Clauses 2, 3, 4, 5 and 6 provide for the appointment of the Board that will administer the Act and the appointment of the Commissioner of Welfare Benefits, including Additional Commissioners, Deputy Commissioners and Assistant Commissioners. In terms of Clause 3(2) the Board shall be a body corporate and may sue and may be sued in such name. The employees of the Board would not be public officers. There is no unconstitutionality in the provisions with regard to the establishment of the Board and appointments referred to above.

The Petitioner has raised a specific issue of unconstitutionality in relation to the entirety of the Bill on the basis that it is inconsistent, with Article 154(G)(1) of the Constitution. It is his submission that the payment of Welfare Relief Benefits. as contemplated in the Bill is a matter coming within the list 1 - (Provincial Council List) in the 9th schedule to the Constitution. It was further submitted that such payments would come within item 7 of the List which reads as follows:

7- Social Services and Rehabilitation
7:1 Probation and Child Care services;
7:2 The Rehabilitation of destitute persons and families ;
7:3 Rehabilitation and welfare of physically, mentally and socially handicapped persons;
7:4 Relief of the disabled and unemployable.

On that basis it was submitted that it would not be within the legislative competence of Parliament to enact this Bill in the absence of any request by one or more Provincial Councils, as provided for in Article 154(G)(4).

Learned State Counsel submitted that the Bill contemplates only the payment of money by way of welfare benefits. He relied on the pharase "Welfare Benefit Payment" in clause 28. He further submitted that Item 7 of List 1 referred to above relates to the rendering of services and a process of rehabilitation, in respect of specific categories of persons and does not involve purely monetary payments as contemplated in this Bill.

We have considered the submissions of Counsel on the issue of constitutionality that has been raised. We are inclined to agree with the submission of learned State Counsel that there is distinction between a payment made as a welfare benefit and matters such as social service and rehabilitation. Item 7 in List 1 envisages specific services and a process of

rehabilitation, that relate to children , destitute persons and families, physically, mentally and socially handicapped persons. These are services that involve infrastructure facilities and services provided by persons engaged in that process. On the other hand the welfare benefit payment that is contemplated by the Bill is made in the nature of a dole or a hand-out of money, to persons who come within the criteria specified in the scheme. There is no specific item in any of the lists in the Ninth Schedule which relates to a welfare benefit payment. In the circumstances it would come within List 11 (Reserved List) as a subject or function not specified in any of the lists and it is within the legislative competence of Parliament to provide by law for welfare benefit payments that would be generally applied throughout the country. It is indeed the duty of the State to assist persons who lack resources, to sustain themselves. This has been done in the past by giving a rice ration, food stamps, Janasaviya payments, Samurdhi payments and the like. This reinforces the view we take that it is within the competence of Parliament to enact a law to provide for a generally applicable scheme of welfare benefit payments.

Counsel for the Petitioner also submitted that the Bill entails the stoppage of payments received from public assistance schemes presently operative under applicable law. Whilst it is within the competence of Parliament to provide by law for the granting of public assistance, it is equally within the competence of Parliament to terminate such assistance. However as correctly submitted by learned State Counsel the only provision contained in the Bill for the stoppage of such payments is in Clause 7(2). It provides that when a person who is currently receiving public assistance by way of poverty alleviation or otherwise notifies the Commissioner in terms of Clause 7(1) and is recognized as a person eligible to receive welfare benefit payments under this Act, the payments hitherto received by such person will cease. The substitution of one kind of public assistance payment with another does not involve any issue of constitutionality. There is no other provision in the Bill which provides for the stoppage of public assistance payments currently received under applicable law. It is also noted that there is no clause in the Bill which provides for the repeal of any law under which public assistance is currently given. Hence it is unnecessary to consider this submission of learned Counsel for the Petitioner any further, in these proceedings.

For the reasons stated above we make a determination in terms of Article 123(1) of the Constitution that the Bill and the provisions thereof are not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

Shirani A. Bandaranayake
Judge of the Supreme Court

Hector S. Yapa
Judge of the Supreme Court.

Bill was Presented to Parliament on: 26.07.2002
Bill No. 46
Decision of the Supreme Court Conveyed to Parliament on : 27.08.2002 Passed on : 28.08.2002
Speaker's Certificate Endorsed on: 22.10.2002
Title : Welfare Benefits Act No, 24 of 2002

2002

7. RENT (AMENDMENT)

A

BILL

to amend the Rent Act, No. 7 of 1972

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

A BILL TITLED "RENT (AMENDMENT)"

S. C. Special Determination
No. 8/2002
In the matter of an Application under Article 121(1) of the Constitution

Present :

Sarath N. Silva	-	Chief Justice
Shirani A. Bandaranayake	-	Judge of the Supreme Court
J. A. N. de Silva	-	Judge of the Supreme Court

Counsel :

Petitioner is absent and unrepresented
Ms. Demuni de Silva, S. S. C., for the Attorney- General

Court assembled for hearing at 10.15 a. m. on 29th August, 2002.

A Bill bearing the title "Rent (Amendment)" to amend the Rent Act, No. 7 of 1972 was presented to Parliament and placed on the Order Paper for 06.08.2002. W. M. S. Abeysekera of No. 144/1, Eksath Mawatha, Mahara, Kadawatha has presented a petition to this Court, received on 12.08.2002, challenging the constitutionality of the Bill. He has thereby invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution.

The Petitoner has not attended the Registry of this Court to arrange a date for the hearing of the petition. Hence the petition was fixed for hearing on 29.08.2002 and the Petitioner was informed by telegram. He was absent and unrepresented. In view of the limited time within which the determination should be made, learned Senior State Counsel, representing the Attorney-General, moved Court to consider the matter in the absence of the Petitioner.

The Bill as its title connotes, is to amend an existing law enacted by Parliament viz; the Rent Act, No. 7 of 1972. The Petitoner has not raised any issue of constitutionality with regard to any particular clause of the Bill. It is his contention that the Bill in its entirety deals with a subject that comes within Item 5. 2 of List 1 (Provincial Council List) in the Ninth Schedule to the Constitution and that the provisions of Article 154G (3) will apply. In terms of this provision the Bill has to be referred by the President to every Provincial Council for the expression of its views.

The relevant item in the Provincial Council List reads as follows:
"5 Provincial Housing and Construction -
5:1 .....
5:2 The implementation of the Protection of Tenants Act and the Rent Act within a Province.

Therefore, in terms of Article 154(1) every Provincial Council is empowered to make statutes, applicable to the Province for the "implementation" of the Rent Act. The Subject of the Rent Act itself does not come within the legislative competence of a Provincial Council. Item 5:2 relied on by the Petitioner in its very content postulates a Rent Act which is generally applicable throughout the country and statutes being made by respective Provincial Councils where necessary to implement the Act within such Province. The

Rent Act would come within List 11 (reserved List) as an unspecified subject and the Parliament has the legislative competence to amend its content as envisaged in the Bill. As noted above there is no challenge to the constitutionality of any provision of the Bill.

For the reasons stated above we make a determination in terms of Article 123(1) of the Constitution that the Bill referred to above is not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

Shirani A. Bandaranayake,
Judge of the Supreme Court

J. A. N. de Silva
Judge of the Supreme Court"

Bill was Presented to Parliament on: 06.08.2002
Bill No. 49
Decision of the Supreme Court Conveyed to Parliament on : 10.09.2002
Passed on : 10.09.2002
Speaker's Certificate Endorsed on : 24.10.2002
Title : **Rent (Amendment) Act, No. 26 of 2002**

2002

8. ELECTRICITY REFORM

A

BILL

to Provide for the Regulation of the Generation, Transmission and Distribution and Supply of Electricity in Sri Lanka; to Provide for the taking over and Discharge of the Functions of the Ceylon Electricity Board and the Lanka Electricity Company by Certain Public Companies to be Incorporated for that Purpose; to Repeal the Electricity Board Act and the Electricity Act; and for Matters Connected Therewith or Incidental Thereto.

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

ELECTRICITY REFORM ACT

S. C. Special Determination
No. 9 of 2002

In the matter of a reference under Article 121 of the Constitution.

Dampahalage Don Somaweera Chandrasiri,
No. 41, Rajamaha Vihara Road,
Navinna, Maharagama.

Petitioner

Federation of Electricity Sector Professionals' Trade Unions of the Ceylon Electricity Board Head Quarters,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

Intervenient Petitioner

vs.
The Attorney-General,
Attorney General's Department,
Colombo 12.

Respondent

PRESENT: D. P. S. Gunasekera, Judge of the Supreme Court
C. V. Wigneswaran, Judge of the Supreme Court
T. B. Weerasuriya, Judge of the Supreme Court

COUNSEL: K. Thiranagama with M. J. A. Hasan and Hasanthi Ratnayake instructed by Piyasena Dissanayake for the Petitioner, R. K. W. Goonesekera with Suranjith Hewamanna, J. C. Weliamuna, Sampath Tennakoon, Krismal Warnasuriya, Ramya Geeganage and Chamani Abeyratne instructed by M. S. Lalanthi de Silva for the Intervenient Petitioner, Saleem Marsoof P. C. Additional Solicitor - General with P. A. Ratnayake D. S. G. and Anusha Navaratna S. S. C. for the Attorney-General.

07.10.2002

The Court assembled for hearing at 10.00 a. m. on 01.10.2002 and 10.00 a. m. on 04.10.2002.

A Bill entitled "Electricity Reform" was published in the Government Gazette of 19.08.2002 and was placed in the Order Paper of Parliament on 10.09.2002. The petitioner by his petition filed in the Registry of the Supreme Court on 17.09.2002 has invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution and prayed for a special determination to be made that the said Bill or any of its provisions are inconsistent with the Constitution.

On 24.09.2002 His Lordship the Chief Justice made order that the said Bill be taken up for consideration before this Bench on 01.10.2002. When the matter was taken up for consideration on 01.10.2002 Mr. R. K. W. Goonasekera having filed papers on 30.09.2002 moved for permission for the Federation of Electricity Sector Professionals' Trade Unions of the Ceylon Electricity Board to intervene in this application. Having considered the

submissions of learned Counsel and the learned Additional Solicitor - General we permitted the intervention and added the Federation of Electricity Sector Professionals' Trade Unions of the Ceylon Electricity Board as the Intervenient Petitioner to this application.

At the commencement of the hearing Mr. Goonesekera drew the attention of Court to section 2 of the Bill and submitted that it was contemplated that the administration of this Act would vest in the Public Utilities Commission of Sri Lanka (hereinafter referred to as the Commission) instituted under the Public Utilities Commission of Sri Lanka Act of 2002 which was yet to be established. He submitted that the constitutionality of the Public Utilities Commission Bill was due to come up for a special determination in Application No. 10 of 2002 before this Court tomorrow, 02.10.2002 and that without knowing the outcome of that determination that it is too premature for this Court to consider the present application. The learned Counsel for the petitioner as well as the learned Additional Solicitor-General agreed with this contention. In the circumstances we made order that this application be taken up for consideration before this Bench on Friday, 04.10.2002.

On 04.10.2002 when this application was taken up for consideration our attention was drawn to Clause 45 of the Bill by Mr. Goonesekera who submitted that the outcome of the special determination in respect of the establishment of the Public Utilities Commission of Sri Lanka was not yet known and therefore urged the Court to consider the appropriateness of considering this application for the reason that the said Section presupposes a contingent event.

Clause 45 (1) of the Bill is as follows :

> "After the coming into operation of this chapter and before a date to be specified for the purposes of this section, by the Minister, by Order published in the Gazette, the Minister shall in consultation with the Commission (if established), persons representative of the electricity industry and persons likely to be affected by the reorganizations, prepare a scheme for the reorganization of the electricity industry in Sri Lanka."

It was contended by learned Counsel that it would be futile for this Court to consider this application without the Public Utilities Commission of Sri Lanka being established. The Additional Solicitor-General agreed with the contention of learned Counsel for the Intervenient Petitioner, However, he submitted that having regard to the constraints of time that he had no objection to the deletion of the Words "if established" appearing in Clause 45 and for the Court to proceed to consider this application. Learned Counsel for the petitioner and the intervenient petitioner had no objection to the proposed course of action. We made order accordingly and deleted the words "if established" in the Section and proceeded to consider the provisions of the Bill on the assumption that the Public Utilities Commission of Sri Lanka has been established.

Learned Counsel for the petitioner submitted that electricity has become a base need for the life of the community and that the provisions of the Electricity Board Act, No. 17 of 1969 as amended, and the Electricity Act, No. 19 of 1950 as amended have made adequate provisions that the community is afforded this facility. He contended that this Bill had ignored the needs of the community and was intended to secure the interests of the successor companies which are to take over the functions of the Ceylon Electricity Board and the Lanka Electricity Company in regard to the generation, transmission and distribution and supply of electricity in Sri Lanka. We are unable to agree with this contention of Learned Counsel. On an examination of the provisions of this Bill specially

clauses 3 (e), 3(k), 4(1), 11(1)(a), 12(1), 12(2), 19(2), 29(3), 31(4) and 39 we are of the opinion that adequate measures have been provided to safeguard the interests of the consumers and for their protection.

Clause 38(2) of the Bill states that -

"On a reference under paragraph (a) of sub section (1) the Commission shall determine the dispute and on a reference under paragraph (b) of sub section (1) the Commission shall determine the dispute unless it decides that it is more appropriate for the dispute to be determined either by the Courts or arbitration."

We are of the view that the use of the words " shall determine the dispute" involves the exercise of judicial power and that inasmuch as the Commission is not a judicial body and its members are not judicial officers, they cannot lawfully exercise judicial power. We are of the opinion that the provisions of Clause 38(2) of the Bill are inconsistent with Articles 3, 4 and 105 of the Constitution which mandates that the judicial power of the people shall be exercised by Parliament through Courts, Tribunals and institutions created and established or recognized by the Constitution, or created and established by Law and would therefore come within the ambit of Article 83(a) of the Constitution and hence will be required to pass by the special majority required under Article 84(2) of the Constitution and be approved by the people at a Referendum by virtue of Article 83 of the Constitution.

We are of the view that this inconsistency would cease if the word "shall determine" in this section are replaced with the words "shall mediate and resolve."

It was submitted that the provisions of Clause 47 of the Bill is arbitrary and discriminatory for the reasons that it makes provision for some of the employees of Ceylon Electricity Board and Lanka Electricity company to be offered employment in any one of the successor companies in terms and conditions not less favourable than those enjoyed by them on the day preceeding the relevant date and those who are not offered employment would continue to be in the service of the Ceylon Electricity Board and the Lanka Electricity Company on the same terms and conditions or to be paid such compensation as may be determined by the Cabinet of Ministers.

We are of the view that those provisions entail a situation in which the security of tenure of employees is adversely affected. There are no guide lines or a scheme with regard to the selection of the employees who are not to be offered employment. This provision, in our view, is arbitrary and offends Article 12(1) of the Constitution.

The provisions in Clause 48 which enables successor companies to establish a Provident Fund or a contributory pension scheme for the purpose of providing superannuation benefits to their employees not withstanding the provisions of employees Provident Fund (Special Provisions) Act, No. 6 of 1975, in our view place the successor companies in a privileged position *vis a vis* other companies established after coming into operation of the Employees Provident Fund (Special Provisions) Act, and is discriminatory and violative of Article 12(1) of the Constitution.

We determine that Clauses 47 and 48 of the bill are inconsistent with Article 12(1) of the Constitution and may only be passed with the special majority provided by Article 84(2) of the Constitution. We have examined the rest of the provisions of the Bill and agree with the learned Additional Solicitor General that the remaining provisions of the Bill are not inconsistent with the Constitution.

It is to be noted that there are several typographical errors and inconsistencies between the English and Sinhala version of the Bill; for instance :

"Section 8(1) of the English version refers to General Electricity which should read Generated Electricity. In Section 38(2) the word "despute" should be replaced by the word 'dispute' and in Clause 45(1) the word "effected" should be replaced by the word "affected".

We thank all Counsel who assisted us in examining the constitutionality of the Bill.

D. P. S. Gunasekera,
Judge of the Supreme Court.

C. V. Wigneswaran,
Judge of the Supreme Court.

T. B. Weerasuriya,
Judge of the Supreme Court.

Bill was Presented to Parliament on : 10.09.2002
Bill No. 60
Decision of the Supreme Court conveyed to Parliament on: 08.10.2002
Passed on : 10.10.2002
Speaker's Certificate Endorsed on : 11.12.2002
Title : **Electricity Reform Act, No. 28 of 2002.**

2002

9. Public Utilities Commission of Sri Lanka

A

BILL

to provide for the establishment of the Public Utilities Commission of Sri Lanka to regulate certain utilities industries pursuant to a coherent national policy : and for matters connected thereto or incidental thereto.

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

"PUBLIC UTILITIES COMMISSION OF SRI LANKA" BILL

In the matter of an application under Article 121 of the Constitution.

S. C. Special Determination No. 10 of 2002

Sripani Jayaratne Ranasinghe.
Secretary,
Local Government Education Institute,
31/27, Narahenpita Road,
Nawala, Rajagiriya

Petitioner

Vs

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

Respondent

Present :

S. W. B. Wadugodapitiya	Judge of the Supreme Court
Ameer Ismail	Judge of the Supreme Court
P. Edussuriya	Judge of the Supreme Court

Counsel:

K. Thiranagama with Miss. Hasanthi Ratnayake and Piyatissa Abeykoon for the Petitioner.

Saleem Marsoof, P.C., Additional Solicitor General, with Miss. Anusha Navaratne, Senior State Counsel, for the Attorney-General.

Court assembled for the hearing at 10.00 a.m. on 2nd October 2002

A Bill entitled *"Public Utilities Commission of Sri Lanka"* was published in the Government gazette of 16th August, 2002, and was placed on the Order Paper of Parliament on 10th September, 2002.

The Petitioner, by his petition of 17th September 2002, has invoked the jurisdiction of the Supreme Court in terms of Article 121 (1) of the Constitution to determine whether the Bill or any provision thereof is inconsistent with the Constitution.

The Bill seeks to establish a Commission called the Public Utilities Commission of Sri Lanka, to regulate certain utilities industries.

Clause 17 (i) of the Bill states as follows :

"Subject to the provisions of this Act, the Commission shall, amongst other things, mediate and determine or determine disputes arising in any public utilities industry, in accordance, with the industry Act relating to such industry ;....."

We are of the opinion that the words " or determine disputes" involve the exercise of judicial power, and that, inasmuch as the Commission is not a judicial tribunal and its members are not judicial officers, Clause 17(i) is inconsistent with the provisions of Article 105(I) of the Constitution, and therefore will be required to be passed by the special majority required under Article 84(2) of the Constitution.

The inconsistency would cease (a) if the words, "mediate and determine or determine disputes" occuring in Clause 17(i) are deleted, and replaced by the words, "determine by mediation, disputes" and (b) by the deletion of the words, "in accordance with the industry Act relating to such industry."

Clause 18(2)(d) of the Bill seeks to vest in the Commission, the power to admit, at a public hearing, any evidence which would be inadmissible under the Evidence Ordinance, in civil or criminal proceedings.

This could be ratified by amending Clause 18(2)(d) to read as follows :

" to admit evidence, written or oral, notwithstanding the provisions contained in the Evidence Ordinance."

Clause 18(5) provides for a summary of the evidence given at a public hearing before the Commission to be kept by the Commission, and made available to the public.

We are of the opinion that, inasmuch as such a summary could leave room for distortion and/or variation of the substance of the evidence, and since the rights of parties could by seriously affected in such an event especially by considering the far-reaching consequences, we recommend that this be rectified the substitution for the word "summary", of the word, "record", thus ensuring that a true, accurate and faithful record of the evidence be kept by the Commission.

Clause 18(6)(b) has omitted to cater or those persons who wish to be affirmed instead of being sworn giving evidence Rectification of this clause could be effected by adding the words, "or affirmed" after the words, "to be swore," and also after the words, "been duly sworn."

Clause 18(6)(b) also enables questions to be put to a witness at a public hearing which would be interalia, self-incriminatory, scandalous or vexatious. We recommend that this be rectified by interpolating the word, "lawfully" between the words "any question" and the words, "put to him....."

Where Clauses 18(7), 18(8) and 18(9) are concerned, we are of the opinion that these three clauses are inconsistent with Article 105(3) read with Article 105 (1) (c) of the Constitution, inasmuch as the Commission proposed to be established is not a Court or tribunal or institution established for the administration of justice in terms of Article 105(1) (c) nor is it one which Parliament has established as allowed by Article 105 (1) (c) of the Constitution.

That being so, when the certificate setting out the determination of the Commission that a party is "guilty of the offence of contempt against, or in disrespect of the authority of the Commission," is transmitted to the Court of Appeal in terms of Clause 18 (7), the Court of Appeal will have no jurisdiction to take cognizance of such matter in terms of Clause 18(8), for the reason that the Court of Appeal, in terms of Article 105(3) of the Constitution, has power only to mete out punishment for contempt of itself, or for contempt of any other court, tribunal or institution referred to in Article 105(1) (c) of the Constitution.

Since, the Commission quite clearly does not fall into any of the institutions mentioned in Article 105(1)(c) of the Constitution, the Court of Appeal will have no jurisdiction or power to take cognizance of any such matters transmitted to it by the Commission, and will therefore in any event, refuse to entertain them, thus rendering the entire exercise nugatory.

In the circumstances, Clauses 18(7), 18(8) and 18(9) are inconsistent with Article 105(3) read with Article 105(1)(c) of the Constitution, and will be required to be passed by a special majority set out in Article 84 (2) of the Constitution.

Where Clause 18(9) is concerned, we are of the opinion that, in any event, it would not be lawful or proper to protect the members of the Commission from being "Summoned or examined as a witness." The powers of a Court of Law cannot be circumscribed or stultified in this manner.

We have examined the rest of the provisions of the Bill and agree with Learned Additional Solicitor General that the remaining provisions of the Bill are not inconsistent with the Constitution.

Accordingly the Court determines that, as set out above, Clause 17(i), and Clauses 18(7), 18(8) and 18(9) of this Bill are inconsistent with the Constitution, and will be required to be passed by the special majority specified in Article 84(2) of the Constitution.

We thank both Counsel for the assistance given in the examining the constitutionality of the Bill.

S. W. B. Wadugodapitiya
Judge of the Supreme Court

Ameer Ismail
Judge of the Supreme Court

P. Edussuriya
Judge of the Supreme Court

Bill was Presented to Parliament on: 10.09.2002

Bill No. 61.

Decision of the Supreme Court Conveyed to Parliament on: 08.10.2002,

Passed on: 08.10.2002

Speaker's Certificate Endorsed on: 20.12.2002

Title : Public Utilities Commission of Sri Lanka Act No. 35 of 2002.

2002

10. EIGHTEENTH AMENDMENT TO THE CONSTITUTION

A
BILL

To Amend the Constitution of the Democratic Socialist Republic of Sri Lanka

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

A Bill titled " EIGHTEENTH AMENDMENT TO THE CONSTITUTION "

In the matter of applications under Article 121 (1) of the Constitution.

PRESENT : Sarath N. Silva - Chief Justice
S. W. B. Wadugodapitiya - Judge of the Supreme Court
Dr. Shirani A. Bandaranayake - Judge of the Supreme Court
A. Ismail - Judge of the Supreme Court
P. Edussuriya - Judge of the Supreme Court
H. S. Yapa - Judge of the Supreme Court
J. A. N. de Silva - Judge of the Supreme Court

S. D. No. 12 / 2002	Petitioner	Koggala Wellala Bandula
	Counsel	Dr. Jayampathy Wickramaratne, PC, with Gaston Jayakody
S. D. No. 14 / 2002	Petitioner	Parakrama Agalawatta
	Counsel	Manohara de Silva
S. D. No. 22 / 2002	Petitioner	Suranjith Richardson Kariyawasam Hewamanne
	Counsel	J. C. Weliamuna with Lilanthi de Silva and Chrismal Warnasooriya and Sanath Jayawardane
S. D. No. 23 / 2002	Petitioner	Centre for Policy Alternatives (Guarantee) Limited
	Counsel	M. A. Sumanthiran with Viran Corea Renuka Sennanayake
S. D. No. 24 / 2002	Petitioner	Dr. Piyasena Dissanayake
	Counsel	Manohara de Silva with W. D. Weeraratne
S. D. No. 29 / 2002	Petitioner	Mangala Pinsiri Samaraweera
	Counsel	Wijayadasa Rajapakse, PC, with Kapila Liyanagamage and Ranjith Meegaswatte
S. D. No. 36 / 2002	Petitioner	Galaboda Devage Piyasiri
	Counsel	Dr. Jayampathi Wickramaratne, PC, with Gaston Jayakody and Pubudini Wickramaratne
		K. C. Kamalasabeysan, PC, AG with S. Marsoof, PC, ASG, Uditha Egalahewa, SC, and Harsha Fernando, SC, for State.

Court assembled at 10. 15 a.m. on 03rd October, 2002.

A Bill bearing the title "18th Amendment to the Constitution" was placed on the Order Paper of Parliament for 18th September, 2002. Seven petitions, numbered as above have been presented invoking the jurisdiction of this Court in terms of Article 121 (1) for a determination in terms of Article 123 of the Constitution in respect of the Bill.

Upon receipt of the petitions the Court issued notice on the Attorney-General as required by Article 134 (1) of the Constitution.

The Counsel representing the petitioners and the Attorney-General were heard before this Bench at the sittings held on 03.10.2002.

The petitioners' contended that Clauses 2, 4 and 5 of the Bill are inconsistent with Article 3 read with Article 4 of the Constitution and that if they require to become law, they must be passed by a two-thirds (2/3) majority in Parliament and thereafter be approved by the people at a Referendum, in terms of Article 83 of the Constitution.

Since extensive references were made to Clause 4 of the Bill, we would consider this first.

CLAUSE 4

Clause 4 of the Bill seeks to amend Article 41 (H) of the Constitution and is in the following terms :

> Article 41 (H) of the Constitution is hereby amended by the substitution for the words and figures "subject to the provisions of paragraphs (1), (2), (4) and (5) of Article 126, no Court shall" of the words "No Court, including the Supreme Court acting under Article 126 shall".

Counsel for the Petitioners argued that by the amendment of Article 41 (H) of the Constitution, the power of the Supreme Court to exercise its jurisdiction over any "decision, recommendation and approval of the Constitutional Council", set up by Article 41 (A) of the Constitution, is taken away.

The Constitution *inter alia,* provides for the amendment or repeal of the provisions of the Constitution. Provision is made in regard to such amendments or repeals in Articles 82 and 83 of the Constitution.

Article 83 of the Constitution refers to the approval of certain Bills at a Referendum. This Article reads as follows :

> " Notwithstanding anything to the contrary in the provisions of Article 82 -
>
> (a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or of this Article, and
>
> (b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over 6 years,
>
> shall 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."

It is not disputed that Article 83 makes no reference to proposed Articles 41 (F), 41 (H), 41 (J) and 41 (K), which respectively are mentioned in Clauses 2, 4 and 5 of the Bill. However, the arguements put forward by the petitioners were to the effect that although the aforementioned Articles are not referred to in Article 83, the provisions in the proposed Articles are inconsistent with Article 3 read with Article 4, which is specifically mentioned in Article 83 of the Constitution.

Article 3 of the Constitution, which is an entrenched provision, deals with the sovereignty of the People and reads as follows :

> " In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise. "

It was the unanimous contention of all the petitioners that Article 4 is complementary to Article 3 of the Constitution. In fact this Court has ruled in a series of cases that Article 3 is linked up with Article 4 and that these two Articles must be read together (*Vide* S. D. 5/80, 1/82, 2/83, 1/84 and 7/87).

Article 4 of the Constitution deals with the exercise of sovereignty and provides that,

" The Sovereignty of the People shall be exercised and enjoyed in the following manner .-

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum ;

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People ;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established or recognized by the Contitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law ;

(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided ; and

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."

Thus in terms of Articles 3 and 4 of the Constitution, fundamental rights and franchise constitute the sovereignty of the People, and is inalienable. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. Even the immunity given to the President under Article 35, has been limited in relation to Court proceedings specified in Article 35 (3). Moreover, the Supreme Court has entertained and decided the questions in relation to Emergency Regulations made by the President [Joseph Perera Vs. Attorney General - (1992 1 Sri L. R., pg 199)] and Presidential appointments [Silva Vs. Bandaranayake (1997 1 Sri L. R, pg 92].

By the envisaged 18th amendment, the Constitutional Council is clothed with unlimited and unfettered immunity on their decisions, recommendations and approvals. If such simmunity is given to the Constitutional Council, it would in effect be elevated to a body that is not subject to law, which is inconsistent with the Rule of Law. The Rule of Law, means briefly the exclusion of the existence of arbitrariness and maintaining equality before the Law. (A. V. Dicey, Law of the Constitution, pg. 120)

Hitherto without exception, executive and administrative action have been subjected to the jurisdiction enshrined in Article 126 of the Constitution. The total immunity expected in terms of the proposed amendment to the Constitution would effectively shut out the justiciability of actions of the Constitutional Council in the exercise of the fundamental rights jurisdiction by the Supreme Court.

The Constitutional Council established under the 17th Amendment, is part of the Executive and is attributed executive power. Thus the Council would come within the executive organ of Government in regard to Article 4 (d) of the Constitution, referred to above. It is therefore the duty of the Constitutional Council to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution. The functions of the Constitutional Council would come within the framework of executive action as provided for in terms of Article 17 of the Constitution. Article 17 enables every person to apply to the Supreme Court in respect of the infringement or imminent infringement of a fundamental right.

The effect of the amendment in Clause 4 is to introduce a different class of people whose actions are not subject to judicial review. There is no justification for such immunity to be granted, which is contrary to Article 12 (1) of the Constitution and the basic principles of Rule of Law.

The concept of judicial review of administrative action, being a predominant feature of Constitutional jurisprudence, prevents total immunity being to any body, created under the Constitution as such restriction of judicial scrutiny, would impair the very foundation of the Constitution and the Rule of Law. The total immunity contemplated by the amendment, taking away the judicial review of the actions of the Constitutional Council out of the fundamental rights jurisdiction, in effect would alienate the judicial power from the people in contravention of Articles 3 and 4 of the Constitution. It is to be noted that Article 3 of the Constitution specifically refers to the following :

(A) the sovereignty is in the people and that it is inalienable ; and

(B) the sovereignty includes the powers of Government, fundamental rights and the franchise.

For the aforementioned reasons we determine that Clause 4 of the Bill is inconsistent with Articles 3 and 4 of the Constitution. We also state that the Bill in its present form is therefore require to be passed by the special majority in terms of the provision of paragraph (2) of Article 84 and approved by the people at a Referendum by virtue of the provisions of Article 83.

CLAUSE 2

Clause 2 of the Bill is to amend Article 41 (F) of the Constitution and to insert a new Article, namely, Article 41 (FF) which would deal with the Rule making powers of the Constitutional Council. This new Article is in the following terms :

"(1) The Council may from time to time make rules setting out the procedure and guidelines to be followed by it, in the performance and discharge of the duties and functions assigned to it under the Constitution, or by any other law.

(2) Every rule made under paragraph (1) of this Article, shall be published in the Gazette and shall come into operation on the date of such publication.

(3) The Council shall, before the publication of any rule formulated in terms of this Article in the Gazette, communicate such rule to Parliament".

The Petitioners submitted that these Rules would be for the purpose of setting out the procedure and guidelines to be followed by the Constitutional Council itself. It was also pointed out that no provision has been made in the Amendment that these Rules must be approved by Parliament. The amendment merely requires the Constitutional Council to communicate such Rules to Parliament.

The Constitutional Council, as pointed out earlier is established by the 17th Amendment. The proposed Amendment enables the Council to exercise legislative power, which according to Article 4 (a) of the Constitution, is reposed in the People and is exercised by Parliament. In terms of Article 76 (1) of the Constitution, Parliament cannot abdicate or alienate its legislative power.

The Rule making power of the Constitutional Council is derived from the Constitution. The Amendment shows that this power is not subjected to any kind of control. However the other organs, which are created by the Constitution, and thus have the power to make Rules, are quite correctly subjected to the accepted norms of Parliamentary control. For instance, the Rules of the Supreme Court made under Article 136 of the Constitution, should as soon as convenient after their publication in the Gazette, be brought before Parliament for approval. The proposed Amendment thus undermines the Parliamentary control over the Rule making powers of an institution established by the Constitution, which in turn is an abdication as well as an alienation that affects the sovereignty of the People, which is inconsistent with Articles 3 and 4 of the Constitution. Hence this Clause requires approval by the People at a Referendum in addition to a two-thirds majority votes (including those not present) in terms of Article 83 of the Constitution.

We are of the opinion that if Clause 2 is amended by incorporating the requirement for the Rules prepared by Constitutional Council to be placed before the Parliament in order to obtain approval or the power of the Council is restricted to the formulation of guidelines only, the inconsistency with Articles 3 and 4 of the Constitution would cease and the approval by the People at a Referendum in terms of Article 83 of the Constitution would not be necessary.

CLAUSE 5

Clause 5 of the Bill consists of 2 Articles, namely, 41J and 41K(1) and (2), which are proposed to be inserted immediately after Article 41H of the Constitution. While 41J refers to immunity from suit, 41K(1) and (2) deal with the interference with the Council. These two Articles are in the following terms :

"41J. No suit or proceeding shall lie against the Council, the Chairman, a Member, the Secretary or an officer of the Council in respect of anything done or omitted to be done by the Council, the Chairman, a Member, the Secretary or any officer of the Council in the performance or discharge of any duty or function conferred or assigned in terms of the Constitution or by any other law.

41(K)(1) Every person who, otherwise than in the course of such persons lawful duty, directly or indirectly by himself or by or with any other person, in any manner whatsoever influences or attempts to influence or interferes with any decision or recommendation of the Council, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(2) A High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1)"

Learned Counsel in petitions No 14/2002 and 24/2002 contended that the proposed Article 41 (K)(1) would have implications, violative of Article 12(1) of the Constitution. His submission was that Article 41(3) of the Constitution provides for the mandatory appointment of 3 persons from the minority communities to represent their interest, whereas the majority community as such is not represented in the Constitutional Council to safeguard their interest. Accordingly, any representation made in respect of the majority community, would entail the consequences of prosecution. Whilst the minority communities could communicate with their representatives in the Constitutional Council, the majority community would be denied such opportunity in the absence of the specific representation, which in turn would be violative of Article 12(1).

Article 3, referred to above, specifically mentions that sovereignty includes fundamental rights and which is " in the people and is inalienable." Article 4(d) which refers to the exerise of severeignty specifies that the fundamental rights which are declared and recognized by the Constitution must be "respected, secured and advanced" by all the organs of the Government. This Article further contemplates that the fundamental rights cannot be abridged, restricted or denied.

In such circumstances the proposed Article 41(K) 1 is inconsistent with Article 3 read with Article 4 of the Constitution.

The Attorney-General conceded that there is much merit in these submissions and suggested in his written submissions tendered after the hearing was concluded, the following to be considered.

(a) an appropriate definition to be included in the proposed Article to exclude any representation that may be made to the Council by any person or

in the alternative,

(b) The words "otherwise than in the class of such persons lawful duties directly or indirectly by himself or by or with any other persons in any manner whatsoever influence or attempt to influence or " be deleted from the proposed Article to ensure protection to persons making representation to the Council.

Since the suggestions were not made at the time of the hearing of these applications, which would have given an opportunity for the petitioners also to consider the views expressed by the Attorney-General, it would not be possible for this Court to consider them.

We therefore determine that the proposed Article 41(K)1 is inconsistent with Articles 3 and 4 of the Constitution. The proposed Article therefore is required to be passed by the special majority in terms of paragraph 2 of Article 84 and approved by the people at a Referendum by virtue of the power of Article 83.

The proposed Article 41J referred to above, which grants an immunity to the Constitutional Council, the Chairman, a Member, the Secretary or an officer, from judicial proceedings in respect of anything done or omitted to be done, attracts both objections dealt with, in the proceeding paragraphs of this determination. They are;

(1) that it would alienate the judicial power from the people;

(2) that it creates a special class of people in violation of Article 12(1) of the Constitution, who would not be subjected to judicial review.

for the reasons stated above we determine that there is merit on both grounds of objections and the proposed Article 41J is therefore inconsistent with Article 3 read with Article 4 of the Constitution.

For the reasons stated above, the Bill, in its present form, requires approval by People at a Referendum in addition to a two-thirds majority vote (including those not present) in terms of Article 83 of the Constitution.

We shall place on record our deep appreciation of the assistance given by Attorney-General and all the other learned Counsel who made submissions in this matter.

Sarath N. Silva,
Chief Justice.

S. W. B. Wadugodapitiya,
Judge of the Supreme Court.

Dr. Shirani A. Bandaranayake,
Judge of the Supreme Court.

A. Ismail,
Judge of the Supreme Court.

P. Edussuriya,
Judge of the Supreme Court.

H. S. Yapa,
Judge of the Supreme Court.

J. A. N. de Silva,
Judge of the Supreme Court.

Bill was Presented to Parliament on: 18.09.2002
Bill No: 64
Decision of the Supreme Court Conveyed to parliament on: 22.10.2002
Bill was not proceeded with.

2002

11. NINETEENTH AMENDMENT TO THE CONSTITUTION

A

BILL

to amend the Constitution of the Democratic Socialist Republic of Sri Lanka

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

A Bill entitled, "NINETEENTH AMENDMENT TO THE CONSTITUTION".

in the mateer of applications under Article 121 (1) of the Constitution.

PRESENT : Sarath N. Silva		Chief Justice
S. W. B. Wadugodapitiya		Judge of the Supreme Court
Dr. Shirani A. Bandaranayake		Judge of the Supreme Court
A. Ismail		Judge of the Supreme Court
P. Edussuriya		Judge of the Supreme Court
H. S. Yapa		Judge of the Supreme Court
J. A. N. De Silva		Judge of the Supreme Court
S. D. No. 11/2002	Petitioner	1. Lanka Samasamaja Party 2. Batty Weerakoon 3. Baddegama Samith Thera, M.P.
	Counsel	Mr. Batty Weerakoon for Petitioners
S. D. No. 13/2002	Petitioners	W. A. Sarath Kumara Weragoda
	Counsel	Sarath Weragoda (in person)
S. D. No. 15/2002	Petitioners	Champani Padmasekara M. S. Aub Khan,
	Counsel	D. P Mendis, P. C. With Nadeera Gunawardena and Keerthi Segara
(Intervenient)	Counsel	Shibly Aziz P. C. With L. C. Seneviratne P C., Daya Pelpola, S. G. Mohideen Ronald Perera, Chandimal Mendis and Rohana Deshapriya
S. D. No. 16/2002	Petitioner	Mohan Saliya Ellawala,
	Counsel	S. S. Sahabandu, P. C., With Keerthi Segara, Situge and S. D. Yogendra
S. D. No. 17/2002	Petitioner	Janaka Bandara Tennakoon
	Counsel	A. A. de Silva P. C., With A. W. Yusuf, Prasanna Obeysekera and Chaminda Weerakkody
S. D. No. 18/2002	Petitioner	V Puththirasigamoney
	Counsel	R. I. Obeysekera, P. C. With A. W. Yusuf, P. Liyanaarachchi, Chaminda Weeakkody and Piyal Ranathunga
S. D. No. 19/2002	Petitioner	W. H. Piyadasa
	Counsel	B. Jayamanna with Swinitha Gunaratne

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S. D. No. 20/2002	Petitioner	Mahinda Tissa Athukorala
	Counsel	L. V. P. Wettasinghe with Swinitha Gunaratne
S. D. No. 21/2002	Petitioner	Centre for Policy Alternatives (Guarantee) Ltd.,
	Counsel	M. A. Sumanthiran with V. Corea and Renuka Senanayake
S. D. No. 25/2002	Petitioner	B. D. P. A. Perera
	Counsel	Anil Obeysekera, P. C., With Palitha de Silva and Bandula Wellala
S. D. No. 26/2002	Petitioner	E. P. Wickremasekera (in Person)
S. D. No. 27/2002	Petitioner	Piyasena Dissanayake
	Counsel	A. A. de Silva, P. C. with Piyatissa Abeykoon and Kanishka Witharana
S. D. No. 28/2002	Petitioner	Tilvin Silva
	Counsel	Manohara de Silva
S. D. No. 30/2002	Petitioner	Mangala Pinsiri Samaraweera
	Counsel	Wijedasa Rajapakse, P. C., with Kapila Liyanagamage and Ranjith Meegaswatta
S. D. No. 31/2002	Petitioner	Shantha Niriella
	Counsel	Neville Jayawardene with P. D. R. S. Panditharatne
S. D. No. 32/2002	Petitioner	D. M. Jayaratne
	Counsel	H. L. de Silva, P. C., with Negel Hatch
S. D. No. 33/2002	Petitioner	Maithripala Sirisena
	Counsel	R. K. W. Gunasekera with Gaston Jayakody
S. D. No. 34/2002	Petitioner	Prof. Ranjith Amerasinghe
	Counsel	Dr. Jayampathy Wickremaratne with Gaston Jayakody
S. D. No. 35/2002	Petitioner	Prof. Ranjith Amerasinghe
	Counsel	Dr. Jayampathy Wickremaratne with Gaston Jayakody
S. D. No. 37/2002	Petitioner	Kamal Nissanka
	Counsel	A. R. I. Athurupana with R. Edirimanne
S. D. No. 38/2002	Petitioner	K. R. M. A. Raheem
	Counsel	A. W. Yusuf with Piyal Ranatunga
S. D. No. 39/2002	Petitioner	Somaweera Chandrasiri
	Counsel	A. A. de Silva, P. C. with P. Abeykoon and Kanishka Witharana

S. D. No. 40/2002	Petitioner	B. A. Victor Perera
	Counsel	Petitioner absent and unrepresented.
		K. C. Kamalasabayson,. P. C. Attorney General, with S. Marsoof, P. C. Addl. Solicitor General, Uditha Egalahewa, S. C. and Harsha Fernando, S. C. for State
	Intervenient	Shibly Aziz, P. C. with L. C. Seneviratne, P. C. Daya Pelpola, S. G. Mohideen, Ronald Perera, Chandimal Mendis and Rohana Deshapriya

Court assembled at 10.15 a. m. on 01st and 03rd October 2002.

A Bill bearing the title "19th Amendment to the Constitution". was placed on the Order Paper of Parliament for 19.09.2002. Twenty four petitions, numbered as above have been presented invoking the jurisdiction of this court in terms of Article 121 (1) for a determination in terms of Article 123 of the Constitution, in respect of the Bill.

Upon receipt of the petitions the Court issued notice on the Attorney General as required by Article 134 (1) of the Constitution.

The Petitioners or Counsel representing them, the Intervenient Petitioner and the Attorney General were heard before this Bench at the sittings held on 1.10.2002 and 3.10.2002

The proposed 19th Amendment to the Constitution as contained in the Bill deals with broadly four matters:-

01. the appointment of the Prime Minister, an amendment to Article 43(1) of the Constitution, as contained in clause 2;
02. the dissolution of the Cabinet of Ministers, an amendment to Article 49 as contained in clause 2;
03. the dissolution of Parliament, an amendment to Article 70 as contained in clauses 4 and 5;
04. the conferment of an immunity from disciplinary action that may be taken against Members of Parliament by recognized political parties or independent groups in respect of speaking, voting, or abstaining from voting on any amendment to the Constitution contained in the Bill, as set out in clause 6 of the Bill.

Since the Bill taken as a whole hinges on the provisions contained in clauses 4 and 5 with regard to the dissolution of Parliament we would consider this matter first.

DISSOLUTION OF PARLIAMENT

The provisions presently in the Constitution regarding dissolution of Parliament are contained in Article 70 (1). The main paragraph in Article 70 (1) reads as follows:

"The President may, from time to time, by Proclamation Summon, Prorogue and Dissolve Parliament."

The broad power thus attributed in the President is subject to certain limitations and clarifications as are specified in provisos (a) to (d) of the sub-article. The contents of these provisos may be summarized as follows:

(a) where a General Election has been held consequent upon a dissolution of Parliament by the President, the President shall not thereafter dissolve Parliament until the expiration of one year from the date of such election unless Parliament by resolution requests the President to do so;

(b) the President shall not dissolve Parliament on the rejection of the statement of government policy at the commencement of the first session of Parliament after a General Election;

(c) restriction on the power of dissolution where a motion for the impeachment of the President has been entertained by the Speaker;

(d) where the President has not dissolved Parliament upon the rejection of the Appropriation Bill, Parliament shall be dissolved if the next Appropriation Bill is rejected.

It is seen that provisos *(a)*, *(b)* and *(c)* are specific restrictions of the power of dissolution, whereas proviso *(d)* is mandatory, and requires dissolution.

THE CONTENTS OF THE BILL WITH REGARD TO THE DISSOLUTION OF PARLIAMENT:

The amendments in the Bill in this regard are contained in clauses 4 and 5. Clause 4 repeals proviso *(a)* of Article 70(1), referred to above and substitutes a new proviso with two sub paragraphs. As noted, proviso *(a)* is a restriction on the powers of the President to dissolve Parliament within one year after a General Election, that had been held consequent upon a dissolution of Parliament by the President. The effect of the amendment is two fold:-

(i) the proviso will apply irrespective of the circumstance that caused the General Election. That is, whether is resulted from a dissolution by the President or by the expiration of the term of Parliament being 6 years, as contained in Article 62(2).

(ii) the residuary power which in terms of the present proviso *(a)* lies in the President not to dissolve, even where the Parliament by resolution requests the same, is removed and it becomes mandatory on the President to dissolve within 4 days of the resolution being communicated by the Speaker. However the period of 1 year from the General Election during which the proviso will apply, remains;

Clause 5 seeks to add a new provision as Article 70A immediately after Article 70. The new Article will have four sub articles, the provisions of which can be grouped as follows;

(1) Article 70A (1) *(a)* which deals with a situation "where the majority of the Members of Parliament belong to a recognized political party or parties or an independent group or groups of which the President is not a member". In such event after the expiration of one year from the General Election the President shall not dissolve Parliament unless upon a request by Parliament supported by a resolution passed by not less than two thirds of the whole number of members, including those not present.

(2) Article 70A (1) *(b)* and 70A(2) are linked. Paragraph *(b)* provides that where the Parliament passes a resolution that the Government no longer enjoys the

confidence of the Parliament, the President shall dissolve Parliament. However as stated in paragraph (2), if such a resolution identifies a Member of Parliament who enjoys the confidence of Parliament and the resolution is passed by not less than one half of the whole number of members (including those not present) the President shall not dissolve Parliament but shall appoint such person as Prime Minister.

(3) Article 70A (3) and (4) are consequential provisions contents of which need not be referred to for the purpose of this determination.

Considering the somewhat diffused picture that comes to mind when the amendment is read into the existing provision, we would summarize the situation that will emerge as follows:

(1) the main provision in Article 70 (1) referred to above, which broadly attributes the power of dissolution of Parliament to the President, remains;

(2) the substituted proviso (a) which applies in relation to the first year after the General Election remains. The discretion that now lies with the President not to dissolve even if the Parliament requests such dissolution is removed and such dissolution is mandatory on the part of the President.

(3) There is a bifurcation in the provisions that will apply in respect of the period after the lapse of 1 year from the date of the General Election. These provisions are:-

(a) where the majority of the Members of Parliament belong to a recognized political party or independent group or groups of which the President is not a member, the power of dissolution is totally removed from the President and can be exercised by the President only upon a resolution passed by not less than two thirds of the whole number of members (including those not present) request such dissolution.

(b) If the President is a member of the majority party or group in Parliament, the power of dissolution will remain as it presently stands, subject to the provisions in Article 70A(1) (b) and (2) referred to above.

THE GROUND OF CHALLENGE

The Petitioners challenge the provisions contained in clauses 4 and 5 on the basis that they constitute an erosion of the Executive power of the President, which is inconsistent with Article 3 read with article 4*(b)* of the Constitution and urge that the inconsistency is aggravated by the criterion upon which the power of the President in this regard is reduced to nothing, viz., the absence of membership in a particular political party or a group.

ANALYSIS OF THE GROUND OF CHALLENGE AS TO CLAUSES 4 & 5

The Court has to consider whether the said clauses require to be passed by the special majority provided in Article 84 (2) and approved by the People at a Referendum by virtue of the provisions of Article 83. The Petitioners contend as noted above that these provisions require to be approved at a Referendum in terms of Article 83 *(a)*, as they are inconsistent with Article 3 read with Article 4(B) of the Consitution. Since extensive references were made to Articles 3 and 4 of the Constitution, we reproduce the respective Article in full.

3. " In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".

4. The sovereignty of the People shall be exercised and enjoyed in the following manner:

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum:

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided;
and

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors".

These Articles relate to the sovereignty of the People and the exercise of that sovereignty. Mr. H.L.de Silva, P. C., submitted and correctly so, that the two Constitutions of Sri Lanka of 1972 and 1978 are unique in proclaiming that sovereignty is in the People and specifically elaborating the content of such sovereignty, whilst in most Constitutions the term "sovereignty" is used only as descriptive of the power of the State, similar to Article I, which states that – " Sri Lanka (Ceylon) is a Free, Sovereign, Independent, and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka". This submission was further developed by Mr. Batty Weerakone from the perspective of political theory and he submitted that in terms of Articles 3 and 4, sovereignty is transmuted from a "grim reality" to something that is "tangible" or "palpable," without being elusive or visionary.

It was the common submission of counsel for the petitioners that sovereignty conceptualized in Article 3 is given a practical dimension in Article 4. Although Mr. Shibly Aziz, P. C., counsel for the Intervenient Petitioner sought in a brief argument to delink the two Articles, the Attorney General submitted that they are linked together and should be read together. Indeed, the Attorney General's submission has been the constant trend of decisions of this Court that date back to the year 1980. Whilst the previous decisions relate to alleged instances of the erosion of judicial power, fundamental rights/franchise or devolution of power to sub-ordinate (or as alleged, coordinate bodies), we are presently confronted with an alleged erosion which involves the legislative organ of Government

and the Executive organ of Government. Hence, it is necessary to examine the concept of the sovereignty of the People and the working thereof, as set out in Articles 3 and 4 from a slightly different perspective.

Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People, to include;

01. The powers of Government;
02. The fundamental rights; and
03. the franchise.

Fundamental rights and the franchise are exercised and enjoyed directly by the People and the organs of government are required to recognize, respect, secure and advance these rights.

The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4(a),(b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub- paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and Judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power " *of the people*" shall be exercised by Parliament; the executive power " *of the People*" shall be exercised by President and the judicial power " of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.

Therefore the statement in Article 3 that sovereignty is in the People and is "inalienable," being an essential element which pertains to the sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4. The relevant sub paragraphs would then read as follows:

(*a*) the legislative power of the People *is unalienable* and shall be exercised by Parliament;

(*b*) the executive power of the People *is inalienable* and shall be exercised by the President; and

(*c*) The judicial power of the People *is inalienable* and shall be exercised by Parliament through Courts.

The meaning of the word "alienate" as a legal term, is to transfer anything from one who has it for the time being to another, or to relinquish or remove anything from where it already lies. Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution is one organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent

with Article 3 read together with Article 4 of the Constitution. It necessarily follows that the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained.

This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another. The dissolution of Parliament and impeachment of the President are some of these powers which constitute the checks incorporated in our Constitution. Interestingly, these powers are found in chapters that contain provisions relating to the particular organ of government subject to the check. Thus, provision for impeachment of the President is found in Article 38(2) contained in Chapter VII titled, "The Executive, President of the Republic". Similarly, the dissolution of Parliament is found in Article 70(1), which is contained in Chapter XI titled, "The Legislature, Procedure and Powers."

Mr. H. L. de Silva, P. C. submitted forcefully that they are "weapons" placed in the hands of each organ of government. Such a description may be proper in the context of a general study of Constitutional Law, but would be totally inappropriate to our Constitutional setting, where sovereignty as pointed out above, continues to be reposed in the People and organs of government are only custodians for the time being, that exercise the power for the People. Sovereignty is thus a continuing reality reposed in the People.

Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People. Similarly, legislative power should not be identified with the Prime Minister or of any party or group in Parliament and thereby be given a partisan form and character. It should be seen at all times as the power of the People. Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as "weapons" in the hands of the particular organ of government. These checks have not been included in the Constitution to resolve conflicts that may arise between the custodians of power or, for one to tame and vanquish the other. Such use of the power which constitutes a check, would be plainly an abuse of power totally antithetic to the fine balance that has been struck by the Constitution.

The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the "trust" that is implicit in the conferment of power has been stated as follows:

> "Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely- that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."
> (Administrative Law 8th Ed. 2000- H. W. R. Wade and C. F. Forsyth p. 356)

It has been firmly stated in several judgments of this Court that the 'rule of law' is the basis of our Constitution (Visuvalingam vs. Liyanage 1983 1 SLR at 236, Premachandra vs. Jayawickrema - 1994/2 SLR p.90)

A. V. Dicey in "Law of the Constitution" postulates that 'rule of law' which forms a fundamental principle of the Constitution has three meanings one of which is describes as follows:-

> "It means, in the first place, the absolute supremacy or predominance or regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone.....

The Attorney General has appropriately cited the dictum of Bhagawati J (later, Chief Justice of India) in the case of *Gupta and others vs Union of India* 1982 Air (SC) 197, where he observed;

> "If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective."

To sum up the analysis of the balance of power and the checks contained in the Constitution to sustain such balance, we would state that the power of dissolution of Parliament and the process of impeachment being some of the checks put in place, should be exercised, where necessary, in trust for the People only to preserve the sovereignty of the People, and to make it meaningful, effective and beneficial to the People. Any exercise of such power (constituting a check), that may stem from partisan objectives would be a violation of the rule of law and has to be kept within its limits in the manner stated by Bhagawati J. There should be no bar to such a process to uphold the Constitution.

Our conclusion on the matters considered above can be stated as follows-

(01) The powers of government are included in the sovereignty of the People as proclaimed in Article 3 of the Constitution.

(02) These powers of government continue to be reposed in the People and they are separated and attributed to the three organs of government; the Executive, the Legislature and the Judiciary, being the custodians who exercise such powers in trust for the People.

(03) The powers attributed to the respective organs of government include powers that operate as checks in relation to other organs that have been put in place to maintain and sustain the balance of power that has been struck in the Constitution, which power should be exercised only n trust for the People.

(04) The exercise of the sovereignty of the People can only be perceived in the context of the separation of powers as contained in Article 4 and other connected provisions of the Constitution, by the respective organs of government.

(05) The transfer of a power which attributed by the Constitution to one organ of government to another; or the relinquishment or removal of such power, would be an alienation of sovereignty inconsistent with Article 3 read with Article 4 of the Constitution.

CONCLUSIONS APPLIED TO THE PROVISIONS OF THE BILL

Conclusions arrived at in the foregoing analysis have now to be applied to the provisions of the bill, the constitutionality of which should be examined in the light of the ground of challenge.

It is clear that according to the framework of our Constitution, the power of dissolution of Parliament is attributed to the President, as a check to sustain and preserve the balance of power that is struck by the Constitution. This power attributed to the President in broad terms in Article 70(1) is subject in its exercise to specifically defined situations as set out in provisos (a) to (c) referred to above. Even in these situations, the final say in the matter of dissolution remains with the President. The only instance in which dissolution is mandatory,

is contained in proviso (d), terms of which, if the Appropriation Bill (the Budget) has been rejected by Parliament and the President has not dissolved Parliament, when the next Appropriation Bill is also rejected, the President shall dissolve Parliament, This is a situation of a total breakdown of the government machinery, there beign no money voted by Parliament for the government to function. In such an event dissolution is essential and the Constitution removes the discretion lying in the President by requiring a dissolution. As the Constitution now stands this is the only instance where Parliament could enforce a dissolution by the President and that too the oblique means of rejecting the Appropriation Bill twice. This demonstrates the manner in which the Constitution has carefully delineated the power of dissolution of Parliament. The People in whom sovereignty is reposed have entrusted the organs of government, being the custodians the exercise of the power, as delineated in the Constitution. It is in this context that we arrived at the conclusion that any transfer, relinquishment or removal of a power attributed to an organ of government would be inconsistent with Article 3 read with Article 4 of the Constitution. The amendments contained in clauses 4 and 5 of the Bill vest the Parliment with the power, to finally decide on the matter of dissolution by passing resolutions to that effect in the manner provided in the respective sub-clauses set out above. The residuary discretion that is now attributed to the President (except in Article 70(1)(d) – Appropriation Bill being rejected for the second time) is removed and it becomes mandatory on the part of the President to dissolve Parliament within four days of the receipt of the communication of the Speaker notifying such resolution.

The provision which attracted most of the submissions of the {Petitioners who opposed the bill, is the proposed Article 70A(1)(a) referred to above, which totally removes the power of the President to dissolve Parliament, if the majority of the members of Parliament belong to a political party or independent group of which the President is not a member. In such event the President shall not dissolve Parliament unless upon a resolution passed by Parliament by a two thirds majority. Significantly, there were no submissions in support of this provision. Article 4(b) of the Consitution provides that the executive power of the People shall be exercised by the President of the Republic, elected by People. Thus upon election the incumbent becomes the "President of the Republic", who in terms of Article 30(1) is "the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces". The power attributed to such an office cannot possibly be different, dependent on the absence of membership of a political party or group. The Constitution conceives of a President, who is the "Head of the State," and who would stand above party politics. This provision moves in the opposite direction. There may be practical considerations that led to this provision being conceived, of which we cannot be unmindful. However, the Constitution is the "Supreme Law" of Sri Lanka and should not be seen only from the perspective of such considerations that arise in the moment, but as a body of law, which we could uphold according to the oath that we have taken. It is unnecessary to dwell on this matter any further since the Attorney General in his written submission tendered after the hearing in Court was concluded, suggested an amendment to this provision deleting the portions that include references to the absence of membership in a political party or group and the requirement for the resolution to be passed by a two thirds majority.

We would now consider the amendment suggested by the Attorney General according to which the proposed Article 70(1)(a) is replaced with a provision stating that after the lapse of one year from a General Election, the President shall not dissolve Parliament unless upon a resolution passed by not less than one half of the whole number of members of Parliament, including those not present. It has to be noted that this amendment does not address the inconsistency with Articles 3 and 4, dealt with in the preceding sections of this determination. We have stated clearly, on the basis of a comprehensive process of reasoning, that the

dissolution of Parliament is a component of the executive power of the People. attributed to the President, to be exercised in trust for the People and that it cannot be alienated in the sense of being transferred, relinquished or removed from where it lies in terms of Article 70(1) of the Constitution. Therefore, the amendments contained in clauses 4 and 5 of the Bill, even as further amended, as suggested by the Attorney General, constituted in our view such an alienation of executive power, inconsistent with Article 3 read with Article 4 of the Constitution and require to be passed by the special majority required under Article 84(2) and approved by the People at a Referendum, by virtue of the provisions of Article 83.

Article 123(2)(c), empowers this Court when making a determination in the manner set out above, to specify the nature of the amendments that would make the provisions in question cease to be inconsistent with the Constitution. Whilst the hearing was in progress, the Court, from time to time, posed questions to learned Counsel to evoke a response on possible amendments. When questioned about an increase of the period of one year from a General Election during which the President shall not dissolve Parliament unless upon a resolution to that effect passed by Parliament, Mr. H. L. de Silva, P. C., firmly submitted that even the slightest increase of that period would be an erosion of the executive power and be inconsistent with Article 3 read with Article 4(b). Questions were posed on the basis of similar provisions in other Constitutions, being mindful at all times of the diversity in the particular structure of such Constitutions. More specifically, attention Counsel was drawn to the 1996 Constitution of the Republic of South Africa, which has a fixed term for the duration of the National Assembly without a broad power of dissolution, as contained in Article 70(1) of our Constitution but includes a provision for dissolution after three years if there is a resolution to that effect, supported by a majority of the Members of the Assembly. This is one of the more recent Constitutions, put in place after and extensive process of consultation and which contributed to the transformation of a conflict ridden country to a unified Nation. However, we noted that Counsel were slow to respond to these questions. We are mindful of the position that they have to be guided by instructions received from the persons whom they represent. The lines of division were manifestly sharp and the arguments were addressed from polarized perspectives. It is our view that an amendment of the Constitution cannot be looked at in this manner. Dr. Wickremaratne in a submission, replete with facts and instances, cited previous amendments to the Constitutions that were alleged to have been done with partisan objectives. These related to a period where the political party in power had a two-thirds majority in Parliament. He may be correct in the sharp criticisms made of such instances. However, partisanship of one side cannot be pitted against partisanship of the other. In the process of enacting law, especially in amending or reforming the Constitution, the sharp edges of the divide should be blunted and we have to seek common ground bearing upper most in mind the interests of the People who are sovereign.

It is obvious that the proposed amendment has been conceived due to certain difficulties that are envisaged. Although, those who framed the Constitution are presumed to have looked to the future, it may be that they did not fully visualize the stress on the machinery of State that would build up, when there is a divergence in policies between the President who exercises executive power on a mandate of the People, and the majority in the Parliament exercising legislative power also on a mandate of the people. Article 70(1)(a) is intended to provide for such a situation in terms of which during the first year after a General Election held pursuant to a dissolution of Parliament by the President, Parliament could be dissolved only if there is a resolution requesting such dissolution. Thus, in effect during this period the matter of deciding on the dissolution of Parliament become a responsibility shared by the President with Parliament. There is no alienation of the power of dissolution attributed to the President. Any extension of this period of one year may be seen as a reduction or as contended by Mr. H. L. De silva an erosion of that power. However, we are of the view that on an

examination of the relevant provisions in the different contexts in which they have to operate, that every extension of such period would not amount to an alienation, relinquishment or removal of that power. That would depend on the period for which it is extended. If the period is too long, it may be contended that thereby the power of dissolution attributed to the President to operate as a check to sustain the balance of power, as noted above, is by a side wind, as it were, denuded of its efficacy. But, if we strike middle ground , the balance of power itself being the overall objective would be strengthened especially in a situation of a divergence of policy, noted above. We are of the view that if Clauses 4 and 5 of the Bill, dealt with in the preceding portion of this determination are removed and replaced with a clear amendment to proviso (a) of Article 70(1) whereby the period of one year referred to therein is extended to a period to be specified not exceeding three years (being one half of the period of Parliament as stated in Article 62(2) that would not amount to a alienation relinquishment, or removal of the executive power attributed to the President. The inconsistency with Article 3 read with Article 4 (b) would thereby cease. The substituted clause should be passed by the special majority provided in Article 84(2) and not require approval by the People at a Referendum.

We would now move to the other clauses of the Bill that will be dealt with in the light of the conclusions stated above.

CLAUSES 2 AND 3(1) OF THE BILL

These provisions relate to the dissolution of Parliament and the amendments contained in Clauses 4 and 5. They attract the determination stated above, based on the inconsistency with Article 3 read with Article 4(b) and require the approval by the People at a Referendum.This inconsistency would cease, if these provisions are removed and replaced with an amendment to proviso (a) of Article 70(1), as stated above.

CLAUSES 3(2) OF THE BILL

This provision contains an amendment to Article 49(2) of the Constitution which sets out certain situations in which, "the Cabinet of Ministers shall stand dissolved." The sub-Article now specifies three such situations, viz, where the Parliament,

(i) rejects the Statement of Government Policy or,
(ii) rejects the Appropriation Bill or,
(iii) passes a vote of no confidence in the Government.

The amendment removes situation (iii). Taken by itself, this amendment would not make any sense whatever. It appears that this amendment has to be read in the light of the proposed Article 70A(1)(b) which states that, where Parliament passes a resolution declaring that the Government no longer enjoys the confidence of Parliament the President shall, dissolve Parliament. The resulting position is that where Parliament passes a motion of no confidence in the Government, instead of the Cabinet standing dissolved, as presently provided, the Parliament itself which passed the motion will be dissolved. As submitted by Dr. Wickramaratne P.C., the resulting position is illogical and arbitrary. In the context of the framework of the Constitution dealt with above, the matter is more serious. Article 43(1) of the Constitution states as follows:

> 43(1) "There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament"

This is a check put in place by the Constitution relevant to the executive organ of government, whereby it is made collectively responsible and answerable to Parliament. The check is enforced, inter alia, by the provision in Article 49(2), which empowers the Parliament

to pass a vote of no confidence in the Government, resulting in the dissolution of the Cabinet of Ministers. We are of the view on the application of the reasons set out in the preceding sections of this determination with regard to the exercise of the sovereignty of the People relevant to executive power, that this amendment would amount to an alienation, relinquishment or removal of the legislative power of the People. The amendment as contained in Clause 3(2) would then be inconsistent with Article 3 read with Article 4(a) of the Constitution and require to be passed by the special majority provided in Article 84(2) and approved by the People at a Referendum.

CLAUSE 6 OF THE BILL

In view of the nature of the submissions and the amendment suggested by the Attorney General, we reproduce this clause in full :

> 6. "A Member of Parliament who speaks or votes or abstains from voting on any amendment to the Constitution contained herein, according to his own belief or conscience or free will, shall not be expelled or suspended from membership or be subjected to any disciplinary action by the recognized political party or the independent group as the case may be on whose relevant nomination paper his name appeared at the time of his becoming such Member of Parliment for having so spoken or voted or abstained from voting, and the provisions of sub-paragraph (a) of paragraph (13) of Article 99 shall not apply to such member; and the seat of such Member in Parliament shall not thereby become vacant."

All Counsel and petitioners in person, made submissions regarding this Clause. The grounds of objection can be summarized as follows:

(i) That the clause does not satisfy the requirements of Article 82 (1) of the Constitution. This article which states that any amendment of the Constitution must be express, requires that a Bill for the amendment of any provision of the constitution shall not be placed on the Order Paper of Parliament, " unless the provision to be repealed altered or added and consequential amendments, if any, are expressly specified in the Bill ....." It was submitted that the provision of the constitution sought to be amended is not expressly stated.

(ii) That the clause is outside the legislative power of Parliament in view of article 75 of the Constitution which empowers Parliament to make laws but lays down a specific limitation to that power in the following terms–

"Provided that Parliament shall not make any law –

(a) suspending the operation of the Constitution or any part thereof....."

It was submitted that this clause has the effect of suspending the operation of Article 99 (13) (a), being a part of the Constitution.

(iii) That the clause erodes the franchise, which forms part of the sovereignty of the People. It was submitted that the People exercised the franchise at the election of the Members of Parliament, by casting a vote for a recognized political party or an independent group and preference votes were cast to particular candidates, on the premise that they would be subject to disciplinary control by the party or group and in the event of expulsion, be replaced by another candidate. This submission was further developed in relation to Members of Parliament elected on the " National List," as provided in article 99 A. It was further submitted that the franchise has a continuing effect inter alia through Article 99 (13) (b) (which

provides for the candidate securing the next highest number of preferences to the declared, whithout a fresh recourse to the electorate) and that clause is thereby an erosion of the franchise, forming part of the sovereignty of the People and is inconsistent with Article 3 read with Article 4(e) of the constitution, as would require the approval by the People at a Referendum.

(iv) That the clause denies to Members of Parliament equality before the law and the equal protection of the law being the fundamental right to equality guaranteed by Article 12 (1) of the constitution. It was submitted that this clause which confers an immunity from disciplinary action that may be taken by a political party or group, only in the instance specified in the clause, is a denial of the right to equality which is thereby an erosion of a fundamental right, forming part of the sovereignty of the People inconsistent with Article 3 read with articles 4 (d) of the Constitution as would require the approval by the People at a Referendum.

We would deal with grounds (1) and (2) which are connected in certain respect. Article 82 (1), referred to in ground (1), requires that any bill for the amendment of any provision of the constitution should expressly specify the provision of the Constitution if that is sought to be 'repealed, altered or added and the consequential amendments, if any, This manifests a cardinal rule that applies to the interpretation of a Constitution, that there can be no implied amendment of any provision of the Constitution. The Attorney-General submitted that in view of the reference to the particular provisions of Article 99 (13) (a), the clause should be considered as an " addition" to that Article and be read as a " proviso". In view of ground (2), which goes to the root of the matter, we do not have to deal with this aspect further.

Mr. R. K. W. Gunasekera, who made submissions on this ground of challenge, submitted that proviso (a) and (b) to article 75 contain specific limitations on the legislative power of Parliament. Proviso (a) cited above, contains a bar on the making of any law, which suspends the operation of the Constitution or any part thereof. That, clause 6 in effect suspends the operation of Article 99 (13) (a) in the situation specified in the clause which therefore cannot be validly included in the bill. It was further submitted that the Court should in such event, give effect to the provisions of Article 75 by declaring that the particular clause has not been validly included in the bill. Since it is outside the legislative power of Parliament no further question arises as to compliance with the requirement for the clause to be passed by the special majority or be approved by the People at a Referendum that constitutes stages of a process of making law.

The submission in our view raises a very important question of constitutional Law and of the legislative power of Parliament. In terms of the preamble, the Constitution has been adopted and enacted as the Supreme Law of Democratic Socialist Republic of Sri Lanka. All State authority flows from the Constitution, which establishes the organs of government; declares their powers and duties; proclaims the sovereignty of the People, which is inalienable' declares and specifies the fundamental rights and the franchise that form part of the sovereignty of the People. It necessarily follows that the Constitution should apply equally in all situations that come within the purview of its provisions. It is this context that a strict bar has been put in place in Article 75 on the suspension of the

operation of the Constitution or any part thereof. We have to give effect to this provision according to the solemn declaration made in terms of the Fourth Schedule to the Constitution, to "uphold and defend the Constitution."

There are two principal questions that arise in considering the objection that has been raised. They are;

(i) whether the provisions of clause 6 have the effect of suspending the operation of Article 99(13)(a) as contended by Counsel, and,

(ii) Whether Article 99 (13) (a) could be considered as being a part of the Constitution, so as to attract the bar in Article 75(a).

We would now examine the first question stated above-

The phrase, "suspending the operation," would in its plain meaning encompass, a situation in which the clause contained in the Bill has the effect of keeping the relevant provision of the Constitution in and inoperative state for a time. The test would be to place clause 6 and Article 99 (13)(a), side by side, and ascertain whether they could apply equally to a given situation which comes within their purview. Article 99 (13)(a) recognized the right of a political party or of an independent group to expel a member, who is a Member of Parliament; the consequence of such expulsion being the loss of the seat of such Member of Parliament; the review of the validity of such expulsion by this Court; and the process by which the vacant seat is filled. It is manifest that clause 6 strikes at the very root of the process set out in Article 99(13)(a) in stating that a Member of Parliament "shall not be expelled or suspended from membership or subject to any disciplinary action by the recognized political party....." If clause 6 is enacted in this form, being the later in point of time, it would have the effect of overriding the provisions in Article 99(13)(a) and keep those provisions inoperative in respect of the instance specified in the clause. Hence we are of the view that clause 6 has the effect for suspending the operation of Article 99 (13)(a). We have to state that the question would have been different, if clause 6 was sought to be enacted as an amendment to Article 99(13)(a) as contended by the Attorney-General. In such event the clause would have to be of general application and not limited to a single instance. The grounds of objection (iii) and (iv) stated above would then have to be considered in relation to such amendment.

We now move to the second question stated above whether, article 99 (13)(a) the operation of which is sought to be suspended could be considered as being a part of the Constitution so as to attract Article 75

The Constitution is divided into Chapters, Articles, sub-Articles, Schedules and so on. It is significant that Article 75 does not refer to any of these divisions, but refers to a "part" of the Constitution. This is an indication that we have to look to the functional aspect of the provision that is being suspended and ascertain whether such provision is necessary for the working of the Constitution. To ascertain this matter we have to examine the provisions from three perspectives. viz:

(i) the content of the provision:

(ii) the context in which the provision is included:

(iii) the implications of the provision.

As regard (i), we have in the preceding pragraph, set out the content of Article 99 (13) (a) by separately identifying its component elements.

As regards (ii) we note that Article 99(13)(a) is found in the Chapter titled" The Franchise and Elections" and significantly that the Article itself deals with proportional representation, being a novel feature in the present Constitution.

As regards (iii), we note that Article 99(13)(a) has implications on the exercise of the franchise as set out in relation to ground (iii) of the objections referred to above and the exercise of Judicial power. The clause has the effect of distorting the former and removing the latter. On the basis of the foregoing analysis, we have no difficulty in concluding that Article 99(13)(a) is a part necessary for the working of the Constitution.

Accordingly, we hold that clause 6 of the Bill has the effect of suspending the operation of a part of the Constitution and cannot be validly enacted by Parliament.

Therefore clause 6 has to be deleted from the Bill.

After the bearing was concluded the Attonery-General tendered a further written submission requesting us to consider the amendment of clause 6 by the deletion of the words," ..... and the provisions of sub-paragraph (a) of pragraph 13 of Article 99 shall not apply to such member, and this seat of such Member in Parliament shall not thereby become vacant."

It appears that this amendment has been suggested to overcome the objection referred to above, based on the suspension of Article 99 (13) (a), However, we note that the main portion of clause 6 yet remains in terms of which it is specifically provided that a member "shall not be expelled or suspended from membership or be subject to any disciplinary action by the recognized political party .....". So long as that portion remains the consequences that would otherwise flow in terms of Article 99 (13)(a) would remain inoperative. Therefore the proposed amendment seeks to achieve by indirect means that cannot be done directly.

The objection referred to above would be applicable in itis entirety even if the clause is amended as suggested by the Attorney General.

SUMMARY OF DETERMINATION

1. That clause 6 of the Bill has the effect of suspending the operation of a part of the Consititution and cannot be validly enacted by Parliament in view of the specific bar contained in Article 75 of the Constitution.
2. Clause 2, 3, 4 and 5 contain provisions inconsistent with Article 3 read together with relevant provisions of Article 4 and as such have to be passed by a special majority required under the provisions of Article 84(2) and approved by the People at a Referendum.
3. The inconsistency with Article 3 read with the relevant provisions of Article 4 would cease if clauses 2, 3, 4 and 5 are deleted and substituted with an appropriate amendment to proviso (a) to Article 70 (1) of the Constitution by removing the period of one year in the proviso and substituting that with a period not exceeding three years.

Sarath N. Silva
Chief Justice

S. W. B. Wadugodapitiya
Judge of the Supreme Court

Dr. Shirani A. Banadaranayake
Judge of the Supreme Court

Ameer Ismail
Judge of the Supreme Court

P. Edussuriya
Judge of the Supreme Court

Hector S. Yapa
Judge of the Supreme Court

J. A. N. de Silva
Judge of the Supreme Court

Bill was Presented to Parliament on: 19.09.2002
Bill No. 65
Decision of the Supreme Court Conveyed to Parliament on: 22.10.2002
Bill was not proceeded with.

2002

12. INDUSTRIAL DISPUTES (HEARING AND DETERMINATION OF PROCEEDINGS) (SPECIAL PROVISIONS)

A

BILL

to provide for the expeditious Hearing and Determination of Applications and references made under the Industrial Disputes Act and the Termination of Employment of Workmen (special provisions) Act, to amend Industrial Disputes Act and the Termination of Employment of Workmen (special provisions) Act, and for matters connected there with or incidental thereto.

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

A bill entitled "Industrial Disputes (Hearing and Determination of proceedings) (Special Provisions)"

S. C. Determination
No. 4/2/2002
In the matter of an Application under Article 121(1) of the Constitution.

Present:
Ameer Ismail Judge of the Supreme Court
P. Edussuriya Judge of the Supreme Court
T. B. Weerasuriya Judge of the Supreme Court

S. C. Special Determination No. 41/2002
1. Lanka Sama Samaja Party
2. Ceylon Federation of Labour
3. Batty Weerakoon
4. S. Siriwardene

Petitioner
Counsel: Batty Weerakoon

S. C. Special Determination No. 43/2002
Siripala Amarasinghe

Petitioner
Counsel: Parakrama Amarasinghe

S. C. Special Determination No. 45/2002
Dahampahalage Don Somaweera Chandrasiri

Petitioner
Counsel: Kalyananda Thiranagama with M.J.A. Hassen and Hasanthi Ratnayake instructed by Piyasena Dissanayake

S. C. Special Determination No. 48/2002
Dahampahalage Don Somaweera Chandrasiri

Petitioner
Counsel: R. K. W. Goonesekere with Suranjith Hewamanne, Krishmal Warnasuriya, Ramya Geeganage and Chamani Abeyratne

Uditha Egalahewa, SC with Ms. Suharshi Herath, SC for Attorney General

The Court assembled for hearing at 10.00 a.m. on 17.10.2002 and 24.10.2002.

A Bill entitled "Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions)" was published as a Supplement in Part II of the Gazette of September 13, 2002. It was presented in Parliament by the Hon Minister of Employment and Labour and was laced on the Order Paper of 8th October 2002.

The petitioners filed four applications numbered as above in the Registry of the Supreme Court on 10.10.2002, 14.10.2002 and 15.10.2002 respectively seeking to challenge its constitutionality.

They have invoked the jurisdiction of this Court in terms of Article 121 (1) of the Constitution and have prayed for determination in terms of Article 123 of the Constitution.

Due notice of the several petitions were given to the Hon. Attorney General. Counsel representing the petitions and State Counsel were heard at the sittings of this Bench. The written submissions tendered by counsel were also considered.

The Bill seeks to provide for the expeditious hearing and disposal of application and references made under the Industrial Disputes Act and the Termination of Employment of Workmen (Special Provisions) Act, by stipulating time frames in respect of the procedure adopted in the determination of applications made to labour tribunals and the Commissioner and references made to an arbitrator. Time frames have also been stipulated in respect of the hearing and deciding of appeals lodged against orders made on such applications and in respect of applications for writ and for the determination of pending actions.

The main submission of Counsel for the petioners was that the provisions contained in clauses 2, 4, 5 and 6 of the Bill are inconsistent with Articles 12(1) and 14(1) (g) of the Constitution. If was contended that these provisions affect the right of the workmen to equality and the equal protection of the law, while denying to them security of employment end exposing them to easy victimization thus impinging upon their fundamental right to work.

The provisions of clause 2 of the Bill stipulate time limits in respect of the procedural steps leading to the determination of an application before a labour tribunal.

Clause 4 mandates the hearing of an application before a labour tribunal from day to day until its conclusion while permitting a postponement only exceptional reasons to be recorded by such tribunal.

Clause 6 fixes a period of twenty-one days for filing an appeal under section 31 D of the Industrial Disputes Act against an order made by a labour tribunal. It also provides for the hearing and determination of such appeal or an application in revision within four months of the date on which such appeal or application was filed.

Similarly, clauses 8 and 9 stipulate time frames for an application made to the Court of Appeal and an appeal preferred to the Supreme Court to be heard and decided.

The determination of applications made under the Termination of Employment of Workmen (Special Provisions) Act, references made to an arbitrator, applications made to interpret awards or orders under the Industrial Disputes Act and the determination of pending proceedings have all been subjected to time frames by the provisions contained in clauses 12 to 17 of the Bill.

Counsel for petitioners submitted that the stipulated time limits in the above clauses are unrealistic and prejudicial to the interests of the workmen. The brief period within which a labour tribunal would be compelled to conclude the hearing and determination of an application militates against the desired objective of securing a just and equitable order. It was also contended that time constraints would not facilitate the amicable resolution of disputes by a non-adversarial approach and that the hearing of an application as proposed from day to day unitl its conclusion would only be to the advantage of the employer.

Learned State Counsel submitted that apart from the time limits stipulated for invoking the jurisdiction of a court, as in clause 6 and 7, the time limits specified in the other clauses are merely directory. They serve to expedite the proceeding before a labour tribunal and the Commissioner. Procedural provisions are construed liberally and must be read in the light of the objects and purposes of an Act. In Nagalingam V. Commissioner of Labour, 78 NLR 231, Sharvananda, J. while dealing with the provisions of section 2(2)(c) of the Termination of Employment of Workmen (Special Provisions) Act, 1971. stated as follows:

> "The object of the provisions relating to time limits in section 2(2)(c) is to discourage bureaucratic delay. That provision is an injunction on the Commissioner to give his decision within the 3 months and not to keep the parties in suspense. Both the employer and the employee should know the fate of the application made by the employer. In my view, a failure to comply literally with the aforesaid provision does not affect the efficacy of or finality of the Commissioner's order made there-under."

Time frames have been stipulated in clauses 2, ,5, 6, 8, 9 and 12 to 17 of the Bill. They necessary to achieve the objects and purposes of the Act. We are of the view that the provisions stipulating time limits do not contravene any of the provisions of the Constitution.

The next objection was to the provision in clause 5(1) of the Bill, which deals with the powers and duties of labour tribunals in regard to application and which is now provided for in section 31(C)(1) of the Industrial Disputes Act. As the said provision has been included in this Bill, section 31 C of the Industrial Disputes Act is being mended by the repeal of subsection (1) of that section. The petitioners contend that this clause, which seeks to introduce as procedure a substantial provision of the Act, would alter drastically the purport and ambit of section 31 of the Industrial Disputes Act. Learned State Counsel pointed out that, on the contrary, this clause world enhance and protect the power and jurisdiction of a labour tribunal, as the repealed subsection is now being incorporated in a special Act. A provisions in a special Act cannot be a subsequent Act. It is also appropriate for a provision dealing with the powers and duties of a labour tribunal to be included among the special provisions, as a special law must be taken to be exhaustive of the subject it enacts.

Supreme Court in the case of Independent Newspapers Limited V. Commercial and Industrial Workers Union-SC Appeal No. 106/96-SC Minutes of 09.07.97, where it was held that "the effect of the words of subsection 31 B(5) is to affect the jurisdiction of the labour tribunal, where a workman has first resorted to any other legal remedy. Subsection 6B (2) of the later Act effectively removes that obstacle to the jurisdiction of the labour tribunal, in so far as a workman had first resorted to a legal remedy before the Commissioners."

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

We have also considered the other provisions of this Bill, and we determine that none of the provision are inconsistent with the Constitution or any provision thereof.

(Sgd.) Ameer Ismail
Judge of the Supreme Court

(Sgd.) P. Edussuriya
Judge of the Supreme Court

(Sgd.) T. D. Weerasuriya
Judge of the Supreme Court

Bill was Presented to Parliament on : 08.10.2002
Bill No. 71
Decision of the Supreme Court Conveyed to Parliament on 06.11.2002
Passed on : 08.01.2003
Speaker's Certificate Endorsed on : 20.03.2003

Title : **Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act No. 13 of 2003.**

2002

13. TERMINATION OF EMPLOYMENT OF WORKMEN (SPECIAL PROVISIONS) (AMENDMENT)

A

BILL

to amend the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971

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

A BILL ENTITLED "TERMINATION OF EMPLOYMENT OF WORKMEN (SPECIAL PROVISIONS) (AMENDMENT)"

In the matter of an application under Article 121(1) of the Constitution.

Present:

Ameer Ismail Judge of the Supreme Court
P. Edussuriya Judge of the Supreme Court
T. B. Weerasuriya Judge of the Supreme Court

S.C. Special Determination
No. 42/2002

1. Lanka Sama Samaja Party
2. Ceylon Federation of Labour
3. Batty Weerakoon
4. S. Siriwardene

Petitioners.

Counsel: Batty Weerakoon
Ceylon Bank Employees Union

Intervenient -Petitioner.

Counsel: Shirley Fernando PC with Suranjith Hewamanne, Krishmal Warnasuriya, Ramya Geeganage and Chamani Abeyratne

S. C. Special Determination — Siripala Amarasinghe

No. 44/2002 — Petitoner

Counsel: Parakrama Agalawatte

S. C. Special Determination
No. 44/2002 — Dahampahalage Don Somaweera Chandrasiri

Petitioner:

Counsel: Kalyananda Thiranagama with M. J. A. Hassen and Hasanthi Ratnayake instructed by Piyasena Dissanayake
Uditha Egalahewa, SC with Ms. Suharshi Herath, SC for Attorney General.

The Court assembled for hearing at 10.00 am on 17.10.2002 and 24.10.2002,

A Bill entitled "Termination of Employment of Workmen (Special Provisions) (Amendment)" was published as a Supplement in Part II of the Gazette of September 13,2002. It was presented to Parliament by the Hon. Minister of Employment and Labour and was placed on the Order paper of 8th October, 2002.

The petitioners filed four applications numbered as above in the Registry of the Supreme Court on 10.10.2002, 14.10.2002 and 15.10.2002 respectively seeking to challenge its constitutionality.

They have invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution and have prayed for a determination in terms of Article 123 of the Constitution.

Due notice of the several petitions were given to the Attorney General. Counsel representing the petitioner, the intervenient-petitioners and State Counsel were heard at the sitting of this Bench. The Written submissions tendered by counsel were also considered.

This Bill seeks to amend the Termination of Employment of Workmen (Special Provisions) Act, No 45 of 1971, hereinafter referred to as the 'principal enactment'

Clause 2 of the Bill seeks to amend section 2 of the principal enactment by affording the wrokman concerned an opportunity of being heard, before a determination is made by the Commissioner on an application made to him under that section. This clause enhances the protection presently available to workmen by the requirement of providing an opportunity of being heard.

The introduction of a new provision requiring the workman to submit his response, within seven days, to an application made to the Commissioner under section 2 is an additional safeguard with regard to his rights. Under the existing provision, the workman would not have known of any application made by an employer until the Commissioner had made a determination.

Clause 3 seeks to amend section 6 of the principal enactment by adding a provision. Which would enable the Commissioner to order the employer to pay compensation to a workman as an alternative to reinstatement where the continuation of employment is prejudicial to him. This provision was challenged on the basis that there appear to be no guidelines for the Commissioner to decide whether compensation should be paid in lieu of reinstatement.

There was uncertainty as to the interpretation to be placed on the power of the Commissioner under the existing provisions in section 6 of the principal enactment. In S. D. Gunadasa V.

Commissioner of Labour- C. A. Application No. 418/91- C. A. Minutes of 15.11.93, the Commissioner took the view that he had the power under section 6 of the principal enactment only to order reinstatement, even where the workman sought compensation and gratuity. The Court decided, however, that as the word "may" in section 6 is *prima-facie* enabling and permissive, it should be construed as conferring a discretionary power on the Commissioner to order payment of compensation in lieu of reinstatement in a suitable case.

Again, in Lanka Multi Moulds Pvt. Ltd. Vs. Commissioner of Labour, (2001) 3 Sri LR 302, it was held that the Commissioner is vested with a discretion under section 6 of the principal enactment to grant alternate relief in lieu of reinstatement or to even refrain from granting relief if the circumstances of the case so warrants.

The powers of the Commissioner in dealing with applications under that section have now been set out clearly and in definite terms in the new section numbered as 6(2).

The Commissioner's decision whether reinstatement is prejudicial to the workman should be based on the evidence placed before him. It is settled law that an order at any inquiry must be based on the evidence that has been led at such inquiry, It was held in Brohier V. Munidasa, 73 NLR 17, that under Section 31 C of the Industrial Disputes Act, a labour tribunal must make its order on the evidence led and must not go beyond the evidence. Thus the fear of the petitioners that an employer could avail himself of this provision to terminate the services of certain workmen for extraneous reasons seems unfounded. The Commissioner' s power is restricted and confined to situation where continuation of employment would be prejudicial to the workmen.

Section 6(2) was challenged also on the ground that it introduces a formula yet to be determined by the Commissioner according to which the compensation to be paid will be computed. It was pointed out that compared to the Industrial Disputes Act, 1947 of India, where the computation is set out in the Act itself, the provision sought to be introduced in section 6D would be favourable to Sri Lankan employees. The formula presently adopted by the Commissioner has been published in the Sri Lanka Labour Gazette, Vol. 52, Number 1, Jan-March 2001. It appears, therefore, that a formula has already been determined under the principal enactment and that only the figures would now have to be revised, pursuant to the new provision which is sought to be introduced.

Counsel for the petitioners submitted further that the safeguard provided in section 6B(2) of the principal enactment, as amended by Act No. 51 of 1988, would be lost as the workman who is now to be given a hearing and would be party to proceedings before the Commissioner would be prevented from seeking relief elsewhere. Such a view is incorrect. Section 6(B) of the principal enactment and section 31B (5) of the Industrial Disputes Act were considered by the Supreme Court in the case of Independent Newspapers Limited V. Commercial and Industrial Workers Union - S. C. Appeal No. 106/96 -S. C. Minutes of 9. 7. 97, where it was held that "the effect of the words of subsection 31B (5) is to affect the jurisdiction of the labour tribunal, where a workman has first resorted to any other legal remedy. Subsection 6B(2) of the later Act effectively removes that obstacle to the jurisdiction of the labour tribunal, in so far as workman had first resorted to legal remedy before the Commissioner".

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

We have also considered the other provisions of this Bill, and we determine that none of the provisions are inconsistent with the Constitution or any provision thereof.

(Sgd.) Ameer Ismail
Judge of the Supreme Court

(Sgd.) P. Edussuriya
Judge of the Supreme Court

(Sgd.) T. D. Weerasuriya
Judge of the Supreme Court

Bill was Presented to Parliament on : 08.10.2002
Bill No. 73
Decision of the Supreme Court Conveyed to Parliament on 06.11.2002
Passed on : 08.01.2003
Speaker's Certificate Endorsed on : 20.03.2003

Title : **Termination of Employment of Workmen (Special Provisions) (Amendment) Act, No. 12 of 2003.**

2002

14. APPROPRIATION

A

BILL

to provide for the service of the financial year 2003, to authorize the raising of loans in or outside Sri Lanka for the purpose of such service, to make financial provision in respect of certain activities of the government during that financial year, to enable the payment by way of advances out of consolidated fund or moneys of, or at the disposal of, the government, of moneys required during that financial year for expenditure on such activities, to provide for the refund of such moneys to the consolidated fund, and to make provision for matters connected therewith or incidental thereto

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

A BILL ENTITLED "THE APPROPRIATION ACT NO-OF 2003"

S. C. Determination
No. 47/2002

In the matter of an application under Article 121(1) of the Constitution.

Present:

S. W. B. Wadugodapitiya	Judge of the Supreme Court
Ameer Ismail	Judge of the Supreme Court
H. S. Yapa	Judge of the Supreme Court

Counsel: PIYASENA DISSANAYAKE for the Petitioner.
A. GUNARATNE, DSG with U. EGAL HEWA, SC for the Attonery-General

Court assembled for hearing at 11.30 a.m. on 28th October, 2002.

The jurisdiction of this Court has been invoked in terms of Article 121(1) of the Constitution by Renuka Perera, of 365, Nagahavila Road, Kotikawatta, Angoda, who has forwarded to this Court a petition dated 15 10.2002, which was received at the Registry of this Court on the same day.

When this application was taken up for hearing, Learned Counsel for the Petitioner moved to withdraw the application. This was allowed and accordingly, the application was withdrawn.

Inasmuch as this application has been withdrawn there is now no necessity for this Court to make a determination in terms of Articles 121(3) and 123 of the Constitution.

(Sgd.) S. W. B. Wadugodapitiya
Judge of the Supreme Court

(Sgd.) Ameer Ismail
Judge of the Supreme Court

(Sgd.) H. S. Yapa
Judge of the Supreme Court

Bill was Presented to Parliament on : 08.10.2002
Bill No. 70
Decision of the Supreme Court Conveyed to Parliament on 06.11.2002
Passed on : 10.12.2002
Speaker's Certificate Endorsed on : 11.12.2002

Title : **Appropriation Act, No. 31 of 2002.**

2003

1. INDUSTRIAL DISPUTES (AMENDMENT)

A

BILL

to amend the Industrial Disputes Act

SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Colombo 12.

January 06, 2003.

Hon. Joseph Michael Perera,
Speaker to the Parliament,
Parliamentary Complex,
Sri Jayawardenapura,
Kotte.

Hon. Speaker,

A BILL ENTITLED "INDUSTRIAL DISPUTES (AMENDMENT)"

Further to our determination forwarded to you on October 28, 2002, in respect of the Bill entitled "Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions)":

As the provisions of the twin Bill referred to in S. C. Special Determination No. 41/2002 entitled "Industrial Disputes (Amendment)" were consequential to the provisions enacted in the aforesaid "Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions)" Bill, and as no separate application was made in respect of the said twin Bill, a separate determination was not consequently made.

In any event, in view of our determination in S. C. Special Determination No. 41/2002, we are of the view that the Clauses 1, 2, 3, 4 and 5 of the Industrial Disputes (Amendment) Bill are not inconsistent with the Constitution or any provision thereof.

(Sgd.) Ameer Ismail
Judge of the Supreme Court

(Sgd.) P. Edussuriya
Judge of the Supreme Court

(Sgd.) T. B. Weerasuriya
Judge of the Supreme Court

Bill was Presented to Parliament on : 08.10.2002
Bill No. 72
Decision of the Supreme Court Conveyed to Parliament on 07.01.2003
Passed on : 08.01.2003
Speaker's Certificate Endorsed on : 20.03.2003
Title : **Industrial Disputes (Amendment) Act,. No. 11 of 2003.**

2003

2. EMPLOYEES' PROVIDENT FUND (AMENDMENT)

A

BILL

to amend the Employees' Provident Fund Act,. No. 15 of 1958

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

A BILL ENTITLED, "EMPLOYEES' PROVIDENT FUND (AMENDMENT)".

In the matter of an Application under Article 121(1) of the Constitution.

PRESENT : P. EDUSSURIYA - JUDGE OF THE SUPREME COURT
J. A. N. DE SILVA - JUDGE OF THE SUPREME COURT
T. B. WEERASURIYA - JUDGE OF THE SUPREME COURT

S. C. D. No. 49/2002 Senaka Manihdawansa Jayasinghe, No. 198/19, Panchikawatte Road, Maradana, Colombo 10.

Petitioner

COUNSEL : P. Agalawatte for Petitioner.

S. C. D. No. 50/2002 Chandana Jagathpriya Nanayakkara, President, Local Government Service United Workers' Union of No. 31, Colombo Road, Kaluwella, Galle.

Petitioner

COUNSEL : K. Tiranagama with S. V. A. Dissanayake for Petitioner.

Uditha Egalahewa S. S. C. for Attorney - General.

The Court assembled at 10.00 a.m. on 6th January 2003 to commence its sittings for the year.

A Bill entitled Employees Provident Fund (Amendment) was published as a supplement in part II of the Gazette of 29th November 2002. It was presented in Parliament and was placed on the Order Paper of 11th December 2002.

Two petitions numbered as above had been filed in the Registry of this Court on 16th December 2002 and 18th December 2002 respectively, invoking the jurisdiction of this Court challenging the constitutionality of the said Bill.

Due notice of the said petitions had been given to the Hon. Attorney-General. Counsel for the petitioners as well as Senior State Counsel were heard.

The Bill seeks to amend the Employees' Provident Fund Act, No. 15 of 1958 by adding a new part III A after Section 26 of the principle enactment.

The main contention of Counsel for both petitioners was that the proposed amendment violates Article 12(1) of the Constitution, in that the employees referred to in the proposed Amendment, namely those employed after 1st January 2003 would be placed at a disadvantage in comparison to those employed prior to that date as they are required to contribute 8% of their monthly earnings from employment towards the Pension Fund.

It is the view of this Court that the proposed Amendment applies to all those who would be employed after 1st January 2003 and does not seek to discriminate amongst such employees.

It was conceded by Counsel that as an employer, the State too, is entitled to stipulate terms and conditions of employment. If that be so, then, employees cannot as of right demand that they be employed on their terms or on the same terms as others before them.

The petitioners entertained the fear that the Minister referred to in the proviso to Section 26H (2) might arbitrarily withhold the approval referred to therein. Though pointed out by learned Senior State Counsel that the approval of the Minister is only a formality, it can lead to discriminatory treatment in respect of employees and as such is inconsistent with Article 12(1) of the Constitution.

Learned Senior State Counsel drew the attention of Court to a printing error and informed Court that the Legal Draftsman after detecting the error had corrected it as follows :

Page 10, Clause 4: delete lines 13 to 22 and substitute the following:

(i) where the period of service of the emloyee is thirty-two years or more, seventy percentum of the average salary of the employee for the three years immediately previous to his date of retirement, increased by one percentum for each six month period of service or part thereof :

(ii) where the period of service of the employee is less than thirty two years seventy per centum of the last drawn salary of the employee for the three years immediately previous to his date of retirement, reduced by one per centum for each six month period of service or part thereof".

Copies of the said correction were furnished to the Counsel for the petitioners.

However, it is observed that, the Long Title of the proposed Amendment states that the proposed Pension Fund is applicable to certain classes of employees in the Public Service and the Provincial Public Service. This is repeated in Clauses 26A, 26F (2) and in several other Clauses. Throughout the Bill, reference is made only to the Public Service and the Provincial Public Service.

Clause 26F (2) sets out that an "Employee to whom this Act applies" shall be a person belonging to the Public Service or the Provincial Public Service and those employed in any of the categories specified in schedule 1 to the Act. Although the schedule (there is no schedule 1) refers to Judges of the Supreme Court, Court of Appeal, High Court and all Judicial Officers, Clause 26W defines "Judicial Officer" as having the same meaning as in Article 170 of the Constitution. Article 170 of the Constitution defines a "Judicial Officer" other than in Article 114 as any person who holds office as a Judge of the Supreme Court, Court of Appeal, High Court and a Member of any Court of First Instance, Tribunal or Institution created and established for the administration of justice or for the adjudication of any labour or other dispute, but does not include a person who performs arbitral functions or a Public Officer whose principal duty or duties is or are not the performance of functions of a judicial nature. Article 170 defines a "Public Officer" as a person who holds any paid office under the Republic, other than a Judicial Officer.

As such, a Judge of the Supreme Court, Court of Appeal, High Court or other Judicial Officer as defind in Article 170 of the Constitution does not fall within the category of the Public Officer.

Hence the provisions of the Bill which seek to bring Judges of the Supreme Court, Court of Appeal, High Court and Judges of Court of First Instance, Tribunal or other Institution created and established for the administration of justice or for the adjudication of any labour or other disputes within the meaning of Public Officers are inconsistent with the definition set out in Article 170 of the Constitution. Therefore the incorporation of Judge of the Supreme Court, Judge of the Court of Appeal, Judge of the High Court and all Judicial Officers in the Schedule and all references in this Bill to Judge of the Supreme Court, Judge of the Court of Appeal, Judge of the High Court and any Judicial Officers are also inconsistent with the Constitution.

We therefore hold that the proviso to Clause 26H (2) is inconsistent with Article 12 (1) of the Constitution, whilst all references in the Bill to Judge of the Supreme Court, Judge of the Court of Appeal, Judge of the High Court and any Judicial Officer are inconsistent with Article 170 of the Constitution.

We therefore hold that the above mentioned clauses are required to be passed by a special majority under the provisions of paragraph 2 of Article 84 of the Constitution.

The other caluses of the Bill are not inconsistent with the Constitution.

P. Edussuriya
Judge of the Supreme Court.

J. A. N. de Silva
Judge of the Supreme Court.

T. B. Weerasuriya
Judge of the Supreme Court.

Bill was Presented to Parliament on: 11.12.2002
Bill No.: 94
Decision of the Supreme Court Conveyed to Parliament on : 08.01.2003
Bill was not certified.

2003

3. SRI LANKA DISASTER COUNTER MEASURES

A

BILL

to provide for the establishment of the national council for disaster management, the national disaster management centre, the appointment of a technical advisory committee: the preparation of disaster management plans, the declaration of a state of disaster, the award of compensation and for matters connected therewith or incidental thereto.

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

A BILL TITLED, "SRI LANKA DISASTER COUNTER-MEASURES"

S. C. Special Determination No. 1/2003

In the matter of a petition under Article 121 of the Constitution.

PRESENT : SARATH N. SILVA - CHIEF JUSTICE
AMEER ISMAIL - JUDGE OF THE SUPREME COURT
T. B. WEERASURIYA - JUDGE OF THE SUPREME COURT

COUNSEL : S. S. Sahabandu, P. C., with Hemantha Situge for the Petitioner.

Shavindra Fernando, S. S. C., and Uditha Egalahewa S. C., for the Attorney General

Court assembled for hearing at 10.15 a.m on 23rd January 2003

A Bill titled "Sri Lanka Disaster Counter-Measures" has been presented to Parliament and has been placed on the Order Paper of Parliament.

The Petitioner has challenged the constitutionality of certain provisions of the Bill by petition dated 13.01.2003.

The Bill takes note of natural disasters taking place within the territory of Sri Lanka and the threat and danger to human life, property and the environment of Sri Lanka resulting from such disasters. The object of the Bill is to deal with this threat and danger from a national perspective by the preparation of a national policy and plan and the appointment of central co-ordinated committees and institutions to give effect to the policy and plans formulated.

The Petitioner has raised three grounds of constitutionality -

1. That, Clauses 3(1)(a), (3) and 12, are inconsistent with the exercise of the executive power of the People, by the President. The Petitioner contends that by the impugned clauses the Prime Minister is vested with power that overrides the position and status of the President.
2. That Clause 23 which gives immunity to members of the council and other organizations from suits or prosecutions is an erosion of judicial power as provided in Article 4(c) of the Constitution read with Article 3.
3. That the matters stated in clause 25 of the Bill, being the interpretation clause, come within a subject in the concurrent list and that the Bill cannot be passed without following the procedure laid down in Article 154G (5)(a) of the Constitution.

As regards the 1st ground of constitutionality raised by the Petitioner we note that the contention of the Petitioner is that Prime Minister will be the Chairman of the Council, in terms of Clause 3 (1)(a), whereas the President would be a member of the Council.

At the commencement of the hearing, learned Senior State Counsel representing the Attorney General submitted that it has been decided to amend Clause 3(1) to provide for the President to be the Chairman of the Council. In the circumstances it is unnecessary for the Court to consider this ground of objection any further. In any event it is noted that the

measures to be taken in terms of the Bill would be triggered off upon a declaration of a state of disaster being proclaimed by the President. It is only upon such a declaration being made that in terms of Clause 12, the Prime Minister will direct any one or more of the appropriate organizations to take measures as provided for in Clause 12. In these circumstances and in view of the amendment that is being made there will be no inconsistency with any of the provisions of the Constitution as alleged by the petitioner in respect of this ground of objection.

As regards the 2nd ground referred to above, Clause 23 gives immunity to members of the Council or any appropriate organization as provided therein from suits of prosecutions in respect of any action, which is done in good faith under the Act.

Learned Senior State Counsel submitted that the provision to give immunity in respect of prosecutions would be deleted. In the circumstances there would be only a immunity in respect of action taken in good faith from civil suits. That would not in any way curtail judicial power as alleged by the Petitioner. Hence when the clause is amended as agreed, there would be no unconstitutionality as alleged.

The 3rd ground urged by the Petitioner relates to the application of Article 154G (5)(a) of the Constitution. It was contended by learned President's Counsel for the Petitioner that the provision of relief in respect of any disaster as contemplated in the Bill is a subject which comes within item 7 of list III in the 9th schedule to the Constitution, being the concurrent list.

Counsel contended that in particular item 7:2 provides that relief for disaster due to flood, drought and the like is a concurrent subject. On that basis it was contended that in terms of Article 154G (5) (a) it would be necessary for the Parliament to consult all the Provincial Councils as may be considered appropriate in these circumstances.

The provision of relief in respect of any distress as provided for item 7:2 referred to above and the objective of the Bill are not of the same nature. The objective of the Bill as noted above, is to address the matter of natural disasters from a national perspective and to lay down provisions for the formulation of a national policy and plan so that immediate counter measures may be taken. Thus it would come within the list II being the reserved list which includes the formulation of national policy on all subjects and functions. We are of the view that it would not be mandatory to comply with the provisions of Article 154G (5)(a) of the Constitution. The subject of the Bill is well within the legislative competence of Parliament.

For the foregoing reasons we make a determination that in terms of Article 123(1) of the Constitution that neither the Bill nor any provision thereof (as amended in the manner agreed to by learned Senior State Counsel), is inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

Ameer Ismail
Judge of the Supreme Court.

T. B. Weerasuriya
Judge of the Supreme Court.

Bill was Presented to Parliament on: 07.01.2003
Bill No.: 95
Decision of the Supreme Court Conveyed to Parliament on : 18.02.2003
Bill was not proceeded with.

2003

4. NEW WINE HARVEST MINISTRIES (INCORPORATION)

A

BILL

to incorporate the New Wine Harvest Ministries
(private member's bill)

25

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

A BILL TITLED "NEW WINE HARVEST MINISTRIES (INCORPORATION)"

S. C. Special Determination
No. 2/2003

In the matter of a petition under Article 121 of the Constitution

Present:

Sarath N. Silva	Chief Justice
H.S. Yapa	Judge of the Supreme Court
T.B Weerasuriya	Judge of the Supreme Court

Counsel :

Manohara R. de Silva with W.D.Weeraratne, G.W.C. Bandara Talagune for the Petitioner.

M.A. Sumanthiran with Viran Corea instructed by S. Balendra Associates for Intervenient Petitioner.

P. A. Rathnayake. D.S.G. with Arjuna Obeysekara. S.C., for the Attorney General

Court assembled for hearing : At 10.15 a.m. on 29th January 2003.

A Bill titles " New Wine Harvest Ministries Incorporation " has been presented to Parliament as a private member Bill.

The Bill was placed on the Order Paper of the Parliament on 10.1.2003 and the Petitioner has challenged its constitutionality by papers presented to this Court On 16.1.2003. He has thereby invoked the jurisdiction of this Court in terms of Aritricle 121(2) of the Constitution. Hon. Attorney General has been given due notice of the petition.

The person claiming to be the President of " New Wine Harvest Ministries" the body sought to be incorporated by the impugned Bill was permitted to intervene and was heard in respect of the grounds of unconstitutionality that have been urged.

The Bill seeks to incorporate an organization called " New Wine Harvest Ministries" for the purpose of carrying out the objects that have been set out in the Bill. The objects of the organization sought to be incorporated are contained in clause 3. The objects relevant to the grounds of challenge are contained in the following sub clauses of clause 3. They are -

(a) to establish and maintain New Wine Harvest Ministries and to organize deliverance meetings, gospel meetings. cottage meetings, youth discipleship meetings, individual meetings, Bible studies;

(b) to conduct tract Ministry, based on the Articles of Faith in order to spread, promote and make known the message and teachings of Jesus Christ ;

(c) to undertake and carryon in the Spirit of the Articles of Faith based on the teachings of Jesus Christ and in accordance with the Christian Faith and practice activities that would uplift the socio-economic conditions of the people of Sri Lanka.

.....

(f) to promote, arrange, organize and hold exhibitions, lectures, seminars, symposia, work shops, classes, debates. conferences, tours, excursions or any other activities in furtherance of the objects of the Corporation.

The contention of the Petitioners is that the objective of the body sought to be incorporated although seemingly religious in nature transcends gospel meetings, Bible studies and making known the message and teachings of Jesus Christ to a socio-economic dimension encompassing persons of other religions, faiths or beliefs.

It is therefore submitted that the body would not only provide for the manifestation of a religion or belief or faith in the exercise of the fundamental right guaranteed by Article 14(1)(g) of the Constitution but also engage in economic activity that will assist in the spread and promotion of the faith.

In this context the Petitioner relied on the powers of the body sougth to be incorporated as contained in clause 4 of the Bill. By this clause the body that will be incorporated will have the power, inter alia to raise funds, receive grants, acquire and dispose of movable and immovable property open operate and close bank accounts and to borrow or raise money with or without security. Further the corporation will have the power to invest funds and levy fees.

It is the contention of the Petitioner that the economic dimensions of the objects would be strengthened by the powers that are vested in the body which would enhance the financial capacity of the corporation to induce and allure persons of other religions and convert them to the faith that is sought to be spread.

The Petitioners relies on a body of material to demonstrate the ill effects of what is alleged to be unethical conversions of persons of one religion or faith to another. It is contended by the Petitioners that the clauses referred to in the Bill would in effect distort the freedom every person must necessarily have to adopt a religion or behalf of his choice and is therefore inconsistent with Artilcle 10 of the Constitution.

Learned Deputy Solicitor General representing the Hon. Attorney General has supported the grounds that have been urged by the Petitioner.

Counsel for the Intervenient Petitioner contends that it is a part and parcel of every religion to promote its beliefs, doctrines and practices and the practice of all religions involve " altruistic objectives" to uplift the socio-economic conditions of the people "regardless of their faith or pursuits". On that basis the economic dimension of the objects and powers impleaded by the petitioner are sort to be justified as being neceassary to spread the faith.

In Supreme Court Determination No. 2 of 2001, this Court examined a similar ground of challenge relating to a Bill titled "Christian Sahanaye Doratuwa Prayer Centre (incorporation)". After an exhaustive analysis including the reasoning adopted by the Supreme Court of India in a case relied on by the Petitioners, this Court stated in its conclusion as follows :

"... In our view the Freedom guranteed to every citizen by Article 14(1) (e) of the Constitution to practice a religion and engage in worship and observance, by himself or in association with others, should be taken as distinct from the freedom guranteed by Article 14 (1)(g) to engage in a lawful occupation, trade, business or enterprise. A prayer center that seeks special legislative recognition by way of incorporation cannot avail itself of these two freedoms

together. If it is sought to be done in that manner there is a likelihood of the fundamental right guranteed by Article 10 being infringed. The freedom guranteed by Article 10 to every person to adopt a religion or belief of his choice postulates that the choice stems from the free excercise of one's thought and conscience without there being any fetter or allurement which in any way distorts that choice ".

The endeavour to mix the observance and practice of a religion or belief with economic activity is clearly manifest in the impugned clauses of the Bill. In clause 3(c) the object to undertake and carry on in the spirit of the articles of faith based on the teachings of Jesus Christ in accordance with Christian faith is directly linked with activities that would uplift the socio-economic conditions of the people in Sri Lanka.

We have to agree with the ground of challenge of the Petitioners that the process of uplifiting the socio-economic conditions of the people of Sri Lanka, not restricted to persons who are of the same religious belief of faith as that of the body sought to be incorporated, would necessarily result in an inconsistency with the free excercise of a persons thought, conscience and religion as postulated in Article 10 of the Constitution. The allurencement which would result in the process of uplifiting socioeconomic conditions would distort the freedom which every person should have to observe a religion on behalf of his choice as guaranteed by Article 10 of the Constitution.

Counsel for the intervenient Petitioner has refferred to several laws that have been enacted incorporating bodies that have the object of promoting a religion and also have objectives in the nature of social, welfare and educational activity. On that basis he has urged the court to examine the provisions of the Bill in the light of these laws. On the other hand, Counsel for the Petitioner has referred to several enactments incorporating religious bodies that do not have "obnoxious provisions of the nature include in this bill. "In excercising jurisdiction under Article 123 of the Constitution we cannot examine the validity of past legislation Nor, can we take their content as a standard of consistency with the provisions of the Constitution. Our task is to examine the provisions of the bill challenged by the Petitioner and to determine whether they are inconsistent or not with the provisions of the Constitution. In that context what Counsel for the intervenient Petitioner has commended to us, is an exercise in futility, which we shall not engage in.

For the reasons stated above we hold that the provisions of clauses 3 and 4 of the Bill are inconsistent with Article 10 of the Constitution.

The next submissions made by the Petitioner is in relation to clause 7(3) of the Bill which states that Articles of Association of the body sought to be incorporated in force on the date preceding the date of the commencement of the Act shall be deemed to be the rules of the corporation. Since these Articles now in force do not form part of the Bill Parliament would be giving recognition to rules, the content of which is not known. Counsel for the intervenient Petitioner submits that the rules relate to internal matters of the body sought to be incorporated. However, the extent to which it would affect persons can be examined only of its content is known. Therefore, we have to agree with the submission of Counsel for the Petitioner that this provision is inconsistent with Article 76 (1) of the Constitution.

Clauses 3 and 4 referred to above are the principle provisions of the Bill. Since the material content of these provisions are inconsistent with Article 10 of the Constitution we make a determination in terms of Article 123(2) of the Constitution that the Bill comes within the

purview of Article 83 (a) and hence is required to be passed by the special majority as provided for in Article 84(2) of the Constitution and approved by the people at a Referendum.

Sarath N. Silva.
Cheif Justice

H. S. Yapa
Judge of the Supreme Court

T.B. Weerasuriya
Judge of the Supreme Court

Introduced in Parliament by Mr. Mano Ganesan , M.P. Colombo District on 10.01.2003 and was referred to the Minister of Interior and Christian Affairs for report to Parliament.
Bill No. 99
Decision of the Surpreme Court Conveyed to Parliament on :18.02.2003
Bill was not proceeded with.

2003

5. PREVENTION OF ORGANIZED CRIME

A

BILL

to make provision for the prevention and investigation of organized crime: to make special provision in relation to the prosecution and punishment of offenders: and for matters connected therewith or incidental thereto.

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

A BILL TITLED THE "PREVENTION OF ORGANIZED CRIME"

In the matter of a petition under Article 121(1) of the Constitution.

Present :

Shirani A. Bandaranayake - Judge of the Supreme Court
P. Edussuriya - Judge of the Supreme Court
J. A. N. de Silva - Judge of the Supreme Court

S.C. Special Determination
No. 4/2003

Batagoda Jayamanne,
No. 34/A, 1st Lane,
Colombo 05.

Petitioner

Counsel :

S. S. Sahabandu, PC, with Hemantha Situge and Champani Padmasekera
C. R. de Silva, PC, Solicitor-General with Gihan Kulatunga, State Counsel for Attorney-General.

S.C. Special Determination
No. 5/2003

Sanjeevani Kasthuriarachchi,
Attorney-at-Law,
Legal Officer of the Lawyers for Human Rights & Development,
225/1/1, Cotta Road,
Colombo 08.
Petitioner

Counsel :

Kalyananda Tiranagama with M. J. A. Hassan, Ms. Hasanthi Ratnayake and Rohan Wijesena instructed by Piyasena Dissanayake.

Dr. Paikiasothy Saravanamuttu,
No. 3, Ascot Avenue,
Colombo 05.

Intervenient-Petitioner

Counsel :

Dr. J. de Almeida Gunaratne with Kishali Pinto Jayawardane and Viran Corea
C. R. de Silva, PC, Solicitor-General with Mr. Gihan Kulatunga, State Counsel for Attorney-General.

S.C. Special Determination
No. 6/2003

Sunil Handunnetti,
No. 44, Alhena Road,
Maharagama.

Petitioner

Counsel :

Parakrama Agalawatta

C. R. de Silva, PC, Solicitor-General with Gihan Kulatunga, State Counsel for Attorney-General.

The Court assembled for hearing at 10.00 a.m. on 11th and 12th March, 2003.

A Bill bearing the title "Prevention of Organized Crime was placed on the Order Paper of Parliament for 18th February, 2003. 3 Petitions, numbered as above, have been presented invoking the jurisdiction of this Court in terms of Article 121(1) of the Constitution to determine whether the Bill or any provision thereof is inconsistent with the Constitution. Hon. Attorney General has been given due notice of the Petitions.

The Counsel representing the Petitioners and the Solicitor General were heard before this Bench at the sitting, held on 11th and 12th March, 2003.

The Petitioners contended that caused 2, 3, 4, 5, 9, 10, 11, 13, 17, 19, 20 and 24 of the Bill are inconsistent with Articles 4 (c), 11, 12(1), 13(1), 13(2), 13(3) and 13(5) of the Constitution and that if they are to become law, they must be passed by a two-thirds (2/3) majority in Parliament.

The Bill seeks to make provision for the Prevention and Investigation of Organized Crime and to make special provision in relation to the prosecution and punishment of offenders.

Clauses 2, 3, 4 and 5

The present Bill consists of 3 parts and Part I, which contains clauses 2 to 8, sets out the offences which are dealt with under the provisions of this Bill. The Contention of the Petitioners, is that a minimum mandatory sentence is prescribed by these clauses and such presumption of minimum mandatory sentences is violative of Articles 4(c) and 12(1) of the Constitution. In support of this contention, the Petitioners' referred to the special *Determination of this Court,* in S.D. 6 and 7/1998, where the Bill on Prohibition of Ragging and other Forms of violence in Educational Institutions was considered. In the said Bill the minimum mandatory sentence was for 5 years whereas in the present Bill the minimum mandatory period will not exceed 2 to 3 years, which would be fixed proportionally according to the offence committed. In respect of the offences given in the schedule, the minimum mandatory sentence is prescribed by the respective statutes. With regard to the other offences under the Penal Code, the minimum mandatory sentence prescribed correspondingly related to the sentence stipulated by the Penal Code. In S.D. 6 and 7/1998, this Court held that certain clauses which require mandatory minimum sentences are inconsistent with Article 4(c) and 12(1) of the Constitution, However it must be taken into consideration that the said Bill, was dealing with the prohibition of Ragging and other Forms of violence in Educational Institutions with a view to eliminating ragging and other forms of violence and crime, inhuman and degrading treatment from educational institutions. The present Bill is not dealing with such activities in Educational Institutions, but with organized crimes and organized criminal groups, which have become a menace to our society and have created several ramifications. The offences that the students of an Educational Institution would commit, cannot be compared with the offences committed by members of an organized criminal group. Moreover,the creation of a minimum mandatory

sentence per se cannot be said to be violative of Article 4(c) of the Constitution. Article 4(c) states that judicial power of the people shall be exercised by Parliament through Courts, Tribunals institutions created by the Constitution on created and established by law. Considering the provisions in clauses 2, 3, 4 and 5 of the present Bill and the provisions in Article 13(6) of the Constitution a minimum mandatory sentence per se is not inconsistent with Article 4(c) of the Constitution. In S.D. 6 and 7/1998, the position with regard to a minimum mandatory was considered and it was stated that;

> "Although the legislative prescription of a minimum sentence seems inconsistent with the entrustment- by Article 4 (c) of the judicial power (which includes the power to determine both guilt and punishment) to the judiciary, Article 13 (6) seems by implication to recognize a legislative power to prescribe a minimum penalty"

In such circumstances clauses 2, 3, 4, and 5 of the Bill are not inconsistent with Article 4 (c) of the Constitution.

The Petitioners contended that clauses 2, 3, 4 and 5 are inconsistent with Article 12 (1) of the Constitution. Article 12 (1) states that "All persons are equal before the law and are entitled to the euqal protection of the law". It was contended on behalf of the Petitioners that the persons who would come under the present Bill are Members of organized criminal groups who, cannot be treated differently and should be given the equal protection to which they are entitled to in terms of Article 12 (1) of the constitution. The equality clause in our Constitution is applicable only to equals and it is well settled law that unequals should not be treated as equals. The present Bill deals with a separate group of people who would come within a different category, Members of an orgainzed criminal group cannot be said to be similarly circumstanced as the other petty offenders. Accordingly the clauses 2, 3, 4, and 5 are not inconsistent with Article 12 (1) of the Constitution.

In the course of the hearing, it was agreed to bring in an exception to clause 4 for the provision to be in line with the exception to section 209 of the Penal Code which would be in the following terms:

> "This provision shall not extend to any case in which the harbouring concealing, assisting or maintaining is by the husband or wife or parent or child of the offender."

The Petitioner in S. D. 6/2003, brought to our notice that in clause 5 the element of *mens rea* is placed in the disjunctive. Both the Petitioners in S.D. 5 and 6/2003 further referred to the word "reputation" in the Explanation to section 5 of the Bill. The Petitioners contended that in as much as the offence of criminal defamation has been abolished it would not be disirable to use the word reputation.

Although there is no inconsistency with any of the Articles of the Consitution, the learned Solicitor General agreed to look into this suggestions pertaining to clause 5.

Clauses 9 and 10

Clauses 9 and 10 of the Bill deal with investigations. The Petitioners contended that in terms of clause 9, the provision of section 36, 37 and 38 of the Code of Criminal Procedure, Act No. 15 of 1979 will not be applicable to investigations under the present Bill. This contention was on the basis that the protection under section 37 of the Criminal Procedure Code, namely that a person arrested shall not be detained for more than twenty four (24) hours, should not be extended to a person who had committed offences falling under this Bill. The Petitioner's contended that therefore clauses 9 and 10 are inconsistent with Articles

11, 12 (1), 13 (1) and 13 (2) of the Constitution.

Although by clause 9, the applicability of provisions in sections 36, 37 and 38 of the Criminal Procedure Code has been revoked, clause 10 of the Bill makes provisions for the suspect to be produced within twenty four (24) hours of the arrest and thereby incorporates the provisions in sections 36 and 37 of the Criminal Procedure Code.

The clauses 9 and 10 of the Bill are therefore not inconsistent with Articles 11, 12 (1), 13 (1) and 13 (2) of the Constitution.

Clause II

The Petitioners contended that clause 11 which deals with the period of detention of persons in police custody for a period not exceeding seven days is inconsistent with Article 13 (2) of the Constitution.

Learned Solicitor General submitted that the detention in terms of clause 11 would be subject to judicial supervision. The detention for a further period of time beyond the 24 hour period for further investigation would be only with the permission of the Magistrate. The learned Solictior General contended that, the Magistrate is not mandated on a mere application made by a Police Officer to allow them to detain the accused for a period of seven (7) days. The discretion of allowing a person to be kept in custody is with the Magistrate and would depend on the matters that have been investigated. It was further submitted that a similar provision is available in the Poisons, Opium & Dangerous Drugs (Amendment) Act of 1984. In S. C. Determination No. 01/84 this amendment was examined and the Court did not find any of the provisions in the said amendment to be inconsistent with the provisions of the Constitution.

Article 13 (2) of the constitution, which refers to the freedom of a person from arbitrary detention is in the following terms:

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

According to the provisions of the present Bill the suspect has to be produced within 24 hours of his arrest, and for the purpose of detention for a further period in order to carry out the investigations, it is necessary to obtain an order from the Magistrate. The Magistrate would make order only if he is satisfied that there are reasonable grounds to belive that such person.

(a) has been concerned in the commission of: or

(b) has committed

an offence under this Bill.

In such circumstances clause 11 has no inconsistency with Article 13 (2) of the Constitution.

However, clause 10 refers to the suspect being produced "before the nearest Magistrate, of the Magistrate or the division within which the offence is committed." Clause 11 also refers to an application being filed for further detention of a suspect " in the Magistrate's Court before which such person was produced or the Magistrate's Court of the division within which the offence was committed."

We are of the opinion that clause 10 should be amended to make provision for the suspect to be produced before the "Magistrate of the nearest Court" and for the extension of the period of detention an application to be filed in the "Magistrate's Court before which such person was so produced."

We are also of the opinion that clause 11 (2) should be amended to include the following words, after the words "whichever event occurs earlier," " after recording his reasons for making such order."

In the course of the hearing the learned Solictior General agreed to add another sub clause, to clause 11 to be read as clause 11 (3) , which would read as follows:

Every order made by the Magistrate in terms of sub section 2 of this section shall stipulate the conditions of detention and hours of interrogation. The Magistrate may also order that the suspect be examined by a Medical Officer if necessary. The Magistrate shall take steps to notify, the spouse or any family member nominated by the suspect, of the order of detention made under this section and the place of detention."

Clause 13

This clause refers to the order of remand of the suspect until the conclusion of the trial. The contention of the Petitioner's is that the removal of judicial discretion and making it mandatory for the suspect to be remanded until the conclusion of the trial is inconsistent with Article 4 (c) and 13 of the Constitution. Learned Solictor General submitted that section 404 of the Code of Criminal Procedure Act empowers the Court of Appeal to grant bail.

Accordingly this clause is not inconsistent with Articles 4(c) and 13 of the Constitution.

We are however, of the opinion that section 404 of the Code of criminal procedure Act be specifically mentioned in clause 13.

Clause 17

The petitioners contention was that the provisions of this clause would prevent a person from having a fair trial in terms of Article 13(3) of the Constitution. Clause 17 refers to the statements signed by suspects and states that such statements are relevant and admissible. Learned Solicitor General submitted that these statements are subject to section 24 of the Evidence Ordinance. Section 24 of the Evidence Ordinance vitiates a confession, if there is an appearance of an inducement, threat or promise in relation to the charge against the accused person. The Petitioners contended that the evidentiary burden of establishing the " appearance" of vitiating circumstances is cast on the accused person. It is however to be noted that such a transfer of evidential burden is permitted by the proviso to Article 13(5) which states that ;

" Provided that the burden of proving particular facts may, by law, be placed on an accused person".

Therefore clause 17 is not inconsistent with Article 13(5) of the Constitution.

Clause 19 and 20

Clause 19 refers to the admissibility of certain documents found in the custody, Control or possession of a person accused or his agent or representatives. Clause 20 pertains to the admissibility of a certain category of evidence which is necessary to establish a fact in issue. This is for the sole purpose of establishing that the accused person is a member of an organized criminal group.

The contents of the documents referred to in clause 19, are only prima facie evidence, which could be rebutted. What occurs as a consequence of these clauses is merely a shifting of the burden of poof of a particular fact.

These Clauses are therefore not inconsistent with any of the Articles of the Constitution.

Clause 24

Clause 24 refers to forfeiture of movable or immovable property, being proceeds of crime or property obtained from the proceeds of the offence which is the subject matter of the action. The petitioners' contention was that this provision tends to ' pile up punishment on punishment' because the word ' shall' in the said clause, makes it mandatory for such property to be forfeited. Accordingly, the petitioners contended that the said clause is inconsistent with Articles 4(c) and 12(1) of the Constitution.

This clause does not deal with a penal confiscation, but only makes it mandatory for the Court to forfeit any property, which the Court is satisfied to be "either proceeds of crime or has been obtained from the proceeds of crime". This kind of property as contemplated in clause 24 should necessarily be forfeited and this cannot be treated as 'pile up punishment on punishment'.

This clause therefore is not inconsistent with any of the provisions of the Constitution.

We have considered the provisions of the Bill and we are of the opinion that none of the provisions of this Bill are inconsistent with any Articles of the Constitution.

We shall place on record our appreciation of the assistance given by the learned Solicitor General and all the other learned Counsel who made submissions in this matter.

(*Sgd*) Shirani A. Bandaranayake,
Judge of the Supreme Court

(*Sgd*) P. Edussuriya,
Judge of the Supreme Court

(*Sgd*) J. A. N. de Silva,
Judge of the Supreme Court

Bill was Presented to Parliament on: 18.02.2003
Bill No. 103
Decision of the Supreme Court Conveyed to Parliament on 19.03.2003
Bill was not proceeded with.

2003

6. MEDIATION (SPECIAL CATEGORIES OF DISPUTES)

A

BILL

to provide for the establishment of Mediation Boards for settlement through mediation of special categories of disputes and for matters connected therewith and incidental thereto.

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

A BILL TITLED THE "MEDIATION (SPECIAL CATEGORIES OF DISPUTES)"

In the matter of a petition under Article 121(1) of the Constitution.

Present :

Shirani A. Bandaranayake - Judge of the Supreme Court
P. Edussuriya - Judge of the Supreme Court
J. A. N. de Silva - Judge of the Supreme Court

S.C. Special Determination
No. 3/2003

Janaka Bandara Tennakoon,
"Ranagiri", Sama Uyana Road,
Boralesgamuwa.

Petitioner

Vs.

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

Counsel :

S.S. Sahabandu, PC, with Hemantha Situge and Champani Padmasekera
Uditha Egalahewa, State Counsel for Attorney-General.
Court assembled for hearing at 10.00 a.m. on 11th March, 2003.

A Bill bearing the title "Mediation (Special Categories of Disputes)" was placed on the Order Paper of Parliament for 18th February, 2003 and the Petitioner has challenged its constitutionality by papers presented to this Court on 24th February, 2003. He has thereby invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution. Hon. Attorney General has been given due notice of the petition.

The Petitioner contended that clauses 2, 3, 4, 8 and 26 of the Bill are inconsistent with Article 4(a) and (c) of the Constitution and that, if they are to become law, they must be passed by a two-thirds (2/3) majority in Parliament.

The Bill seeks to provide for the establishment of Mediation Boards for settlement of special categories of disputes through Mediation. Clause 2 of the Bill refers to the subject and matters in respect of which the Act shall apply and are set out in the following terms :

"2(1) The Provisions of this Act shall apply in regard to the settlement through mediation of such categories of disputes as shall be determined by the Minister by Order published in the Gazette.

(2) In specifying such categories the Minister shall take into consideration the need to provide for the meaningful resolution of disputes relating to social and economic issues.

The contention of the Petitioner is that the Minister will be empowered to determine the categories of disputes that would be settled through mediation and in specifying such categories the Minister would take into consideration the need to provide for the meaningful resolution of disputes relating to "social and economic issues". It is therefore submitted that this clause is inconsistent with Article 4(a) of the Constitution as the Minister is deciding on the kinds of disputes, which are judicial in nature. In this context, the Petitioner also relies on clause 4 of the Bill, which deals with the appointment of a Panel of Mediators. By this clause, the Mediation Boards, Commission is given the power, subject to the provisions of sub-section 2 of clause 4 to take all necessary steps and appoint a Panel of Mediators in respect of each Special Mediation Board Area. Sub-section 2 of clause 4 is in the following terms :

"(2) A person to be eligible to be appointed under sub-section (1) as a Member of a Panel shall be required to have such qualifications as shall be prescribed for that purpose by the Minister, who shall in prescribing such qualifications have regard to the expertise required of Members to be appointed to such Panel, taking into consideration the nature of the subjects and matters determined by the Minister under section 2. Different qualifications may by prescribed in respect of different subjects and matters determined under that section."

It is the contention of the Petitioner that the provision in clause 4 (2) would empower the Minister to specify the qualifications and decide on their expertise to function as mediators. Such a power given to the Minister, according to the Petitioner is inconsistent with Article 4(c) of the Constitution as it is an interference with the judicial power by the Minister.

The Petitioner also contented that clause 3 of the Bill empowers the Minister to specify an area for Special Mediation Boards for the settlement of disputes, determined in terms of clause 2 of the Bill. It was the contention of the learned State Counsel that the Mediation (Special Categories of Disputes) Bill recognizes the existence and operation of Mediation Boards Act, No. 72 of 1988 as amended by Act, No. 15 of 1997 and thereby the existence and operation of the Mediation Board Commission. The purpose of the present Bill is to provide for special categories of disputes, which were excluded by the Mediation Boards Act, of 1988 (as amended) which was generally applicable to minor civil disputes, minor offences and small claims in which the value of the civil disputes must be below Rs. 25,000. The present Bill in effect therefore is an effort to expand the scope of the Mediation Boards Act, of 1988 (as amended).

Although the Petitioner very strenuously submitted that empowering the Minister to prescribe the qualifications of the Members of the Panel, was an interference with judicial power, the learned state counsel contended that the Minister has no power under the Bill to appoint any particular mediator to deal with any particular dispute for mediation.

A close examination of clauses 2 and 3 of the Bill indicates that the Minister has no power either to appoint any particular mediator or refer any particular dispute for mediation. The Minister can only prescribe by Gazette notification, types of disputes to be referred and qualification of the mediators, for the respective areas. It is also important to note that the Minister's power to prescribe qualifications of the Members of Commissions, Boards and other Panels is not an uncommon feature and in no way could be categorized as an interference with the Judicial power.

The appointment of the Panel of Mediators, referred to in clause 4, is however not a function allocated to the Minister. The Provision in clause 4 is clear in this regard and the responsibility is thus attributed to the Mediation Boards Commission to appoint such panels in respect of each Special Mediation Board Area. The Mediation Boards Commmission, as referred to earlier, is not appointed under the present Bill, but is appointed in terms of the provisions of the Mediation Boards Act, No. 72 of 1988 (as amended).

The Petitioner contented that clauses 8 and 26 are inconsistent with Article 4 (c) of the constitution. Clause 8 makes provision to the effect that, no proceedings in regard to a dispute arising wholly or partly within a Special Mediation Board Area, for which a Mediation Board has been appointed shall be instituted or entertained by a Court of first instance unless it is accompanied by a certificate of non-settlement. Clause 8 (2) reserves the power for a competent Court under Part IV of the Civil Procedure Code to make or grant provisional remedies. Clause 26 of the Bill sets out that, where an agreement contains a mediation clause agreeing to refer any dispute arising out of such agreement for mediation, no Court could assume jurisdiction until the parties refer such dispute for settlement by mediation. Similar provision was made in the Mediation Boards Act, No. 72 of 1988 as section 7 of the said Act contains similar wording, as has been used in clauses 8 and 26.

The Petitioner also objected to clause 1 of the schedule. The said clause in the schedule enables the Commission to select persons possessing such qualifications as prescribed by the Minister and prior to appointing them as Members of a Panel, to send them for preliminary training in mediation skills and techniques. This position does not grant any judicial authority either to the Minister or to the Commission and as referred to earlier, the said Commission is appointed in terms of the Mediation Boards Act, of 1988 (as amended).

The contention of the Petitioner is that clauses refer to above viz. 2,3,4,8 and 26 are inconsistent with Article 4(c) of the Constitution. Article 4 of the Constitution deals with the exercise of sovereignty and is in the following terms.

"4. The sovereignty of the People shall be exercised and enjoyed in the following manner ;-

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution, or created and established by law, except in regard to matters relating to the privilleges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law.

Thus, Article 4 (c) of the Constitution directly referred to the Judicial power of the People and for the aforementioned clauses to be inconsistent with Article 4 (c), it is necessary for such clauses to have provisions for the exercise of judicial power. Clauses 2, 3, 4, 8 and 26 of the present Bill, referred to above are dealing with situations regarding mediation. Mediation which has its roots in the times of the ancient Sinhalese Kings, dating from 425 B. C., is an inexpensive and expeditious measure for settleing disputes. "Mediation" could be described as a more democratic way of settling disputes than the adjudication of the dispute in a Court of law. The process in mediation is settlement of disputes reached though the involvement of a third party, with the participation of the disputed parties. The Procedure followed in mediation does not invole the exercise of judicial power since it is done with the consent of the parties to the dispute. In fact this Court in S. D. 9/2002 (Electricity Reform Bill) and in S. D. 10/2002 (Public Utilities Commission of Sri Lanka Bill, held that resolution of a dispute through mediation does not form part of judicial power of the

People. Accordingly the present Bill does not deal with the exercise of judicial power and in such circumstances there cannot be any erosion of the judicial power of the People vested in them in terms of Article 4 (c) of the Constitution. Therefore, clauses 2, 3, 4,8 and 26 of the Bill are not inconsistent with Article 4 (c) of the Constitution.

The Petitioner drew our attention to clauses 12 and 17 (1) of the Bill, which had certain elements of uncertainty. Clause 12 sets out that it shall be the duty of any party to a dispute brought before a Board for settlement by mediation to,

(b) refrain from revealing any information of a confidential nature disclosed or discussed at the mediation session.

We are of the opinion that, this provision would create unnecessary problems if in case the matter before the Mediation Board was to come before a Court of law due to non-settlement. In such circumstances, although there is no such inconsistency with any of the Articles of the Constitution it would be desirable if clause 12 (b) is deleted from the Bill. Clause 17 of the Bill refers to failures to comply with or violation of a settlement. In terms of clause 17 (1), when a matter which was referred to a Special Mediation Board under clause 7 is settled and one of the parties to the settlement there after fails to comply with or violates the terms of such settlement *at any time* the other party could report such failure or violation as the case may be to the Board. Clause 17 (2) provides for, in such circumstances, to settle the matter in issue or failing which to issue a certificate of non-settlement. The concern however is with regard to clause 17 (1) when a party could inform the Board of a failure or a violation of a settlement *at any time* without any regard to the time factor between the settlement and the failure or violation. *We are of the opinion* that it is desirable to prescribe a time limit of 30 days within which parties are free to repudiate a settlement arrived before a Special Mediation Board.

Having considered the provisions of the Bill, we are of the opinion that none of the provisions of the Bill are inconsistent with any Article of the Constitution.

We shall place on record our appreciation of the assistance given by the State Counsel and the learned President's Counsel who made submissions in this matter.

(Sgd.) Shirani A. Bandaranayake,
Judge of Supreme Court

(Sgd.) P. Edussuriya,
Judge of the Supreme Court

(Sgd.) J. A. N. de Silva,
Judge of the Supreme Court

Bill was Presented to Parliament on: 18.02.2003
BILL No. 104
Decision of the Supreme Court Conveyed to Parliament on : 19.03.2003
Passed on : 06.05.2003
Speaker's Certificate Endorsed on: 30.07.2003
Title: **Mediation (Special Categories of Disputes) Act, No. 21 of 2003**

2003

7. ARTICLES AND SERVICES (REGULATION AND MAINTENANCE)

A

BILL

to provide for a strategy to deal with shortages which are likely to arise due to the outbreak of hostilities outside the territory of Sri Lanka; to ensure the availability of supplies of articles essential to the life of the community; to provide for the equal distribution of such articles at fair prices ; to ensure the maintenance of utility services essential to public life and to regulate the prices of such services; and to provide for matters connected there with or incidental thereto.

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

A BILL TITLED "ARTICLES AND SERVICES (REGULATION AND MAINTENANCE)"

S.C.Special Determination
No. 7/2003 — In the matter of a reference under Article 12 of the Constitution

Present:

Sarath N. Silva - Chief Justice
H. S. Yapa - Judge of the Supreme Court
J. A. N. de Silva - Judge of the Supreme Court

Counsel :
U. Egalahewa, Senior State Counsel, assisted Court

Court assembled for hearing at 10.15 a.m. on 13.03.2003

Her Excellency the President has made a written reference requiring a special determination as to the constitutionality of the above Bill.

The Cabinet of Ministers has in terms of Article 122(1) of the Constitution decided that the Bill is urgent in the national interest.

U. Egalahewa, State Counsel assisted the Court in examining the constitutionality of the several provisions contained in the Bill.

The Bill is intended to provide a strategy to deal with shortages likely to arise due to the outbreak of war outside the territory of Sri Lanka. It is intended that in such event there would be a mechanism to ensure the distribution of articles essential to the life of the community at fair prices and to ensure the maintenance of utility services essential to public life.

In terms of clause I, the Act it would come into operation on a date to be appointed by the Minister and will be in operation for a period of three (3) months. The period of operation may be extended by resolution of Parliament. Since the Act would be in operation only for limited periods and the provisions contained are a departure from the ordinary law, it is appropriate to incorporate in the title of the Bill itself that the provisions are temporary in nature.

The Bill provides in clause 2 for the appointment of a Competent Authority and inClause 4 for the appointment of an Advisory Committee. The Advisory Committee will consist mainly of Secretaries to Ministries and include a representative of the Federation of Chambers Commerce, nominated by the Federation.

The Advisory Committee established in terms of Clause 4 is entrusted with the task of advising the Minister in regard to the discharge of functions under the Bill.

Clause 5 is the principal provision of the Bill. It empowers the Minister to make an order described as "Exigent Services Order". The order has to be made with the approval of the Cabinet of Ministers and placed before Parliament in terms of Clause 5(4). The Minister is empowered, *inter alia,* to fix by such order the maximum wholesale and retail prices of any article and to specify the price structure in respect of such article.

In the context of Clause 4, it appears that the Minister will be guided by the advice of the Advisory Committee in making such an order. However, it is noted that in Clause 5(1) being the specific provision empowering the Minister to make an order, there is no requirement that such an order will be made in accordance with the advice of the Advisory Committee.

Learned State Counsel agreed that a suitable amendment would be made to Clause 5(1) to provide that an order would be made in accordance with the advice of the Advisory Committee.

Though the power vested in the Minister in terms of Clause 5(1) would ordinarily be inconsistent with Article 12(1) for the lack of adequate guidelines as to the exercise of the power vested in them, we are of the view that the following safeguards would be adequate to avoid any such inconsistency;

1. the order will be made on the advice of the Advisory Committee which consists not only of officials but also of a representative of the Federation of Chambers of Commerce;
2. the order to be made with the approval of the Cabinet of Ministers;
3. the order has to be placed before Parliament within two weeks.

In the circumstances subject to the amendment being made as agreed to by the learned State Counsel we are of the view that that Clause 5 would not be inconsistent with Article 12(1) of the Constitution.

Learned State Counsel, agreed that Clause 5(1)(f) would be amended by deleting the provision for requisitioning of vehicles, which is inconsistent with Article 12(1) of the Constitution.

Upon an order being made in terms of Clause 5(1), the Competent Authority is vested with power and functions as are specified in Clause 2(3) Sub-paragraph (a) and (e) of Clause 2(3) empowers the Competent Authority to enter and inspect premises where any article is stored or enter and inspect any premises in respect of which an order for requisition had been made. Such premises would be privately owned and the law that is applicable under the Code of Criminal Procedure Act, No. 15 of 1979, a search can be effected only upon a warrant issued the Magistrate. The departure from the ordinary applicable law would amount to an infringement of Article 12(1) of the Constitution. There is no provision in the Bill to justify such departure and learned State Counsel agreed that a suitable amendment would be made to sub-paragraph (a) in order to provide that such entry and inspection would be carried out on the basis of a Warrant issued by the Magistrate. If such amendment is made the inconsitsency with Article 12(1) would cease in relation to sub-paragraph (a).

Learned State Counsel also agreed that sub paragraphs (e) and (f) of Clause 2(3) would be deleted since the connected provisions with regard to requisitioning of articles provided for in Clause 6(1) will be amended as noted hereinafter.

Clause 6 provides for the requisitioning of articles. It implies that articles owned and possessed by any person could be taken over by the competent authority without the payment of any consideration therefor.

Clause 6(4) provides for compensation to be assessed and paid in accordance with regulations that will be made.

In terms of the applicable law payment has to be arranged for concurrently with the articles being removed from the owner or person entitled to possission thereof.

It is noted that articles are often imported on the basis of credit given by Banks upon instruments such as trust receipts, the ultimate owner of articles may not even be the person who is currently in possession. In the circumstances the provision is a serious departure from the applicable law and the person whose articles are requisitioned would be denied the equal protection of law guaranteed to him by Article 12(1) of the Constitution.

We are of the view that Clause 6 which provides for requisitioning of articles without payment being arranged for, would be inconsistent with Article 12 (1) of the Constitution. Similar provisions are contained in Sections 5A and 5B of the Control of Prices Act. However, that was a law made prior to the guarantee of the equal protection of the law being enshrined in the Constitution.

Learned State Counsel submitted that the clause would be substituted with a provision which would enable the Competent Authority to purchase the articles at the price which is fixed in terms of the order made in terms of Clause 5(1). In the event of a refusal to sell there could be provision to obtain an order from the Magistrates Court to compel such sale. such an amendment would in our view avoid the inconsistency with Article 12(1) of the constitution.

Clause 7 provides for offences and punishments.

Clause 7(1)(b) and (c) are vague and do not set out the ingredients that could be made punishable in the manner that is provided for in the clause.

Learned State Counsel submitted that these two provisions will be deleted and replaced with a provision which makes it an offence to sell of an article above the price fixed in terms of Clause 5(1)(a). In that way the offence would be a similar to one under the Control of Prices Act. Such an amendment would avoid the inconsistency with any provision of the Constitution.

For the foregoing reasons we make a determination in terms of Article 123 of the Constitution that the provisions in Clauses 2(3),(a), (e) and (f), 5(1)(f) in relation to requisitioning of vehicles; 6 and 7(1)(b) and (c) are inconsistent with the Constitution and may only be passed with special majority required under Article 84(2) of the Constitution.The inconsistency will cease if the Bill is amended in the manner stated in this determination.

(Sgd.) Sarath N. Silva
Chief Justice

(Sgd.) H.S. Yapa
Judge of the Supreme Court

(Sgd.) J.A.N. de Silva
Judge of the Supreme Court

Bill was Presented to Parliament on: 19.03.2003
Bill No. : 112
Decision of the Supreme Court Conveyed to Parliament on: 19.03.2003
Passed on : 20.03.2003
Speaker's Certificate Endorsed on: 23.03.2003
Title: **Articles and Services (Regulation and Maintenance) (Temporary Provisions) Act No. 14 of 2003**

2003

8. LOCAL AUTHORITIES (SPECIAL PROVISIONS)

A

BILL

to provide for calling of fresh nominations and the holding of elections in respect of certain municipal councils, urban councils and pradeshiya sabhas, in the northern and eastern provinces where elections to such councils and sabhas have been postponed due to unforseen and urgent circumstances and to provide for matters connected therewith or incidental thereto.

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

"LOCAL AUTHORITIES (SPECIAL PROVISIONS)" BILL

In the matter of an application under Article 121 (1) of the Constitution

S. C. Special Determination
No. 12/2003 Sarath Jayasinghe,
Attorney-at-Law
Lawyers for Human Rights & Development,
Colombo 8

Petitioner
Vs.
Hon. Attorney General,
Colombo 12
Respondent

Counsel : K. Thiranagama with M. J. A. Hassan & Mrs. H. Ratnayake instructed by Piyasena Dissanayake for the Petitioner.

Saleem Mahroof, P. C. , Addl. Solicitor General with Shavindra Fernando, S. S. C. and Wigneswaran, S. C. , for the Attorney General

S. C. Special Determination
No. 13 of 2003 Champani Padmasekera,
01st Lane, Anura Mawatha,
Kalubowila

Petitioner

Totabaduge Gamini Sarath,
Pethispura, Kandy Road,
Trincomalee

Intervenient - Petitioner

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

Respondent

COUNSEL : S. S. Sahabandu, P. C., with Hemantha Situge and Keerthi Sigera for the Petitioner.

Parakrama Agalawatte with P. K. Rajapaksha, K. G. Wimal Piyatissa and T. Gamini Sarath for intervenient Petitioner.

Saleem Marsoof, P. C., Additional Solicitor General, with Shavindra Fernando, S. S. C and N. Wigneswaran, S. C. for the Attorney-General

PRESENT : Sarath N. Silva Chief Justice
Shirani A. Bandaranake - Judge of the Supreme Court
J. A. N. de Silva - Judge of the Supreme Court

Court assembled for the hearing at 10.00 a. m. on 6th June, 2003

A Bill bearing the above title was published in the Government Gazette of 28th April, 2003, and was placed on the Order Paper of Parliament on 21st May, 2003. Two petitions have been filed invoking the jurisdiction of this Court in terms of Article 121 (1) of the Constitution.

We have heard submissions of learned counsel representing the Petitioners and the Intervenient-Petitioners and of the Additional Solicitor General who represented the Hon. Attorney-General.

The Bill contains a preamble which sets out the purpose for which it is being enacted. It states that in respect of certain Municipal Councils, Urban Councils and Pradeshiya Sabhas in the Northern and Eastern Provinces nominations have been received but dates of poll for elections have been postponed from time to time by orders made under Section 38 (2) of the Local Authorities Election Order in Council (Ordinance) as amended by Act No. 5 of 2002. Although not stated in the preamble to the Bill, the Petitioners have produced the relevant orders made by the respective Returning Officers and the government gazette dated 18.09.2002 fixing 25.6.2003 as the date for the taking of poll in respect of elections for these local authorities.

Clause 2 (1) of the Bill states that nomination papers submitted in respect of the said local authorities in terms of Section 28 of the Ordinance are "deemed to be of no force and effect, and as if such nomination papers had never been submitted."

Clause 2 (2) revokes the notices published in terms of Section 38(3) of the Ordinance in respect of the said elections.

Clause 2 (3) provides for the return of the deposits that have been placed by candidates together with interest.

Clause 3 provides for steps to be commenced for the holding of such elections and the proviso to that clause empowers the Minister to determine by order published in the government gazette not later than 6 months from the coming into operation of the Act, the date on which the notice calling for nominations would be published.

The Petitioners contended that the said clauses are inconsistent with Article 12 (1) of the Constitution in so far as these provisions single out the candidates who have validly submitted nominations for election and have a legitimate expectation of being elected to the said local authorities and, subject them to a treatment different from the ordinarily applicable law. It was also contended that the system of elections for local authorities as amended by Act, No. 25 of 1990 provides for 2 classes of candidates, one of which defined as youth candidates have to be below the age of 35 years as on the last date of the nomination period in terms of Section 89. In particular, one of the candidates, being an intervenient petitioner has shown that if there is a requirement to resubmit the nomination he would not be qualified to contest as a youth candidate. On that basis it is contended that the franchise of these youth candidates will be adversely affected and that on the whole the provisions would, in addition, be inconsistent with Article 3 read with Article 4 (e) of the Constitution as being and alienation of sovereignty which includes the franchise.

It was also contended by the Petitioners that the proviso to clause 3 which empowers the Minister to determine the date on which the notice calling for nomination should be published is inconsistent with Article 104B(1) of the constitution introduced by the 17th Amendment which vests the power in respect of the electoral process in the Commission, or the Commissioner General as the case may be established in terms of that amendment.

Learned Additional Solicitor General submitted that the provisions of clause 2 annulling the nominations that have been submitted would not adversely affect the candidates since they would be entitled to submit fresh nomination. In respect youth candidates it was submitted that they could contest in the other category as ordinary candidates.

He further submitted that there had been similar provisions introduced by Acts, No. 38 of 1998 and 24 of 1990 whereby nomination papers submitted in respect of local authorities elections have been annulled by law and the process commenced afresh. The Additional Solicitor General contended that the right to contest elections in respect of Local Authorities does not come within the ambit of the franchise as dealt with in Article 3 and 4 (e) of the Constitution and that it is only a statutory right which does not attract the constitutional provision.

Counsel for the Petitioners submitted that constitutionality of the Bills which became law as Acts, Nos. 38 of 1998 and 24 of 1990, were not subject to review by this Court and as such they cannot be cited as presidents for similar legislation inconsistent with the relevant provisions of the Constitution.

It was submitted that the said laws were enacted prior to the amendment bringing in the segment of youth candidates and that when a youth candidate's nomination is annulled such candidate cannot secure nomination in the ordinary category, since the party or group has a full compliment of such candidates already in the list. They also contended that Local Authorities have acquired constitutional recognition after the 13th Amendment and the electoral process would come within the ambit of Article 3 read with Article 4 (e) of the Constitution.

We have considered the submissions of learned Counsel in relation to the relevant provisions of the Constitution. It is clear that Bill deals with a specified class of persons who have submitted valid nominations and who have a legitimate expectation of being elected on the basis of the contest that now exists. Although the Bill is couched in the form of affecting the electoral process, which according to the argument of the learned Additional Solicitor General, could be repeated, it has a specific impact and directly affects the rights of these candidates. These candidates who have submitted valid nomination papers have now a legitimate expectation of facing the poll, without the intervention of any further candidates and of being elected it terms of the relevant provisions of the Ordinance.

The process of election itself has been interrupted in terms of the Orders made under Section 38(3) of the Ordinance as amended by Act, No. 1 of 2002. This provision empowers the Election Officer to appoint another date for the taking of the poll. The amendment introduced by Act, No. 1 of 2002, introduced an additional ground on the basis of which such an order for postponement could take place. Whereas in terms of original provision a poll could be postponed only due to any emergency. The amendment added "unforeseen circumstances" as another ground. Whether the postponement has been validly made or not, is not a matter that comes up for consideration in this determination. We have to examine the provisions of the Bill on the basis that the poll has been validly postponed and is now fixed for 25.6.2003.

Clause 2 (2) of the Bill revokes the date of the poll that has been fixed by the Returning Officers in terms of Section 38 (3) of the Ordinance. The Bill has the effect of interrupting and annulling an electoral process that is in motion according to the applicable law.

Provision to clause 3 is a further departure which empowers the Minister to fix the date for re-activating this electoral process which is sought to be interrupted and annulled by the Bill.

It is thus seen that the Bill is intended to apply to only a specific situation being an electoral process now in motion according to the applicable law and affects only an identified class or persons, namely, the candidates who have submitted valid nominations and who have a legitimate expectation of being elected in the contest as presently identified. Viewed from this perspective it is both ad hoc and ad hominem. On the other hand the bill indirectly favours persons who have not submitted nominations when the opportunity was presented to them in accordance with the law and offers to them a fresh opportunity to enter the contest, thereby bringing in a new element to the contest as presently identified.

Article 12 (1) state as follows : " all persons are equal before the law and are entitled to the equal protection of the law "

This fundamental right to equality requires that laws should apply equally in respect of all persons. The Local Authorities Elections Ordinance, being the law in question applies equally in respect of all persons when the electoral process in issue commenced. As correctly submitted by learned Counsel for the Petitioners, section 25 of the Ordinance provides for elections to be held with a specified period of time prior to the date on which the term of office of the members who are to be elected is to commence. This provides for a continuity of elected members to administer the affairs of the Local Authorities. It is correct that the subsequent amendments especially in the nature of Act, No. 1 of 2002, referred to above distorted the original framework of the Ordinance being a democratic ideal. The amendment now in issue not only distorts, but seeks to annual what has validly taken place in terms of the applicable law. Therefore all candidates are adversely affected by the amendment as contained in the Bill. In respect of the youth candidates, the degree to which they are affected is undeniably higher. On the other side of the coin is the favourable treatment to persons who did not submit nominations when the opportunity was presented to them and are now being afforded a fresh opportunity to submit their nominations. In that respect the Bill is based on a clear classification in respect of the persons who would be directly affected by its provisions. Hence the Court has to consider whether the classification that is done is one that is permissible.

In the case of Ram Krishna Dalmia vs. Justice Tendolkar 1958 AIR SC 530, the Supreme Court of India dealt with the matter of classification extensively. Das C,J., Summarized five types of classifications and the manner in which each such type should be considered. The first type of classification, to which the present Bill would belong is, where the Bill indicates the persons or things to whom its provisions are intended to apply and the basis of the classification appears on the face of the Bill itself or could be gathered from the surrounding circumstances. In this instance the Bill, as noted above, clearly applies in relation to candidates who have validly submitted their nominations and who have a legitimate expectation of being elected in the contest as presently identified. In such a situation, in considering the validity or otherwise of the Bill, the Court has to examine whether the classification is reasonable and is based on some intelligible criteria which justifies the special treatment which the Bill gives to the identified group of persons.

It is clear that the nomination of these candidates are being annulled and their legitimate expectation of being elected to office is thwarted for no fault of theirs. The reason for this classification is contained in the last paragraph of the preamble, which states that due to the period of time that has lapsed since the nominations were submitted it is necessary to make provision for holding of fresh elections. Thus it is sought to adversely affect the candidates who have now submitted norminations on the basis of delay that has infact been brought about by an entirely different source. The delay has been brought about by the Returning Officers who postponed the elections from time to time. Counsel for the Petitioner contended that such postponements could not have been made since Parliamentary Elections have been held and there has been a cessation of hostilities due to the "Memorandum of Understanding" that has been entered into. Even assuming that the postponements have been validly made, nevertheless these candidates who have acted according to law and are engaged in a democratic process of being elected to public office by the exercise of the franchise cannot be denied the equal protection of the law in having their nominations declared void in the manner that is sought to be done by the Bill

Therefore the reason for the classification as contained in the preamble does not bear scrutiny and the object of this Bill, namely, the interruption and annulment of an electoral process, being the essence of the democratic ideal so boldly stated in the name of the Republic as contained in Article 1 of the Constitution, is inconsistent with the right to equality as guaranteed by Article 12 (1) of the Constitution.

The Petitioners also contended that the provisions of the Bill affect the franchise and as such would be inconsistent with Articles 3 read with 4 (e) of the Constitution.

Learned Additional solicitor General contended that the franchise contemplated in Articles 3 and 4 (e) of the Constitution does not extend to the elections to Local Authorities and would be applicable only in respect of elections to the office of President, Members of Parliament and a Referendum as specifically stated in Article 4 (e) of the Constitution. It was submitted that the franchise in relation to Local Authorities is merely a statutory right which the Parliament can validly remove in the manner that is contemplated in the Bill.

Article 3 of the constitution provides that in the republic sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise. Article 4 is an elaboration of the exercise of sovereignty in relation to legislative power, executive power, judicial power, fundamental rights and the franchise. The mere fact that in Article 4 (e) there is no reference to elections to Local Authorities does not mean that franchise as contemplated in Article 3 would not extend to elections to local authorities. Local Authorities have acquired constitutional status, in particular after the enactment of the 13th Amendment, which specifically deals with Local Government as item 4 in list 1 of the 9th schedule. Item 4 : 3 reads as follows :

> " Local authorities will have the powers vested in them under existing law. Municipal Councils and Urban Councils will have the powers vested in them under the Municipal Councils Ordinance and the Urban Councils Ordinance, Pradeshiya Sabha will have the powers vested in them under existing law. It will be open to a Provincial Council to confer additional powers on local authorities but not to take away their powers"

It is thus seen that the powers vested in Local Authorities have now acquired constitutional recognition. Furthermore as contended by Counsel for the Petitioners, Article 104B of the Constitution, as amended by the 17th Amendment, provides for the exercise of the power in relation to elections to Local Authorities by the Commission established in terms of the

Constitution. In the light of these provisions we cannot agree with the submission of the learned Additional Solicitor General that the franchise in relation to Local Authorities does not come within the purview of Article 3 of the Constitution. The Constitution has to be looked at as an organic whole and its terms cannot be fixed to meanings they may have had at the time of enactment.

The franchise as contemplated in the Constitution includes the rights of persons qualified under the law to present themselves as candidates. It is not limited to a right to vote. Chapter XIV of the Constitution which deals with "The Franchise and Elections" also include the provisions with regard to persons qualified to be elected to office by means of the exercise of the franchise

Although we are not inclined to agree with the submission of the Additional Solicitor General that the franchise as contemplated in Articles 3 and 4 (e) do not extend to elections to local authorities, we have to consider the further aspect whether the Bill contains an inconsistency with Article 3 read with Article 4 (e) which would warrant the application of Article 83 which requires a referendum. Article 3 is a safeguard which prevents an alienation of the elements that constitute the sovereignty of the People and its exercise as provided in Article 4. The provisions of the Bill affects the exercise of the franchise, particularly in relation to the candidates who are directly affected as reasoned out above. The fact that the treatment they are subject to affects their franchise aggravates the inequality in relation to them. But, that alone does not amount to an inconsistency with Article 3 read with Article 4 (e) since the electoral process is kept alive to recommence within 6 months.

For the reasons stated above we make a determination in terms of Article 123 of the Constitution that the provisions of the Bill as a whole are inconsistent with Article 12 (1) of the Constitution and could be validly passed only by the special majority required in terms of Article 84 (2) of the Constitution.

Sarath N. Silva
Chief Justice

Shirani A. Bandaranayake
Judge of the Supreme Court

J.A.N. de Silva
Judge of the Supreme Court

Bill was Presented to Parliament on : 21.05.2003
Bill No : 123
Decision of the Supreme Court Conveyed to Parliament on : 18.06.2003
Bill was not proceeded with.

2003

9. INTELLECTUAL PROPERTY

A

BILL

to provide for the law relating to intellectual property and for efficient procedure for the registration, control and administration: to amend the Customs Ordinance (chapter 235) and the High Court of Provinces (Special Provisions) Act, No. 10 of 1996: and to provide for matters connected there with or incidental thereto.

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

A bill bearing the title "Intellectual Property"

In the matter of Petitions under Article 121(1) of the constitution

Present:

Sarath N. Silva	Chief Justice
Shirani A. Bandaranayake	Judge of the Supreme Court
J. A. N. de Silva	Judge of the Supreme Court

S. C. Special Determination
No. 14/2003

Dr. Kamalika Abeyratne,
No. 91A, Fifth Lane,
Colombo 03.

Petitioner

Counsel :

Ms. I . R. Rajapakse with Ms. S. Daluwatte

Saleem Marsoof, PC, Additional Solicitor-General with Shavindra Fernando, Senior State Counsel and N. Wigneswaran, State Counsel for Attorney-General.

S. C. Special Determination
No. 15/2003

Centre for Policy Alternatives (Guarantee) Ltd.,
No. 24/2; 28th Lane,
Sir Ernest De Silva Mawatha,
Colombo 07.

Petitioner

Counsel :

M. A. Sumanthiran with Buddhika Illangatillake, S. Anthony and S. Kanag-Iswaran.

Saleem Marsoof, PC, Additional Solicitor-General with Shavindra Fernando, Senior State Counsel and N. Wigneswaran, State Counsel for Attorney-General.

S. C. Special Determination
No. 16/2003

Nihal Fernando,
No. 18, Skelton Road,
Colombo 05.

Petitioner

Counsel :

Jagath Gunawardane with Ms. Lilanthi de Silva.

Saleem Marsoof, PC, Additional Solicitor-General with Shavindra Fernando, Senior State Counsel and N. Wigneswaran, State Counsel for Attorney-General.

The Court assembled at 10.00 a.m. on 06th June, 2003 and at 1.30 p.m. on 09th June, 2003.

A Bill bearing the title "Intellectual Property" was placed on the Order Paper of Parliament for 21st May, 2003. Three petitions numbered as above have been presented, invoking the Jurisdiction of this Court in terms of Article 121(1) of the Constitution to determine whether the Bill or any provision thereof is inconsistent with the Constitution. Hon. Attorney-General has been given due notice of the petitions.

The Counsel representing the petitioners and the Additional Solicitor-General were heard before this Bench at the sittings held on 06th and 09th June, 2003.

The petitioners contended that Clauses 84, 90, 91, 92, 93 and 94 of the Bill are inconsistent with Articles 3 and/or 4(d), 12(1) and 14(1)g of the Constitution and that if they are to become law, they must be passed by a two-thirds (2/3) majority in Parliament.

The Petitioners also contended that, although they are mainly concerned with the Clauses referred to earlier, which are found in Chapters XIV to XVII, that it would be necessary to refer to other areas, which would include other Clauses. Accordingly the petitioners contended that clauses 62, 83 and 87 of the Bill are also inconsistent with Articles 3 and/or 4(d), 12(1) and 14(1)g of the Constitution.

The Bill seeks to provide for the law relating to Intellectual Property and for efficient procedure for the registration, control and administration and to amend the Customs Ordinance and the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Clauses 83 and 84

The present Bill consists of eleven parts and forty-three Chapters. Clause 83, which is in Chapter XIV, deals with the Duration of Patent and Clause 84, which is in Chapter XV, provides for the rights of an owner of a Patent. The contention of the petitioners is that these for the rights of an owner of a Patent. The contention of the petitioners is that these two clauses would make provision for the grant of a Patent for a twenty-year duration in respect of products and processes. The owner of such a Patent, it was contended, would have the exclusive right for a period of twenty years to exploit the patented invention to assign or transmit the patent and to conclude licensing contracts in respect of such inventions. The petitioners further contended that, in accordance with the terms of Patent Chapters read with Articles 3 and 4 of the Trade Related Intellectual Property Rights (TRIPS) Agreement, the Government of Sri Lanka will not be able to accord to its own citizens or corporate entities any protection or privileges which are not granted to foreign persons or corporate entities. These provisions in effect would allow the foreign patent holders of any product or process, including medicinal drugs and the processes for their manufacture, to control the supply and price of such drugs in the Sri Lankan market. This would result in the increase of the prices of such medicine in the market as the aforementioned provisions will have the effect of removing the power of the Sri Lankan authorities or a Sri Lankan citizen from obtaining medicines for the 'people of Sri Lanka' at the cheapest available price and from a source of their choice.

The Contention of the petitioners therefore is that these provisions are violative of Article 12(1) of the Constitution. In support of this contention the petitioners drew our attention to the Report on "TRIPS and Health Section in the South-East Asia Region" published by the world Health Organization (WHO) which sets out the consequences of adherence to the TRIPS agreement on the health of people in the South and East Asian countries, including Sri Lanka.

The Petioners' contention is chiefly based on the position that the mitigating features, which were incorporated in the TRIPS Agreement, have not been included in the present Bill. The following three (3) examples could be cited as important issues that should have been taken into consideration.

(A) Articles 30 and 31 of the TRIPS Agreement provides for a State to make provision for the use of the subject matter of a patent for the domestic market without the prior authorization of the patent holder in certain situations such as national emergencies.

Article 30 of the TRIPS Agreement is on Exceptions to Rights conferred and reads as follows :

> "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

Article 31 on the other hand deals with other use without Authorisation of the Right Holder, and reads as follows :

> " Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provision shall be respected:
>
> 12 provisions are laid down under this Article."

(B) The Doha Declaration makes provision for compulsory licensing and parallel importing of pharmaceutical drugs to meet national health emergencies. This includes granting of compulsory licenses in respect of pharmaceutical products with regard to public health crisis including those related to HIV/AIDS, tuberculosis, malaria and other epidemics.

(C) The TRIPS Agreement includes several mitigatory measures, which are allowed under the said Agreement.

None of these measures have been incorporated in the Bill on Intellectual Property. The provisions of the TRIPS Agreement clearly specifies that it has incorporated mitigatory provisions, as the Agreement would be applicable for developed countries as well as to the less developed nations. In fact, World Trade Organisation (WTO), has recognized the inequality of nations in respect of the TRIPS Agreement by prescribing a staggered time frame for the implementation of the Agreement among countries of different economic levels. Therefore it is an accepted fact that the provisions of the TRIPS Agreement would be applicable to countries developed as well as developing, which cannot be treated as equals. Article 12(1) of the Sri Lanka Constitution not only guarantees equality before the law, but also provides for the equal protection of the law. It is well settled law that just as much equals should not be placed unequally, at the same time unequals should not be treated as equals.

Equal protection means the right to equal treatment when similar circumstances are prevailing allowing no discrimination between two persons who are similarly circumstanced. Similarly equal protection in terms of Article 12(1) guarantees protection not only from the executive, but also from the legislature. This Article is in line with Article 7 of the Universal Declaration of Human Rights (1948), which states that, "All are equal before the law and are entitled, without any discrimination, to equal protection of the law."

Article 12(1) of our Constitution is similar in content and effect to the 14th Amendment to the Constitution of the United States of America and to Article 14 of the Constitution of India. As it has been decided by a series of cases in India, the guarantee of equal protection of the laws is an injunction issued by the framers of the Legislature against enactment of discriminatory laws. Although the legislature has a wide choice in articulation of subject matter of its laws, it should not treat unequals as equals and equals as unequals.

For the aforesaid reasons we determine that Clauses 83 and 84 of the Bill are inconsistent with Article 12(1) of the Constitution. The Bill in its present form therefore requires to be passed by the special majority required under the provisions of paragraph 2 of Section 84 of the Constitution.

Clauses 90, 91, 92, 93 and 94

Clauses 90 to 97 are in Chapter XVII and deals with licence contracts. Clause 90 which is the interpretation Clause, defines the licence contract and is in the following terms :

> " For the purposes of this part licence contract means any contract by which the owner of a patent (hereinafter referred to as 'the licensor') grants to another person or enterprise (hereinafter referred to as 'the licenser') a licence to do all or any of the acts referred to in paragraph (a) of sub-section (1) and sub-section (3) of Section 84."

Section 84, as referred to earlier, deals with the rights of an owner of a patent. It was contended on behalf of the petitioners that, a patent, which is a statutory grant of a right to an inventor on his invention from which others are excluded as long as the grant runs, will give the inventor a monopoly to exploit the invention at the exclusion of all others. This will detract any opportunity available for the use of the patented product by any other user. This in effect would be a disincentive and an obstacle to the development of the local pharmaceutical industry, which would in turn be unequal treatment and violation of equal protection for the persons who are engaged in such industry.

We therefore determine that Clauses 90, 91, 92, 93 and 94 are inconsistent with Articles 12(1) of the Constitution.

Clause 87

The petitioners contended that Clause 87 of the Bill is inconsistent with Articles 12(1) and 14(1)g of the Constitution for the following reasons :

Clause 87 deals with the rights derived from prior manufacture or use and, reads as follows:

"Where a person at the filling date or where applicable, the priority date of the patent application -

(a) was in good faith making the product or using the process in Sri Lanka which is the subject of the invention claimed in such application ;

(b) had in good faith made serious preparation in Sri Lanka towards the making of the product or using the process referred to in paragraph (a). He shall have the right, despite the grant of the patent to exploit the patented invention :

Provided that the product in question is made or the process in question is used by the said person in Sri Lanka :

Provided further, if the invention was disclosed under circumstances referred in paragraphs (a) or (b) of sub-section (3) of Section 64, he may prove that his knowledge of the invention was not as a result of such disclosure."

Clause 64 deals with 'Novelty' and refers to 'Prior art', which is defined in Clause 64(2) in the following terms :

"Prior art shall consist of -

(a) everything disclosed to the public, anywhere in the world by written publication, oral disclosure, use or in any other way prior to the filing or, where appropriate, priority date of the patent application claiming the invention."

However, in terms of Caluse 87(1) read together with Clause 64, a Sri Lankan, who had been already making a product or using a process in respect of which another party has applied for the patent, may end up only with the right to exploit the patented invention or process. If the purpose of the inclusion of Clause 87 was to protect the Sri Lankan who is already making a product or using the process, where another party had applied for a patent, then the Sri Lankan should be entitled to it and the application made by the other party for the patent should be refused on the ground that the invention has already been anticipated by prior art.

Clause 87 therefore is not granting the equal right or the equal protection to an inventor, who had already made a product or uses a process and thereby is inconsistent with Article 12(1) of the Constitution.

Clause 62

Clause 62 deals with definitions and Clause 62(3) b refers to the items, although they are inventions, which are not patentable within the meaning of sub-Clause (1) of Clause 62. These are -

"(b) plants and animals, other than micro organism and an essentially biological process for the production of plants and animals other than non-biological and micro-biological processes" (emphasis added)

It is clear that this Clause has excluded micro-organism by excluding them from living organisms thus allowing them to patented.

Petitioners contended that in terms of the TRIPS Agreement, although it is necessary for a country to give patents to micro-organisms, there is no definition given to this term. This has created a situation where it is possible to have a broad scope of patent protection, which could in turn be detrimental to the interests of the country. Examples were given of the pure culture of the micro-organism sreptisporangium fragile that is capable of producing the antibiotic complex containing Frajilomycin A which has been found in a paddy field in the village of Anaikota, situated about 5 miles from Jaffna in the Northern Province of Sri Lanka. Reference was also made to micro organism known as 'pathogens'. It was submitted that due to the fact that there is no definition for the term 'micro-organism' makes it possible for a variant of a pathogens to be patented. This will pave the way for a patent holder to carry our research for the purpose of diagnosis and finding cures, which in effect will increase the prices of diagnosis and cures. Therefore the petitioners contended that, the non-inclusion of the necessary definition to micro-organism is inconsistent of Article 12(1) of the Constitution which guarantees equal rights and equal protection to person, with which we agree.

It is however, suggested that if the words "and micro-oganism other than transgenic micro-organism" is added after the word animals in Clause 62(3) b thereby amending the said Clause it would cease to be inconsistent with Article 12(1) of the Constitution.

Accordingly the following paragraph also will have to be added to Clause 213 of the Bill as an interpretation Clause.

"Transgenic" means an organism that expresses a characteristic, not attainable normally by the species under natural circumstances, but which has been added by means of direct human intervention in this genetic composition."

Learned Additional Solicitor General, did not concede to the suggested amendments to the present Bill in order for it to be consistent with the provisions of the Constitution. He was also not in agreement to consider the inclusion of proposed Clauses which were included in a previous draft that were deleted from the instant Bill.

Learned Additional Solicitor General's contention was based on the purpose of a Patent and how it could be claimed by another person. He took up the view that a patent is the ownership of intellectual property rights, which would be necessary in order to meaningfully exercise one's fundamental rights, especially those guaranteed under Article 14(1)g. This provision, he contended, is restricted in terms of Article 15(7) of the Constitution in the interests of inter alia "securing due recognition and respect for the rights and freedoms of others....."

According to the learned Additional Solicitor General, in terms of Article 15(5) of the Constitution, fundamental rights may be restricted in the interests of national economy or of meeting the just requirements of the general welfare of a democratic society. This would be the basis whereby the Legislature would strive to achieve the balance between the rights of the individual and the society in general.

Undoubtedly the provisions of Article 14(1)g is restricted in terms of Article 15(5) of the Constitution. However, this does not mean that such provision could override the safeguard and protection given to persons in terms of Article 12 (1) of the Constitution. As referred to earlier, the provisions in Article 12(1) guarantees equal rights as well as equal protection and the provision of the TRIPS Agreement cannot be applicable to developed and developing countries equally without attributing due consideration to such rights with particular reference to the mitigatory provisions in the Agreement.

Producers of patented products and processes and their agents in developed nations and consumers of such products in developing countries such as Sri Lanka cannot be taken as parties that are similarly circumstanced. There is ample justification to treat them differently as they cannot be put on equal footing. If they are to be treated equally such decision should be justified by relevant criteria.

The learned Additional Solicitor General has showed no such justification by a relevant differentiation between the aforementioned parties. Nor has he given any indication as to why the mitigatory provisions suggested by the TRIPS Agreement could not be considered in the enactment of the Bill. In such circumstances we are not in a position to agree with the submissions of the learned Additional Solicitor General when it is visibly clear that the aforementioned Clauses of the Bill are inconsistent with Article 12(1) of the Constitution.

For the aforementioned reasons we determine that clauses 62, 83, 84, 87, 90, 91, 92, 93 and 94 are inconsistent with Article 12(1) of the Constitution. We therefore state that the Bill in the present form is required to be passed by the special majority required under the provisions of paragraph 2 of Article 84 of the Constitution.

We shall place on record our appreciation of the assistance given by the learned Additional Solicitor General and all the other learned Counsel who made submissions in this matter.

Sarath N. Silva
Chief Justice

Shirani A. Bandaranayake
Judge of the Supreme Court

J. A. N. de Silva,
Judge of the Supreme Court

Bill was Presented to Parliament on : 21.05.2003
Bill No. 122
Decision of the Supreme Court Conveyed to Parliament on 18.05.2003
Passed on : 25.07.2003
Speaker's Certificate Endorsed on : 12.11.2003
Title : **Intellectual Property Act No. 36 of 2003.**

10. PETROLEUM RESOURCES

A

BILL

to provide for the exploration and recovery of petroleum resources in Sri Lanka and for the regulation of the same; to repeal certain provisions of the Ceylon Petroleum Corporation Act, No. 28 of 1961; and to provide for matters connected there with or incidental thereto.

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

"PETROLEUM RESOURCES" BILL

In the matter of a petition under Article 121 of the Constitution.

S.C.(SD) NO. 17/2003 & 18/2003

PRESENT: Sarath N. Silva Chief Justice
J.A.N. de Silva Judge of the Supreme Court
T.B. Weerasuriya Judge of the Supreme Court

COUNSEL: K. Tiranagama with Jaufer Hassan and Piyasena Dissanayake for the Petitioners.

P.R. Ratnayake, Addl. Solicitor General with Arjuna Obeysekera, S.C. for the Attorney-General

Court assembled at 10.00 a.m. on 20th June, 2003

The jurisdiction of this Court to determine the constitutionality of the above Bill has been invoked by E.S.Hewage (17/2003), and M. Rohan Wijesena (18/2003) by petitions addressed in terms of Article 121(1) of the Constitution. The Bill has been placed on the Order Paper of Parliament and the petitions were filed on 10.6.2003.

The contention of the Petitioners is that the provisions of clause 3, 4(1) and 6 (b) are inconsistent with Article 12(1) of the Constitution. It is also contended that clause 17 cannot properly be included in the Bill.

The Bill provides for the exploration and recovery of petroleum resources in Sri Lanka.

Clause 2 of the Bill vests absolute ownership of all petroleum resources occurring naturally within the areas specified in sub-paragraphs (a) and (b), in the State. The other provisions of the Bill are intended to provide a mechanism for the State to explore and exploit these resources. For this purpose a Committee known as the "Petroleum Resources Development Committe" (PRDC) is established in terms of clause 5 of the Bill.

The Petitioner's contention is that clauses 3, 4 and 6(b) referred to above empowers the State to take steps for exploration and exploitation of petroleum resources only with "private sector or jointly with private sector participation." It was argued that the exclusion of the other sectors result in an inequality in the application of the law and is therefore inconsistent with Article 12(1) of the Constitution.

On a consideration of the submissions there are two grounds on which the inconsistency with Article 12(1) emerges. They are,

(i) the phrases " private sector" and "private investors" as contained in clauses 3, 4 and 6(b) are not defined in the Bill, This would vest an unguided discretion in the appropriate authority to discriminate between persons who intend to engage in exploration and exploitation of petroleum resources in terms of the Bill.

(ii) On the assumption that the phrase "private sector" and "private investers" exclude what may generally come within the description of the State sector including State agencies and public corporations, there are no rational grounds contained in the Bill which justifies such an exclusion.

We are of the view that both grounds are well founded and the restriction contained in clauses 3, 4(1) and 6(b) limiting its operation to " Private sector" and "private investors" result in an inconsistency with Article 12(1) of the Constitution.

Learned Deputy Solicitor General submitted that steps would be taken at the Committee Stage to amend the said provision by deleting the references to the, "private sector" and "private investors" in order that the provisions be applicable to all persons including, Stage agencies and public corporations.

The next clause referred to by Counsel does not involve any issue of constitutionality. He referred to clause 17, which provides that the Minister shall not make vesting or requisitioning orders in respect of certain matters.

It is submitted that there is no provision empowering the Minister to make such vesting or requisitioning orders and in the absence of such a provision it is meaningless to provide that the Minister shall not make such orders in respect of certain properties.

The learned Deputy Solicitor General agreed with the submissions and stated that this clause would be deleted at the Committee Stage.

The Petitioner did not urge any other ground of inconsistency with the Constitution.

For the reasons stated above we make determination in terms of Article 123 of the Constitution that the provisions of Clauses 3,4(1) and 6(b) are inconsistent with Article 12(1) of the Constitution and require to be passed by the special majority stated in Article 84(2) of the Constitution.

However, the said inconsistency would cease if the relevant clauses are suitably amended to delete the references in these provisions to the "private sector" and "private investors" as noted in the preceding section of this determination.

Sarath N. Silva
Chief Justice

J.A.N. de Silva
Judge of the Supreme Court

T.B.Weerasuriya
Judge of the Supreme Court

Bill was Presented to Parliament on : 03.06. 2003
Bill No : 124
Decision of the Supreme Court Conveyed to Parliament on : 08.07.2003
Passed on : 09.07.2003
Speaker's Certificate Endorsed on : 09.09.2003
Title : **Petroleum Resources Act No. 26 of 2003**

2003

11. PROVINCIAL OF THE TEACHING SISTERS OF THE HOLY CROSS OF THE THIRD ORDER OF SAINT FRANCIS OF MENZINGEN OF SRI LANKA (INCORPORATION)

A

BILL

to incorporate the Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis Of Menzingen of Sri Lanka (private member's bill)

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

A BILL TITLED, "PROVINCIAL OF THE TEACHING SISTERS OF THE HOLY CROSS OF THE THIRD ORDER OF SAINT FRANCIS IN MENZINGEN OF SRI LANKA (INCORPORATION)".

In the matter of a petition under Article 121 of the Constitution.

S. C. Special Determination, No. 19/2003

Present : Shirani A. Bandaranayake - Judge of the Supreme Court
H. S. Yapa - Judge of the Supreme Court
Nihal Jayasinghe - Judge of the Supreme Court

Anula Irangani Fernando, No. 41A, Kassapa Road, Colombo 05.

Petitioner

Counsel : Manohara R. de silva with G.W.C. Bandara Thalagune and W.D. Weeraratne for the Petitioner.

P.A. Ratnayake, Additional Solicitor - General with S. Balapatabendi, State Counsel, for the Attorney - General.

Court assembled at 10.00 a.m. on 25.07.2003.

A Bill titled "Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)" has been presented to Parliament as a Private Member's Bill. This Bill was placed in the Order paper of Parliament on 09th July 2003 and the petitioner has challenged its constitutionality by papers presented to this Court on 14th July 2003. The petitioner has thereby invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution. Hon. Attorney - General has been given due notice of the petition.

This Bill seeks to incorporate an organization called the 'Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka' for the purpose of carrying out the objects that have been set out in the Bill. The general objects of the organization sought to be incorporated are set out in clause 3 of the Bill. The objections raised by the petitioner relate to the constitutionality of clause 3 and clause 5 of the Bill. The petitioner contended that clause 3 should be read with the Preamble to the Bill and clause 5 should be read with clause 3 of the Bill.

The Preamble to the Bill and clause 3 of the Bill are in the following terms :

PREAMBLE :"WHEREAS the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen in Sri Lanka have established themselves as a Congregation for the propagation of Religion by establishing and maintaining catholic schools and other schools assisted or maintained by the State and engaged in educational and vocational training in several parts of Sri Lanka and in establishing and maintaining orphanages and homes for children and for the aged :

AND WHEREAS it has become necessary for the aforesaid purposes to be more effectively prosecuted, pursued and attained to have the incorporation of the provincial of the Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka :

AND WHEREAS it has become expedient to have the said provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka duly incorporated :"

CLAUSE 3

"3. (1) The general objects for which the Corporation is constituted are hereby declared to be-

(a) to spread knowledge of Catholic religion ;

(b) to impart religious, educational and vocational training to youth ;

(c) to teach in Pre - schools, Schools, Colleges and Educational Institutions ;

(d) to serve in Nursing Homes, Medical Clinics, Hospitals, Refugee Camps and like institutions ;

(e) to establish and maintain Creches, Day Care Centres, Homes for the elders, Orphanages, Nursing Homes and Mobile Clinics and care for the infants, aged, orphans, destitutes and the sick ;

(f) to bring about society based on love and respect for one and all ; and

(g) to undertake and carry out all such works and services that will promote the aforesaid objects of the Corporation".

The contention of the petitioner is that the Preamble read with clause 3 of the Bill make provision not only to propagate the catholic religion, but to allure persons of other religions by providing material and other benefits which include medical facilities, education to children and also providing care for the infants, aged, orphans, destitutes and the sick and thereby converting them to the faith that is sought to be spread. This is carried out, according to the petitioner, by taking advantage of the young age, inexperience and or the physical and mental disability of such persons. The petitioner contented that the Bill therefore provides facilities to the organization to convert children of other religions attending state and private schools, the sick undergoing treatment in hospitals and other medical institutions, orphans and destitutes in refugee camps and other institutions, elders in homes for the elders and members of the public through conducting mobile clinics, by providing them with material and other benefits and taking advantage of their young age and other infirmities.

The petitioner further contended that, Clause 5 of the Bill, which gives the authority to the organization to receive and hold property both movable and immovable acquired by virtue of purchase, gift, grant, testamentary disposition or otherwise, shall be held possessed and enjoyed by the Corporation for the purposes set out in this Bill.

In support of his contention the petitioner relied on clause 3, which refers to the general objects of the Corporation. Clause 3 referred to earlier, includes 7 sub clauses. Clause 3, read with the Preamble to the Bill, clearly set out that the intention of the corporation is to 'propagate the religion'. This propagation is carried out through the establishment and maintenance of catholic schools and other schools that are maintained or assisted by the

state. Furthermore, it was submitted that sub - clauses (c), (d), and (e) of clause 3 would give a statutory right to the corporation to provide assistance to persons, which would be economic or financial in nature, and would be quite distinct from the observance and practice of a religion, which is a fundamental right guaranteed by Article 14(1)(e) of the Constitution.

It was further submitted that when a statutory right is given to impart religious, educational and vocational training to youth, to teach in pre schools, schools, colleges and Educational Institutions, to serve in Nursing Homes, Medical Clinics, Hospitals and Refugee Camps with the object of propagating the Religion, that would necessarily result in alluring or converting of persons of other religions to the faith that is sought to be spread.

Furthermore it was submitted that by establishing and maintaining Creches, Day Care Centres, Homes for the elders, Orphanages, Nursing Homes and Mobile Clinics and care for the infants, aged, orphans, destitutes and the sick, the corporation is reaching the people who are in distress and or in need and thereby taking advantage of their inexperience, trust, low intellect and naivety. It was therefore argued that freedom of thought, conscience and religion of other persons guaranteed by Article 10 would be infringed.

Petitioner also made the submission that the objects enumerated in clause 3 would even violate Article 9 of the Constitution.

Learned Additional Solicitor - General, representing the Hon. Attorney - General, has supported the grounds that have been urged by the petitioner.

Petitioner referred to the Bills of similar nature that were considered by this Court *In re Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill* (SC Determination No. 2/2001) and *In re New Wine Harvest Ministries (Incorporation) Bill* (SC Determination No. 2/2003).

The petitioner relied on several Articles of Human Rights covenants and the decisions of the European Court which has recognized the unfettered freedom of a person to adopt a religion of his or her choice.

Article 10 of our Constitution reads as follows :

> "Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice"

Article 10 could be regarded as an absolute right as there are no restrictions in terms of Article 15 of the Constitution. Therefore every person has a constitutional guarantee that he has the freedom to adopt a religion or belief of his choice.

According to the petitioner it would appear that the main object of the Bill is to propagate a religion while taking advantage of the vulnerability of certain persons. The Supreme Court in India has considered the question of freedom of religion and conversion of persons into one's own religion in *Rev. Stainislaus* v *State of Madhya pradesh and Others* (AIR 1977 SC pg. 908) which was cited with approval in SC Determination No. 2/2001. In this case one of the questions raised for consideration of the Supreme Court was that whether the two Acts in question were violative of Article 25 (1) of the Indian Constitution.

Article 25 (1) of the Indian Constitution reads as follows :

> "Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

The Indian Constitution spells out the word 'propagate' in Article 25 (1). Article 10 and 14 (1) (e) of our Constitution do not refer to the word 'progagate' and therefore, it could be said that the provisions in our Constitution are more restrictive than that of Article 25 (1) of the Indian Constitution. Ray, CJ. referring to the word 'propagate' in Article 25 (1) was of the view that,

> "..... for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees 'freedom of conscience' to every citizen and not merely to the followers of one particular religion, and that in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike."

In such circumstances, as pointed out in SC Determination No. 2 of 2001, the reasoning of Ray CJ. would apply more forcefully with regard to Articles 10 and 14 (1) (e) of our Constitution.

During the course of the submissions, our attention was also drawn to several International Conventions in which an unfettered freedom for a person to adopt a religion of his or her choice has been recognized. For instance Article 18 of the Universal Declaration of Human Rights states that,

> "Everyone shall have the right to freedom of thought conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Article 18 (2) of the International Covenant on Civil and political Rights which refers to a situation in which there could be subjection to coercion states that,

> "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

The decision of the European Court in *Larissis* v *Greece* is a case in point with regard to the circumstances given in clause 3 of the Bill which seeks to 'spread knowledge of catholic religion'. An examination of clause 3 (c), (d) and (e), indicate strong relationships that of teacher - student, nurse / doctor - patient, curator - refugee and that of guardian - minor. In the *Larissis's case*, three officers of the Greek Air Force, who were followers of pentecostal church were convicted for proselytalising three Airmen of a lesser rank. With regard to the proselytalising of the Airmen by officers of superior rank, the European Court was of the view that,

> "The Commission found that the interference could be justified as ensuring that the three airmen's religious beliefs were respected, in view in particular of the speial character of the relationship between a superior and a subordinate in the armed forces, which rendered the subordinate more susceptible to influence in a variety of matters including religious beliefs."

In a situation where toddlers, children, invalids, aged and refugees are concerned, they would be in a similar or a worse position as that of an airman under a superior officer in an airforce, and the reasoning of the European Court to the susceptibility of subordinate officers to superiors should apply with greater force. Where there are special relationships that exist, preaching would create a situation where there could be infringement of freedom of thought of the person, who is under authority as there could be compulsion to that effect.

Executing pressure on people by offering material or social advantage in order to convert into their religion was discussed in the European Court decision in *Kokkinakis* v *Greece*. This decision deals with a situation similar to the instances referred to in the preamble and clause 3 of the Bill. In that case a Jehova's Witness was convicted for proselytism, when an attempt was made to convert a wife of a Cantor in the Orthodox Church by visiting her house to teach their religion. Considering the activities of offering material or social advantage, the Court was of the view that,

> "First of all, distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956, under the auspices of the World council of Churches describes as an essential mission and a responsibility of every Christian and every church. The latter represents a corruption or deformation of it. **It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.**"

The provisions in the Bill, viz, the Preamble, clause 3 and also clause 5, which deal with the powers of the organization that includes inter alia to be able to receive and hold property both movables and immovables and or to dispose such property, create a situation which combines the observance and practice of a religion or belief with activities which would provide material and other benefits to the inexperience, defenseless and vulnerable people to propagate a religion. The kind of activities projected in the Bill would necessarily result in imposing unnecessary and improper pressures on people, who are distressed and in need, with their free exercise of thought, conscience and religion with the freedom to have or to adopt a religion or belief of his choice as provided in Article 10 of the Constitution. What Article 10 postulates is to adopt a religion or belief of his or her choice and the execution of improper inducement would not be compatible with such a provision.

For the aforementioned reasons we hold that the provisions in clauses 3 and 4 of the Bill are inconsistent with Article 10 of the Constitution.

The petitioner submitted that the objects enumerated in clause 3 also violates Article 9 of the Constitution.

Article 9 of the Constitution reads as follows:

> "The Republic of Sri Lanka shall give the Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the *Buddha Sasana,* while assuring to all religions the rights granted by Articles 10 and 14(1)(e)."

The petitioner submitted that the effect of Article 9 is to 'protect and foster' the *Buddha Sasana* whilst assuring to all religions the rights mentioned in Articles 10 and 14(1)(e) of the Constitution. Therefore the petitioner contented that a person of other religions could exercise the said right as long as it does not affect the *Buddha Sasana.* It was also submitted that when an institution is established to propagate Christianity by providing material and other benefits and thereby converting such recipients to the said religion, that would affect the very existence of Buddhism.

As referred to earlier, the Constitution does not recognise a fundamental right to propagate a religion. the experession 'propagate' has a number of meanings, but according to the shorter Oxford Dictionary it means 'to spread from person to person, or from place to place to disseminate, diffuse (a statement, belief, practise, etc).' In the Supreme Court Determination No. 2/2001 it was stated that,

> "In Sri Lanka the Constitution does not guarantee a fundamental right to 'propagate' religion as in Article 25(1) of the Indian Constitution. What is guaranteed here to every citizen is the fundamental right by Article 14(1)(e) to manifest, worship, observe, practice that citizen's religion or teaching."

IN such circumstances, although it is permissible under our Constitution for a person to manifest his or her religion, spreading another religion would not be permissible as the Constitution would not guarantee a fundamental right to propagate religion. Even in situations where propagation is treated as a fundamental right enshrined in a Constitution, the entitlement has not extended to convert another person to one's own religion as that would impinge on the 'freedom of conscience. (Rev. Stainislaus v State of Madhya Pradesh). Similarly when there is no fundamental right to propagate, if efforts are taken to convert another person to one's own religion, such conduct could hinder the very existence of the *Buddha Sasana.* What is guaranteed under the Constitution is the manifestation, observance and practice of one's own religion and the progagation and spreading Christianity as postulated in terms of clause 3 would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana.*

Clause 3(1)(a) and (b) in the Bill referred to earlier, states that the corporation is constituted and declared to be, to spread knowledge of catholic religion and to impart religious, educational and vocational training to youth.

Those sub clauses speak not merely of spreading a religion, but spreading knowledge of a religion.

In these circumstances we are inclined to agree with the submissions made by the petitioner that clause 3 of the Bill, as presently constituted, would be inconsistent with Article 9 of the Constitution.

The Petitioner also referred to clause 4 of the Bill which is in the following terms :

> "The Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka shall be appointed according to the Constitutions and Statutes governing the said Congregation of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka which shall be in conformity with the laws and usages of the Roman Catholic Church."

The 'Constitutions' and the 'statutes' which govern the appointments of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka referred to in this clause are not before Parliament. Learned Additional Solicitor General submitted that there is a possibility of the Constitutions and the statutes to be changed in conformity with the law, and usages of the catholic church. In such circumstance that would amount to an abdication of legislative power by the Parliament which would violate Article 76(1) of the Constitution.

Clause 3 referred to above is the principal provision of the Bill. Since the material contained in this provision is inconsistent with Articles 9 and 10 of the Constitution we make a determination in terms of Article 123(2) of the Constitution that the Bill comes within the purview of Article 83(a) and therefore it is required to be passed by the special majority as provided for in Article 84(2) of the Constitution and approved by the People at a Referendum.

We shall place on record our appreciation of the assistance given by the learned Additional Solicitor General and the learned Counsel for the petitioner who made submissions in this matter.

Shirani A. Bandaranayake.
Judge of the Supreme Court.

H. S. Yapa,
Judge of the Supreme Court.

Nihal Jayasinghe,
Judge of the Supreme Court.

Introduced in Parliament by Mr. Joseph Pararasasingham, M.P. for Batticaloa District on : 09.07.2003 and was referred to the Minister of Interior and Christian Affairs for report to Parliament.
Bill No: 137
Decision of the Supreme Court Conveyed to Parliament on : 05.08.2003
Bill was not proceeded with.

2003

12. INLAND REVENUE (SPECIAL PROVISIONS) (AMENDMENT)

A

BILL

To amend the Inland Revenue (Special Provisions) Act, No. 10 of 2003

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

INLAND REVENUE (SPECIAL PROVISIONS) (AMENDMENT) BILL

A BILL TO AMEND THE INLAND REVENUE (SPECIAL PROVISIONS) ACT, NO. 10 OF 2003

In the matter of an application under Article 121(1) of the Constitution.

Supreme Court of Sri Lanka
Special Determination No.: 20/ 2003
and
Special Determination No.: 21/2003.

Present :

Ameer Ismail	Judge of the Supreme Court	
P. Edussuriya	Judge of the Supreme Court	
T. B. Weerasuriya	Judge of the Supreme Court	
SC (SD) No.: 20/2003	Nihal Sri Ameresekera	– Petitioner
SC (SD) No.: 21/2003	Sunil Handunetti	– Petitioner

Counsel:

P. A. Ratnayake, Additional Solicitor General with Udithe Egalahewa SC, M. R. Ameen SC, and Rajiv Goonetilleke SC for the Attorney General.

K. Kanag-Isvaran P. C. with Dr. Lakshman Marasinghe, M. A. Sumanthiran, Ms. Vindya Weerasekera, Viran Corea and Shivaan Kanag-Isvaran for the petitioner in SC (SD) 20/2003.

Parakrama Agalawatte for the petitioner in SC (SD) 21/2003.

The Court assembled for hearing on 07th August, 2003.

The petitioners presented their respective petitions on 29th and 31st July, 2003. The Additional Solicitor General and Counsel for the petitioners assisted Court when both applications were taken up together for consideration and thereafter, they tendered meticulously prepared written submissions.

The Bill entitled the " **Inland Revenue (Special Provisions) (Amendment)**" was published as a Supplement in Part II of the Gazette of July 11, 2003 and was placed on the Order Paper of Parliament on 25th July, 2003.

The petitioners invoked the jurisdiction of this court in terms of Article 121 (1) of the Constitution to determine whether Clauses 2 and 3 of the said Bill are inconsistent with Articles 3, 4 and 12(1) of the constitution.

It would be useful to refer firstly to the **Inland Revenue (Special Provisions) Act, No. 7 of 2002,** which was certified on 5th June, 2002, in order to understand the legal effect of the provisions of Clauses 2 and 3 of the Bill. It was an Act to enable persons who had not furnished a return of income or a full return of income for any of the years of assessment

commencing prior to April 1, 2002, to make a declaration to the commissioner-General in respect of undeclared profits and to indemnify such persons against liability to pay certain taxes and against investigations, prosecutions or penalties in respect thereof. The object of the enactment was to secure future compliance by such persons with tax laws and it provided for matters connected therewith and incidental thereto.

The **Inland revenue (Special Provisions) Act, No. 7 of 2002** was repealed by the **Inland Revenue (Special Provisions) Act, No. 10 of 2003,** which was certified on 17th March, 2003.

Section 2 of **Act, No. 10 of 2003** similarly enabled persons who had not furnished a return of income and assets prior to March 31, 2002, to make a declaration in respect thereof. It also made provision for the grant of certain concessions to such declarants and non-declarants and to indemnify such persons against liability to pay certain taxes and against liability from investigations, prosecutions and penalties under specified statutes. It also provided for a person who had already made a declaration to make a further declaration under Section 2 to ascertain the correctness of his position and to extend immunities to such person.

Section 2 of the Act also provided that such a declaration of the sources of income or assets as at April 1, 2002, should be made to the Commissioner-General on or before June 30, 2003.

Section II of the **Act, No. 10 of 2003** provided that any declaration made in terms of section 2 of the **Inland Revenue (Special Provisions) Act, No. 7 of 2002** prior to its repeal, shall notwithstanding such repeal be deemed to be a declaration made in terms of Section 2 of the present Act and shall be so considered for the purpose of granting any immunity or exemption from liability.

Section 11 further provided that any such person whose declaration was deemed to be accepted in terms of this section may, if he so desired, notify the Commissioner-General requesting any alteration, amendment, or variation of such declaration in order to bring it into conformity with its provisions.

The petitioner in the present application, SC (SD) 20/2003, had previously, on 21st April, 2003, invoked the jurisdiction of this Court in SC (SD) Application No. 11/2003, seeking to challenge the provisions of Act, No. 10 of 2003 as being inconsistent with the provisions of the Constitution. However, while the present application was pending, a preliminary objection taken to that application was upheld and the application was dismissed. The finding of the court was that the petitioner could not circumvent the preclusive clause in Article 80 (3) of the Constitution by seeking to challenge the validity of the provisions of the bill which preceded the relevant act of Parliaments.- SC Minutes of 4/8/ 2003.

Clause 2 of the present impugned Bill amends **Section 2 of the Inland Revenue (Special Provisions) Act, No. 10 of 2003,** hereinafter referred to as the "principal enactment". Its legal effect is to extend the period within which the declaration referred to therein has to be made to the Commissioner-General from June **30, 2003 to August 15, 2003.** It similarly extends the period up to August 15, 2003 for a declarant to verify the correctness of any previous declaration made by him and thereby become entitled to the benefit of the immunity to be granted.

Clause 3 amends Section 11 of the principal enactment, the legal effect of which is to enable persons who had made a declaration in terms of the repealed **Inland Revenue (Special Provisions) Act, No. 7 of 2002,** which is now deemed to be a declaration made in terms of section 2 of this Act, to make any amendment, alteration, or variation of any such declaration at any time prior to August 15, 2003.

Counsel for the petitioners submitted that Parliament cannot by merely extending the time period re-enact, in effect, indirectly the provisions of **Act, No. 10 of 2003**, which lapsed on 30th June, 2003 and that such an exercise, being inconsistent with article 3 read with Article 4 of the Constitution requires the approval of the people at a referendum.

It was also submitted that the **Inland Revenue (Special Provisions) Act, No. 10 of 2003** is an "expired' Act or " dead" law and the clauses 2 and 3 of the said Bill seek to give life to the said Act for the period from 1st July, 2003 to 15th August, 2003 and that it would thus constitute a fresh enactment incorporating by reference the provisions of **Act, No. 10 of 2003.**

The petitioner in SC (SD) 20/2003 presented his petition dated 29th July, 2003 while his previous application SC (SD) 11/2003, challenging the constitutional validity of the provisions of **Act No. 10 of 2003** as being inconsistent with the Constitution, was pending and before it was decided. Consequently, the petitioner in his petition referred to the said Act as the " purported" Act and by incorporating the words of the proposed amendment in the present Bill extending the time up to August 15, 2003, he produced what was termed as a composite "Bill" which appeared to be the Bill in respect of which he was seeking a determination. However, learned President's Counsel for the petitioner explicitly stated at the hearing that he was not seeking a determination as to the Constitutional validity of the provisions of Act, No. 10 of 2003 but that he was seeking to impugn only the present Bill which is to amend the principal enactment.

Learned Additional Solicitor General replied that Act No. 10 of 2003 was not a temporary statute which had lapsed or had become "dead" law, drawing a distinction between the characteristics of a perpetual statute and a temporary statute. A perpetual statutory is not perpetual in the sense that it cannot be repealed but that it is perpetual in that it is not abrogated by affluxion of time. A temporary statute can if at all become "dead" law upon the expiry of the time stipulated in the statute. An example of such a temporary statute is the Rehabilitation of Public Enterprises Act, No. 29 of 1996, which expressly provided in section 9 that, " The provisions of this Act shall be operative for a period of six months from the date of its commencement."

However, Act No. 10 of 2003 does not contain a provision that limits its validity. The time period up to 30/6/2003 specified in the Act does not relate to the time period up to which the Act would be in force, but to the period up to which the relevant declaration could be made in terms of Section 2 of the Act. It was also submitted that merely because some of the purposes of a statute may be temporary, it does not make the statute itself temporary.

A perusal of some of the other sections clearly reveals that the Act was not meant to be of a temporary nature. Section 10 of the Act, No. 10 of 2003 is of general application, restricting the time period for taking steps for recovery of taxes for a period of five years after the tax was regarded as being in default. It is applicable not only to taxes that were due at the time the Act was passed but also to tax liabilities that would arise in the future, indicating clearly that the statute would be effective even beyond 30th June, 2003. It is therefore incorrect to label it as a temporary statute or an " expired" Act. Similarly section 9 of the Act provides for the consequence of failure to come within the provisions of this Act, which is yet another indication that the Act was not restricted to be operative for a specified time period.

We are therefore of the view that the principal enactment, Act, No. 10 of 2003, is alive and can be amended.

Clauses 2 and 3 of the Bill seek to amend Sections 2 and 11 of the principal enactment, in a limited way, by extending the period of the validity of its provisions up to August 15, 2003. It is evident that the proposed Bill is an amendment which does not attract the principles relating to referential incorporation. The effect of an amendment on the principal enactment is that it is read as if the words of the amendment had been written into it from the beginning.

We have considered the provisions of the Bill and we are of the opinion that neither the Bill nor any of its provisions is inconsistent with any of the provisions of the Constitution.

We accordingly determine that the provisions of the Bill are consistent with the Constitution.

Ameer Ismail
Judge of the Supreme Court

P. Edussuriya
Judge of the Supreme Court

T. B. Weerasuriya
Judge of the Supreme Court

Bill was Presented to Parliament on : 25.07.2003
Bill No.: 146
Decision of the Supreme Court Conveyed to Parliament on : 19.08.2003
Passed on : 21.08.2003
Speaker's Certificate Endorsed on: 22.10.2003
Title : Inland Revenue (Special Provisions) (Amendment) Act, No. 31 of 2003

2003

13. RECOVERY OF LOANS BY BANKS (SPECIAL PROVISIONS) (AMENDMENT)

A

BILL

To amend the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990

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

"RECOVERY OF LOANS BY BANKS (SPECIAL PROVISIONS) (AMENDMENT) BILL

In the matter of an application under Article 121(1) of the Constitution.

S. C. (SD) NO. 22/2003

Kusumin Kirthi Kumarry
(Petitioner)

Kulandan Palaniandy
Nihal Sri Ameresekere
(Intervenient-Petitioners)

Hon. Attorney-General
(Respondent)

Before :

Sarath N. Silva	Chief Justice
P. Edussuriya	Judge of the Supreme Court
Hector S. Yapa	Judge of the Supreme Court
J. A. N. de Silva	Judge of the Supreme Court
T. B. Weerasuriya	Judge of the Supremet Court

Counsel:

K. Tiranagama with M. J. A. Hassan, Ms. H. Ratnayake and Piyasena Dissanayake for the Petitioner.

U. Egalahewa, Senior State Counsel for Attorney- General

M. A. Sumanthiran with Miss. P. Bandaranayake for the Intervenient - Petitioner

Nihal Ameresekere, Intervenient-Petitioner (in person)

The Court assembled on 26.08.2003 at 10.30 a.m.

A Bill titled "Recovery of Loans by Banks (Special Provisions) (Amendment)", was published in the Government Gazette of 04.07.2003, and was placed on the Order Paper of Parliament. The Petitioner abovenamed invoked the jurisdiction of this Court to determine the question whether the Bill is inconsistent with the provisions of the Constitution. The other Petitioners have intervened in these proceedings after the original Petitioner validly invoked the jurisdiction of this Court in terms of Article 121 (1) of the Constitution.

We have heard submissions of learned Senior State Counsel representing the Hon. Attorney-General, counsel for the Petitioner and the Intervenient - Petitioner and, the Intervenient - Petitioner who appeared in person (Mr. Ameresekera.)

The Bill seeks to amend the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990. This Act is based on a Bill which was considered by the Cabinet of Ministers as being urgent in the national interest and referred by the then President for a Special Determination by this Court. At that stage, the Court made a determination that the provisions of the Bill were not inconsistent with the Constitution, resulting in the Bill being enacted as Act, No. 4 of 1990.

Whilst learned Senior State Counsel contended that the provisions of the Bill now before this Court only supplement the provisions of the Act presently in force and should be considered as being consistent with the Constitution in view of the previous Special Determination ; learned Counsel for the Petitioner and Intervenient - Petitioner and Mr. Ameresekera submitted that the provisions of the Bill are not merely incidental in nature and cover new ground and seek to strengthen the provisions of the present Act to the detriment of certain classes of persons, denying to them the equal protection before the law guaranteed as a fundamental right under Article 12 (1) of the Constitution. It is further contended that these persons are, in the matters at issue, effectively denied access to a Court or other institution administering justice, for the protection, vindication or enforcement of their rights, in contravention of Article 105 (1) of the Constitution.

The provisions of the Bill broadly relate to mortgages of movable and/or immovable property. The Mortgage Act in Section 3 defines a mortgage to include " any charge on property for securing money or money's worth." Thus a mortgage is not a transaction complete in itself and is intrinsically connected to a transaction or facility where money is lent or advanced. The Mortgage Act was intended, as stated in its long title, to amend and consolidate the law relating to mortgage. It provides for a hypothecary action to obtain an order from Court decline the mortgaged property to be bound and executable for the payment of moneys due upon any mortgage and to enforce such payment by a judicial sale of the mortgaged property. In terms of Section 48, where the Court finds that the mortgage ought to be enforced, the decree should provide for a sale of the land within 2 months. Whilst, the provisions of the Act secure the interests of the mortgagee, the significant feature of the Act is that the decree for sale should be preceded by a finding of a Court that the mortgage ought to be enforced. This necessarily involves a finding by the Court that the debtor is in default of re-payment of money that had been lent or advanced upon the security of the mortgage.

From this background of the law relating to mortgage and a proceeding by way of a hypothecary action, we would move to consider the nature and the exercise of judicial power. Article 4 of the Constitution which lays down the manner in which the sovereignty of the People shall be exercised and enjoyed, specifically provides in sub-paragraph (c) that the judicial power of the People shall be exercised by Parliament through Courts and institutions, created and established or recognized by the Constitution, or created and established by law. The essential concomitant of the exercise of judicial power is set out succinctly and effectively in Article 105 (1) of the Constitution which reads as follows:

"Subject to the provisions of the Constitution the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be –

(a) the Supreme Court of the Republic of Sri Lanka,

(b) the Court of Appeal of the Republic of Sri Lanka,

(c) 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."

Here, we see the practical implications of the exercise of judicial power from the perspective of its process and objective. The process is the administration of justice and its objective is to protect, vindicate and enforce the rights of People. The substratum on which both the process and objective rests, is the law. The law ordains and establishes the institutions that administer justice and provide for their procedures. This is the institutional and procedural make up of the process of the administration of justice. The substantive law, be it the common law, or law enacted by a legislative body, lays down the rights in their wider

scope, as encompassing co-relative duties and so on, which would be protected. Vindicated and enforced by the institutions administering justice. This basically, is the Rule of Law, on which our Constitution is based. Therefore it would be inconsistent with the Rule of Law and the requirements of our Constitution as to the administration of justice to invest in any person the power to decide in respect of his rights as against another, and further to empower that person who so decides to enforce his unilateral decision by the sale of property of such other person.

The making of a decision as to a right as against another person and the enforcement of that decision against such person are the two stages of the administration of justice in a civil matter. These two stages are provided for in Part I of the Civil Procedure Code, extending from Sections 6 to 372.

The enforcement of a right as against another person by seizure and sale of property without the intervention of a Court, is described as " parate execution". The Roman Dutch Law being our common law, has looked upon this process described as "parate execution" with extreme disfavour. The preceding analysis of judicial power, its scope and exercise demonstrates that our constitution frame-work is set against any recourse to "parate execution", in our law. The Constitution positively assures to every person the protection, vindication and enforcement of his rights by an institution established or recognized by law for the administration of justice. Since any transaction which may result in a dispute, involves rights and duties of parties *inter se*, the constitutional guarantee is a two-way process which should ensure equally to the benefit of both parties.

The Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 very clearly permits a Bank as defined in Section 22 of the Act to exercise the right of "parate execution" in respect of any property mortgage to such Bank where a default has been made in the payment of any sum due on any loan. Section 3 of the Act provides that whenever default is made, the Bank may in its discretion take action as specified either in section 5 or in section 4. Section 5 empowers the Board of the Bank to authorize a person by Resolution to enter upon any immovable property mortgaged to the Bank and to take possession and maintain such property. Section 4 empowers the Board to authorize any person by Resolution to sell any property mortgaged to the Bank as security to recover the unpaid portion of any loan and the interest due thereon.

Section 9 provides for such sale and section 11 empowers the Board of the Bank to fix an upset price below which the property shall not be sold to any person other than the Bank to which the property is mortgaged.

Section 15 empowers the Board of the Bank to issue a certificate of sale in respect of such property, which has the effect of vesting the property in the purchaser. It further provides that no person claiming through the borrower could move any Court to invalidate the sale for any cause whatsoever or to claim any right, title or interest, in the property as against the purchaser. Section 15 (2) provides that the certificate signed by the Board shall be conclusive proof with respect to the sale of any property and of the due compliance with all the provisions of the Act relating to the sale of the property.

The legislative scheme as contained in the Act empowers the Bank to decide that a default has been made in respect of any loan and to proceed upon such decision to take possession of the mortgaged land and to sell it by public auction without any intervention of a Court of justice. The Bank is also empowered to fix the price below which no person

other than the Bank would purchase such property and to issue a certificate of sale to any purchaser and which shall be conclusive evidence of the due compliance with the provisions of the Act. It also prevents the borrower or any person deriving interest from the borrower from seeking to invalidate such sale in a Court of law.

From the foregoing analysis, it is seen that where a Bank that has lent or advanced money on the security of a mortgage alleges a default on the part of the debtor, the Bank has a choice of resorting to a one of two procedures for recovery. The first, is the regular procedure set out in the Mortgage Act which provides for a hypothecary action and if the Court finds that the mortgage ought to be enforced a sale of the property is ordered.

The second is the procedure laid down in Act No. 4 of 1990, whereby the Bank could at its own option, without recourse to a Court, take over the possession and management of the mortgaged property, cause it to be sold and issue a certificate conveying title in the property to the purchaser. From the perspective of the provisions of the Constitution the question that arises for consideration is whether the availability of two such procedures that may be availed of by the Bank is inconsistent with Article 12 (1) of the Constitution which guarantees the equal protection of the law to every person.

In India, the Supreme Court has dealt with several instances where two procedures have been provided by law to cover the same ground H. M. Seervai in his book titled " Constitutional Law of India" has examined the dicta in several judgements of the Indian Supreme Court and stated the conclusion to be drawn from them is as follows :

" The principle therefore is that the Court will strike down harsh, oppressive or unconscionable law prescribing a procedure other than the ordinary procedure" – 4th Edition – Vol. I, page 532

The Petitioner contended, that the procedure contained in Act No. 4 of 1990 whereby the Bank being one of the parties to the transaction is given the power to decide on the matter of default and enforce its rights by selling the property mortgaged and conveying title to the purchaser, is harsh, oppressive and unconscionable. However, the Petitioners concede that the Court cannot examine the constitutionality of any of the provisions of the law presently in force. They contend that the amendments in the Bill seek to strengthen the harsh, oppressive and unconscionable provisions already contained in the Act No. 4 of 1990. From this stand point they contend that the provisions of the Bill should be held as being inconsistent with Article 12 (1) and 105 (1) of the Constitution.

The specific provisions in the Bill adverted to by the Petitioners as being objectionable are as follows :

(i) Clause 2 which introduces a new provision as section 2 (1) (c) and, the amendment to section 5 contained in clause 4, that have the effect of extending the process of the parate execution to instances where the property has been mortgaged by a person other than the borrower. This would cover a mortgage given by a guarantor as security for the debt of the borrower.

(ii) Clause 3 which amends section 4 and specifically provides that it shall not be competent for the borrower or the mortgagor or any other person claiming through them to move in any Court to invalidate or annul a Resolution of the Board of the Bank authorizing a sale of the land. It is further provided that no Court shall entertain any such application.

(iii) Clause 3 (3) introduces a new provision as Sections 4(2) and (3), where the right of parate execution is extended to a syndicated loan secured by a concurrent mortgage given in favour of several Banks. The provision empowers any one such Bank to resort to parate execution in respect of the entire amount outstanding.

(iv) Clause 6 which introduces a new provision as section 8(3) providing that any application made by a borrower or mortgagor or any other person for an injunction or enjoining order against a Bank, restraining the Bank from taking any steps pursuant to a resolution to sell the property, should be filed within a period of 30 days of the publication or receipt of notice of such Resolution.

(v) Clauses 7 and 15 which introduce new provisions as section 8A and 20A creating offences punishable with fine and/or imprisonment to cover situations where any movable property that is mortgaged is removed from the place where it is usually kept without the prior written consent of the Bank and where immovable property is in any way altered resulting in a decrease of the value of such property.

(vi) Clause 16, amends the definition of the term " Bank" to include specialized Banks, Finance Companies and the Housing and Development Finance Corporation.

The Petitioners contend that these provisions are pervasive in their effect and extend the provision of the law that is already harsh and oppressive to cover new transactions and new lending institutions, denying the equal protection of the law and access to justice to a wider category of persons.

The matters stated at (i) above would extend the process of " parate execution" to any person who has not even borrowed money from a Bank but who merely comes in as a guarantor. Under the law that prevails it is only upon an established default on the part of the principal debtor that a guarantee becomes effective. The harshness of the law that is proposed is brought into sharp focus by empowering the Bank to decide on the default in respect of the borrower and proceedings to enforce the guarantee by selling the property of the guarantor who is not a borrower.

The matters stated in (ii) and (iv) above, have the effect of specifically denying access to justice in respect of a borrower or mortgagor, where the Bank resorts to "parate execution". Section 4 as amended provides that a borrower or mortgagor cannot seek to invalidate or annul a resolution and bar any Court from entertaining any such application. Section 8(3) lays down a time limit within which an application for an injunction or enjoining order can be made. If a mortgagor or borrower cannot move to invalidate a resolution for sale there would in any event be no basis to make an application for an injunction or enjoining order restraining the Bank from taking steps pursuant to such Resolution. Thus the resulting effect is that, on the one hand the Bank could proceed to a seizure and sale of the property without the intervention of Court and on the other, the borrower or mortgagor cannot have recourse to even a regular action to dispute the course of action taken by the Bank.

The offences, in Sections 8A and 20A, visit the person lawfully in possession of property with penal sanctions in respect of actions which he could otherwise take under the ordinary law of the land.

The Bill loses sight of the fact that taking of a loan or advance on the security of a mortgage, is a civil transaction entered into freely by two parties. Such a transaction cannot lead to an offence punishable under law, where a person in possession of property takes action in respect of the property as he may do under common law.

It is clear from the foregoing analysis, that we have to uphold the grounds urged by the Petitioner and the Intervenient Petitioners. This Court does not have the jurisdiction to examine the constitutionality of the Act already in force. However, an amendment cannot be viewed in isolation. It certainly cannot derive a stamp of constitutionality from the Act that is in force. Lenders and borrowers are both parties to a civil transaction. They belong to a single class of persons in the perspective of Article 12(1) of the Constitution which firmly provide that " all persons are equal before the law and are entitled to the equal protection of the law." There may be inherent strengths and weaknesses in the parties to a transaction or in any relationship whilst the law may be affirmative action seek to remedy such inherent inequality, the law certainly cannot strengthen the strong and weaken, the weak. Such a course of action is manifest in the amendment which not only denies to a mortgagor the equality guaranteed by Article 12 (1) but also denies to him access to justice as provided in Article 105(1). This amounts to a subversion of the due process of law.

For the reasons stated above we make determination in terms of Article 123(2)(b) that the Bill bearing title " Recovery of Loans by Banks (Special Provisions) (Amendment) may only be passed by the special majority required under the provisions of Article 84(2) of the Constitution.

Sarath N. Silva
Chief Justice

P. Edussuriya
Judge of the Supreme Court

Hector S. Yapa
Judge of the Supreme Court

J. A. N. de Silva
Judge of the Supreme Court

T. B. Weerasuriya
Judge of the Supreme Court

Bill was Presented to Parliament on: 05.08.2003
Bill No: 147
Decision of the Supreme Court Conveyed to Parliament on: 23.09.2003
Bill was not proceeded with.

2003

14. DEBT RECOVERY (SPECIAL PROVISIONS) (AMENDMENT)

A

BILL

To amend the Debt Recovery (Special Provisions) Act No. 2 of 1990

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

DEBT RECOVERY (SPECIAL PROVISIONS) (AMENDMENT) BILL

In the matter of an Application under Article 121(1) of the Constitution

S.C. (SD) NO. 23/2003

M. Rohana Wijesena
(Petitioner)

Manel Rajkumar
Kulandan Palaniandy
Nihal Sri Ameresekere
(Intervenient-Petitioners)

Hon. Attorney-General
(Respondent)

Before: Sarath N. Silva - Chief Justice
P. Edussuriya - Judge of the Supreme Court
Hector S. Yapa - Judge of the Supreme Court
J.A.N. de Silva - Judge of the Supreme Court
T.B. Weerasuriya - Judge of the Supreme Court

Counsel : K. Tiranagama with M.J.A. Hassan, Ms. H.Ratnayake and Piyasena Dissanayake for the Petitioner.

U. Egalahewa, State Counsel for Attorney-General

M.A.Sumanthiran with Miss P. Bandaranayake for the Intervenient Petitioner.

Nihal Ameresekere Intervenient-Petitioner (in person)

Court assembled at 10.30 a.m. on 26.8.2003

A Bill titled "Debt Recovery (Special Provisions) (Amendment)" was published in the Government Gazette of 4.7.2003 and was placed on the Order Paper of Parliament. The Petitioner above named invoked the jurisdiction of this Court to determine the question whether the Bill is inconsistent with the provisions of the Constitution. The other Petitioners have intervened in these proceedings after the original Petitioner validly invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution.

We have heard submissions of learned Senior State Counsel representing the Hon. Attorney-General, Counsel for the Petitioner and the Intervenient Petitioner and the Intervenient Petitioner who appeared in person (Mr. Ameresekere).

The Bill seeks to amend the Debt Recovery (Special Provisions) Act No. 2 of 1990. Counsel for the Petitioner and the Intervenient Petitioner and Mr. Ameresekere submitted that the Bill is inconsistent with Article 12(1) of the Constitution.

The hearing of that matter was taken up together with SC(SD) No. 22/2003 where a similar issue was raised with regard to an inconsistency with Article 12(1) of the Constitution. Counsel and Mr. Ameresekere dealt with both bills together in the respective submissions

made by them. The reasoning set out fully SC(SD) 22/2003 will apply with equal force in relation to this matter in respect of the alleged inconsistency with Article 12(1) cf the Constitution.

The Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 lays down a special procedure that could be availed of by a lending institution when it institutes an action to recover any debt, due to such institution. The provisions in these Acts in effect constitute amendments to the Civil Procedure Code. The code lays down two procedures for the recovery of money lent or advanced. The first is the ordinarily applicable regular procedure and the second is the special summary procedure on liquid claims. In an action where the procedure is regular, as stated in the illustration to Section 7, the Defendant is called upon to formally state his answer to the case which is alleged against him before any question of fact is entertained by the Court, or its discretion thereon is in any degree exercised. Where the summary procedure on liquid claims as provided in Sections 703 to 711 is availed of and summons issue in Form No. 19 of the first schedule, the Defendant cannnot appear or defend the action unless he obtains leave from the Court in the manner that is especially provided. Section 703 provides that the summary procedure on liquid claims could be availed of only where the debt arises upon a bill of exchange, promissory note, or cheque or instrument or contract in writing for a liquidated amount of money or on a guarantee in which the claim against the principal debtor arises from such a document. It is of interest to note that in the Civil Procedure Code, enacted in 1889 at a time when there was no guarantee to every person of the equal protection of the law, a distinction is made between the regular procedure and the stricter summary procedure, not on the basis of the identity of the creditor but on the basis of a neutral circumstance namely the availability of evidence in the form of a written commitment to repay the debt.

On the other hand the Debt Recovery (Special Provisions) Act No. 2 of 1990 passed at a time when there was a constitutional guarantee to every person of the equal protection of the law, makes a distinction on the basis of the identity of the lender. When such a distinction is made between two parties who have entered into a transaction, placing one party in a more advantageous position and submitting the other to a more stringent procedure, the question arises as to an inconsistency with Article 12(1) of the Constitution. Article 12(1) requires that all persons be equal before the law and entitled to the equal protection of the law. The matters stated in S.D.(SC) 22/2003 regarding the application of the equality provision in relation to any law that provides for a special procedure which is seen as harsh, oppressive and unconscionable would apply in relation to this matter as well. The Petitioners concede that this Court has no jurisdiction to examine the constitutionality of the law that has been enacted by Parliament. However, they rely on two particular matters in the Bill that impact on certain limitations that are included in the law that is presently applicable, to minimize its strictness in relation to debtors.

These two matters are as follows :

(i) Clause 2 of the Bill which amend section 2 of Act No. 2 of 1990. The present section 2(2) provides that no action shall be instituted in terms of the special procedure where the sum alleged to be in default is less than Rs. 150,000/=. In the original Act the amount of Rs. 150,000/= was fixed in relation to the principal sum lent or advanced. By the amendment in 1994 the limitation was imposed in relation to the total sum in default which would include the principal and interest. The Bill under consideration reduces this limit to Rs. 50,000/=. The petitioner contended that since 1990 the value of the Rupee decreased considerably due to inflation and other factors. They argue

that if at all, the threshold amount should be increased and not reduced. If the limit is reduced to Rs. 50,000/= it would cover almost any transaction with a lending institution and a wider category of debtors, including those persons who are economically weak would come within the purview of the more stringent special procedure.

(ii) Section 2(1) of the original Act empowers a lending institution to have recourse to the special procedure to recover a debt due to such institution. The term "debt" is defined in Section 30 as amended by Act No. 9 of 1994. In terms of this definition a debt would include any sum of money which is due to a lending institution arising from a transaction had in the course of its business. It is significant that the definition has a clear reservation that a debt "does not include a sum of money owed under a promise or agreement which is not in writing."

In view of this reservation the special procedure could be resorted to only in instances where there is a written promise or agreement on the basis of which the sum due is claimed. This is broadly similar to the provision in the summary procedure on liquid claims. The amendment in clause 8 of the Bill, repeals the definition of the term "debt" in section 30. The substituted definition excludes the words referred to above which limit its applicability to money owed under a promise or agreement which is in writing. The resulting position is that the court would not have any written evidence of the commitment on the part of the debtor when it issues decree nisi in the first instance.

We are inclined to agree with the submission of the Petitioners that the two amendments referred to above would extend the application of the special procedure which is more stringent from the point of the debtor, to a wider category of persons and to any transaction had with the lending institutions, even in the absence of a written promise or agreement to pay.

We are further of the view that there is no rational basis to extent the provisions of the Act that is presently in force in the manner referred to in (i) and (ii) above.

Accordingly we make a determination in terms of Article 123(2)(b) of the Constitution that the Bill bearing the title "Debt Recovery (Special Provisions) (Amendment)" is inconsistent with Article 12(1) of the Constitution and has to be passed by the special majority required under Article 84(2) of the Constitution.

We have further considered in terms of Article 123 (2) (c) whether an amendment could be made to the Bill by which the inconsistency would cease. Accordingly, we make the determination that if clauses 2(1) and 8(1) (in which objectionable provisions referred to above are contained) are deleted, the Bill would cease to be inconsistent with the Constitution.

Sarath N. Silva,
Chief Justice.

P. Edussuriya,
Judge of the Supreme Court.

Hector S. Yapa,
Judge of the Supreme Court.

J. A. N. de Silva,
Judge of the Supreme Court.

T. B. Weerasuriya,
Judge of the Supreme Court.

Bill was Presented to Parliament on : 05.08.2003
Bill No · 148
Decision of the Supreme Court Conveyed to Parliament on : 23.09.2003
Bill was not proceeded with.

2003

15. Water Services Reform

A

BILL

to provide for the supply of water services in Sri Lanka; to regulate and monitor the provisions of water services; to provide for the regulation of Tarrifs for Water Services in Sri Lanka; to specify the standards of water quality and to regulate water quality; to specify level of service and standards to be maintained in the provision of water services; to ensure compliance with consumer protection requirements in the water services industry; to facilitate and promote private sector participation in the water services industry; and to provide for matters connected therewith or incidental thereto.

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

"WATER SERVICES REFORM BILL"

In the matter of an application under Article 121(1) of the Constitution.

S.C. (SD) 24/2003
Nihal Fernando (Petitioner)
Roshan Mendis (Intervenient Petitioner)
Hon. Attorney General (Respondent)

S.C. (SD) 25/2003
Kusumini Kirthi Kumari (Petitioner)
Sunil Handunnetti (Intervenient-Petitioner)
Hon. Attorney-General (Respondent)

Before :

Sarath N. Silva — Chief Justice
Hector S. Yapa — Judge of the Supreme Court
T. B. Weerasuriya — Judge of the Supreme Court

Counsel:

Ms. I. R. Rajapakse with Jagath Gunawardena and Ms. S. Daluwatte for the Petitioner in S.C. (SD) 24/2003
M. A. Sumanthiran with Mrs. P. Bandaranayake for the Intervenient-Petitioner.
K. Tiranagama for the Petitioner in S.C.(SD) 25/2003
P. Agalawatte for the Intervenient Petitioner
Shravindra Fernando, S.S.C., with Mrs. Indika Demuni de Silva S.S.C., for the Attorney General

Court assembled at 10.30 a.m. on 13.11.2003

A Bill bearing the title "*Water Services Reform*" was published in the Government Gazette and placed on the Order Paper of Parliament on 22.10.2003.

Two Petitioners have invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution to determine the constitutionality of the Bill and two persons have intervened in the proceedings by filing appropriate papers. The contention of the Petitioners and the intervenients is that the provisions of the Bill taken as a whole are inconsistent with the Constitution in its content and the procedure followed in having it placed in the Order Paper of Parliament. They rely on grounds that may be summarized as follows :

(i) The Bill seeks to regulate "water services" and to empower the Public Utilities Commission of Sri Lanka as the regulator of water services industry in Sri Lanka to grant licenses to "service providers" who would connect, provide and maintain water services to premises of consumers within the area in respect of which a license is granted. It is contended that the provision of "water services" as defined in the Bill is a function of local authorities and in terms of the 13th Amendment to the Constitution it would be a matter set out in the Provincial Council List, which requires compliance with Article 154G of the Constitution.

(ii) That the Bill specifies the powers of persons licensed as "service providers" that are weighted in their favour which would work to the detriment of the consumers. It is submitted that water services would be provided to any consumer on the basis of an agreement entered into with a licensee on commercial terms and the provisions in the Bill that vest specific powers weighted in favour of a licensee without adequate provision to safeguard the interests of consumers would result in an unequal application of the law, inconsistent with Article 12(1) of the Constitution.

(iii) That, in terms of the General Comment No. 15 (2002) of the Economic and Social Council of the United Nations, the right to water comes within Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. The General Comment specifically states that the right to water is to be considered a human right and since Sri Lanka has acceded to the International Covenant, the provisions of our law should be interpreted in the light of the obligations under the Covenant and in terms of the General Comment made thereon by the Council. On that basis it is contended that the right to water would come within the purview of fundamental rights as referred to in Article 3 of the Constitution and form part of the sovereignty of the People. That the Bill which seeks to remove the function of providing pipe-borne water supply to the people by State agencies including Local Authorities and vest it in private sector licensees would amount to an alienation of the Sovereignty of the People inconsistent with Article 3 of the Constitution.

We would now examine the content of the respective grounds of challenge.

The requirement to comply with Article 154G of the Constitution.

The 13th amendment to the Constitution which set up Provincial Councils vested legislative power in such Councils to be exercised in relation to the subjects in List I of the 9th Schedule (Provincial Council List).

Article 154G(3) provides that no Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after it is published in the Gazette and before it is placed in the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon. After such reference, where every Council agrees to the passing of the Bill it may be passed by a simple majority in Parliament and in terms of Article 154G(3) (b) where one or more of the Councils do not agree to the Bill it has to be passed by the special majority required by Article 82.

The Bill under reference has not been referred by the President to the Provincial Councils, as provided in sub-Article 154G(3) and we have to consider whether such compliance is necessary.

Senior State Counsel contended that the subject of "water services" is not specified in any of the Lists in the 9th Schedule and as such would come within the legislative competence of Parliament as an unspecified subject. The Preamble to the Bill contains a statement which would tend to indicate that the Bill is being enacted as a formulation of national policy on the subject of "water services". In terms of list (11) (Reserved list) it is within the legislative competence of Parliament to make law laying down the national policy on all subjects and functions. On the other hand, the Petitioners contend that water supply has been at all times a function of Local Authorities. The National Water Supplies and Drainage Board Law enacted in 1974, under the provisions of the previous Constitution

established a Public Authority known as the National Water Supplies and Drainage Board, but that law did not ipso facto take away the functions of Local Authorities in relation to water supply. The Petitioners further contended that the Bill contains specific provisions with regard to "service providers" which applies to Provincial Councils and Local Authorities who are deemed to be licensees to provide water for a limited period of 5 years. Thereafter, the function of providing water services would vest in "service providers" granted licenses by the Public Utilities Commission. On this basis it is contended that the Bill is in respect of a matter set out in the Provincial Council List and the provision of Article 154G(3) would apply.

The Bill covers the provision of water services in the whole of Sri Lanka. "Water services" is defined in clause 74 to mean the provision of pipe borne water, supply from a public water supply system, in any urban or rural area including the provision of water through water bowsers and also include public sewerage services. The definition excludes irrigated water and bottled water. In this context it is necessary to examine in its proper perspective, the law with regard to the provision of pipe borne water supply to consumers within the country. The Colombo Water Works ordinance No. 18 of 1907 provided for the vesting of the water works hitherto known as the Ceylon Government Water Works, in the Municipal Council of Colombo. It is thus seen that even prior to the enactment of the Municipal Councils Ordinance in 1947, the supply of pipe borne water was vested in the Colombo Municipal Council. Thereafter this legal regime was extended to the Kandy Municipal Council and the other Municipal Councils in the country. The Urban Councils ordinance empowered the Councils to provide public utility services. In terms of Section 129(a) the provisions of water supply was a public utility service vested in the Council. Sections 133 and 134 specifically provides for the supply of water for domestic purposes. Similar provisions are contained in the Town Councils Ordinance and later in sections 108(a), 114 to 118 of the Pradeshiya Sabha Act No. 15 of 1987. Thus it is clear that the provision of pipe borne water to consumers within any area has been a function vested in the respective local authorities.

The National Water Supplies and Drainage Board Law of 1974, enacted under the provisions of the previous Constitution provides inter alia for the supply of water. However, as correctly submitted by Counsel for the Petitioners, the law did not remove the role of local authorities in this regard. The provisions in the respective Local Authorities Ordinances and the Pradeshiya Sabha Act being a later enactment under the present Constitution, that empower these authorities to supply pipe borne water, remain in force.

Item 4 in the Provincial Council List I, in the 9th Schedule, specifies Local Government as a Subject coming within that List. Item 4:3 provides as follows:

> "Local Authorities will have the powers vested in them under existing law. Municipal Councils and Urban Councils will have powers vested in them under the Municipal Councils Ordinance and Urban Councils Ordiance, Pradeshiya Sabha will have the power vested in them under existing law. It will be open to Provincial Councils to confer additional power on Local Authorities but not to take away their power."

It is seen from the preceding analysis that under existing law the supply of pipe borne water is a function vested in the respective of local authorities. Therefore it is a subject in List I within the legislative competence of Provincial Councils. However, even Provincial Councils cannot take away these powers from the respective local authorities. The Bill under review does not take into account the preceding provisions of the Constitution and the applicable law which vests the supply of water services in local authorities.

Clause 8(1) provides that notwithstanding anything to the contrary in any other written law, no person shall carry on business in Sri Lanka as a provider of water services, unless he is authorized to do so by a licence granted under this Act. Clause 8(2) provides that the National Water Supply and Drainage Board or any Provincial Council or Local Authority or any community based organization who on the appointed is date engaged in providing water services shall be deemed to be a licensee under this Act to carry on such business for a period of 5 years and clause 8(3) provides for the termination of this interim arrangement. Clause 11 deals with local authorities as "asset holders" in relation to "water services" and empowers these authorities to enter into agreements for the abstraction of water resources in the area with any person who seeks a license from the Public Utilities Commission to provide water services to consumers in the area of the particular local authority. On the whole the Bill is pervasive in its content in eroding the functions of local authorities in providing water services to consumers in each area. It seeks to give legislative recognition to local authorities in abdicating their duty to provide an essential public utility service to residents in its area. The provisions of the Bill are functionl in nature with specific application to the matters contained in the Bill. Therefore the Bill cannot be considered as laying down national policy so as to come within List 11(Reserve List).

For the reasons set out above we make a determination in terms of Article 120 read with Articles 123 and 154G of the Constitution that the Bill is in respect of a matter set out in the Provincial Council List and shall not become law unless it has been referred by the President to every Provincial Council as required by Article 154G(3) of the Constitution. Since the Bill has been placed on the Order Paper of Parliament without compliance with provisions of Article 154G(3) we would not at this stage make a determination as to the other two grounds of challenge referred to above.

We wish to place on record our appreciation of the valuable submissions made by learned Counsel who assisted Court at the hearing.

Sarath N. Silva
Chief Justice

H. S. Yapa
Judge of the Supreme Court

T. B. Weerasuriya
Judge of the Supreme Court

Bill was Presented to Parliament on: 22.10.2003
Bill No: 163
Decision of the Supreme Court Conveyed to Parliament on: 20.11.2003
Bill was not proceeded with.

2003

16. FOREIGN EXCHANGE MANAGEMENT

A

BILL

To Provide for the Management and Regulation of Foreign Exchange; to vest the Responsibility for Managing and Regulating Exchange in the Ministry of Finance; to Designate the Central Bank of Sri Lanka as the Agent of the Ministry; to Provide for the Repeal of the Exchange Control Act (Chapter 423); and to Provide for Matters Connected There with or Incidental Thereto

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

A BILL TITLED "FOREIGN EXCHANGE MANAGEMENT"

S. C. Special Determination

No. 32/2003

In the matter of an Application under Article 121 of the Constitution
Rohan Wijesena, Attorney - at - Law,
Legal Officer of Lawyers for Human
Rights and Development
233/1, Cotta Road, Colombo 8.

Petitioner

V.s.

Hon. Attorney - General

Respondent

Before:

C. V. Wigneswaran - Judge of the Supreme Court
J. A. N. de Silva - Judge of the Supreme Court
T. B. Weerasuriya - Judge of the Supreme Court

Counsel :

K.Tiranagama with
Jaufer Hassan for the Petitioner

Saleem Marsoof P.C.,
Addl. Solicitor General with
Milinda Gunatilake S.C.
for the Hon. Attorney - General

The Court assembled at 10 a.m. on 09.12.2003

The Government of Sri Lanka published a Bill of Parliament titled "Foreign Exchange Management" which was presented to Paliament on 19.11.2003 by the Honourable Minister of Finance. The Petitioner has challenged its constitutionality by petition presented to this Court dated 25.11.2003. The Petitioner has thus invoked the jurisdiction of this Court in terms of Article 121 (1) of the Constitution. Honourable Attorney - General was given due notice of the petition.

The said Bill is said to provide for the managemet and regulation of foreign exchange; to vest the responsibility for managing and regulating foreign exchange in the Ministry of Finance; to designate the Central Bank of Sri Lanka as the agent of the Ministry; to provide for the repeal of the Exchange Control Act (Chapter 423) and to provide for matters connected therewith or incidental thereto.

The objections raised by the Peitioner relate to the constitutionality of Clauses 2, 4, proviso to Clause 5(1), clauses 5(2), 5(3), 7, 13(5) and 18.

It was the contention of the learned Counsel for the Petitioner that this Bill sought to designate the Central Bank of Sri Lanka as an agent of the Ministry of Finance while providing for the repeal of the Exchange Control Act (Chapter 423). This, it was argued,

was in direct countravention of the hitherto accepted legal position that the Central Bank of Sri Lanka under the provisions of the Exchange Control Act was to be the agent of the Government of Sri Lanka and the Monetary Board of the Central Bank was entrusted with the duty of implementing the provisions of the Exchange Control Act. The provisions of this Bill sought to replace an independent and neutral body advising all successive Governments on sound fiscal policies to a mere agent of the Ministry of Finance while repealing the Exchange Control Act. It was further pointed out that the Foreign Exchange Management Bill sought to take over the powers vested in and excercised by the Central Bank and the Monetary Board of the Central Bank and vest them in the Ministry of Finance and in the Secretary to the Ministry of Finance. It was argued that this would lead to arbitrary consequences, destroy the independence and neutrality of the Central Bank and bring it under direct political control of the Minister in relation to all foreign exchange matters which would affect and violate the fundamental right to equality before the law and equal protection of the law and go against the principle of the Rule of Law, thereby infringing upon the provisions of Article 12(1) of the Constitution. In particular the provisions of Clauses 2, 4, 5, 7, 13, &18 were referred to as stated above.

The learned Additional Solicitor General denied that there was any inconsistency between the provisions of the Bill and the Constitution. He argued that in terms of Article 43(1) of the Constitution, it was the Cabinet of Ministers, including the Minister of Finance, who were charged with the direction and control of the Government of the Republic and they were "collectively responsible and answerable to Parliament." Therefore the subsitution of " the Ministry of Finance " (Clause 2(3) of the Bill) in place of " the government " (Section 2(1) of the Exchange Control Act) could introduce no change in relation to the nature of the decision-maker. The Bill only sought to identify the decision-maker now more precisely as the Minister and his Ministry while hitherto the entire Government being vested with responsibility did not provide for proper accountability. In any event, it was argued, that both " the Government " and " the Minister "were required to excercise statutory powers reasonably.

The learned Additional Solicitor - General further argued that even presently the activities relating to Public Debt and Exchange Control were agency functions where the Central Bank functioned as the implementing agency carrying out government policy. Therefore he said, the status of the Central Bank did not change by designating it as an agent.

The learned Additional Solictor - General argued that in comparison to Sections 4 and 5 of the Exchange Control Act, No. 24 of 1953 read with its amendments, the present Clause 4 of the Bill took away the discretion granted to the Minister earlier and provided for all Commercial Banks to act as authorized dealers to deal in foreign exchange. Hence he said the new clause was not violative of Article 12(1) of the Constitution.

Dealing with Clause 5 it was submitted that Clause 5(2) provided for every Order made by the Minister under Clause 5(1) to be placed before Parliament for approval. So long as the date on which the Orders shall take effect was to be modified to be the date on which the Orders are approved by Parliament, no question could arise as to the legality or otherwise of actions taken in terms of such Orders prior to approval by Parliament. Further it was pointed out that the provisions of Clause 4 were subject to the provisions of Clauses 11 and 12 of the Bill.

As to the criticism that provision to Clause 5(1)and Clause 7 gave arbitrary powers to the Minister without any criteria or guidelines as to the manner in which such powers were to be excercised, the learned Additional Solicitor - General referred to Clause 7(2) wherein

criteria and guidelines have been provided. Further it was pointed out that the distinction between capital and current transactions provided for in Clause 7(1) was necessitated by our Government agreeing in 1994 to bind itself to Article 8 of the schedule to the Bretton Woods Agreement of 1944 of the International Monetary Fund wherein it was provided *inter alia* that no member State shall without approval of the International Monetary Fund impose restrictions on current transactions.

The learned Additional Solicitor - General dealing with the criticism that the provisions of Clause 13(5) granted arbitrary powers to the Minister in respect of appeal procedure relating to decisions made by the Central Bank under Clauses 11 and 12, said, that the Minister was bound to consider the report of the Board of Inquiry before making a decision. As the law stands, the Additional Solicitor - General pointed out that the decision of the Minister was final and conclusive and that there was no Board of Inquiry to fetter the use of his discretion.

The learned Additional Solicitor - General dealing finally with Clause 18 said that the provisions of that clause only protected officials from action for damages in relation to acts done in good faith. He said the clause does not introduce any new provisions into the draft Bill when compared to Section 50 of the Exchange Control Act. In any event he said the clause would only exclude suits for damages and compensation but would not shut out other remedies like Writs. (the decisions in Wickramasinghe Vs. Monetary Board of the Central Bank of Sri Lanka and another 1989 2 SLR Page 230 and Silva Vs. Attorney - General 43 NLR 305 were referred to)

All these contentions would presently be examined.

Article 12(1) of the Constitution states as follows :

" All persons are equal before the law and are entitled to the equal protection of the law".

Section 2(1) of the Exchange Control Act states as follows :

" The Central Bank of Ceylon shall, as agent of the Government, be responsible for carrying out the provisions of this Act, and it shall be the duty of the Monetary Board to cause those provisions to be carried out in accordance with such directions as may from time to time be issued in that behalf by the Minister. "

Clause 2(3) of the Bill states as follows :

" The Central Bank of Ceylon shall, act, as agent on behalf of the Minister of Finance and be responsible for implementing the provisions of this Act, in accordance with such directions as may from time to time be issued in that behalf in terms of this section ".

To act as the agent of the Government is different from acting as the agent of a particular Ministry and its Minister. Ministers are generally politically motivated beings. Time and again the Fundamental Rights, jurisdiction of the Supreme Court has been invoked with regard to acts of Ministers under the provisions of the Land Acquisition Act for example, wherein land is acquired purportedly for public purposes but in fact for politically motivated reasons. There is therefore a grave possibility that any depature from the present state of the law where the Central Bank is expected to act as an agent of the Government as a whole rather than a specified person in the Government might infringe upon the provisions of Article 12(1) of the Constitution. Though the Cabinet of Ministers, of whom the Minister in charge of Finance may be one, no doubt is charged with the direction and control of the Government of the Republic, the organs of Government include apart from the Executive,

the Legislative and Judicial organs of Government as well. While the Minister of Finance could certainly be charged with the responsibility for implementing the provisions of the Bill, the Central Bank need not act as agent on behalf of the Minister of Finance. It could still continue to act as agent of the Government. Government means the collective will of all organs of Government. While the substitutions of the Minister in its (Government's) place would grant greater powers to an individual or a single institution (the Ministry), the need to continue the present state of the law would no doubt become more appropriate when viewed from the stand point of possible difficulties in cohabitation between or among organs or sub organs of Government. Checks and balances are to be preferred in a democratic set-up. Difficulties in cohabitation is not a mere academic guess. Hence Clauses 2(1), 2(2) & 2(3) need to be suitably amended to continue to allow the Central Bank to act as agent of the Government while, if necessary, the Minister of Finance is made responsible for implementing the provisions of the Bill. Otherwise we are inclined to agree with the submissions made by the learned Counsel for the Petitioner that Clauses 2(1), 2(2) & 2(3) of the Bill as presently constituted would be inconsistent with Article 12(1) of the Constitution.

Next, Clause 5 needs to be examined. The provision to 5(1), Clauses 5(2) & 5(3) read as follows :

" Provided, however, that where a person in, or resident in, Sri Lanka holds foreign exchange in a bank account or accounts in or outside Sri Lanka, of such amount as does not in the aggregate exceed such amount as the Minister may by Order published in the Gazette specify or owns a foreign asset or assets not exceeding in value such aggregate sum as aforesaid, such foreign exchange of foreign asset shall be deemed not to have been derived or acquired by the conversion of Sri Lanka currency or the disposal or conversion of an asset within Sri Lanka, or the provision of a service within Sri Lanka, or from the business of dealing in foreign exchange.

(2) Every Order made by the Minister under Sub-section (1), shall as soon as convenient after the making thereof, be placed before Parliament for approval.

(3) Parliament may, in the interests of the national economy, by Resolution, vary the amount specified in any Order made under Sub-section (1), so however that the aggregate sum specified in the original Order shall not be diminished ".

The objection to the above provisions are two fold. Firstly, the phrase " be placed before Parliament for approval " is vague. There is no time specified as to when it should be placed before Parliament and as to when the Bill would come into operation. Clause 5(2) is thus open ended. Secondly, Clause 5(3) restricts the right of Parliament to vary the amount specified, in the Order made under Sub-section (1) only by increasing such amount but not diminishing it. This would bind the rights of future Parliaments too. An aggregate amount fixed by one Parliament may be viewed by another Parliament as too high. The subsequent Parliament would lack the power to diminish such amount.

Under the circumstances it would appear that appropriate action must be taken to clarify the provisions of Clause 5(2). The learned Additional Solicitor - General himself referred to the illustrations of Section 9(1) of the Soil Conservation Act, No. 25 of 1951 (C.L.E. Vol XI chapter 279) and Section 4(2) of the Employees' Provident Fund (Special Provisions) Law No. 6 of 1975 (C.L.E. Vol XX chapter 624)as alternative methods to appropriately amend the open - endedness of Clause 5(2). Merely placing for approval before Parliament is not sufficient. After approval, such orders of the Minister must be published in the Gazette and

should be required to come into operation only after such publication. Not to appropriately amend clause 5(2) would clothe the Minister with arbitrary powers. Thus we are of opinion that the failure to appropriately amend clause 5(2) would entail inconsistency with the provisions of Article 12(1) of the Constitution.

So too clause 5(3). If the said clause is to remain in the Bill in the present form since it affects the rights of future Parliaments, it could only be passed with a 2/3rd majority followed by a Referendum.

Clause 7 refers to capital transactions which are interpreted in clause 27. Current transactions are also interpreted in clause 27 as follows :

" Current transaction" means any international transaction necessitating a transfer of foreign exchange into or from Sri Lanka, and referred to in Article xxx of the Articles of the International Monetary Fund;

Reference to Article xxx of the Articles of the International Monetary Fund without the inclusion of the relevant IMF Article in the Bill seems inappropriate. We suggest that the said Article be included in a schedule to the Bill.

Clause 18 of the Bill which next needs examination reads as follows:

"No suit, prosecution or other legal proceedings shall lie against the Monetary Board or any of its members or the Central Bank or any of its employees or the Minister or the Secretary or any officials of the Minister or any other person exercising power or performing any duty or discharging any function under this Act for any act or omission done or omitted to be done, in good faith done under this Act;"

It was contended that this clause seeks to oust the jurisdiction of the Court and is therefore inconsistent with the provisions of the Constitution dealing with judicial power.

It is to be noted that Section 50 of the present Exchange Control Act reads as follows :

"No person shall be liable in any suit or other legal proceedings for any act done, or purporting to be done, in good faith in pursuance of the powers conferred by or under this Act, or for the purpose of carrying out the provisions of this Act".

We are inclined to view Clause 18 as an indemnity clause for acts done in good faith or omissions committed by mistake or error by the Monetary Board or its members, Central Bank or its employees, Minister or Secretary or officials of the Ministry and others specified, rather than an attempt to oust the jurisdiction of Courts. In any event it is settled law that the supervisory Writ jurisdiction of Courts are not ousted by such sections. (Vide 1989 2 SLR page 230 referred to earlier)

The Other objections raised by the learned Counsel for the Petitioner have been adequately met by the learned Additional Solicitor General and we have referred to them.

We are therefore of opinion that only Clauses 2, 5 & 7 need amendment as otherwise they would be inconsistent with the provisions of Article 12(1) of the Constitution. If the Bill is to be passed as presently presented it would come within the purview of Article 83(a) of the Constitution and therefore be required to be passed by the special majority as provided for in Article 84(2) of the Constitution and approved by the people at a Referendum.

We place on record our appreciation of the assistance given by the learned Additional Solicitor General and State Counsel to us in our deliberation.

JUDGE OF THE SUPREME COURT
J.A.N. DE. SILVA

I agree

JUDGE OF THE SUPREME COURT
T.B.WEERASURIYA

I agree

JUDGE OF THE SUPREME COURT

Bill was Presented to Parliament on: 19.11.2003
Bill No. 164
Decision of the Supreme Court Conveyed to Parliament on: 16.12.2003
Bill was not proceeded with

2003

17. LAND OWNERSHIP

A

BILL

to provide for the dispersal of ownership of lands by the transfer of ownership of state lands to citizens of Sri Lanka; for the removal of certain restrictions attached to grants and transfers made under the Land Development Ordinance (chapter 464) and the Land Grants (Special Provisions) Act No. 43 of 1979; and to provide for matters connected therewith or incidental thereto

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

A BILL TITLE "LAND OWNERSHIP"

In the matter of applications under Article 121(1) of the Constitution.

Present:

Shirani A. Bandaranayake - Judge of Supreme Court
J. A. N. de Silva - Judge of Supreme Court
Nihal Jayasinghe - Judge of Supreme Court

S. D. No. 26/2003	Petitioner	Mohan Ellawala, Chief Minister, Sabaragamuwa Provincial Council, Ratnapura.
	Counsel	A. A. de Silva, PC, with Champani Padmasekera, Nevil Jayawardena and Prasanna Ubeysekera
S. D. No. 27/2003	Petitioner	Berty Premalal Dissanayake, Chief Minister, North Central Provincial Council, Anuradhapura.
	Counsel	Wijeyadasa Rajapakse, PC, With Kapila Liyanagamage, Rasika Dissanayake, Ananda de Silva and Lakshitha Jayawardena.
S. D. No. 28/2003	Petitioner	Lasantha Alagiyawanna, Meewitigammana, Urapola.
	Counsel	Dr. Jayampathy Wickramaratne, PC, with Gaston Jayakody.
S. D. No. 29/2003	petitioner	Danny Hiththetiyage, Minister of Land, Southern Provincial Council, Town Hall, Galle.
	Counsel	Dr. J. de Almeida Gunaratne with Ms. Kishali Pinto Jayawardena, Ranga Ratnayake, Suranjith Hewamanne.
S. D. No. 30/2003	Petitioner	Environmental Foundation Limited, No. 3, Campbel Terrace, Colombo 10.
	Counsel	Ms. 1. R. Rajapakse with J. Gunawardena, R. Dabare, Ms. P. Rajakeeya, Ms. I. Senadeera and Ms. U. Illeperuma.

S. D. No, 31/2003	Petitioner	Hasanthapani Ratnayake,
		Attorney-at Law, Legal Officer of Lawyers for Human Rights & Development, No. 233/1, Cotta Road, Colombo 08.
	Counsel	K. Tiranagama with Jaufer Hassan
S. D. No. 33/2003	Petitioner	Sarath Ekanayake, No. 27/1, Gemune Mawatha, Hanthana Place, Kandy.
	Counsel	L. V. P. Wettasinghe with Kirthi Sigera and B. Manawadu.
S. D. No. 34/2003	Pettioner	Senerath Attanayake, Minister of Land, Uva Provincial Council, Kings Street, Badulla.
	Counsel	S. S. Sahabandu, PC, with Hemantha Situge and Champani Padmasekera.
S. D. No. 35/2003	Petitioner	Yatanwala Gamaralalage
		Padmasiri, Provincial Minister of Lands, Agriculture, Industry, Rural Development, Minor Irrigation & Fisheries, Sabaragamuwa Provincial Council, New Town, Ratnapura.
	Counsel	D. P. Mendis, PC, with B. Jayamanne and Nadeera Gunawardena.
S. D. No. 36/2003	Petitioner	Dassanayaka Gunaratna Basnayaka Mudiyanselage Darmasiri Dasanayake, "Chandima", Pahala Gomugomuwa, Munamaldeniya.
	Counsel	Nihal Jayamanne, PC, with Anandalal Nayayakkara, Ms.Uditha Collure, Prasanna Obeysekera and Dilhan de Silva. Uditha Egalahewa, SC, with Vikum Abrew, SC, for State,

Court assembled at 10.00 a.m. on 10th December 2003.

A Bill bearing the title "Land Ownership" was published in the Government Gazette and placed on the Order Paper of Parliament on 19th November 2003. 10 petitioners have challenged the constitutionality of this Bill by petitions presented to this Court and have thereby invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution. Hon. Attorney General has been given due notice of the petitions.

The Bill according to it is long title to provide for the dispersal of ownership of lands by the transfer of ownership of State Lands to citizens of Sri Lanka; for the removal of certain restrictions attached to grants and transfers made under the Land Development Ordinance (Chapter 464) and the Land Grants (Special Provisions) Act, No. 43 of 1979"

The petitioners contended that the provisions of the Bill in its entirety and the procedure followed in having the Bill placed in the Order Paper of Parliament are inconsistent with the Constitution.

The petitioners took up the latter as a preliminary ground of challenge, which we would now examine as it amounts to a threshold issue.

Learned Counsel for the petitioners contended that since the passing of the Thirteenth Amendment to the Constitution, the subject of land, which is said to mean "rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement of the extent set out in Appendix II" of the 9th Schedule to the Constitution, is a matter set out as item No. 18 in List I, commonly known as the Provincial Councils List, of the Thirteenth Amendment to the Constitution. Therefore they contended that the subject of Land is devolved to the Provincial Councils.

Learned State Counsel did not agree with this contention. He submitted that purely because a subject matter is referred to in the Provincial Councils List, it cannot be taken into account that the subject in question is a devolved subject where the Provincial Councils have the power over it. Learned State Counsel referred to the Special Determination No. 2/91 on the Agrarian Services (Amendment) Bill in support of his contention where this Court held that it is not possible to determine whether a matter is a List I or a List III subject by merely looking at the headings in those lists.

Item 18 of the Provincial Councils List refers to the subject of land and states as follows:

> "Land that is to say, rights in or over land, Land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II."

Appendix II, which again is under and in terms of the Provincial councils list, is solely dedicated to matters pertaining to "land and land settlement". This refers to State lands and provides that it shall continue to vest in the Republic and may be disposed of in accordance with Article 33 (d) of the Constitution and written law governing the matter, Subject to the aforesaid restriction, land it treated as a Provincial Council subject. However, there are certain special provisions that would be applicable to the land coming under the purview of the Provincial Councils. Such special provisions are broadly categorised into 3 sections, namely,

(1) State Land,
(2) Inter-provincial Irrigation and Land Development Projects, and
(3) National Land Commission.

The Bill under reference deals with the subject areas that are referred to in item 1 of Appendix II of the Provincial Councils List. Item 1.3 in Appendix II refers to "alienation or disposition of State land within a Province and reads as follows :

> "1.3 Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."

This re-affirms the position that State land shall continue to vest in the Republic while the subject of land being a matter for the Provincial Council.

The position that was taken up by the learned State Counsel, came up in Agrarian Services (Amendment) Bill. Agrarian Services as has been enumerated by this Court, is a subject which is given in the Provincial Councils List as well as in the concurrent list in the Ninth Schedule to the Constitution. When a subject is listed in the concurrent list, it would be necessary to consider the subject matter in depth to ascertain how much authority the Provincial Councils would have over such a subject. However, this difficulty does not arise with regard to the question under review as there is no reference to the subject matter of land in the concurrent List.

In fact in the Reserved List, reference is made to State lands and provides that,

"State lands and Foreshore, except to the extent specified in Item 18 of List I."

Such extents, as referred to earlier are clearly set out in Appendix II of the 9th Schedule, which specifically states that, "**land shall be a Provincial Council Subject.**" In considering the aforementioned contents it is abundantly clear that the matter in question is a Provincial Council subject that has been devolved to the Provincial Councils in terms with the Thirteenth Amendment.

The Thirteenth Amendment to the Constitution came into effect in 1987 and the Provincial Council Act, No. 42 of 1987 was enacted in order to establish Provincial Councils in the country. Article 154(G) of the Constitution refers to the statutes of the Provincial Councils and Article 154(G)3 describes the position with regard to the law making power of the Central Government in respect of a subject given in the Provincial Councils List. Accordingly, in terms of Article 154(G)3 of the Constitution, no Bill with regard to any matter set out in the Provincial Councils List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order paper of Parliament, to every Provincial Council. The necessity of such reference to Provincial Council is for the purpose of expression of their views on the Bill within the specified time period. After such reference, in the event where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting. In a situation where one or more Councils do not agree to the passing of the Bill, such Bill is passed by the special majority required by Article 82 of the Constitution.

Article 154(G)2 of the Constitution provides limited exceptions to the provisions specified in Article 154(G)3, which reads as follows :–

> "Notwithstanding anything in paragraph (3) of this Article, Parliament may make laws, otherwise than in accordance with the procedure set out in that paragraph, in respect of any matter set out in the Provincial Council List for implementing any **treaty, agreement or convention with any other country or countries or any decisions made at an international conference, association or other body** (emphasis added)."

Admittedly no such reference, as referred to in Article 154(G)3, was made to the Provincial Councils and the Bill in question does not come within the categories referred to in Article 154(G)2 of the Constitution.

In such circumstances the Bill in question, being of a matter set out in the Provincial Councils List, shall not become law unless it has been referred by the President to every Provincial Council as required by Article 154(G)3 of the Constitution.

The main contention of all the petitioners, as referred to earlier, was that the provisions, in its entirety of the Bill is inconsistent with the Constitution. The long title to the Bill on "Land Ownership"makes specific reference to the Land Development Ordinance (Chapter

464) and the Land Grants (Special Provisions) Act, No. 43 of 1979. Both these statutes deal with alienation of State land and came into effect well before the Provincial Councils were established by virtue of the Thirteenth Amendment. Under the Land Development (Amendment) Act, No. 27 of 1989, in terms of Section 19, State land is initially given on a permit to a person with a personal right of occupation, subject to payment of annual installments. Once a permit-holder has paid all sums due and developed the land to the satisfaction of the Government Agent, he becomes entitled to a grant. Even after becoming entitled to a grant, such grant would be subjected to certain conditions and the First and Second Schedules to the Land Development Ordinance of No. 19 of 1935 sets out such mandatory and optional conditions. Section 22A of the Land Development (Amendment) Act, No. 27 of 1981 prohibits the alienation of land to persons who are not citizens of Sri Lanka.

The Land Grants (Special Provisions) Act, No. 43 of 1979 on the other hand deals with agricultural and estate lands that were originally privately owned and vested in the Land Reform Commission as excess lands. By virtue of the aforementioned Act, such land was vested in the State to be given to land-less citizens of Sri Lanka. Section 5 of this Act however stipulates several conditions that would be applicable to such land.

The Land Ownership Bill provides for the holder of land under a grant made in terms of Section 19(4) of the Land Development Ordinance or Section 3 of the Land Grants (Special Provisions) Act referred to above, to apply for his existing right to be converted into full ownership, free of all encumbrances. The procedure for such grant of ownership of State land is described in Part I of the Bill. Accordingly an application in terms of the Bill requesting that the rights conveyed to him under such grant or transfer be converted to full ownership and to the "right, title and interest in such land free from all encumbrances" has to be forwarded to the Land Commissioner with a copy to Divisional Secretary, Designated Officer or to an authorized Officer. Such Officer shall thereafter forward his observations to the Minister and the Minister on receipt of the observations, after satisfying himself on the correctness of the observations, forward all the relevant documents and the application to the President with his recommendation to the effect that in his opinion a certificate in terms of this Act may be issued granting the applicant full ownership in respect of such land, free from all encumbrances.

This procedure for the determination of such application has no provision for the Provincial Councils to be consulted and has bypassed them entirely.

Learned Counsel for the petitioners therefore strenuously argued that although the Bill does not state specifically that it is for the amendment or repeal of the Constitution, there are several clauses of the Bill which seek to amend impliedly or have the effect of amending the Constitution.

Admittedly, the Bill does not state that it is seeking to amend any provision or provisions of the Constitution. On the contrary the long title, referred to above, deals only with the transfer of ownership of State lands to citizens of Sri Lanka.

Referring to amending statutes, Bindra is of the view that it is an alteration or a change of something established as law. He quotes Sutherland regarding amendments, who stated, citing U.S. v La France [(1931) 282 US 568] that,

> " Any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an Act purporting to amend, repeal, revise or supplement, or by an Act independent and original in form is treated as amendatory. And it is the effect, not the name given to an Act that determines

its character. If a subsequent statute does in fact modify and change the proceedings to be had under a former Act, the latter Act is an amendment of the earlier Act and must be so regarded and treated, although it is not so called in the Act itself (emphasis added)" (N.S. Bindra, Interpretation of Statutes, 8th Edition, pp. 621-622).

By the introduction of the Provincial Councils in terms of the Thirteenth Amendment to the Constitution, the subject of land " that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II of the Ninth Schedule to the Constitution, became a subject that was allocated to the Provincial Councils, Appendix II, which refers to land and land settlement, clearly stated that State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) of the Constitution and written law governing the matter. Subject to the aforementioned, land was devolved as a Provincial Council subject, which had to be carried out subject to several special provisions given in Appendix II. In that the alienation or disposition of State land within a Province was to be by the President on the advice of the relevant Provincial Council. Therefore, the situation and procedure pertaining to alienation or disposition of State land within a province was clearly stipulated by constitutional provisions.

The proposed Bill, as has been stated in its long title is to provide for the dispersal of ownership of lands by the transfer of ownership of State lands to citizens of Sri Lanka and also speaks of " removal" of certain restrictions attached to grants and transfers made under the Land Development Ordinance and the Land Grants (Special Provisions) Act.

It is however to be remembered that land being one of the most valuable natural resources is to be utilized, while State land still continued to be vested in the Republic, by the Provincial Councils in accordance with the national policy formulated by the National Land Commission. Provision was made under the Thirteenth Amendment for the establishment of a National Land Commission which would prepare the national policy that would lay down general norms in regard to the use of land, having regard to soil, climate, rainfall, soil erosion, forest cover, environmental factors, economic viability, etc. The restriction that was attached to grants were laid down so as to retain control over the use of land and transfer of land in order to safeguard an invaluable natural resource.

The proposed Bill thus has ignored the basic framework, structure as well as the policy that was to be formulated under the National Land Commission and has introduced a different scheme. The Bill has totally ignored the concept of the President's function on the advice of the Provincial Council with regard to alienation and disposition of State land. The Bill has thereby totally by passed the provisions containing in Appendix II which amounts to an implied amendment to the Constitution.

Chapter XII of the Constitution provides for amendments to the Constitution where it has clearly stated that amendment or repeal of the Constitution must be express. Such an amendment to the Constitution must comply with the provisions stipulated in Articles 82(1) and 82 (2) of the Constitution.

In the backdrop of the aforementioned aspects we would now turn to examine the Clauses in the Bill which the petitioners have contended to be inconsistent with the Constitution.

Learned Counsel for the petitioner's contention was broadly two fold. Firstly they submitted that Clauses 1(1) and 1(2) are inconsistent with Article 12(1) of the Constitution. Secondly they submitted that, Clauses 1(3)b, 2(2), 3, 32(2)c, 4(20), 4(3) and the entirety of Parts I, II and III of the Bill are inconsistent with the Thirteenth Amendment to the Constitution.

(A) Inconsistencies with Article 12(1) of the Constitution

1. Clause 1(1)

Clause 1(1) refers to the short title and the application of the Bill. The said Clause states that the provisions of the Bill shall apply to "one or more of the Divisional Secretaries Divisions falling within an Administrative District or to all or any Grama Niladhari Divisions falling within any Divisional Secretary's Division". The specifications of such application would be decided from time to time by the Minister. Learned Counsel for the petitioners contended that this provision is violative of Article 12(1) of the Constitution.

This Clause provides for the Bill to be brought into force selectively to cover Divisional Secretaries Divisions or Grama Nladharis' Divisions at the discretion of the Minister. There is no provision in the said Clause, for the Minister to make such a decision on an intelligible criteria or basis. Article 12(1) of the Constitution, which provides a right to equality, specifies that " all persons are equal before the law and are entitled to the equal protection of the law" Although it is permitted to have differentiation without such action becoming a discrimination, this cannot be carried out in an ad hoc or in an arbitrary manner. The essential ingredient for such classification is that it should be based on an intelligible principle. Discussing such classifications, Kagzi points out that,

> " There should be no discrimination between any two persons, if as regards the subject - matter of legislation they are similarly situated..... Though the legislature has a wide choice in articulation of subject - matter in its laws, any classification should rest on real substantial criteria, and should be supported by an intelligible object intended to be pursued by the legislature. The legislature should neither treat unequals as equals, nor equals unequally without any rhyme or intelligible purposive differentia relatable to the legislative purpose spelled out by it." (Jain Kagzi, The Constitution of India, 5th Edition, pg. 210).

When no such intelligible basis or criteria are given, that would amount to equals not been treated equally, violating the equal protection guaranteed in terms of Article 12(1) of the Constitution.

This Clause therefore is inconsistent with Article 12(1) of the Constitution and will have to be passed by the special majority required under the provisions of paragraph 2 of Article 84 of the Constitution.

2. Clause 1(2)

Clause 1(2) of the Bill spells out the exemptions from the provisions of the Act in respect of lands in urban areas reserved by the Minister for the purposes of development. The said Clause reads as follows:

(2) The provisions of this Act shall not apply in respect of –

(*a*) lands, the elevation of which is over one thousand five hundred and twenty-four meters above mean sea level;

(*b*) lands falling within the limits of a municipality declared under the Municipal Councils Ordinance (Chapter 252) and the administrative limits of an urban council declared under the Urban Councils Ordinance (Chapter 255);

(*c*) lands in urban areas falling within the administrative limits of a Pradeshiya Sabha, declared by the Minister by Ord r published in the Gazette as development areas, for the purposes of this Act;

(*d*) lands in urban areas declared as development areas for the purposes of any other written law, for the time being in force.

As pointed out by learned Counsel for the petitioners' there is no provision for similar exemptions and reservations of lands for development in rural areas. Considering the rural economy and the attempts for improvement of productivity in such areas, it is difficult to comprehend as to on what basis that the exemptions given to the urban areas and reservation of land for such development purposes were not granted to the rural areas of the country. The relevant Clause does not provide any basis for such kind of a classification and merely refers to four selected areas where the provisions of the Bill shall not have any application. As pointed out earlier for a classification to be valid, such classification should be based on intelligible criteria and cannot be unreasonable or arbitrary. There is no necessity for legislative classification to be "scientifically perfect or logically complete" [Kedar Nath v State of West Bengal AIR 1953 (SC) 404]. However, it has to be reasonable, justifiable and free from any arbitrariness. To achieve such object it is necessary to indicate the basis of classifiction and where such basis is not forthcoming, the relevant Clause would be violative of the equal protection guaranteed in terms of Article 12(1) of the Constitution. This Clause therefore is inconsistent with article 12(1) of the Constitution and will be required to be passed by the special majority under the provisions of paragraph 2 of Article 84 of the Constitution.

(B) Inconsistencies with the Thirteenth Amendment to the Constitution.

1. Clause 1(3)(b)

clause 1(3)(b) of the Bill refers to the application of the Bill and is in the following terms:

> "In respect of grants and transfers of land under the Ordinance or the Act as the case may be made after the promulgation of the Thirteenth Amendment to the Constitution, the provisions of this Act shall apply only in respect of grants or transfers made in accordance with the Ordinance or the Act and the provisions of the said Thirteenth Amendment".

Learned Counsel for the petitioners submitted that this Clause is violative of the provisions of the Thirteenth Amendment to the constitution.

As pointed out earlier, List I of the Ninth Schedule to the Constitution refers to the subjects that are coming within the purview of the Provincial Councils. Item 18 of such List and Appendix II to the Ninth Schedule of the Constitution, clearly refers to the subject of land. Accordingly the subject matter envisaged in the Bill is on a subject coming within the purview of the Ninth Schedule in the Thirteenth Amendment to the Constitution. Clause 1(3)(b), referred to earlier, acknowledge the fact that the proposed grants and tranfers under the Bill must be made in accordance with "the provisions of the said Thirteenth Amendment".

In such circumstances, Clause 1(3)(b) is inconsistent with Item 18 of List I and paragraph 1:3 of the Appendix II of the Thirteenth amendment to the Constitution. Therefore, it will be required to be passed by the special majority under the provisions of paragraph 2 of Article 84 of the Constitution.

2. **Clause 2(2), Clause 3 and Clause 32(2)(c)**

These 3 Clauses refer to the role of the Land Commissioner in the issuance of certificates to a grantee under the Land Development Ordinance No. 19 of 1935 or a transfer under the Land Grants (Special Provisions) Act, No. 43 of 1979, under the Land Ownership Bill.

The contention of the petitioners' was that the proposed Bill would be taking over the powers of the Provincial Land Commissioner and handing it over to the Land Commissioner at the center, which action amounts to an amendment to the Thirteenth Amendment to the Constitution.

With the introduction of the Provincial Councils under the Thirteenth Amendment to the Constitution, and the subsequent legislation on Provincial Councils (Consquential Provisions) Act, No. 12 of 1989, the Provincial Land Commissioner was empowered to carry out the relevant functions regarding the grantees under the Land Development Ordinance and/or transfers under the Land Grants (Special Provisions) Act, No. 43 of 1979. The Provincial Councils (Consequential Provisions) Act, No. 12 of 1989 in its preamble states that it is an Act to make interim provision for the interpretation of written law on matter set out in List I of the Ninth Schedule to the Constitution. Thus the position of Provincial Land Commissioner, which was created by the Constitution, making him a "creature of the Constitution" is now being amended by the provisions of the Bill in order to take over his powers to hand it over to the Land Commissioner in terms of the Bill. This is undoubtedly an implied amendment of the powers vested with the Provincial commissioner of Lands which was derived from the provisions of the Thirteenth Amendment. Accordingly the said Clauses, namely Clauses, namely Clause 2(2), 3 and 32(2)(c) of the Bill are inconsistent with the Thirteenth Amendment to the Constitution and therefore, it will be required to be passed by the special majority under the provisions of paragraph 2 of Article 84 of the Constitution.

3. Cluses 4(2) and 4(3) of Bill

Clauses 4(2) and 4(3) of the Bill are in the following terms:

"4(2) The minister shall on receipt of the observations in terms of subsection (1), after satisfying himself on the correctness of the observations, forthwith forward the application with all relevant documents to the President with a recommendation to the effect that in his opinion a Certificate in terms of this Act may be issued granting the applicant full ownership, in respect of such land, free from all encumbrances.

4(3) The President shall, on being satisfied upon a consideration of the relevant documents, of the correctness of the recommendation, within a period of three months of the same being forwarded to the President issue a Certificate substantially in the form set out in the First Schedule to the Act, granting the applicant full ownership, in respect of such land, free from all encumbrances, The Public Seal of the Republic shall be affixed to such Certificate."

The petitioners contended that by virtue of these two Clauses, and especially by Clause 4(3), the Bill seeks to restrict the powers of the President of the Republic with regard to the powers relating to alienation of State Land.

Learned State Counsel on behalf of the Attorney General submitted that in terms of Article 22(d) of the Constitution and the Appendix II of List I of the Ninth Schedule, Parliament is competent to make laws to provide for the procedure of such alienation or disposition of State Land. Therefore he took up the position that the provisions of the present Bill has in no way restricted the discretionary power of the President to alienate State Land. Further he submitted that it was held in SC Determination No. 6/2001 (The Seventeenth Amendment Bill) that although there was a restriction in the exercise of the discretion hitherto vested in the President, the restriction per se would not be an erosion of the executive power by the President and there cannot be any inconsistency with Article 3 and Article 4(b) of the Constitution.

Prior to the establishment of Provincial Councils in terms of the Thirteenth Amendment to the Constitution, the Land Development Ordinance and the Land Grants (Special Provisions) Act vested the power of making grants and dispositions of lands and immovable property with the President of the Republic, Article 33(d) of the Constitution, which is in the following terms, specifically vests the power of disposition of lands and immovable property in the hands of the President.

"33. In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether executed before or after the commencement of the Constitution, the President shall have the power-

(2) to such grants and disposition of lands and immovable property vested in the Republic as he is by law required or empowered to do, and to use the Public seal for sealing all things whatsoever that shall seal."

with the passing of the Thirteenth Amendment to the Constitution, such Constitutional power vested with the President was qualified by virtue of paragraph 1:3 of Appendix II to the Ninth Schedule to the Constitution. By such provision the authority for alienation or disposition of the State land within a province to any citizen or to any organization was yet vested with the President. The new amendment brought in the concept that the President had to carry out such alienation or disposition **on the advice of the relevant Provincial Council** in accordance with the laws governing the matter. By this, a consultative process was introduced with regard to alienation or disposition of the State land within a Province. In effect, even after the establishment of Provincial Councils in 1987, State land continued to be vested in the Republic and disposition could be carried out only in accordance with Article 33(d) of the Constitution read with 1:3 of Appendix II to the Ninth Schedule to the Constitution.

It is to be noted that a qualification to the power vested with the President in terms of Article 33(d) could be effected only by an amendment to the Constitution.

The present Bill, which is admittedly not a constitutional amendment, is now seeking to subject the power of the President to the advice of the relevant Provincial Council to the Minister's recommendation and the Minister's opinion by virtue of an ordinary Bill. In fact according to Clause 4(3) of the Bill the President's function is restricted merely to satisfy herself as to the "consideration of the relevant documents and of the correction of the recommendation made by the Minister."

In the SC Determination No. 6/2001 (decision on the Seventeenth Amendment), the question that had to be considered was whether the "subjection of the discretion of the president, to the recommendation and approval of the Constitutional Council as envisaged by the Bill would amount to an effective removal of the President's executive power". That Bill was introduced for the establishment of the Constitutional Council. Considering the relevant provisions this Court was of the view that " a restriction per se would not be an erosion of the executive power of the President, so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution". We are in agreement and have no conflict with the position taken by this Court in SC Determination No. 6/2001. However, in our view, the position of the present Bill differs substantially from the aforesaid Bill. The present Bill, to reiterate, has two basic purposes:

(a) to provide for the dispersal of ownership of State land to citizens of Sri Lanka, and

(b) for the removal of certain restrictions attached to grants and transfers made under the Land Development Ordinance and the Land Grants Act.

It is thus necessary to consider whether there is a restriction in the exercise of the discretion of the Executive Power and if so whether it amounts to an erosion of the executive authority so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution in the light of the aforementioned objective of the proposed Bill. In Bulankulama and others v. Secretary, Ministry of Industrial Development and others [(2000) 3 Sri L.R. 243] it was held that the national resources of the people were held in "Trust" for them by the Government. Justice Amerasinghe, discussing such trusteeship stated thus,

> "The organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the Constitution, but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development ....."

Discussing the ancient history of land tenure, Hayley (Sinhalese law and customs, F.A. Hayley, chapter II) states that the Kings were the owners of the soil. Contributing to this view H.W. Codrington, (Ancient Land tenure and Revenue in Ceylon, 1938) stated that,

> "The king was bhupati or bhupala, 'lord of the earth', 'protector of the earth' or as the late Niti Nighanduwa (Chapter I, 2) terms Manu the Vaivasvata, the first king of men, 'lord (adhipati) of the fields of all."

From time immemorial, land has thus being held in 'Trust' for the people in this island ; now a Republic. The principle that State land is held in public trust could be clearly seen in the Land Development Ordinance and the State Grants (Special Provision) Act, where land was allocated to land-less persons while reserving certain control by the State over such land.

Moreover, even the time of the establishment of Provincial Councils in 1987, although the subject of land was devolved to the Provincial Councils, it did not defer from the policy that the 'land is being held in Trust for the people by the State'. In Appendix II, the opening paragraph clearly state that,

> "State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter."

Referring to the wording of Clause 4(3) of the Bill, learned Counsel for the Petitioners submitted that while Article 33(d) 'clearly decrees a power, Clause 4(3) has completely transferred that power to a duty or an obligation'. This in effect, it was submitted by the learned counsel, is a serious violation of not only Article 33(d) of the Constitution, but also of the executive power of the President, enshrined in Article 4(b) of the Constitution which the President exercies on behalf of the people in whom sovereignty resides.

Article 33 is contained in Chapter VII of the Constitution, which deals with the Executive – The President of the Republic. This Chapter, which consists of 12 main Articles, solely deals with the appointment, power and functions and the other matters relating to the office of the President of the Republic. Article 33, which consists of 6 sub Articles deals with the powers and functions of the President. The authority given to the President in terms of Article 33 thus flows from the power which is exercised in terms of Article 4(b) read with Article 3 of the Constitution.

According to Article 4(b) of the constitution, "the executive power of the people, including the defence of Sri Lanka, shall be exercised by the President of the Republic who is elected by the people". In such a situation transformation of a power that was decided by a

constitutional provision, namely in terms of Article 33(d), to merely a duty or an obligation, by virtue of an ordinary Bill would amount to an erosion of the executive power of the people, which is exercised by the President of the Republic who had been elected by the people. This would in effect alienate the Executive Power from the people in contravention of Articles 3 and 4 of the Constitution.

This Court has ruled in a series of determinations that Article 3 is linked with Article 4 and that these two Articles must be read together (Vide SD 5/80, 1/82, 3/83, 1/84, 7/87, 11/2002 and 12/2002.)

Hence whilst Clause 4(2) is inconsistent with Article 33(d) of the Constitution and 1:3 of Appendix II of the Thirteenth Amendment, Clause 4(3) is inconsistent with Articles 3 and 4 of the Constitution. We therefore, determine that the Bill in its present form is required to be passed by the special majority in terms of the provisions of paragraph 2 of Article 84 and approved by the people at a referendum virtue of the provisions of Article 83.

The objections to the Bill in its entirety was based on the fact that the provisions of the proposed Bill are inconsistent with the provisions of the Thirteenth Amendment to the Constitution read with Article 33(d) of the Constitution. It is now apparent that the process for the alienation of State land which is held in trust by the State for the public benefit is prescribed in Appendix II of the Ninth Schedule and Article 33(d) of the Constitution. The present Bill clearly is suggestive of a different process of alienation of such and thereby infringing with a process provided by Constitutional provisions and for this reason the provisions of the Bill are inconsistent with the Thirteenth Amendment to the Constitution read with Article 33(d) of the Constitution, which would require to be passed by the special majority under the provisions of Article 84(2) of the constitution.

For the reasons aforesaid, in addition to the procedural deficiencies referred to earlier, the Bill in its present form requires approval by people at a referendum in addition to a two-thirds majority vote (including those not present) in terms of Article 83 of the Constitution.

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

Sgd. Dr. Shirani A. Bandaranayake,
Judge of the Supreme Court.

Sgd. J. A. N. de Silva,
Judge of the Supreme Court.

Sgd. Nihal Jayasinghe,
Judge of the Supreme Court.

Bill was Presented to Parliament on: 19.11.2003
Bill No. 165
Decision of the Supreme Court Conveyed to Parliament on 17.12.2003
Bill was not proceeded with.