



**DECISIONS
OF
THE SUPREME COURT
ON
PARLIAMENTARY BILLS**

2004 - 2006

VOLUME VIII

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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
2004, 2005 AND 2006**



**DECISIONS
OF
THE SUPREME COURT
ON PARLIAMENTARY BILLS**

2004



D I G E S T

Page

PROVINCIAL COUNCILS ELECTIONS (AMENDMENT)

9 - 12

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

- referred to the Supreme Court (Article 122(1))
- determined that the provisions of the Bill not inconsistent with the Constitution. (Article 123 (1))

FINANCE (AMENDMENT)

13 - 15

to amend the Finance Act, No. 11 of 2002; to provide for the operation of Part VI of the Finance Act, No. 11 of 1963 notwithstanding the repeal of the said Part by Act, No. 11 of 2002; and to provide for matters connected therewith or incidental thereto

- referred to the Supreme Court (Article 122(1))
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))

PROHIBITION OF FORCIBLE CONVERSION OF RELIGION

16 - 25

to provide for prohibition of conversion from one religion to another by use of force or allurement or by fraudulent means and for matters incidental therewith or incidental thereto

- challenged in the Supreme Court (Article 121 (1))
- in terms of the Article 123 of the Constitution determined that the Section 2 of the Bill does not offend Article 9, 10, 12 (1) 12 (2) and 14 (1) (e) of the Constitution subject to the restrictions recommended to the definition of allurement in Clause 8(9) - the provisions in Clauses 3 (a), 3 (b), 4(a), 4(b), 5 and 6 of the Bill are inconsistent with Articles 10, 12(4), 76(1), 10, 12 (1), 76 (1) of the Constitution respectively
- further recommended that Clauses 3 and 4 (b) of the Bill violate Article 10 of the Constitution the Bill in its present form has to be 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 in terms of Article 83 (a) of the Constitution

- in view of the findings of the Clause 4(a) of the Bill in violation of Article 12(1) of the Constitution, that the words "Notwithstanding anything to the contrary to any provision in Code of Criminal Procedure Act" in Clause 4(a) of the Bill be deleted. And that item 11 of the schedule referred to in, the proviso to Clause 4 (a) of the Bill be deleted

- in the event of Clause 4(a) being amended, any institution of proceedings under the Clause 5, of the Bill relating to the offences mentioned therein be instituted in accordance with the provisions of Section 136 of the Criminal Procedure Code Act and subject to the written sanction of the Attorney-General

- to interpolate the words "for the purpose of converting a person from one religion to another" after the word "temptation" in sub paragraph (a) of Clause 8 and the words "for the purpose of converting a person from one religion to another" at the end of sub paragraph (c) of Clause 8, and the word of "wilful" after the word of "includes" in sub paragraph (d) of Clause 8 and the interpolation the words "for the purpose of converting a person from one religion to another" at the end of the sub paragraph 8 (d)

- further specified that if Clauses 3 and 4 (b) are deleted the Bill will not be inconsistent with Article 10 of the Constitution.

ELECTIONS (SPECIAL PROVISIONS)

26 - 28

to provide for the requirement that a voter produce a valid identity document in proof of identity; and to amend the Parliamentary Elections Act, No. 1 of 1981, the Presidential Elections Act, No. 15 of 1981, the Provincial Councils Elections Act, No. 2 of 1988, the Local Authorities Elections Ordinance (Chapter 262), and the Referendum

- referred to the Supreme Court (Article 122 (1))
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))

	<i>Page</i>
INLAND REVENUE (AMENDMENT)	29 - 31
to amend the Inland Revenue Act, No. 38 of 2000. - referred to the Supreme Court (Article 122(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
FINANCE	32 - 36
to make provision for the imposition of certain charges and levies consequential to the 2004 budget proposals; and to provide for matters connected therewith and incidental thereto. - referred to the Supreme Court (Article 122(1)(b)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1)) - further observed that by an error the Bill in its 2nd Proviso to Clause 21 refers to Clause 26 instead of Clause 22 and with regard to the making of regulations in terms of Clause 22 no provision has been made for such regulations to be published in the Gazette and to be presented to the Parliament. The Supreme Court is of the view that these omissions could be rectified at the committee stage of the Bill.	
TOBACCO TAX (AMENDMENT)	37 - 40
to amend the Tobacco Tax Act, No. 8 of 1999. - referred to the Supreme Court (Article 122(1)) - determined that Clause 3 of the Bill is inconsistent with Article 12(1); Clause 7(2) (c) is inconsistent with Article 13(2); Clause 7(3) is inconsistent with Article 13(1) of the Constitution. - the Bill in its present form may only be passed by the special majority provided in Article 84(2) of the Constitution. - the inconsistencies stated above would cease if the following amendments are effected to the Bill :- - the deletion of the words "who being a registered manufacturer in terms of the act" appearing in Clause 3;	

- an additional provision is included in relation to Clause 7 (2) (c) that the officers empowered to arrest and detain any person are deemed to be Peace Officers in terms of the Code of Criminal Procedure Act, No. 15 of 1979 and the procedure established in the Code is made applicable to an arrest and detention under Clause 7(2) (c); and
- the deletion of Clause 7(3).

INLAND REVENUE (REGULATION OF AMNESTY)

41 - 46

to provide for the regulation of the grant of an amnesty in respect of the non-payment or non-disclosure of liability to pay income tax in respect of declarations made on or before August 31, 2003 in terms of the repealed Inland Revenue (Special Provisions) Act, No. 7 of 2002 and the Inland Revenue (Special Provisions) Act, No. 10 of 2003; to provide for the repeal of the Inland Revenue (Special Provisions) Act, No. 10 of 2003; and for matters connected therewith or incidental thereto.

- referred to the Supreme Court (Article 122(1))
- determined that Clause 2 (2) of the Bill is inconsistent with Article 80(1) of the Constitution
- the inconsistency would cease if clause 2(2) is replaced by a provision of the following lines :-

"Subject to the provisions of Section 3 of this Act, any person who was liable to any tax, penalty (including any penalty in respect of any offence), forfeiture or fine in terms of any of the laws specified in the schedule to the Inland Revenue (Special Provisions) Act, No. 10 of 2003, immediately prior to the enactment of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 as amended by Act, No. 31 of 2003 will continue to be liable to such tax, levy, penalty (including and penalty in respect of any offence), forfeiture or fine notwithstanding any thing done or any right or liberty acquired in terms of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 as amended by Act, No. 31 of 2003."

VALUE ADDED TAX (AMENDMENT)

47 - 51

to amend the Value Added Tax Act, No.14 of 2002.

- referred to the Supreme Court (Article 122(1))
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))

Page

- observed that there is an omission in Clause 8 of the Bill by the non inclusion of the Act number of the amending Act to the principal enactment which should read as No. 7 of 2003 and the Supreme Court is of the view that this could be rectified at the committee stage of the Bill.

BANKING (AMENDMENT)

52 - 57

to amend the Banking Act, No. 30 of 1988

- challenged in the Supreme Court (Article 121 (1))
- in terms of the Article 123 of the Constitution determined that the provisions of Section 42(1) and (2) contained in Clause 16 are not inconsistent with the Constitution;

- the provisions of Clause 42(3) (a) is not in conflict with Article 12(1) of the Constitution and there is no merit in the alleged inconsistency with Article 14(1)(c) of the Constitution and that there could be no inconsistency with the Article 14(1)(g) of the Constitution;

- with regard to the Section 83(c) in Clause 37 the Court is of the view that since a new offence is created its ingredients should be specially set out to ensure the equal protection of the law guaranteed by Article 12(1) of the Constitution and if the provisions is re-formulated as stated in the determination it would cease the inconsistency with Article 12(1);

- Section 83(c) (8) of the Bill which provides for only an ex parte order to be made is inconsistent with Article 105(1) of the Constitution and is of the view that the inconsistency would cease if an amendment is made to provide for a hearing to the effected party at the Committee Stage; and

- Clause 37 of the Bill is inconsistent with Article 12 (1) and Article 105(1) of the Constitution and may only be passed with the special majority required under Article 84(2) of the Constitution and the inconsistency would cease if the impugned provisions contained in the Clauses are amended in the manner stated in the determination.

NINETEENTH AMENDMENT TO THE CONSTITUTION

Page
58 - 68

to amend the Constitution of the Democratic Socialist Republic of Sri Lanka.

- challenged in the Supreme Court (Article 121 (1)) - in terms of the Article 123(2)(b) of the Constitution determined that *Clauses 9:1 to 9:5 of the Bill are inconsistent with Articles 3, 10, 12(1), 12(2), and 14(1)(e) and Articles 3 and 4(a) insofar as they affect the fundamental rights referred to in the determination;*

- *this Bill does not have the effect of suspending the operation of the Constitution or any part of the Constitution; and*

- *since the Bill seeks to repeal Article 9 of the Constitution, in terms of Article 83(a), it has to be passed by a special majority and approved by the People at a Referendum.*

S.C. (S.D.) No. 1/2004

"Provincial Councils Elections (Amendment) Bill"

BEFORE :

Sarath N. Silva	-	Chief Justice
J.A.N. de Silva	-	Judge of the Supreme Court
T. B. Weerasuriya	-	Judge of the Supreme Court

COUNSEL :

Saleem Marsoof, P.C., Addl. Solicitor General with Janak de Silva, S.C.,
and R. Goonatilleke S.C., for the Attorney-General

Court assembled on 29.01.2004 at 10.15 a.m.

A Bill bearing the above title has been certified by the Cabinet of Ministers in terms of Article 122 (1), as being urgent in the national interest and referred by the President for a special determination to this Court, as to its constitutionality,

The Additional Solicitor General assisted Court in its deliberations. It was revealed in the course of the submissions that the Bill seeks to limit the number of members of each Provincial Council to the number that has been determined by the President in terms of Section 2 of the Provincial Councils Act, No. 42 of 1987 and to rescind the determination made by the Commissioner-General of Elections, in terms of Section 3 of the Provincial Councils Elections Act, No. 2 of 1988 and published in the Government Gazette No. 1319/4 of 16th December, 2003.

The Bill further seeks to permit a poll to be held in respect of a Provincial Council on any working day including a Saturday.

The amendments have to be considered in the light of the following provisions of law.

Provincial Councils were established in terms of Article 154A of the Constitution introduced in by the 13th Amendment. Accordingly nine Provincial Councils have been established for the Provinces specified in the 8th schedule to the Constitution. Article 154A(2) states that the election of members to every Provincial Council shall be in accordance with a law that may be enacted by Parliament. The first law that was enacted in this regard is the Provincial Councils Act, No. 42 of 1987. Section 2 of the Act empowers the President to specify the number of members of each Provincial Council. This section states that in doing so the President shall have regard to the area and the population of the Province for which each Provincial Council is constituted. In terms of this provision the President has made determinations published in the Government Gazette No. 491/17 dated 5.2.88 in respect of each Provincial Council. Elections have been held from time to time in respect of the number of members that have been specified by the President in the determinations.

After the enactment of the Provincial Councils Act, No. 42 of 1987 referred above the Parliament enacted the Provincial Councils Elections Act, No. 2 of 1988. Section 3 of this Act also contains a provision which deals with membership of every Provincial Council. This section empowers the Commissioner - General of Elections to make a

determination specifying the number of members to be declared elected from each administrative district within a province. Such determination has to be in terms of sub-section 3 on the basis of there being one member for every 40,000 residents as disclosed in the last general census. This section does not make any reference to the determination made by the President in the determination under Section 2 of the Provincial Councils Act, No. 42 of 1987. Thus there are two overlapping provisions with regard to the manner of determining the number of members of each Provincial council. The proposed amendment seeks to eliminate any inconsistency that may arise from the overlapping provisions and also to restrict any increase in the number of members of a Provincial Council.

Learned Additional Solicitor General conceded that the proposed amendment may present further difficulties in its implementation resulting in an ambiguity. Therefore he submitted that at the Committee Stage in Parliament Clause 2 of the Bill would be replaced with the following provision :

"Section 3 of the Provincial Councils Elections Act, No. 2 of 1988 (hereinafter referred to as the "principal enactment") is hereby amended as follows :

- i. by the repeal of Sub-section (1) of that Section and the substitution therefor of the following Sub-sections :

"(1) Every Provincial Council shall consist of such number of members as may be specified by the President in an order made under Section 2 of the Provincial Councils Act, No. 42 of 1987."

- ii. By the substitution in paragraph (b) of Sub-section (3) of that Section for the words "1000 square kilometers" of the words "1000 square kilometers:

Provided that the number of members to be determined by the Commissioner in terms of this Sub-section shall correspond to the number of members specified by the President in an order made under Section 2 of the Provincial Councils Act, No. 42 of 1987 less two members to be declared elected in terms of Section 61A(2) of this Act."

We have considered the content of the proposed Clause 2 and we are of the view that it eliminates any ambiguity that may arise from the overlapping provisions in the two enactments and also restricts the number of members to be returned in respect of each Provincial Council to that determined by the President in terms of Section 2 of the Provincial Councils Act, No. 42 of 1987. The number of members so determined include the two bonus seats that go to the party that get the majority within a province. The determination made by the Commissioner - General of Elections in terms of Section 3 of the Provincial Councils Election Act, No. 2 of 1988 would be relevant to the number of members allocated to each administrative district of the province. The two bonus seats are not taken into account in this distribution. We are of the view that the amended clause would have no inconsistency with any provision of the Constitution.

Clause 3 of the Bill is an amendment to Section 22 of the principal Act relevant to the date of poll. In terms of the provisions as it stands the date of poll shall be a date other than a full-moon day, or public holiday specified in the 1st schedule to the Holidays Act, No. 29 of 1971. A Saturday is not a holiday specified in the Holidays Act. However, in terms of the Fuel Conservation - Five Day Week Act, No. 11 of 1978,

a Saturday shall not be a working day in any government department, public corporation, a local authority or trade as specified in that Act. In the circumstances it may be contended that a poll cannot be fixed for a Saturday. The proposed amendment empowers the Commissioner to fix a poll on any working day, including a Saturday. Thus the restriction would apply only in respect of poya days and holidays declared under the Holidays Act.

Clause 4 of the Bill seeks to rescind the determinations that have been made by the Commissioner - General of Elections in terms of Section 2 of the Provincial Councils Act and published in the Government Gazette of 16.12.2003. That determination has been made on the basis of a population ratio of 40,000 residents as disclosed in the last general census. The determinations that have been produced by the Additional Solicitor General show a significant increase in the membership of the Provincial Councils. The need to rescind the determination arises from the amendment contained in this Bill, referred above, which fixes the total number of members of each Provincial Council to that contained in the determination of the President. This amendment relates to the exercise of the franchise. Article 4(e) of the Constitution which provides for the exercise of franchise makes no reference to elections to Provincial Councils. However, even assuming that by a process of interpretation Provincial Councils are considered as being included within the framework of the franchise exercised by the People, we are of the view that a restriction of the number of members to be returned does not amount to an inconsistency. It is to be noted that even in respect of Parliament the number of members to be returned is fixed at 225 in terms of Article 98(1) and (2) of the Constitution. There have been similar restrictions in respect of other elected bodies. The essence of franchise is the equal right to vote of the qualified electors and not the number of members to be returned.

For the reasons set out above we make a determination in terms of Article 123(1) of the Constitution that the provisions of the Bill are not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

J.A.N. de Silva
Judge of the Supreme Court

T. B. Weerasuriya
Judge of the Supreme Court

First Reading :

03.02.2004 (Hansard Vol. 153, No. 7, Col. 1027)

Bill No. : 184**Sponsor :** Minister of Enterprise Development, Industrial Policy and Investment Promotion and Minister of Constitutional Affairs**Decision of the Supreme Court conveyed to Parliament :**

03.02.2004 (Hansard Vol. 153, No. 7, Cols. 981 - 983)

Second Reading :

03.02.2004 (Hansard Vol. 153, No. 7, Cols. 1028 - 1058)

Committee of whole Parliament and Third Reading :

03.02.2004 (Hansard Vol. 153, No. 7, Cols. 1058 - 1059)

Hon. Speaker's Certificate :

03.02.2004

Title :***Provincial Councils Elections (Amendment) Act, No. 5 of 2004.***

S.C. (S. D.) No. 23/2004

"Finance (Amendment) Bill"

BEFORE : Sarath N. Silva Chief Justice
 H. S. Yapa Judge of the Supreme Court
 N. K. Udalgama Judge of the Supreme Court

COUNSEL : P. A. Ratnayake, P.C., Addl. Solicitor General with Ms. Anusha Navaratne, D.S.G., and Arjuna Obeysekera S.C., for the Attorney-General

F.N. Goonewardena, Attorney at Law was permitted to make submissions in respect of the Bill.

Court assembled for hearing on 06.08.2004 at 12.30 p.m.

Her Excellency the President by written reference dated 5th August, 2004 addressed to the Chief Justice has requested the special determination in respect of the Bill bearing the above title, in terms of the provisions of Article 122(1)(b) of the Constitution. The Bill bears the endorsement of the Secretary to the Cabinet of Ministers that is urgent in the national interest.

Notice was issued on the Attorney General as required by the Constitution and the Additional Solicitor General assisted this Court in the consideration of the constitutionality of the provisions of the Bill.

Mr. F. N. Goonewardena, Attorney at Law sought permission of Court to make submissions and was permitted to do so. The purpose of the Bill is to repeal the provisions contained in Sections 19 and 20 (Part IV) of the Finance Act, No. 11 of 2002. These two Sections of the Finance Act, No. 11 of 2002 had in turn repealed, Part VI of the Finance Act, No. 11 of 1963.

Therefore the purpose of the present amendment is to bring back into operation the provisions of Part VI of the Finance Act, No. 11 of 1963, as amended. Part VI of the Finance Act, 11 of 1963 imposed a tax on a transfer of property under certain conditions, to a person who is not a citizen of Sri Lanka. The Act originally covered a transfer of land and shares of companies. By a later amendment the operation of the tax was restricted to transfer of land in favour of person who is not a citizen of Sri Lanka. The tax thus imposed is the amount equivalent to the value of the land. The present Bill revives and brings back into operation the provisions of the Act, No. 11 of 1963, as amended together with all orders, notifications, rules and regulations made in terms of that Law.

Clause 4 of the Bill contains in addition two new provisions, they are, that -

- (1) transfer of ownership of land to any person who is not a citizen shall not be affected at a value below the value as specified in the regulations to be made by the Minister. Such regulations have to be made with the concurrence of the Minister of Lands and the Chief Valuer taking into consideration the prevailing value of the land in any particular administrative district, Divisional Secretary's Division of Grama Seva Niladhari's Division, as the case may be. The purpose of this provision appears to be to prevent land being under valued in order to evade the tax, that is payable.

- (II) that the transfer tax will be payable if the transfer is to a company in which more than 25% of the shares issued are owned by persons who are not citizens of Sri Lanka.

The amendment revives provisions that have been in operation from 1963, and repealed in the year 2002. These provisions impose a tax on the basis of a classification. The tax is imposed only in respect of purchase of land by non citizens or companies where more than 25% of the issued shares are owned by non citizens.

Land being a limited resource should primarily be available to the citizens of this country and the tax is imposed not only as a revenue measure but also to set right a disparity in economic terms between non-citizens who seek to invest in land and citizens who require land to set up a residence or to eke out a livelihood.

We are of the opinion that the classification which has been in operation from 1963 is reasonable in relation to its objective and is based on intelligible criteria. The provisions are therefore not inconsistent with Article 12(1) of the Constitution which guarantees to every person the equal protection of the Law.

Mr. Goonewardena urged two matters for consideration by this Court. They are -

- (i) that the amendment would have the effect of imposing a tax on companies of which more than 25% of the shares are owned by non-citizens who have entered into investment agreements with the Board of Investment in terms of Sections 16 and 17 of the Board of Investment of Sri Lanka Law, as amended.
- (ii) That the imposition of the tax on non citizens may be in contravention of the provisions of International Treaties and Agreements entered into by the Government and approved by the Parliament in terms of Article 157 of the Constitution.

Learned Additional Solicitor General submitted that the Board of Investment is empowered in terms of Section 17 to enter into agreements and to grant exemptions from any law referred to in Schedule "B" of Law, No. 4 of 1978.

He submitted that at the time the Law bearing title Greater Colombo Economic Commission Law was enacted, Part VI of the Finance Act, No. 11 of 1963 which imposed the Property Tax in question was in operation. Section 17 empowered the Commission to grant exemptions from any law referred to in Schedule "B" of the Law. Schedule "B" contains a reference to Finance Act, No. 65 of 1961 which does not cover the Property Tax in issue. Thus it is seen that at the time the Greater Colombo Economic Commission Law was enacted the legislature did not empower the Commission to grant exemptions from Property Tax in question. Thus the approved investments would be subject to the property tax imposed by Act, No. 11 of 1963.

As regards international treaties and agreements, Mr. Goonewardena has not been able to furnish this Court with any evidence of any such treaty that has been approved by a Resolution passed by not less than two thirds of the whole number of members of Parliament as required by Article 157 of the Constitution.

In the short period of 24 hours, that is permitted to this Court to examine the constitutionality of the Bill we are not in a position to embark on a voyage of discovery of treaties that have been approved by Parliament in the manner prescribed by Article 157 of the Constitution. In any event the matter of interpretation of the provisions of any such treaty and a finding that any law is in contravention of the provisions of such a treaty would necessarily have to be the subject of appropriate legal proceedings in which such issue may arise for determination.

On the basis of available material we see no ground to express an opinion that the provisions of the Bill are inconsistent with Article 157 of the Constitution.

For the reasons set out above we make a determination in terms of Article 123 (1) of the Constitution that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

H. S. Yapa
Judge of the Supreme Court

N. K. Udalgama
Judge of the Supreme Court

First Reading :

17.08.2004 (Hansard Vol. 154, No. 13, Col. 1228)

Bill No. : 19

Sponsor : Minister of Finance

Decision of the Supreme Court conveyed to Parliament :

17.08.2004 (Hansard Vol. 154, No. 13, Cols. 1187 - 1190)

Second Reading :

18.08.2004 (Hansard Vol. 154, No. 14, Cols. 1380 - 1440)

07.09.2004 (Hansard Vol. 155, No. 1, Cols. 49 - 122)

Committee of whole Parliament and Third Reading :

07.09.2004 (Hansard Vol. 155, No. 1, Cols. 122 - 123)

Hon. Speaker's Certificate :

05.10.2004

Hon. Speaker's Certificate announced on :

07.10.2004 (Hansard Vol. 155, No. 11, Col. 1457)

Title :

Finance (Amendment) Act, No. 8 of 2004.

S.C. (S. D.) Nos. 2/2004 - 22/2004

"Prohibition of Forcible Conversion of Religion Bill"
In the matter of petitions under Article 121 (1) of the Constitution.

BEFORE : Weerasuriya, J.
Dissanayake, J.
Raja Fernando, J.

COUNSEL :

S.D. No. 2/2004 D. S. Wijesinghe P.C. with
Ms. A. B. D. Dharmadasa for
Petitioner

S.D. No. 3/2004 Wijedasa Rajapakse P.C.
with
Kapila Liyanagamage for
Petitioner

S.D. No. 4/2004 - M. A. Sumathiran with
Nigel Bertholamuez

Vijula Arulanantha Bandaranayake and
Viran Corea for Petitioner

Manohara de Silva with Govinda Jayasinghe,
W. D. Weeraratne and G. W. C. Bandara
Talagune

for Intervenant - Petitioner - Ven. Omalpe
Sobhitha Thero and

Sanjeeewa Jayawardena with Nilshan
Sirimanne

for President of Success Movement -
Intervenant - petitioner (Dr. J. M. K.
Jayaweera)

S.D. No. 5/2004
and

S.D. No. 6/2004 H. L. de Silva, P.C. with
Chanaka de Silva,

Maithree Wickramasinghe and Aravinda
Athurupana

for Petitioners instructed by

Ms. D. L. & F. de Saram
Asoka Gunasekera for Intervenant Petitioner
Ven. Ellawala Medhananda Thero
(S.D. No. 5/2204)

Gomin Dayasiri with P. P. Gunasena for
Intervient Petitioner -

Ven. Uduwe Dhammaloka Thero
(S.D. No. 6/2004)

S.D. No. 7/2004 M. A. Sumanthiran with
Nigel Bertholamuez,

Vijula Arulathnatha, P. Bandaranayake and
Viran Corea for Petitioner

D. Premaratna, P.C. with Pasan Gunasena for
Intervient Petitioner -

Ven. Athuraliye Rathana Thero and
W. Dayaratne for Intervient Petitioner -
Champika Ranawaka

S.D. No. 8/2004 S. F. A. Cooray with
Shammil Perera with Varuna
Senadheera for Petitioner

A. K. Premadasa P. C. with
Mrs. Mallika Premathilake for Intervient
Petitioner **Ven. Kolonnawe Sumangala Thero**

S.D. No. 9/2004 M. A. Sumathiran with
Nigel Bertholamuez,

Vijula Arulanantha Bandaranayake and
Viran Corea for Petitioner

A. A. de Silva, P. C. with U. Mapa and
Guptha

Senadheera for Intervient Petitioner

Ven. Akmeemana Dayarathana Thero.

S.D. No. 10/2004 Nihal Jayamanne, P.C. with
H. Soyza, P. C.

U. Collure, Dilhara de Silva and

Roshan Wickramasinghe for Petitioner

S. C. B. Walgampaya, P.C. with L. K. I.
Perera

for Intervient Petitioner -

Ven. Atte Gnanasara Thero

Ananda Kasturiarachchi for Intervient
Petitioner - **Ven. Rajawatte Vappa Thero**

S.D. No. 11/2004 Kamal Nissanka and
Aravinda Aturupana for
Petitioner
Palitha Kumarasinghe with Hemantha
Wijegunawardane for Intervenant -
Petitioner **Buddhadasa Hewavitharana**

S.D. No. 12/2004 A. R. Surendran, P. C. with
N. R. Sivendran,
K.V.S. Ganeshrajam and N. Kandeepan for
Petitioner -
Prasantha Lal de Alwis with Mrs. Maheshee
de Alwis and Ms. Lakmali Hapugoda for
Intervenant Petitioner - **Ven. Medagama**
Dhammananda Thero -

S.D. No. 13/2004 Asoka Weerasuriya with
Indunil Bandara for
Petitioner
Upul Jayasuriya for Intervenant Petitioner
Nirmala Perera -
H. G. Hussain with A.C.M. Naguleswaran
and
A. M. K. Sugath for 2nd Intervenant
Petitioner -
Neville Karunatileke -

S.D. No. 14/2004 Mohan Peiris with Ms.
Nuwanthi Dias and
Indunil Bandara for Petitioner -
Dr. Harischandra Wijetunga for Intervenant
Petitioner - **H. M. G. B. Kotakadeniyia**

S.D. No. 15/2004 J. C. Weliamuna with
Shantha Jayawardane for
Petitioner -
K. M. P. Rajaratne with B. Wickremasinghe
and
B. Ranatunga for Intervenant Petitioner -
Tilak Karunaratne

S.D. No. 16/2004 Shammil Perera with
Varuna Senadheera for
Petitioner

Lakshman Perera for **Intervenant
Petitioner**

Ven. Hedigalle Wimalasara Thero

Jayatissa Herath with P. P. Gunasena,

D.N.P. Wickrematilleke for

2nd Intervenant Petitioner -
Mangala Ilangasinghe

S.D. No. 17/2004 Elmoe Perera for
Petitioner

Jagath Gunawardane with H. Kularatne for

Intervenant Petitioner - **Prof. Chandra
Wickremagamage**

S.D. No. 18/2004 Elmoe Perera with
C. P. C. Fernando for

Petitioner

Daya Guruge for Intervenant Petitioner -
Senaka de Silva

S.D. No. 19/2004 Chandra de Silva with
Vijula Arulanantha,

Viran Corea for Petitioner

K. Jayasekera for Intervenant Petitioner
Piyasena Dissanayake

Nalinda Indatissa for Intervenant Petitioner -

Ven. Udawatte Nanda Thero

S.D. No. 20/2004 R. K. W. Gunasekera
with Mrs. Suriya Wickremasinghe, Ms.
Savithri Gunasekera, Javid Yusuf and Saliya
Edirisinghe for Petitioner

Gamini Prematilake with Ms. Punya Jayatilleke
and Ms. Kumudini Fonseka for Intervenant
Petitioner - **Ven. Kotapola Amarakitti Thero**

S.D. No. 21/2004 Dr. Jayantha de Almeida
Gunaratne, P.C. with J.C.

Weliamuna, Ms. Kishali Pinto Jayawardane,
Madhuranga Ratnayake and Ms. Shirmila
Anthony

for Petitioner

M.C. Jayaratne with J. C. Weerasuriya, Ms.
Shoba Adikara for Intervient Petitioners

Asungaratne Ariyathilleke and

Ven. Udawatte Nanda Thero

S.D. No. 22/2004 Petitioner is present in
person - V. T.

Thamilmaran

K. Tiranagama with Rohan Wijesena and
K. K. Kumari for Intervient Petitioner -

Chathura Pamunuwa

Y. J. W. Wijayathilaka, D.S.G. with

Mrs. Indika Demuni de Silva, S.S.C. and

Janak de Silva, S.C. for Attorney-General

in all cases.

**Court assembled at 10 a.m. on 06.08.2004 and 09.08.2004 for hearing of the
above petitions.**

A Bill titled "Prohibition of Forcible Conversion of Religion" has been presented as a Private Member's Bill and was placed on the Order Paper of Parliament on 21.07.2004. Twenty one petitions have been presented challenging the constitutionality of the Bill in terms of Article 121 (1), invoking the jurisdiction of this Court for a determination in terms of Article 123 of the Constitution. In addition twenty one intervenient petitioners were made parties on their application.

The purpose of the Bill is stated to be to provide for prohibition of conversion from one religion to another by use of force or allurement or by fraudulent means and for matters incidental therewith or incidental thereto.

The objections raised by the petitioners who opposed the Bill relate to the constitutionality of the entire Bill.

The Preamble of the Bill reads as follows :-

"Whereas, Buddhism being the foremost religion professed and practised by the majority of people of Sri Lanka due to the introduction by Great Thathagatha, the Sambuddha in the eighth month after he had attained Buddhahood on his visit to Mahiyangana in Sri Lanka and due to the complete realization after the arrival of Arahat Mahinda Thero in the 3rd century B.C.

And whereas, the state has a duty to protect and foster the Buddha Sasana while assuring to all religions the rights granted by Article 10 and 14(1) (e) of the Constitution of the Republic of Sri Lanka :

And whereas the Buddhist and non - Buddhists are now under a serious threat of forcible conversions and proselytizing by coercion or by allurement or by fraudulent means.

And whereas the Mahasangha and other religious leaders realizing the need to protect and promote religious harmony among all religions, historically enjoyed by the people of Sri Lanka”;

Clause 2 of the Bill

It was the contention of the petitioners who opposed the Bill that Clause 2 read with the interpretation Clause 8 are inconsistent with Articles 9, 10, 14 (1) (e), 12(1) and 12(2) of the Constitution. They submitted that Article 10 which grants freedom of thought conscience and the freedom to adopt and to have a religion of one's choice are absolute and unconditional and any attempt to regulate manifestation and practice of religion guaranteed under Article 14(1)(e) through Article 15(7) would in effect negate and nullify the contents of Article 10.

The intervenient petitioner in S.D. 4/2004, who is the proponent of the Bill submitted that the Bill seeks to prohibit only conversion from one religion to another by the use of force, or allurement or by fraudulent means and gives to the freedom guaranteed under Article 10 of the Constitution.

Article 10 assures that 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. Thus Article 10 protects absolutely the holding of any religious belief of his choice, no matter how bizarre or irrational. Therefore 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 any fetter which in any way distorts one's choice.

This position becomes clear by examining Article 18 (2) of the International Covenant on Civil and Political Rights which 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.”

It is not disputed that the right to freedom of religion includes the right to adopt the religion or belief and entails the right to change one's religion. The present Bill seeks to prohibit conversions from one religion to another by the use of force or allurement or fraudulent means.

The freedom to practice or exercise one's religion guaranteed by Article 14 (1) (e) of the Constitution is subject to the restrictions that can be lawfully imposed in terms of Article 15(7) of the Constitution. But those restrictions must be prescribed by law and must be for the following purposes namely

- (a) national security
- (b) public order and the protection of public health
- (c) morality

- (d) for the purpose of securing due recognition and respect for the rights and freedom of others
- (e) of meeting the just requirements of the general welfare of a democratic society.

The intervenient petitioner in S.D. 4/2004 who is the proponent of the Bill submitted that the Special Presidential Commission report on Buddha Sasana has disclosed material pertaining to conversion by the use of force fraud and allurement and by unethical means. Clause 3 of the Preamble makes reference to this situation and seeks to address it by way of legislation.

The essential ingredient of the offence of allurement as a means of conversion is the causing of a temptation or an inducement by offering a person some benefit calculated to fascinate him or attract him which may affect his decision.

The contention of some of the petitioners who opposed the Bill that acts of benevolence and charity in obedience to the gospel command may be construed as acts of enticement, falling within the definition of allurement in the Bill making it an offence, merits our consideration. What is improper in this context is the willful engagement of a deceitful exercise to secure a conversion. Conversion by allurement has been dealt with as a method of improper conversion in the case of *Kokkinakis Vs. Greece* (European Court of Human Rights Vol. 260) in the following terms :

(i) "First of all a 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 religions of others."

In the circumstances we are of the view that subject to the restrictions recommended to the definition of allurement in Clause 8(a) of the Bill Section 2 of the Bill does not offend Articles 9, 10, 12(1), 12(2) and 14(1)(e) of the Constitution.

Clause 8(a) of the Bill defines allurement to mean, offer of any temptation in the form of :

- (i) any gift or gratification whether in cash or kind
- (ii) grant of any material benefit whether monetary or otherwise
- (iii) grant of employment or grant of promotion in employment.

Clause 8(c) defines force to include a show of force including threat or harm or injury of any kind or threat of religious displeasure or condemnation of any religion or religious faith.

The definition of the offence of force as set out in Clause 8(c) which seeks to give an extended meaning is not a novel feature in our law. Section 169 c (2) (b) of the Penal Code provides that an inducement to a candidate at an election to believe that he or any person in whom he is interested will be rendered an object of divine displeasure or spiritual censure as committing undue influence.

Clause 8(d) of the Bill defines fraudulent means to include misrepresentation (misspelled as misinterpretation) or any other fraudulent or any other contrivance.

Section 23 of the Penal Code states that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. Thus the two forms of wrongful conduct namely the use of force and the adoption of fraudulent means are already found in Penal Code for different offences.

Therefore the restrictions sought to be placed by the Bill through 15(7) on Article 14(1)(e) are designed to ensure public order, morality and for the purpose of meeting the just requirements of the general welfare of a democratic society.

We recommend certain amendments to Clause 8(a), 8(c) and 8(d) (which would be dealt with later) in view of the concerns raised by some opponents of the Bill in respect of its application.

Clause 3(a) and 3(b)

We agree with the contention of the petitioners who opposed the Bill that Clauses 3(a) and 3(b) of the Bill requiring the "convert" the facilitator, and the witness to such ceremony to notify the Divisional Secretary of the fact of conversion from one religion to another is inconsistent with Article 10 as it would be a restraint on his freedom of thought, conscience, and religion.

Clause 4(a)

This Clause deals with punishment of the offenders. The Magistrate's Court is vested with jurisdiction to try the offences made out in Clause 2. Having regard to the provisions of Section 14 of the Code of Criminal Procedure Act relating to the punitive powers of the Magistrate's Court, we are of the view that it is arbitrary and irrational to exclude the applicability of the provisions of the Code of Criminal Procedure Act to the offences made out in this Bill.

The inclusion of a woman in the proviso to Clause 4 (a) in the category of persons against whom the offence is committed which attracts an enhanced punishment does not violate Article 12(2) of the Constitution in view of the special protection granted to women and children under Act 12(4) of the Constitution.

We are of the view that item II in Schedule 1 of Clause 4 which relates to the category of persons referred to in the proviso is violative of Article 76 (1) of the Constitution.

Clause 4(b)

In view of the findings that Clause 3 of the Bill in its present form is inconsistent with Article 10, Clause 4(b) which seeks to enforce the terms of Clause 3, is also inconsistent with Article 10.

Clause 5

Clause 5 relates to institution of proceedings in the Magistrate's Court. The categorization of persons authorised by this Clause to institute prosecutions against persons accused of committing any offence under the Bill is irrational and arbitrary and therefore violative of Article 12(1).

Clause 6

This Clause empowers the Minister to make rules and regulations for the enforcement and carrying out the provisions of the Act. The prescribed purpose is overly broad and ambiguous. In the circumstances we are of the view that it violates Article 76(1) of the Constitution.

Recommendations

In view of our findings that Clause 3 and Clause 4(b) of the Bill violate Article 10 of the Constitution the Bill in its present form has to be 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 in terms of Article 82(a) of the Constitution.

If Clauses 3 and 4 (b) are deleted the Bill will not be inconsistent with Article 10 of the Constitution.

Clause 4(a)

In view of the finding that Clause 4(a) of the Bill is violative of Article 12(1) of the Constitution we recommend that the words "Notwithstanding anything to the contrary to any provision in the Code of Criminal Procedure Act" in Clause 4 (a) of the Bill be deleted. We further recommend that item 11 of the Schedule I referred to in the proviso to Clause 4 (a) of the Bill be deleted.

Clause 5

We have come to a finding that Clause 5 is arbitrary and irrational and violates Article 12(1) of the Constitution. In the event of Clause 5 being amended to specify that any institution of proceeding relating to the offences mentioned therein be instituted in accordance with the provisions of Section 136 of the Code of Criminal Procedure Act and subject to the written sanction of the Attorney-General, the inconsistency will cease to exist.

As the primary objective of the Bill is to prevent conversion of a person from one religion to another by the use of force or allurement or by any fraudulent means, it is desirable to define the terms force, allurement or fraudulent means in relation to the primary objective of the Bill.

In the circumstances we recommend to interpolate the words "for the purpose of converting a person from one religion to another" after the word temptation in Sub paragraph (a) of Clause 8.

Similarly we recommend the interpolation of the words "for the purpose of converting a person from one religion to another" at the end of Sub paragraph (c) of Clause 8.

We also recommend the interpolation of the word "wilful" after the word "includes" in Sub paragraph (d) of Clause 8 and the interpolation of the words "for the purpose of converting a person from one religion to another" at the end of the Sub paragraph 8(d).

1. T. B. Weerasuriya
2. N. E. Dissanayake
3. Raja Fernando

First Reading :

21.07.2004 (Hansard Vol. 154, No. 6, Col. 453)

Sponsor :

Ven. (Dr.) Omalpe Sobhitha Thero M.P.

Bill No. : 7

Decision of the Supreme Court conveyed to Parliament :

17.08.2004 (Hansard Vol. 154, No. 13, Cols. 1192 - 1200)

Second Reading :

06.05.2005 (Hansard Vol. 159, No. 4, Cols. 601 - 609)

Reference of Legislative Standing Committee of Parliament:

06.05.2005 (Hansard Vol. 159, No. 4, Col. 604)

Nomination to the Legislative Standing Committee of Parliament :

08.07.2005 (Hansard Vol. 159, No. 19, Cols. 2195 - 2197)

Report of the Legislative Standing Committee of Parliament :

06.01.2009 (Hansard Vol. 180, No. 1, Col. 8)

*** It is listed on the Order Paper for Consideration of the Report of the Legislative Standing Committee of Parliament**

S.C. (S.D.) No. 24/2004

“Elections (Special Provisions) Bill”

Reference under Article 122(1)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

BEFORE : Sarath N. Silva, Chief Justice.
H. S. Yapa Judge of the Supreme Court
N. K. Udalgama Judge of the Supreme Court

COUNSEL : P. A. Ratnayake, P.C., Addl. Solicitor General with
Ms. Anusha, Navaratne, D.S.G., and Arjuna
Obeysekera S.C., for the Attorney-General

Court assembled for hearing on 06.08.2004 at 12.30 p.m.

Her Excellency the President by a written reference dated 5th August, 2004 addressed to the Chief Justice has requested the special determination in respect of the Bill bearing the above title, in terms of the provisions of Article 122(1) (b) of the Constitution. The Bill bears the endorsement of the Secretary to the Cabinet of Ministers that it is urgent in the national interest.

Notice was issued on the Attorney-General as required by the Constitution and Additional Solicitor General assisted this Court in the consideration of the constitutionality of the provisions of the Bill.

The Memorandum to the Cabinet of Ministers states that the amendment contained in the Bill is based on the recommendations of a Select Committee of Parliament.

The overall purpose of the Bill is to make it mandatory that the identity of any voter at an election is ascertained by the inspection of a “valid identity document”, before the ballot paper is issued to such a voter.

Part II of the Bill contains the provisions with regard to, Parliamentary Elections, Part III - contains provisions with regard to Presidential Elections; Part IV - contains amendments with regard to Provincial Council Elections; Part V - contains amendments with regard to Local Authorities Elections, and Part VI - contains amendments with regard to Referenda.

The amendments contained in all these Parts follow an identical pattern with regard to the delivery of a ballot paper to each voter. The amendment imposes a pre-condition that a ballot paper is delivered only if a valid identity document of the voter is inspected and the name and identity is thereby ascertained.

The other amendment is to provide that no ballot paper will be delivered to a voter if he refuses to allow the Presiding Officer or the person acting under his authority to make an inspection of a "valid identity document." Clause 3 of the Bill interprets the phrase "valid identity document" to mean

"any document issued by the Government of Sri Lanka in pursuance of any law for whatever purpose with which the identity of the holder may be ascertained."

Learned Additional Solicitor General submitted that documents such as a passport, a driving licence, or a postal identity card would come within the purview of this definition.

The only aspects of constitutionality that arise for consideration are whether -

- i. it affects the franchise as provided in Article 4(e) of the Constitution;
- ii. it is inconsistent with the provisions of Article 12(1) which guarantees to every person the equal protection of the law.

Article 4 of the Constitution states the manner in which the Sovereignty of the People shall be exercised and enjoyed and paragraph (e) provides as follows :-

"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 is seen from this provision that the Constitution guarantees every citizen being a qualified elector the right to exercise the franchise at Elections and Referenda. The name of the person being entered in the register of electors is a necessary pre-requisite for the exercise of franchise. The proposed amendment, in our opinion is a safeguard against impersonation and thereby enhances the exercise of franchise by ensuring that the person whose name is in fact entered in the register of electors is issued a ballot paper for the purpose of voting.

Article 93 of the Constitution contains a general provision with regard to the manner in which elections shall be conducted and it reads as follows :

"The voting for the election of the President of the Republic and of the Members of Parliament and at any Referendum shall be free, equal and by secret ballot."

The requirement contained in this provision that an election shall be free, equal and by secret ballot will also be enhanced by the proposed amendment, which would prevent impersonation and ensure that the person whose name is entered in the register is the one who in fact votes at the election.

The necessary implication of the amendment is that a person whose identity cannot be ascertained with reference to a valid identity document is not issued a ballot paper. Thus the law makes a distinction between persons whose identity could be ascertained with reference to a valid identity document and persons whose identity cannot be so ascertained.

We are of the opinion that this distinction is reasonable in relation to its objective being the prevention of impersonation and is based on intelligible criteria.

The Registration of Persons Act, No. 32 of 1968 has been in operation from 1971 and every person whose name is entered in the register of electors would be issued with an identity card in terms of the Act.

Furthermore, as submitted by learned Additional Solicitor General the phrase "valid identity document" is given a wide interpretation in Clause 3. It permits the identity of the person being ascertained with reference to any document issued by the Government of Sri Lanka in pursuance of any law for whatever purpose. In the circumstances the distinction made between persons whose identity can be ascertained by means stated in the Bill and the persons whose identity cannot be so ascertained, would not be inconsistent with the provisions of Article 12 (1) of the Constitution.

For the reasons set out above we make a determination in terms of Article 123(1) of the Constitution that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

H. S. Yapa
Judge of the Supreme Court

N. K. Udalgama
Judge of the Supreme Court

First Reading :

17.08.2004 (Hansard Vol. 154, No. 13, Cols. 1228 - 1229)

Bill No.: 20

Sponsor : Minister of Justice and Judicial Reforms

Decision of the Supreme Court conveyed to Parliament :

17.08.2004 (Hansard Vol. 154, No. 13, Cols. 1190 - 1192)

Second Reading :

18.08.2004 (Hansard Vol. 154, No. 14, Cols. 1372 - 1380)

21.09.2004 (Hansard Vol. 155, No. 05, Cols. 636 - 718)

06.10.2004 (Hansard Vol. 155, No. 10, Cols. 1368 - 1442)

07.10.2004 (Hansard Vol. 155, No. 11, Cols. 1499 - 1582)

Committee of whole Parliament and Third Reading :

07.10.2004 (Hansard Vol. 155, No. 11, Cols. 1583 - 1589)

Hon. Speaker's Certificate :

18.11.2004

Hon. Speaker's Certificate announced on :

20.11.2004 (Hansard Vol. 156, No. 03, Col. 502)

Title :

Elections (Special Provisions) Act, No. 14 of 2004.

S.C. (S.D.) No. 27/2004

"Inland Revenue (Amendment) Bill"

BEFORE : Sarath N. Silva Chief Justice
 C. N. Jayasinghe Judge of the Supreme court
 N. K. Udalgama Judge of the Supreme court

COUNSEL : Mr. U. Egalahewa, Senior State Counsel with
 Ms. Sonali Siriwardena, S.C., for the Attorney-General.

Court assembled for hearing on 23rd August, 2004 at 10.15 a.m.

A Bill bearing the above title has been referred to this Court in terms of Article 122(1)(b) of the Constitution for a special determination as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement in terms of Article 122(1) of the Constitution made by the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Attorney-General was issued notice as required by Article 134(1) of the Constitution and Mr. U. Egalahewa, Senior State Counsel, assisted Court in considering the constitutionality of the Bill and its provisions.

State Counsel submitted that the several Clauses contained in the Bill fall into, broadly two categories. They are ---

- i. provisions that have been included to give effect to the proposals contained in the budget presented at the end of the year 2003 and have been approved by Parliament;
- ii. provisions that have been included to clear certain ambiguities in the Inland Revenue Act, No. 38 of 2000, as amended and to enact some provisions contained in a Bill gazetted on 1.12.2003 which was passed by Parliament on 22.1.2004 to which the certificate of the Speaker had not been endorsed in terms of Article 80(1) of the Constitution prior to the dissolution of the former Parliament.

State counsel was furnished the necessary material in Court by the officials of the Inland Revenue Department, who were present. With this assistance we have examined the Clause of the Bill and find that the following Clauses have been included to give effect to the proposals contained in the budget presented at the end of the year 2003.

They are :

Clauses :

3, 5, 6, 8, 9, 16, 17, 19, 24, 25, 28, 29, 30, 31, 35, 36, 37, 38, 40, 43, 44, 45, 46, 48, 49, 50, 51, 53, 56, 57, 58 and 59.

The following Clauses have been included to clear ambiguities and to enact provisions that have been contained in the amending Act passed by Parliament on 22.01.2004, but not certified by the Speaker. They are

Clauses : 2, 4, 7, 10, 11, 12, 13, 14, 15, 18, 20, 21, 22, 23, 26, 27, 32, 33, 39, 41, 42, 47, 52, 54 and 55

The substantive provisions of the Act grant concessions from income tax or impose and clarify liabilities.

The former Constitutional Court and this Court have in several determinations stated that in taxation matters the Legislature has the greatest freedom of classification and concessions granted or liability imposed have not been held to be inconsistent with Article 12(1) which provides for the equal protection of the law.

We would cite in this connection a decision of the former Constitutional Court made in respect of the Finance (Amendment) Act of 1978. The Court observed as follows :

"In taxation matters, even more than in other fields, it is well established that the Legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects 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 that it cannot be justified on the basis of any valid classification."

(The Constitutional Court of Sri Lanka - Vol. VI - 1978)

In relation to the Inland revenue (Amendment) Bill this Court made the following observations being on the same lines as stated above ; (S.C.) (S.D.) 3/1980)

"..... This is, however, fiscal legislation and it is a matter for the Legislature to decide what consideration relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to. Presumably, this provision is sought to be enacted on the basis of economic consideration in respect of which the decision must largely be left to the Legislature in view of the inherent complexity of fiscal adjustment of diverse elements that requires to be made."

In respect of Tax Amnesty Bill a bench of 5 Judges of this Court observed as follows :-

"..... We have considered these provisions in the light of the fundamental rights of equality before the law and equal protection of the law as provided in Article 12(1) of the Constitution of Sri Lanka.

In view, however, of the provisions of Article 15(7) of the Constitution and the permitted restriction of the exercise and operation of the fundamental rights in the interest of meeting the just requirements of the general welfare of a democratic society, we think that the purpose of this Bill, justifies the restriction, if any, of the fundamental rights of equality."

It is clear from the observations made consistently by the Constitutional Court and this Court that in revenue matters in making classifications for the purpose of granting concessions or imposing liability there is a wide discretion. These measures are taken not only to raise resources necessary for the State but also to direct economic activity projected to the general welfare of the society. Such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable or discriminatory. On the said basis we have examined the Clauses of the Bill and we make a determination, in terms of Article 123 that neither the Bill nor any of its Clauses are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

C. N. Jayasinghe
judge of the Supreme Court

N. K. Udagama,
Judge of the Supreme Court

First Reading :

07.09.2004 (Vol. 155, No. 01, Col. 45)

Bill No. : 29

Sponsor : Minister of Finance

Decision of the Supreme Court conveyed to Parliament :

07.09.2004 (Hansard Vol. 155, No. 01, Cols. 7-9)

Second Reading :

08.09.2004 (Hansard Vol. 155, No. 02, Col. 276)

Committee of whole Parliament and Third Reading :

08.09.2004 (Hansard Vol. 155, No. 02, Cols. 276 - 289)

Hon. Speaker's Certificate :

18.11.2004

Hon. Speaker's Certificate announced on :

20.11.2004 (Hansard Vol. 156, No. 03, Col. 502)

Title :

Inland Revenue (Amendment) Act, No. 12 of 2004.

S.C. (S.D.) No. 28/2004

“Finance Bill”

BEFORE: Shirani A. Bandaranayake - Judge of the Supreme Court
N. E. Dissanayake - Judge of the Supreme Court
Raja Fernando - Judge of the Supreme Court

COUNSEL : M. R. Ameen, State Counsel, for the Attorney-General

Court assembled for the hearing at 11.10 a.m. on 24th August, 2004.

A Bill titled “An Act to make provision for the imposition of certain charges and levies consequential to the 2004 Budget proposals; and to provide for matters connected therewith or incidental thereto” (the Finance Act, No. of 2004) 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 bears the endorsement of the Secretary to the Cabinet of Ministers that it is urgent in the national interest.

Notice was issued on the Attorney General as required by the Constitution and Mr. M. R. Ameen, State Counsel assisted the Court in the determination of this matter.

The Bill contains four (4) parts and consists of 29 Clauses. Part I deals with the Imposition of an Economic Service Charge whereas Part II refers to Imposition of Cellular Mobile Telephone Subscriber’s Levy. Imposition of International Telecommunications Operation Levy is dealt with in Part III and Part IV is on the amendment to the Finance Act, No. 25 of 2003.

The purpose of the Bill as stipulated in the Preamble is to give effect to the Budget proposals of 2004. For this purpose provision has been made for the imposition of certain charges and levies. Accordingly there are three (3) kinds of levies and/or charges that have been introduced, which are as follows :

- (a) Economic Service Charge;
- (b) Cellular Mobile Telephone Subscriber’s Levy; and
- (c) International Telecommunications Operations Levy

The amendment to the Finance Act, No. 25 of 2003 has been brought in to make certain exceptions to the Tourism Development Levy.

It appears that provisions proposed in Clauses 2(1) and 2(2) require our consideration.

The Economic Service Charge is to be payable by every person and every partnership for each year of assessment commencing on or after 01.04.2004 in respect of the liable turnover of such person or partnership for the relevant year of assessment. The rates that has to be paid are specified in the Schedule to the Bill. However, according to the proviso, no service charge has to be paid by any person or partnership being a BOI enterprise. However, it is to be noted that according to Clause 2(2) and the proviso

to the said Clause, such a service charge is levied from a person or partnership only if the turnover for the relevant year of assessment exceeds Rupees Fifty million. The proviso also provides that in any case the service charge levied from any person or partnership for any relevant year cannot exceed Rupees fifty million. In other words, the charge could be levied only from large establishments. It may appear on the face of the relevant Clauses that the Economic Service Charge which is restricted to persons and/or partnerships which have a turnover exceeding Rupees fifty million would create a separate category without any intelligible differentia, which would distinguish the group from the others, and would become arbitrary, discriminatory and offends against the provisions relating to the Constitution.

However, it is to be borne in mind that in terms of Article 15(7) of the Constitution, the exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to certain restrictions prescribed by law. These restrictions according to Article 15(7),

“..... 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** (emphasis added).”

The main purpose of the Bill, as pointed out earlier is to implement the Budget proposals for 2004, and it is undoubtedly for the purpose of general welfare of a democratic society. To that extent the Clause would come within the exception granted in terms of Article 15(7) of the Constitution.

Moreover, the Bill deals with fiscal legislation, which is a matter for the Legislature to decide as to the kind of considerations that should be granted. In SC No. SD 3/80, considering the Inland Revenue (Amendment) Bill, this Court was of the view that, “the Legislature should decide as to what considerations relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to, when one considers fiscal legislation”. The Court stated that,

“Presumably, the provision is sought to be enacted on the basis of economic consideration in respect of which the decision must largely be left to the Legislature in view of the inherent complexity of fiscal adjustment of diverse elements that requires to be made.”

For the reasons aforesaid we are therefore of the view that, Clause 2 of the Bill is not inconsistent with Article 12(1) of the Constitution.

Clause 14 which is in Part II of the Bill that refers to the Cellular Mobile Telephone Subscriber's Levy speaks of the charge of such tax from every person using a cellular mobile telephone at the rate of two and half *per centum* calculated on the value of supply of services or further services by the mobile telephone operator. However, the proviso to Clause 14 states that,

"Provided however, that no organization or individual to whom the provisions of the Diplomatic Privileges Act, No. 9 of 1996 applies shall be required to pay the levy referred to above."

Although it appears that by the special consideration given by excepting them from the payment of tax referred to in Clause 14, a special category has been formed, such group has been recognised on an intelligible differential which distinguishes the persons that are grouped together as they come within the Diplomatic Privileges Act, No. 9 of 1996. Thus a rational basis is found and we are of the view that Clause 14 of the Bill is not inconsistent with Article 12(1) of the Constitution.

Clause 19, Clause 26(1) and Clause 28 and Clause 13(1) of the Bill refer to the Operation of the provisions of different parts of the Bill. All Clauses state that the Bill is with retrospective effect. For instance Clause 13(1) of the Bill reads thus,

"The provisions of this Part of this Act shall be deemed for all purposes to have come into operation on April 1, 2004."

It is settled law that a tax law otherwise valid creates no unreasonable restriction (Mytibhai Laloobhai and Company v Union of India AIR 1957 /All 84) and would even be retrospective. Retrospective taxation cannot be regarded as unreasonable (State of Kerala v Joseph AIR 1958 SC 296) unless it is clearly prohibitive. More importantly, Parliament is empowered to enact laws having retrospective effect. Article 75 of the Constitution reads thus :

"Parliament shall have power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution:

Provided that Parliament shall not make any law -

- (a) suspending the operation of the Constitution or any part thereof, or
- (b) repealing the Constitution as a whole unless such law also enacts a new Constitution to replace it.

The aforementioned Clauses are only to make laws with retrospective effect and thereby clearly within the general ambit of Article 75 of the Constitution.

For the aforesaid reasons we are of the view that the Clauses 13(1), 19, 26(1) and 28 are not inconsistent with the Constitution.

Clause 21 of the Bill refers to the imposition of International Telecommunications Operators Levy and the 2nd proviso to the said Clause deals with the method of calculating the operators levy for the period commencing from 03.03.2003 until regulations are made. Based on the making of such regulations the 2nd proviso to Clause 21 refers to Section 26 of the Bill. Clause 26 however deals with the date of the operation of Part III of the Bill and it is Clause 22 which is applicable for the purpose of making such regulations. Learned State Counsel submitted that by an error the Bill in its 2nd Proviso to Clause 21 refers to Clause 26 and that this would be rectified at the committee stage at Parliament.

With regard to the making of regulations in terms of Clause 22, no provision has been made for such regulations to be published in the Gazette and to be presented to the Parliament which are generally known to be standard provisions.

Learned State Counsel submitted that steps would be taken at the committee stage to rectify aforesaid omissions.

Part IV of the Bill deals with the amendments to Finance Act, No. 25 of 2003. By this, Section 11 of the said Act is intended to be amended. This Section reads as follows :

“From and after the date of commencement of this Part of this Act, there shall be levied from every institution licensed under the Tourist Development Act, No. 14 of 1968, a levy of one *percentum* on the turnover of such institutions in any year, to be called the Tourism Development Levy.”

The amendment is to bring in a substitution for the words “to be called the Tourism Development Levy of the words,

“to be called the Tourism Development Levy: Provided however such levy shall not be charged on the turnover of any General Sales Agent licensed under the Tourist Development Act, No. 14 of 1968 as a Travel Agent with effect from January 1, 2004.”

The amendment thus creates a category of people who would not be liable to pay the Tourism Development Levy.

It is well settled law that equal protection of the laws is an injunction issued by the framers to the Legislature against enactment of laws, which are discriminatory. However, this does not mean that all enactments should be universal in their application. The State has the power in making distinctions and classifications of individuals, person or things for the mere purpose of legislation thereby accepting the principle that every differentiation is not discrimination.

However, such classification cannot be arbitrary and should only be based on intelligible criteria having a reasonable nexus to the object of the legislation.

The proposed amendment is to relieve the General Sales Agents licensed under the Tourist Development Act, No. 14 of 1968 as a Travel Agent from the Tourism Development Levy. This is a category, which directly deals with the tourism development and the object being the general development of such industry, there is reasonableness as well as intelligible differentia in having such kind of a group to be treated differently. Furthermore this too, relates to fiscal legislation, which as pointed out earlier is a matter for the Legislature to decide.

Considering the purpose of the Bill before us, which largely deals with the fiscal adjustments we are of the view that Clause 27 of the Bill is not inconsistent with Article 12(1) of the Constitution.

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

Shirani A. Bandaranayake,
Judge of the Supreme Court

N. E. Dissanayake,
Judge of the Supreme Court

Raja Fernando,
Judge of the Supreme Court

First Reading :

07.09.2004 (Hansard Vol. 155, No. 01, Col. 46)

Bill No. : 30

Sponsor : Minister of Finance

Decision of the Supreme Court conveyed to Parliament :

07.09.2004 (Hansard Vol. 155, No. 01, Cols. 17 - 20)

Second Reading :

08.09.2004 (Hansard Vol. 155, No. 02, Cols. 212 - 248, 250 - 271)

Committee of whole Parliament and Third Reading :

08.09.2004 (Hansard Vol. 155, No. 02, Cols. 271 - 276)

Hon. Speaker's Certificate :

28.10.2004

Hon. Speaker's Certificate announced on :

20.11.2004 (Hansard Vol. 156, No. 03, Col. 502)

Title :

Finance Act, No. 11 of 2004.

S.C. (S.D.) No. 25/2004

"Tobacco Tax (Amendment) Bill"

BEFORE : Sarath N. Silva Chief Justice
C. N. Jayasinghe Judge of the Supreme Court
N. K. Udalgama Judge of the Supreme Court

COUNSEL : Ms. I. Demuni de Silva, Senior State Counsel for the Attorney-General.

Court assembled for hearing on 23rd August, 2004 at 10.15 a.m.

A Bill bearing the above title has been referred to this Court in terms of Article 122(1)(b) of the Constitution for a special determination as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement in terms of Article 122(1) of the Constitution made by the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Attorney-General was issued notice as required by Article 134(1) of the Constitution and Ms. I. Demuni de Silva, Senior State Counsel, assisted Court in considering the constitutionality of the Bill and its provisions.

The Bill is an amendment to the Tobacco Tax Act, No. 8 of 1999 and has a limited scope.

The Tobacco Tax Act is a law relevant to public finance being a matter within the plenary control of Parliament in terms of Article 148 of the Constitution. It is a subject coming within the "Reserved List" in terms of the Thirteenth Amendment to the Constitution and not within the purview of Provincial Councils. Section 2(1) of the Act imposes a tax on every cigarette, cigar, beedi, cigarette substitute and every kilogramme of pipe tobacco manufactured in Sri Lanka.

The Scheme for the imposition of revenue measures is that locally manufactured tobacco products are imposed excise duties and the imported products are subject to customs duties.

Clause 3 of the Bill introduces a new provision numbered Section 5A which prohibits any registered manufacturer from importing "beedi tobacco" except under a licence issued by the Commissioner General of Excise. The application for such licence should be in the prescribed form and accompanied by the prescribed fee.

It was submitted by Ms. De Silva, that the main thrust of the amendment is to bring within the purview of the principal enactment the importation of "beedi tobacco". There has been tax evasion by the importation of "beedi tobacco". The amendment is therefore a legislative measure to ensure the due payment of the Tobacco Tax and related Excise duties. The provision in the present law covering "cigarette substitute" appears to be ineffective.

Although the purpose of the amendment namely, the proper enforcement of the Tobacco Tax is valid and reasonable. Clause 5, as presently formulated is inconsistent with Article 12(1) of the Constitution which guarantees to every person equality before the Law. The Clause requires only a registered manufacturer to obtain a licence to import beedi tobacco. Inferentially any person not being a registered manufacturer could import beedi tobacco without a licence. Whilst, ex facie there is an inequality in the application of the law, looked from another perspective the object of the law could be defeated by any registered manufacturer carrying out the importation through another person not being a registered manufacturer. In our opinion the inconsistency with Article 12(1) will cease if the words "who being a registered manufacturer in terms of this Act", are deleted from Clause 5A(1).

Clause 4 amends Section 7 by making specific provisions for search of any person, boat, vessel, vehicle and premises on the authority of a warrant issued by a Magistrate or without a warrant in the limited situations specified in Clause 7(1)(b), for the purpose of ascertaining whether any offence under the Act has been committed or whether the Tobacco Tax or duty payable in respect of tobacco leaf, cigarettes, cigars, beedis, beedi tobacco or pipe tobacco have been paid.

Clause 7(2)(c) empowers any of the officers specified in Clause 1 to arrest and detain any person committing an offence under the Act, if such person is in possession of a contraband or if he is in control of any boat, vessel, vehicle, container used in the commission of an offence under the Act.

Article 13(2) of the Constitution requires that every person held in custody or detained shall be brought before the Judge of the nearest competent court according to the procedure established by law. This Article, which contains a salutary fundamental right guaranteeing freedom from arbitrary arrest and detention, is based on the premise that whatever a law permits arrest and detention there shall also be a procedure established by such law to have the person arrested and detained brought before the nearest competent court. The Bill does not contain such a procedure. Senior State Counsel conceded that the provisions of the Code of Criminal Procedure Act will not apply in relation to arrests by Customs Officers and Excise Officers, since they are not "Peace Officers" as defined in the Act.

Therefore, Clause 7 2(c) which vests a power to arrest and detain without adequate provision for the person arrested and detained to be brought before the nearest court of competent jurisdiction is in our opinion inconsistent with Article 13(2) of the Constitution.

The inconsistency will cease if suitable provisions are included whereby officers empowered to make an arrest in terms of Clause 7 (2)(c) are deemed to be Peace Officers in terms of the Code of Criminal Procedure Act and the relevant procedure of the Code is made applicable to an arrest made under the Clause.

Clause 7(3) provides that no person shall be liable to arrest if such person is able to prove to the satisfaction of the person making the arrest that he was not connected with the commission of the offence.

Article 13(1) of the Constitution requires that any person arrested shall be informed of the reasons for the arrest. Therefore Clause 7(3) which casts a burden on the person arrested to prove his innocence, would be in our opinion inconsistent with Article 13(1) of the Constitution.

The other Clauses in the Bill have the effect of deleting the phrase "cigarette substitute" and including the phrase "beedi tobacco".

In Clause 9, the phrase, "beedi tobacco" is interpreted to mean "tobacco specifically grown for the manufacture of beedi."

The interpretation appears to be too narrow since it may be well high impossible to prove that anything has been "specially grown" for a particular purpose. However this is a matter of drafting and does not involve issues of constitutionality.

For the reasons above we are of the opinion that :

- (i) Clause 3 of the Bill is inconsistent with Article 12(1) of the Constitution;
- (ii) Clause 7 (2)(c) is inconsistent with Article 13(2) of the Constitution; and
- (iii) Clause 7(3) is inconsistent with Article 13(1) of the Constitution;

Accordingly we make a determination that the Bill in its present form may only be passed by the special majority provided in Article 84(2) of the Constitution.

In terms of Article 123(2) we make a further determination that the inconsistencies with the Constitution would cease if the following amendments are made to the Bill. They are --

- (i) the deletion of the words "who being a registered manufacturer in terms of this act" appearing in Clause 3 (Section 5A(1));
- (ii) an additional provision is included in relation to Clause 7(2)(c) that the officers empowered to arrest and detain any person are deemed to Peace Officers in terms of Code of Criminal Procedure Act, No. 15 of 1979 and the procedure established in the Code is made applicable to an arrest and detention under Clause 7(2)(c)
- (iii) the deletion of Clause 7(3)

If the amendments indicated above are effected to the Bill it would not be necessary to pass the Bill with the special majority required under of Article 84(2) of the Constitution.

Sarath N. Silva
Chief Justice

C. N. Jayasinghe
Judge of the Supreme Court

N. K. Udagama
Judge of the Supreme Court

First Reading :

07.09.2004 (Hansard Vol. 155, No. 01, Col. 46)

Bill No. : 31**Sponsor :** Minister of Finance**Decision of the Supreme Court conveyed to Parliament :**

07.09.2004 (Hansard Vol. 155, No. 01, Cols. 13 - 16)

Second Reading :

08.09.2004 (Hansard Vol. 155, No. 02, Col. 295)

Committee of whole Parliament and Third Reading :

08.09.2004 (Hansard Vol. 155, No. 02, Cols. 296 - 298)

Hon. Speaker's Certificate :

08.10.2004

Hon. Speaker's Certificate announced on :

19.10.2004 (Hansard Vol. 155, No. 13, Col. 1687)

Title :***Tobacco Tax (Amendment) Act, No. 9 of 2004.***

S.C. (S.D.) No. 26/2004

“Inland Revenue (Regulation of Amnesty) Bill”

BEFORE : Sarath N. Silva Chief Justice
 C. N. Jayasinghe Judge of the Supreme Court
 N. K. Udalgama Judge of the Supreme Court

COUNSEL : Mr. P. A. Ratnayake, P.C., Addl. Solicitor General with
 Mr. R. Ameen for the Attorney-General

Court assembled for hearing on 23rd August 2004 at 10.15 a.m.

A Bill bearing the above title has been referred to this Court in terms of Article 122(1)(b) of the Constitution for a special determination as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement in terms of Article 122(1) of the Constitution made by the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Attorney-General was issued notice as required by Article 134(1) of the Constitution and Mr. P. A. Ratnayake, Addl. Solicitor General, assisted Court in considering the constitutionality of the Bill and its provisions.

Clause 2(1) of the Bill repeals the Inland Revenue (Special Provisions) Act, No. 10 of 2003. Additional Solicitor General submitted that the Act, No. 10 of 2003 has been amended by Act, No. 31 of 2003 by the extension of the period of time that was provided for in the previous Act to submit declarations. He submitted that the repeal of Act, No. 10 of 2003 in effect amounts to a repeal of Act, No. 31 of 2003. We are inclined to agree with the submission of the Additional Solicitor General but wish to note that it would be clearer if the repeal specifically covers Act, No. 31 of 2003, as well.

Additional Solicitor General submitted that in terms of Article 75 of the Constitution the Parliament has a plenary power to make law including laws having retrospective effect and to repeal any law. Since Acts, No. 10 of 2003 and No. 31 of 2003 were passed as ordinary law, that is without the special majority provided for in Article 84(2), we are of the opinion that the repeal of the said Acts would not be inconsistent with any provision of the Constitution.

Clause 2(2) of the Bill makes further provisions to the effect that “Act, No. 10 of 2003, shall except in so far as the same is necessary for the implementation of the provisions of Section 3 of this Act, be deemed to have never been in operation as if the same had not been enacted”. It is to be noted that these words go beyond a repeal of Act, No. 10 of 2003 and have the effect of wiping out that law from the statute book altogether.

We heard the submissions of Addl. Solicitor General regarding the effect of Clause 2(2). Although we are inclined to agree with his submission, as noted above, that Parliament has the power to repeal any law, there is no provision in the Constitution which empowers the Parliament to deem that a law has never been in operation and

had not been enacted. The enactment of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 and the subsequent amendment has been an exercise of the legislative power of the People.

In terms of Article 80(1) of the Constitution those Bills became law upon their being passed by Parliament, when the certificate of the Speaker was endorsed thereon. Therefore it would be inconsistent with Article 80(1) to include a deeming provision in the present Bill that these laws have never been in operation as if they had not been enacted.

Addl. Solicitor General conceded that Clause 2(2) cannot be enacted in the present form. But submitted that the purpose of the Clause 2(2) is to make express provision with regard to the past operation of Act, No. 10 of 2003 as amended. He submitted that the said act provided for amnesty and immunity from the operation of existing law and that the purpose of the present amendment is to revive the liability that had accrued under relevant law and thereby to restore the status quo ante.

The effect of law being repealed is stated in Section 6(3) of the Interpretation Ordinance. This provision reads as follows :

(3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected –

- (a) the past operation of or anything duly done or suffered under the repealed written law;*
- (b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law;*
- (c) any action, proceeding, or thing pending or incompletd when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."*

It is to be noted that Section 6(3) lays down a basic rule of interpretation of statutes and contains within its fold the power to make express provision affecting the past operation or anything duly done or any right acquired, under the law that is to be repealed. The effect of Section 6(3) is that in the absence of any express provision, the repeal by itself, does not affect the past operation or any right acquired under the law that is being repealed. However, by an express provision the past operation of the law that is being repealed could be denuded of any effect so that any right acquired thereunder would be of no force or avail.

Additional Solicitor General submitted that what is sought to be done by the present amendment is to restore the status quo ante so that any liability operative prior to the grant of the amnesty or immunity under Act, No. 10 of 2003 is fully revived.

We are of the opinion that in terms of Article 75 of the Constitution read with Section 6(3) of the Interpretation Ordinance, it is within the legislative competence of Parliament to make provision for the revival of any liability, duty or obligation that was operative under the relevant laws, and thereby remove the legal effect of any concession, indemnity or immunity granted under Act, No. 10 of 2003 as amended, provided that the revival of such liability, duty or obligation would in itself not be inconsistent with

the Constitution. It is relevant in this connection to cite certain passages from an opinion expressed by a bench of 5 Judges of this Court in the exercise of its consultative jurisdiction in terms of Article 129 of the Constitution. The Court expressed the following opinion with regard to the constitutionality of the grant of concessions, indemnities and amnesties under Act, No. 10 of 2003 as amended :

“The immunity granted in terms of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 is not restricted to persons who have not made declarations or had evaded paying tax under the Inland Revenue Act Sections 2 and 3 of the said Act refers to the declaration that has to be made to the Commissioner General and the immunity granted to such persons, respectively under any law which is specified in the Schedule to the Act. Sections 2 and 3 of the Act states that :

“Section 2 –

Any person whether in Sri Lanka or abroad, who though required under any law for the time being in force, which is specified in the Schedule hereto”

“Section 3 –

Any person making a declaration in terms of Section 2, shall enjoy full immunity from liability to pay tax under any law specified in the Schedule hereto”

The Schedule to the Act includes the following Acts which could be considered as been pivotal to the country's revenue, public finance and fiscal control. They are –

- (a) The Customs Ordinance;*
- (b) The Excise Ordinance;*
- (c) The Turnover Tax Act;*
- (d) The National Security Levy Act;*
- (e) The Goods and Services Tax Act;*
- (f) The Stamp Duty Act;*
- (g) The Finance Act;*
- (h) The Save the Natio Contribution Act;*
- (i) The Exchange Control Act; and*
- (j) The Import and Export Control Act;*

Thus it is obvious that the immunity granted by the Inland Revenue (Special Provisions) Act, No. 10 of 2003, although contained in a law that bears that title and includes time periods particularly applicable to Inland Revenue, is not restricted to Inland Revenue alone, but brings in a number of other important areas such as Customs, Excise and even the Goods and Services Tax, that have been in force at the time the said Act was enacted. Some of the laws such as Customs, it was submitted, attracts several other subject areas and therefore would include, matters such as Revenue Protection Act and the Air Navigation (Customs Regulations). Additionally, this has also included Value Added Tax, Exchange Control Act, Import and Export Control Act, Immigrants and Emigrants Ordinance, Board of Investment Act and the like.

The effect of the aforesaid provisions is the creation of two segments of tax payers and persons within the country. One being the law abiding honest person who has diligently complied with laws relating to revenue, public finance and fiscal control and submitted the requisite declarations and returns and paid what is due. The other would be the person who has been evading tax for several years and who has not complied with the salutary requirements of laws relating to revenue, public finance and fiscal control and who would now benefit through the immunity granted by the Inland Revenue (Special Provisions) Act, No. 10 of 2003. Section 3 referred to above, grants 'full immunity from liability to pay tax under any law specified in the Schedule hereto' and the immunity would be enjoyed from liability from any investigation or prosecution for any offence under any law specified in the Schedule to the Act. Thus the Act has made clear provisions to create two categories and through such classification has favoured one category by allowing them to enjoy full immunity not only from liability to pay tax, but also from any investigation or prosecution. There again the immunity is not limited to the Inland Revenue Act, but extends as referred to earlier, to a number of other subject areas."

"It is our opinion, based upon the preceding analysis that, the provisions contained in the Inland Revenue (Special Provisions) Act, No. 10 of 2003, as amended, are inconsistent with Article 12(1) of the Constitution which guarantees to every person equal protection of the law; in that it grants: immunities and indemnities to persons who have contravened the laws that have been referred to and thereby defrauded public revenue causing extensive loss to the State"

Thus it is seen that the revival of the status quo ante in effect removes an inconsistency with the Constitution brought about by Act, No. 10 of 2003, as amended.

The Addl. Solicitor General submitted that Clause 2(2) would be replaced by a provision on the following lines :

"Subject to the provisions of Section 3 of this Act, any person who was liable to any tax, levy, penalty (including any penalty in respect of any offence), forfeiture or fine in terms of any of the laws specified in the Schedule to the Inland Revenue (Special Provisions) Act, No. 10 of 2003, immediately prior to the enactment of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 as amended by Act, No. 31 of 2003 will continue to be liable to such tax, levy, penalty (including any penalty in respect of any offence), forfeiture or fine notwithstanding any thing done or any right or liberty acquired in terms of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 as amended by Act, No. 31 of 2003."

If an amendment is made to Clause 2(2) in the manner that has been suggested we are of the opinion that the inconsistency with the Constitution would cease.

Clause 3 of the Bill grants an amnesty only where hitherto undeclared assets or income or additional or new assets or sources of income are disclosed in a declaration made in terms of Act, No. 10 of 2003, as amended.

This disclosure of undisclosed assets and the like would in our view be a valid basis for the grant of an amnesty which would not be inconsistent with the equal protection of law guaranteed by Article 12(1) of the Constitution.

Proviso to Clause 4(2) empowers the Minister to appoint any person or persons from within the Authority administering any law referred to in the Schedule to Act, No. 10 of 2003, in order to expedite the collection or recovery of taxes, levies or penalties. Such persons would be Public Officers in terms of the Constitution. We are of the view that the power that is sought to be vested in the Minister to appoint any Public Officer to discharge a particular function would be inconsistent with the provisions of Chapter IX of the Constitution relevant to the Public Service, as included in the Seventeenth Amendment.

Prior to the Seventeenth Amendment to the Constitution, the Public Service came within the overall control of the Cabinet of Ministers in terms of Article 55 of the Constitution. The Seventeenth Amendment brought about radical departure from this state and the authority of the Cabinet of Ministers is restricted to Heads of Departments.

Therefore we are of the opinion that the contents of the proviso to Clause 4(2) of the Bill would be inconsistent with Article 55 of the Constitution, as amended by the Seventeenth Amendment to the Constitution.

Clause 6 of the Bill empowers the Minister to issue general or special directions for the proper administration and implementation of the provisions of the Act and where necessary to issue guidelines to ensure the same. This Clause too would attract the same objection referred to above.

The Addl. Solicitor General submitted that similar provisions are not contained in the Inland Revenue Act or any of the revenue Statutes that are in operation. Furthermore the Clause seeks to vest in the Minister a discretionary power without adequate guidelines. It is therefore in our opinion inconsistent with Article 12(1) of the Constitution and the provisions of Chapter IX of the Constitution, as amended by the Seventeenth Amendment.

For the reasons stated above we make a determination as follows :-

- (a) that Clause 2(2) is inconsistent with Article 80(1) of the Constitution;
- (b) the proviso to Clause 4(2) is inconsistent with Article 55 of the Constitution as amended by the Seventeenth Amendment;
- (c) Clause 6 is inconsistent with Article 55 of the Constitution, as amended by the Seventeenth Amendment and Article 12(1) of the Constitution.

We make a further determination in terms of Article 123 of the Constitution that the inconsistencies stated above would cease if Clause 2(2) is replaced by a provision on the following lines :-

"Subject to the provisions of Section 3 of this Act, any person who was liable to any tax, levy, penalty (including any penalty in respect of any offence), forfeiture or fine in terms of any of the laws specified in the Schedule to the Inland Revenue (Special Provisions) Act, No. 10 of 2003, immediately prior to the enactment of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 as amended by Act, No. 31 of 2003 will continue to be liable to such tax, levy, penalty (including any penalty in respect of any

offence), forfeiture or fine notwithstanding anything done or any right or liberty acquired in terms of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 as amended by Act, No. 31 of 2003."

And, the proviso to Clause 4(2) and Clause 6 are deleted from the Bill.

Sarath N. Silva
Chief Justice

C. N. Jayasinghe
Judge of the Supreme Court

N. K. Udalgama
Judge of the Supreme Court

First Reading :

07.09.2004 (Hansard Vol. 155, No. 01, Col. 45)

Bill No. : 32

Sponsor : Minister of Finance

Decision of the Supreme Court conveyed to Parliament :

07.09.2004 (Hansard Vol. 155, No. 01, Cols. 1 - 7)

Second Reading :

09.09.2004 (Hansard Vol. 155, No. 03, Cols. 359 - 369)

22.09.2004 (Hansard Vol. 155, No. 06, Cols. 798 - 886)

Committee of whole Parliament and Third Reading :

22.09.2004 (Hansard Vol. 155, No. 06, Cols. 886 - 890)

Hon. Speaker's Certificate :

20.10.2004

Hon. Speaker's Certificate announced on :

20.11.2006 (Hansard Vol. 156, No. 3, Col. 502)

Title :

Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004.

S.C. (S. D.) No. 29/2004

“Value Added Tax (Amendment) Bill”

BEFORE : Shirani A. Bandaranayake - Judge of the Supreme Court
 N. E. Dissanayake - Judge of the Supreme Court
 Raja Fernando - Judge of the Supreme Court

COUNSEL : Rajiv Gunatillake, State Counsel, for the Attorney-General

Court assembled for the hearing at 12.10 p.m. on 24th August, 2004.

A Bill titled an Act to amend the Value Added Tax Act, No. 14 of 2002 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 bears the endorsement of the Secretary to the Cabinet of Ministers that it is urgent in the national interest.

Notice was issued on the Attorney-General as required by the Constitution and Mr. Rajiv Gunatillake, State Counsel assisted this Court in the determination of this matter.

This Bill contains 23 Clauses and seeks to make the following amendments :

Clause 2 : This Clause amends Section 2 of the Value added Tax Act, No. 14 of 2002 (hereinafter referred to as the principal enactment) and brings in the following amendments :-

- (A) (i) to apply a single rate based of 15% effective from 01.01.2004;
- (ii) to provide for the application of the rates on agreement entered into prior to 31.12.2003 which are not reviewable;
- (B) to defer the tax payable by contractors of donor funded projects for a period of three months;
- (C) to extend the deferment to any goods to be used as exhibition materials or as materials in any technical demonstration.

Clause 3 : This amends Section 3 of the principal enactment and is to extend the categories of goods and services in respect of which the provisions of Section 3 of the principal enactment does not apply.

Clause 4 : This amends Section 7 of the principal enactment and is to extend the application of Section 7 of the principal enactment to several other services.

Clause 5 : This amends Section 21 of the principal enactment and is to advance the date of furnish of returns.

Clause 6 : This amends Section 22 of the principal enactment and is to provide for the following :

- (a) restrict the input tax entitlement to 10% on assets purchased as part of a finance leasing transaction subject to certain defined limitations and in cases where the output tax has been accorded at 10%.
- (b) to make provision to carry forward excess input tax and to set off in the period of 6 months from the end of the taxable period in which such excess first arose.
- (c) to extend the application of the provision to an existing business or project to include any new business or project.
- (d) to make provision to claim the input tax during the transactional period.

Clause 7 : This amends the heading appearing immediately before Chapter 111A of the principal enactment by the substitution for the words "financial services by specified institutions" of the words "financial services by any specified institutions or by any person".

Clause 8 : This amends Section 25A of the principal enactment and is to extend the tax imposed on persons carrying on financial services liable for tax.

Clause 9 : This amends Section 25C of the principal enactment and is for the purpose of --

- (a) making provision for any person to exercise the right to calculate the tax taking into account certain categories of supplies of which the value addition is at zero;
- (b) fixing the value addition at zero in respect of certain category of supplies;
- (c) granting an exemption for tax where the value addition in any month does not exceed seventy five thousand rupees; and
- (d) to include stockbrokers under the liable category effective from 01.01.2004.

Clause 10 : This amends Section 25D of the principal enactment and is to exclude a registered person where the tax payable by such person is calculated subject to the provisions of Section 25(c)5.

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- Clause 11 : This amends Section 25F of the principal enactment and is to exclude the transfer of non-performing loans of a licensed commercial bank to any other bank in terms of a restricting scheme of such Bank from the definition of supply of financial services.
- Clause 12 : This is to bring in a new Section, namely Section 25G to the principal enactment and is consequential to the amendment made by Clause 8 of the Bill.
- Clause 13 : This amends Section 26 of the principal enactment and makes provision to advance the date of payment.
- Clause 14 : This amends Section 58 of the principal enactment and is consequential to the amendment made by Clause 6 of the Bill.
- Clause 15 : This amends Section 59 of the principal enactment and is consequential to the amendment made by Clause 6 of the Bill.
- Clause 16 : This repeals Section 75A of the principal enactment.
- Clause 17 : This replaces Section 76 of the principal enactment.
- Clause 18 : This amends Section 83 of the principal enactment by expanding the definition of "associated persons" and "educational establishment".
- Clause 19 : This amends the first Schedule to the principal enactment and is to extend the exemption from tax to several other services and to add a new Schedule effective from 01.01.2004.
- Clause 20 : This is to amend the Second Schedule to the principal enactment and is to include services in respect of which a tax of 10% is to be levied,
- Clause 23 : This is to give retrospective effect to the amendments to Clauses 2(2), 2(3), 4, 6(1), 6(2), 6(3), 6(4), 8, 12, 13, 16, 17, 18(1), 18(2), 19(1), 19(2), 19(4), 19(5), 19(7), 20(2), 20(3), 20(4), 20(5) and 20(6),

We drew the attention of the learned State Counsel to Clause 8 of the Bill where an omission has been made by the non inclusive of the Act number of the amendment Act to the principal enactment which should read as No. 7 of 2003. Learned state counsel submitted that this could be rectified at the committee stage at Parliament.

Clause 23 of the Bill is specific that several amendments are with retrospective effect. It is settled law that law dealing with tax matters and otherwise valid, creates no unreasonable restriction and would even be retrospective. Such retrospective taxation cannot be regarded as unreasonable. The general notion is that the Legislature is empowered to enact laws, which could be applicable with retrospective effect (Government of Andhra Pradesh v. H.M.J.A 1975 SC 2037). This would include the tax laws Jawahar

v State of Ragasthan A 1966 SC 764) and retrospective taxation cannot be regarded as unreasonable unless it is clearly prohibitive. More importantly, Parliament is empowered to enact laws having retrospective effect. Article 75 of the Constitution reads thus :

“Parliament should have the power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution or adding any provision to the Constitution :

provided that Parliament shall not make any law -

- (a) suspending the operation of the Constitution or any part thereof, or
- (b) repealing the Constitution as a whole unless such law also enacts a new Constitution to replace it.

The Bill does not refer to any kind of such amendment and the relevant Clauses, which are with retrospective effect are only dealing with fiscal matters. Fiscal legislation is matter for the Legislature to decide as to the kind of considerations that should be granted. In SC No. SD 3/80, considering the Inland Revenue (Amendment) Bill, this Court was of the view that,

“The Legislature should decide as to what considerations relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to, when one considers fiscal legislation.”

We have considered the provisions of the Bill and none of which raised any question of inconsistency with the Constitution. We therefore determine that none of those provisions of the Bill are inconsistent with the Constitution or any provision thereof.

Shirani A. Bandaranayake
Judge of the Supreme Court

N. E. Dissanayake
Judge of the Supreme Court

Raja Fernando,
Judge of the Supreme Court

First Reading :

07.09.2004 (Hansard Vol. 155, No. 01, Col. 45)

Bill No.: 33

Sponsor : Minister of Finance

Decision of the Supreme Court conveyed to Parliament :

07.09.2004 (Hansard Vol. 155, No. 01, Cols. 10-13)

Second Reading :

08.09.2004 (Hansard Vol. 155, No. 02, Col. 289)

Committee of whole Parliament and Third Reading :

08.09.2004 (Hansard Vol. 155, No. 02, Cols. 290 - 295)

Hon. Speaker's Certificate :

18.11.2004

Hon. Speaker's Certificate announced on :

20.11.2004 (Hansard Vol. 156, No. 03, Col. 502)

Title :

Value Added Tax (Amendment) Act, No. 13 of 2004.

S. C. (S. D.) Nos. 30 & 31/2004

"Banking (Amendment) Bill

BEFORE: Sarath N. Silva - Chief Justice
T. B. Weerasuriya - Judge of the Supreme Court
N. E. Dissanayake - Judge of the Supreme Court

COUNSEL : M. A. Sumanthiran with V. Arulanathan for the Petitioner in S.C.
(S. D.) 30/2004

K. Kanag-Iswara P.C., with Avinda Rodrigo for the Petitioner in S.C.
(S. D.) 31/2004

M. Gunetilake, S.C. for the Attorney-General

Court assembled on 13th October 2004 at 10.30 a.m.

Written Submission tendered by Counsel on 18.10.2004.

A Bill bearing the above title to amend the Banking Act, No. 30 of 1988 (as amended by Act, No. 33 of 1995) has been published in the Government Gazette dated 3.9.2004 and placed in the Order Paper of Parliament on 22.09.2004. The jurisdiction of this Court has been invoked by two persons in terms of Section 121(1) of the Constitution to determine the constitutionality of certain provisions of the Bill.

The Attorney-General was notified as required by the Constitution. Submissions of President's Counsel, and Counsel for the Petitioners and of State Counsel representing the Attorney-General have been heard at the sitting of this Court held on 13.10.2004. Thereafter written submissions were tendered on 18.10.2004 by President's Counsel, Counsel and State Counsel in respect of the provisions of the Bill, specifically drawn in issue by the Petitioners, at the hearing before Court.

Since the particular Clauses in respect of which submissions have been made are spread out in the Bill which covers an array of matters we would note briefly the legal regime relevant to the subject of Banking, to consider the impugned Clauses in the proper context.

The Monetary Law Act, No. 48 of 1949, as amended from time to time, provided for the establishment of the Central Bank, inter alia, as the authority responsible for the administration of and regulation of the Monetary and Banking System. The overall objective of the Central Bank has been restated in the amendment to Section 5 effected by the Monetary Law (Amendment) Act, No. 32 of 2002. "Bank Supervision" has been a subject within the purview of the Central Bank and has been carried out by a separate department only in terms of the Monetary Law Act until specific legislation was enacted relevant to Banking by the Banking Act, No. 30 of 1988.

In terms of Section 2(1) of the Act, banking business could be carried on after the appointed only by a company, under the authority of a licence granted by the Monetary Board of the Central Bank. In terms of Section 2(4) Banks carrying on business as at that date and specified in Schedule 1 of the Act were issued with licences under the Banking Act. A Bank thus granted a licence is described as a "Licensed Commercial

Bank" and is authorized to carry on banking business as defined in Section 86 of the Act to mean, the business of receiving funds from people by way of deposits payable on demand by cheque, draft or otherwise and to use such funds to make advances, investments or other operations authorized by law or by customary banking practice. The Banking Amendment Act, No. 33 of 1995, introduced a new part covering "Licensed Specialised Banks". A Bank granted such a licence is not authorized to carry out the function of operating of current accounts which remains a business restricted to "Licensed Commercial Banks". "Licensed Specialised Banks" were authorized to accept deposits of money and invest such money by lending. The Banking Amendment Act, No. 33 of 1995 contained specific provisions to license, regulate, control and where necessary cancel the licence of "Licensed Specialised Banks". On the other hand, the Monetary Law Act contains provisions with regard to the supervision of "Licensed Commercial Banks" and in particular Section 30(1) of the Act provides for the suspension of the business of a "Licensed Commercial Bank."

In December 2002 steps had been taken by the Monetary Board in respect of a "Licensed Specialised Bank", the "Pramuka Bank" which had run into a liquidity problems. At that time, a Bill to amend the Monetary Law Act (later enacted as Act, No. 32 of 2002) was before Parliament. At Committee Stage a new amendment was included in the Bill (Section 10), whereby the provisions of the Monetary Law Act were made applicable to the suspension of business and other connected matters in relation to a "Licensed Specialised Banks". This Court has already made an observation in another matter that the amendment appears to have been specifically introduced to cover the situation that had arisen in relation to the "Pramuka Bank", since there are no other provisions in the Monetary Law Act applicable to "Licensed Specialised Banks". In the result we have now provisions in the Banking Act, the Monetary Law Act and in the respective amendments with regard to both categories of Banks.

It is in the background of the legal regime stated above that the draft Bill under review has been prepared. Amongst its objectives, it seeks to make the provisions relevant to "Licensed Commercial Banks" applicable to "Licensed Special Banks" as well. In the result although the two categories of Banks would be functionally different, they would be subject to the same regulatory processes.

The Petitioners challenge the provisions as contained in Clause 16, which repeals Section 42 and re-enact a new provision by that number relating to disqualifications for appointment or election as a Director of a "Licensed Commercial Bank" In view of the other amendments this provision will apply to "Licensed Specialised Banks", as well. The Petitioner in S.D. 30/04 has raised an issue that this provision is inconsistent with Article 12(1) of the Constitution which provides for the equal protection of the law since these disqualifications would not apply in relation to directors of "State Banks" mainly the Bank of Ceylon and the People's Bank.

The Petitioner in S.D. 31/04 being the Chairman and Director of Seylan Bank Ltd., a Licensed Commercial Bank, has raised an issue only in relation to the new provisions in Section 42(3)(a) which provides that a Director or an employee of a Licensed Commercial Bank shall not be appointed, elected or nominated as a Director of another Licensed Commercial Bank or Licensed Specialised Bank, except where such Bank is a subsidiary company or an associate company, of the Bank in which the person is already holding office.

Learned President's Counsel for the Petitioner in S. D. 31/04 had no objection to the disqualifications set out in Section 42(1). Similarly Counsel in S.D. 30/04 had no objection to the disqualifications but submitted that these disqualifications should apply in relation to the Bank of Ceylon and the People's Bank as well which do not come within the definition of a "Licensed Commercial Bank."

State Counsel has in his submission made on behalf of the Attorney-General drawn the attention of Court to the fact that the Bank of Ceylon, People's Bank and Regional Rural Banks have been set up under different Acts of Parliament that have comprehensive provisions with regard to regulation and control of their activities. It was submitted that the People's Bank Act, No. 29 of 1961 and the Regional Rural Banks Act, No. 15 of 1985, contains specific disqualifications as to directors and apply to;

- (a) A Member of Parliament;
- (b) A person declared to be of unsound mind;
- (c) A person who has been declared bankrupt;
- (d) A person convicted of an offence; or
- (e) A Director or an employee of any other Commercial Bank.

Similarly, the Bank of Ceylon Act provides that a Member of Parliament cannot be appointed as a Director of the Bank. It is thus seen that these banks, generally referred to as "State Banks" have adequate provisions with regard to disqualifications of directors and considering the overall regime of control in relation to these Banks, the disqualifications in Clause 16 - Section 42(1) and (2) - with regard to Directors of "Licensed Commercial Banks", and "Licensed Specialised Bank" is based on a reasonable classification. The object of the provision is to ensure that only fit and proper persons hold office as Directors of such Banks and thereby prevent mis-management. Considering the fact that these Banks hold deposits made by a large section of the public who would be adversely affected by any mis-management of its affairs, we are of the view that the enumeration of criteria in Section 42(2) to determine whether a person is a fit and proper to hold office as director, could be rationally related to the objective of the legislation to ensure proper management of such Banks. Accordingly we hold that the provisions of Section 42(1) and (2) contained in Clause 16 are not inconsistent with the Constitution.

Learned President's Counsel, who appeared for the Petitioner in S.D. 31/04 submitted that Section 42(3)(a) which contains a specific bar on a Director of one Licensed Commercial Bank or Special Licensed Bank from being appointed or elected as a Director of another Licensed Commercial Bank or Licensed Specialised Bank, is in conflict with Article 12(1) which provides for the equal protection of the law; Article 14(1)(c), which provides for the freedom of association and of Article 14(1)(g) which provides for the freedom to engage in a lawful occupation or business.

The Petitioner has specifically stated that at present he is the Chairman and Director of the Seylan Bank and the Ceylinco Savings Bank which is a "Licensed Specialised Bank". He has stated that if this amendment is enacted as law he would not be able to hold office in the Ceylinco Savings Bank.

State Counsel submitted that at present, Section 42(1)(d) of the Banking Act as amended by Act. No. 33 of 1995 contains a prohibition on a Director of a "Licensed Commercial Bank" holding office of Director in another "Licensed Commercial Bank".

It was submitted that the purpose of the amendment is to extend the disqualification in relation to "Licensed Specialised Banks", since the overall purpose of the Bill, as noted above, is to make similar provisions applicable to both categories of Banks. He further contended that there is an adequate safeguard in Section 42(3)(a) which permits a person to be a Director of more than one Bank, where it relates to a subsidiary company or an associate company.

We have to first consider whether the specific disqualification referred is inconsistent with Article 12(1) which provides for the equal protection of law. It is seen that the provision applies across the board in relation to all "Licensed Commercial Banks" and "Licensed Specialised Banks". As such, per se there is no inequality in its application. A reasonable classification has been made that any person could hold office as Director only in one Bank and any other Bank which is a subsidiary or associate company of the first named Bank.

We also agree with the submission of State Counsel that the restriction will ensure that there would be no conflict of interest that would arise when the same person is a director of more than one Bank and would prevent the creation of a monopoly that will impair competition in the banking business. Therefore we hold that this provision is not in conflict with Article 12(1) of the Constitution.

Article 14(1)(c) which relates to the freedom of association relied on by the Petitioner has no application in this instance. A person could freely associate by being a shareholder of a company, or of any number of companies that carry on the business of banking. The disqualification is in relation to appointment or election as Director. No person could claim a fundamental right to be appointed or elected as a Director. Such appointment or election could be subject to law. Since the law presented by way of this amendment is in itself based on a rational classification there is no merit in the alleged inconsistency with Article 14(1)(c) of the Constitution. Similarly, Article 14(1)(g) relied upon, guarantees the freedom to engage in a "lawful" occupation or business. This envisages that there could be a bar imposed by law in relation to a particular type of occupation or business. In this instance the bar is in relation to the appointment to what has been described as "cross directorates in banks". As noted above since the law itself is reasonable and based on a permissible classification, there could be no inconsistency with Article 14(1)(g) of the Constitution as alleged.

The Petitioner in S.D. 30/04 contended that since the Monetary Law Amendment Act, No. 32 of 2002 introduced a new Section 30(10)(a) referred to above with regard to the suspension of business of a "Licensed Specialised Bank", the provisions of the Bill which has the effect of making the provisions of Section 76 of the Banking Act applicable to same situation would result in a confusion as to which law would apply in relation to "Licensed Specialised Banks."

State Counsel has correctly contended that the present amendment being the later enactment would prevail. The submission of the State Counsel is based on a well accepted rule of interpretation of statutes. However, it may be desirable to make necessary amendments to eliminate a duplicity of provisions being applicable to the same situation. In any event there is no issue of constitutionality in relation to this matter.

The Petitioner in S.D. 30/04, made specific submissions in relation to the new provision being introduced as Section 83c in Clause 37. This provision contains a prohibition on the conduct of certain "Schemes" that are generally referred to as "Pyramid Schemes". Whilst counsel conceded that it would be permissible to have a bar on the operation of such Schemes, he submitted that the provision as presently contained in Clause 37 is too wide and would therefore be inconsistent with Article 12(1) of the Constitution.

We are of the view that since a new offence is created its ingredients should be specifically set out to ensure the equal protection of the law guaranteed by Article 12(1) of the Constitution. State Counsel conceded this ground of objection.

Learned State Counsel and Counsel for the Petitioner agreed that Section 83c(1) be re-formulated as follows :

"No person shall directly or indirectly initiate, offer, promote, advertise, conduct, finance, manage or direct a Scheme where a participant is required to contribute or pay for participation in such scheme wholly or partly in money or monetary value and the benefits earned by the participants to such a scheme are largely dependant on :

(a) increase in the number of participants in the Scheme; or

(b) increase in the contributions made by the participants in the scheme."

(the added words are underlined).

For the purpose of this sub-section -

"money" means a monetary unit or a medium of exchange that is issued, established, authorized or adopted by Sri Lanka or a foreign government.

"Monetary value" means a medium of exchange, whether or not redeemable in money, including in the form of stored value, payment instrument or credit to account, and shall also include gold coin and gold bullion."

We are of the view that if the provision is re-formulated as stated above it would cease to be inconsistent with Article 12(1) of the Constitution.

Finally, we have to deal with the submission of Counsel for the Petitioner in S.D. 30/04 which relates to Section 83c(8) contained in Clause 37. This provision empowers a Police Officer above the rank of Inspector to obtain an ex parte order from the High Court prohibiting a person from engaging in an act in violation of sub-section (1), which lays down the offence relating to the prohibited Schemes. It was submitted that the provision as presently worded affects the proper exercise of judicial power and is inconsistent with Article 105(1) of the Constitution.

This provision which requires the High Court to make an ex parte order merely on the application of the Police Officer, prohibiting certain acts that are specified would necessarily deny a hearing to the affected persons and is therefore contrary to the principles of natural justice.

It is implicit in Article 105(1) of the Constitution which provides for the exercise of judicial power that such power should be exercised in a manner consistent with the principles of natural justice which assures to every person due notice of the matters

alleged against him and an opportunity of being heard thereon. Therefore, we hold that Section 83c(8) which provides for only an ex parte order to be made, is inconsistent with Article 105(1) of the Constitution.

Learned State Counsel who conceded the inconsistency with Article 105(1) of the Constitution, submitted that necessary amendments would be made at the Committee Stage to provide for a hearing to be granted to the affected party. If such an amendment is made we are of the view that the Clause cease to be inconsistent with Article 105(1) of the Constitution.

Accordingly, we make a determination in terms of Article 123 of the Constitution that Clause 37 is inconsistent with Article 12(1) and of Article 105(1) of the Constitution and may only be passed with the special majority required under Article 84(2) of the Constitution. We make a further determination that the inconsistency would cease if the impugned provisions contained in the Clause are amended in the manner stated above. The provisions contained in the other Clauses of the Bill are not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

T. B. Weerasuriya
Judge of the Supreme Court

N. E. Dissanayake
Judge of the Supreme Court

First Reading :

24.09.2004 (Hansard Vol. 155, No. 08, Col. 1147)

Bill No. : 41

Sponsor : Minister of Finance

Decision of the Supreme Court conveyed to Parliament :

22.10.2004 (Hansard Vol. 155, No. 16, Cols. 2013 - 2018)

Second Reading :

10.12.2004 (Hansard Vol. 157, No. 10, Col. 1725)

Committee of whole Parliament and Third Reading :

10.12.2004 (Hansard Vol. 157, No. 10, Cols. 1725 - 1729)

Hon. Speaker's Certificate :

10.02.2005

Hon. Speaker's Certificate announced on :

22.02.2005 (Hansard Vol. 158, No. 06, Col. 963)

Title :

Banking (Amendment) Act, No. 2 of 2005.

S.C. (S.D.) No. 32/2004

"Nineteenth Amendment to the Constitution Bill"

BEFORE : Weerasuriya, J.
Shiranee Thilakawardena, J. &
Raja Fernando, J.

COUNSEL : M. A. Sumanthiran with Vijula Arulanathan and Prasansani Bandaranayake for the Petitioner - Centre for Policy Alternatives (Guarantee) Limited

Chanaka de Silva with Aruna Samarajeewa for the Intervenant Petitioner - Raja Melroy Blasius Senanayake

Cyrene Siriwardhane for the Intervenant Petitioner - Stanley Jayaweera

K. Kanag Iswaran, P.C. with A. R. Surendran P. C.

N. R. Sivendran and K. V. S. Ganesharajan for the Intervenant Petitioner - All Ceylon Hindu Congress
Viran Corea for Intervenant Petitioner - Roshan Mendis.

Anuruddha Perera for proponent of the Bill Rev. Ellawala Medhananda Thero.

P.A. Ratnayake P.C. Additional Solicitor-General with Indika Demuni de Silva, S.S.C. Riad Ameen S.C. and Rajiv Goonetilaka S.C. for the Attorney-General;

Court assembled at 10.00 a.m. on 10.12.2004 and 13.12.2004 for the hearing of the above petition.

A Bill titled "The Nineteenth Amendment to the Constitution" has been presented as a Private Member's Bill and was placed on the Order Paper of Parliament on 19.11.2004.

The grounds of challenge

The Petitioner and the intervenient petitioners challenge the provisions of the Bill on the following grounds :

- (a) that the Bill as a whole and in part is vague, anomalous and inconsistent with Articles 3, 4, 9, 10, 11, 12(1), 12(2), 14(1)(a), 14(1)(b), 14(1)(c), 14(1)(f), 14(1)(g), 80(2), 84(2) and 85(1), of the Constitution.
 - (b) that the Clauses of the Bill are inconsistent with the spirit of the Constitution, secular state, norms of pluralistic society and international obligations.
-

Analysis of the grounds of challenge

The Bill titled "Nineteenth Amendment to the Constitution" seeks to repeal Chapter II of the Constitution and to substitute in its place a new Chapter.

The preamble to the Bill seeks to give recognition to Buddhism as the religion of the overwhelming majority of the population and to secure to Buddhism the patronage and protection of Parliament. Accordingly the Bill clearly shows that its provisions are aimed at promoting and protecting the interests of a singular religious group to the exclusion of all other religious groups.

Clause 9:1 states: "The official Religion of the Republic is Buddhism. Other forms of religions and worship may be practised in peace and harmony with Buddha Sasana." Accordingly this Clause affords to Buddhism an exalted status of the official religion of the Republic, while stating that other forms of religions may be practised in peace and harmony with Buddha Sasana. It would appear that by declaring that other forms of religions may be practised in peace and harmony with Buddha Sasana, this Bill seeks to render the freedom of religion conditional upon being in harmony with other religions. This Clause would curtail the freedom guaranteed to other religions under Articles 10, 14 1(e). It is to be emphasized that Article 10 confers on every person the freedom of religion. This is an absolute right upon which no fetters could be placed.

Clause 9:2 provides that "All inhabitants of the Republic shall have the right to free exercises of their worship. The exercise of worship shall not contravene public order or offend morals." This Clause is inimical to the provisions of Article 14(1) (e) which states that every citizen is entitled to the freedom either by himself or in association with others in public or in private to manifest his religion or belief in worship, observance, practice and teaching. It is to be observed that Clause 9:2 of this Bill which speaks only of the freedom of worship omits and reference to other forms which Article 14(1)(e) of the Constitution permits a person to manifest his freedom of religion. Further what constitutes as "morals" may differ from religion to religion applying varying yardsticks.

Clause 9:3 provides that "The state shall foster, protect, patronize Buddha Sasana and promote good understanding and harmony among the followers of other forms of worship as well as encourage the application of religious principles to create virtue and develop quality of life". This Clause which enjoins the state to patronise the Buddha Sasana while ignoring other religions is inimical to the principle of equality which is enshrined in Article 12 of the Constitution.

Clause 9:4 states that "The inhabitants of the Republic professing Buddhism are bound to bring up their children in the same". This Clause violates the rights of equality and non-discrimination guaranteed by Article 12(1) and 12(2) of the Constitution in that parents professing Buddhism are compelled to bring up their children as Buddhists, whereas parents of other religions are free to decide what religious upbringing should be provided for their children. This Clause creates an anomalous situation where a Buddhist marries a non-Buddhist and places undue and unfair pressure on them and operates in an unequal and a discriminatory manner contrary to Articles 12(1) and 12(2).

Clause 9:5 provides that "To convert Buddhists into other forms of worship or to spread other forms of worship among the Buddhists is prohibited". This Clause denies the freedom of thought, conscience and religion guaranteed by Article 10 to Buddhists

and non-Buddhists by imposing complete prohibition on conversion from Buddhism to other religions even where such conversion is undertaken voluntarily. This Clause treats conversion from Buddhism to other religions differently from conversion of a person practising any other religion and therefore inconsistent with the right of equality guaranteed by Article 12(1).

Clauses 9:1 to 9:5 of the Bill insofar as they affect fundamental rights in terms of Articles 10, 12(1), 12(2), 14(1)(e), are inconsistent with Article 3 and Article 4(d).

The Legislative power of the people

Article 3 of the Constitution states that sovereignty is in the people and inalienable. Article 4 declares that the sovereignty of the people with regard to legislative power shall be exercised by Parliament consisting of the elected representatives of the people and by the people at a Referendum.

Article 82(5) and Article 83 give life and meaning to the concept of legislative power of the sovereign people as laid down in Article 3 and Article 4 (a) of the Constitution. The people through elected representatives in Parliament and by themselves directly at a Referendum have the power to amend the Constitution. To say otherwise would be to negate the sovereignty of the people and their legislative power as set out in Articles 3 and 4(a) of the Constitution.

It was contended that this Bill seeks to amend the basic structure of the Constitution and goes far beyond the legislative competence of Parliament. The basis for this submission was that Clause 9:1 makes Buddhism the official religion and destroys the secular notion of the State.

Reliance was placed for this proposition of the decision of the Supreme Court of India in *Kesevananda vs. State of Kerala* (AIR 1973 S.C. 1461). The aforesaid decision of the Supreme Court of India was based on Article 368 of the Indian Constitution. This Article of the Indian Constitution carried no definition of "Amendment" nor did it indicate its scope. On the contrary Article 82 of our Constitution provides that 'Amendment' includes repeal, alteration and addition. In view of this definition it would not be appropriate to be guided by the concept of "Amendment" found in the Indian Judgement. Basic features of the Constitution are to be found in some provisions of the Constitution and if the Constitution contemplates the repeal of any provision of the Constitution, there is no basis for the contention that some provisions which incorporate basic features are immune from amendment.

It was contended that Clause 9:1 has the effect of impliedly suspending Article 10 of the Constitution and therefore cannot be validly enacted by Parliament in view of the specific bar contained in Article 75 of the Constitution. Reliance was placed on the Determination of the Supreme Court in *Re the Nineteenth Amendment to the Constitution* (2002 (3) S.L.R. 85 at page 112).

In the aforesaid determination it was held that "suspending the operation" occurring in proviso(a) to Article 75 in its plain meaning encompasses a situation in which the Clause contained in the Bill has the effect of keeping the relevant provision of the Constitution in an inoperative state for a time.

It is to be noted that in that Bill Clause 6 contemplated a limited period for its applicability namely on the voting of the members of Parliament to the proposed amendment. Therefore proviso (a) to Article 75 would not apply where the amendment to the Constitution is not for making the Constitution or part thereof inoperative for any specific period of time but in perpetuity. Accordingly suspension should apply only for a limited period of time and where the amendment is of general application, it has no significance.

Obligations arising from International Treaties and Conventions

In terms of Article 3 of the Constitution the sovereignty is in the people and is inalienable. Article 4(a) states that 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. Article 157 provides that the Treaties and Agreements would not have the force of law unless enacted by Parliament by resolution by not less than two thirds of the whole number of Members of Parliament voting in its favour as being essential for the development of the national economy. In the Land Reform (Amendment) Bill (S.D. 1/1981) and Re the Surcharge on Income tax Bill (S.D. 4/89) Supreme Court held that Bills that are inconsistent with treaties or agreements approved under Article 157 can be enacted with a special majority without the necessity of a Referendum.

It is true that Article 27(5) requires the state to endeavour to foster respect for international law and treaty obligations among the nations. But this does not affect the sovereignty of the people which are inalienable and where the legislative power is exercised by Parliament consisting of elected representatives of the people and by the people at a Referendum.

Amendment of the Constitution

Article 82(5) provides that a Bill for amendment of any provision of the Constitution or for the repeal or replacement of the Constitution shall become law if the number of votes cast in favour of it amounts to not less than two-thirds of the whole number of members (including those not present.)

However, Article 83 provides for a special procedure for a Bill to amend, repeal or replace or which is inconsistent with the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11 of the Constitution. Accordingly any repeal or replacement or which is inconsistent with the aforesaid Articles would require a two-third majority and a Referendum on the basis that it affects the basic features of the Constitution. Accordingly this Bill which seeks to repeal a basic feature of the constitution namely Article 9 of the Constitution, and to substitute a new Clause in its place require two thirds majority in Parliament, and approved by the People at a Referendum in terms of Article 83.

Referendum

Learned Counsel for the petitioner submitted that approval of the people in respect of this Bill cannot be ascertained through a Referendum since the Bill is vague and ambiguous incapable of being reduced to a clear question.

Article 85(1) mandates that the President shall submit to the People by Referendum every Bill or any provision in any Bill which the Cabinet of Ministers has certified as being intended to be submitted to the people by Referendum or which the Supreme

Court has determined as requiring the approval of the people at a Referendum if the number of votes cast in favour of such Bill amounts to not less than two-thirds of the whole number of members (including those not present).

In terms of Article 86 the President may submit to the People by Referendum any matter which in the opinion of the President is of national importance.

It is to be noted that a Referendum in terms of Article 86 would require the formulation of a precise question which could be answered "yes" or "no." However a Referendum in terms of Article 85(1) does not require a formulation of a formal question since it relates to a Bill. Accordingly what is mandatory is to submit to the People the Bill in its entirety or any provision thereof. Therefore the contention of learned counsel that the provisions of the Bill is vague and ambiguous has no relevance.

Role of the Attorney-General in terms of Article 77

Article 77(1) provides that "it shall be the duty of the Attorney-General to examine every Bill for any contravention of the requirements of paragraphs (1) and (2) of Article 82 and for any provision which cannot be validly passed except by the special majority prescribed by the Constitution:"

Article 77(2) provides that if the Attorney-General is of the opinion that a Bill contravenes any of the requirements as aforesaid; he shall communicate such opinion to the President. The proviso to this Article further provides that in the case of an amendment proposed to a Bill in Parliament, the Attorney-General shall communicate his opinion to the Speaker at the stage when the Bill is ready to be put to Parliament for its acceptance.

Article 78(2) states that the passage of Bills shall be in accordance with the Constitution and the Standing Orders of Parliament.

This Bill being a Private Member's Bill is governed by Standing Orders 47 and 48. The Secretary-General of Parliament is required in terms of Standing Order 47(3) to publish a Private Member's Bill in the Gazette. Standing Order 47(4) provides that no proceedings would take effect till the expiry of one week after the due publication of such Bill. The Attorney-General is deemed to have notice of a Private Member's Bill when it is published in terms of Article 78.

Learned Additional Solicitor-General submitted that in terms of Standing Order 47(5) Private Member's Bill is referred to a Government Minister to report on the Bill and that no proceedings are taken in Parliament in that regard till such report or the lapse of six months of such reference and at that stage the Bill is referred to the Attorney-General through the relevant Ministry. We are of the view that in keeping with Article 77 the opinion of the Attorney-General be communicated to the President in every Bill prior to its consideration in Parliament.

Nevertheless we are unable to accept the submission of learned counsel for the petitioner that the Bill is not valid since it has not been referred to the Attorney-General.

Summary of Determination

- (1) Clauses 9:1 - 9:5 of the Bill are inconsistent with Articles 3, 10, 12(1), 12(2) and 14(1) (e) and Articles 3 and 4(a) insofar as they affect the fundamental rights referred to above
- (2) This Bill does not have the effect of suspending the operation of the Constitution or any part of the Constitution.
- (3) Since the Bill seeks to repeal Article 9 of the Constitution, in terms of Article 83(a), it has to be passed by Parliament by a special majority and approved by the People at a Referendum.

Hon. T. B. Weerasuriya
Judge of the Supreme Court

Hon. Shiranee Thilakawardena
Judge of the Supreme Court

Hon. Raja Fernando
Judge of the Supreme Court

On this 17th day of December, 2004.

S.C. Special Determination No. 32/2004

Hon. Justice (Ms.) Shiranee Thilakawardane, Judge of the Supreme Court, having agreed with conclusions of her brother Judges added to the determination which is annexed hereto.

Shiranee Thilakawardane J.

I agree with the conclusions of my brother Judge, Justice Weerasuriya. I would also like to refer to a few additional salient matters. The amendment to the Constitution under Article 75 of the Constitution is a "legislative process" albeit with special majority or a simple majority. The absence of any limitations contained in the article appears to suggest that the amending power was not surrounded with an amorphous penumbra of any inherent or implied limitations. Indeed the constitutional amending process seems to encompass and embrace the repealing and replacing of the Constitution as a whole. However the widest proposition that in some way the sovereign power is supreme to the legislative power does not bear close scrutiny as even the sanctity of the oath of office contained in the Constitution envisages an upholding of both the Constitution and the law, the latter would have been redundant if this was not so. These powers must co-exist in a delicate yet powerful balance in order that there could be the practical sustainability of stable governance.

If for instance the power of amendment was to be exercised so as to damage or destroy the critical essential elements of the basic structure of the Constitution, such in my opinion could only be possible with the repeal and replacement of the whole of the Constitution and not through the "tinkering" or amendment of specific articles of the Constitution. An amendment of the two basic features of the Constitution such as

(a) the democratic character of the Constitution and (b) the separation of powers, must perforce be examined in the light of the features in each individual case. In the place of the particular feature in the scheme of the Constitution, its objects and purpose and the consequence of its denial on the integrity of the Constitution as the fundamental instrument of the country's governance. Indeed it has been held in the Thirteenth Amendment of the Constitution Case (1987 1 SLR 336) "amending power does not extend to altering the basic structure or framework of the Constitution."

The preamble to the Constitution declares that the immutable republican principles of representative democracy, and assuring to all peoples freedom, equality, justice, fundamental human rights and the independence of the judiciary are the intangible heritage for the preservation of a just and free society.

The assurance given to the state by Chapter II of the Constitution is to give the foremost place to Buddhism, but it explicitly says that this must necessarily be balanced to include the assurance that there should not be any interference to the equality of all religions in the country.

The role of the court in this reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. To interpret the questions as relating to the constitutional framework, within which political decisions may ultimately be made. The court has no supervisory role over the political aspects of Constitutional negotiations.

An important tent of a secular state, created by the present Constitution is that there is a multicultural and plural society, recognizing and preserving the different religions and beliefs and languages of its people and placing them together to form a united nation.

In **T M A Pai Foundation and Others Vs. State of Karnataka and others B. N. Kirpal C J** emphasized how important it was for the State to instill a sense of security and confidence in the minorities who should not per se be regarded as weaker sections or underprivileged segments of the society. He stated that :-

"The one billion population of India consists of six main ethnic groups and fifty-two major tribes, six major religions and 6,400 castes. The essence of secularism in India can best be depicted if a relief map of India is made in mosaic, where the aforesaid one billion people are the small pieces of marble that go into the making of a map. Each person whatever his/her caste, religion has his/her individual identity, which has to be preserved, so that when pieced together it goes to form a depiction with the different geographical features of India. These small pieces of marble in the form of human beings, which may individually be dissimilar to each other, when placed together in a systematic manner, produce the beautiful map of India. Each piece, like a citizen of India, plays an important part in making of the whole. The variations of the colours as well as different shades of the same colour in a map is the result of these small pieces of different shades and colours of marble, but when one small piece of marble is removed, the whole map of India would be scarred, and the beauty would be lost."

Our Constitution also recognizes the difference among the people of Sri Lanka, including minority religions, but it gives equal importance to each of them, their difference, notwithstanding, for only then can there be a true and unified secular nation

within the framework of a free and just Democracy especially as each of the people of a nation has an important place in the formation of a nation state. "Each piece has to retain its own colour. By itself it may be an insignificant stone, but when placed in a proper manner it goes into making of a full picture in all its different colours and hues" The essence of being a secular state, as Sri Lanka is the recognition and preservation of the different types of people, with diverse language and different belief, and placing them together so as to form a whole and united nation.

The word "secular" is commonly understood to the opposite of the word "religious" or non-secular. The political philosophy of a secular government has been developed in the west in the historical context of the pre-eminence of the established religion, and the exercise of power by it over society and its institutions where the state clearly separates the two. Secularism may mean therefore a strict "wall of separation" between the state and religion and religious institutions. In India the state is secular in that there is no official religion. However the Constitution does envisage the involvement of the state in matters associated with religion and religious institutions. And even indeed with the practice, profession and propagation of religion in its most limited and distilled meaning.

Indeed religious freedom has value only in so far as the practice of such freedom does not offend against the accustomed community rights of other religions.

Freedom of conscience and free profession, practice and propagation of religion, subject to public order, morality and health and to the other provisions of this part of the Constitution has been a strong cord in binding a united Sri Lanka, all persons are entitled to freedom of conscience and belief and the right freely to profess and practise religion.

An expansive definition of freedom of religion is central to the notion of personal choice and individual autonomy and freedom.

A truly free society is one, which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one, which aims at equality with respect to the enjoyment of fundamental freedoms, and such freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction, which he would not otherwise have chosen, he is not acting of his own volition. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others, no one is to be forced to act in a way contrary to his beliefs of his conscience.

The diversity of belief and non-belief, the diverse socio-cultural backgrounds make it constitutionally incompetent for Parliament to provide legislative preference for any one religion at the expense of those of other persuasions.

It is the right of every person to work out for himself or herself what his or her religious obligations, if any, should be and it is unsafe for the State to dictate otherwise.

Guarantees of freedom of thought, conscience, religion and belief to all is to ensure in particular that no one was deprived of the right of life or the liberty and security of person because of religion or belief.

One of the basic principles of the UN Charter is that the dignity and equality inherent in all human beings, and all member States have pledged to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.

Considering that it is essential to promote understanding, tolerance and respect in matters relating to freedom, religion and belief and to promote that the use of religion or belief for the ends inconsistent with the Charter is conflictive, especially for a State that has ratified the Charter.

Intolerance and discrimination based on religion or belief means any distinction, exclusion, restriction or preference based on religion or belief and having either by its purpose or its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

In the case of *Her Majesty the Queen and Big M. Drug Mart Ltd. Vs. the Attorney General of Canada, The Attorney-General of New Brunswick and the Attorney General of Saskatchewan*, the constitutionality of the *Lords Day Act* and the *Sunday Observance* was challenged as it infringed on the freedoms guaranteed by the Canadian Charter of Rights and Freedoms. The Respondent was charged with unlawfully carrying of the sale of goods on Sunday contrary to the *Lords day Act*. In holding that the Act infringed the right to freedom of conscience and religion guaranteed under the Charter, it was held that the majority of Christians who were members of the Christian majority could not deny the freedom of religion to other religions and Dickson J, referred to the fact that Canada was a secular State with no State religion, and that all religions must enjoy the most complete liberty of thought. He held that compulsion of sabbatical observances offended the freedom of religion, one of the original freedoms, and that the minority religions must be protected from the tyranny of the majority to accord with the true spirit of a free, just and democratic society, which was based on the principle of equality of all.

The amendment, in proclaiming Buddhism the official religion of the Republic would create a climate hostile to, and gives appearance of discrimination against, non-Buddhist Sri Lankans. Despite allowing that other forms of religion may be practised in peace and harmony with the Buddha Sasana, the theoretical content of the amendment, remains a subtle and constant reminder to religious minorities within the country, of their differences with an alienation from the dominant religious culture. This effect is compounded when given the proposal to enshrine the provision in the Constitution, the foundational document that declares the supreme law of the land. It would change the State from secular to a non-secular or religious State. It would militate against the immutable provisions of the preamble of the Constitution.

In our country there is no State religion. All religions are on an equal footing and enjoys complete liberty of thought. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear and hindrance or reprisal and the right to manifest religious belief by worship and practice.

Freedom of conscience and religion means a notion of the centrality of individual conscience and individual judgement and the inappropriateness of governmental intervention to compel or to constrain its manifestation.

It also should be noted however that, an emphasis on individual conscience and individual judgement also lies at the heart of our democratic political tradition.

For the present case it suffices to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious practice for a sectarian purpose.

Freedom of speech, religion and the inviolability of the person are original freedoms, which are at once the necessary attributes and modes of self-expression of human beings and the primary condition of their community life with a legal order.

The task of the Court has been to clarify the legal framework within which political decisions are taken "under the Constitution" and not to usurp the prerogatives of the political forces that operate within that framework. It is to be noted that both purpose and effect are relevant in determining constitutionality.

However the obligations identified by the Courts should only be the binding obligations under the Constitution. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations.

Judge of the Supreme Court

First Reading :

19.01.2004 (Hansard Vol. 156, No. 02, Col. 368)

Bill No. : 48**Sponsor :** Ven. Ellawala Medhananda Thero M.P.**Decision of the Supreme Court conveyed to Parliament :**

04.01.2005 (Hansard Vol. 158, No. 01, Cols. 04-09)

Second Reading :**It is listed on the Order Paper for Second Reading**

**DECISIONS
OF
THE SUPREME COURT
ON PARLIAMENTARY BILLS**

2005

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D I G E S T

	Page
FINANCE	74 - 75
to make provisions for the imposition of certain levies consequential to the 2005 Budget Proposals; and to make provision for matters connected therewith or incidental thereto.	
- referred to the Supreme Court (Article 122(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
INCREASE OF FINES	76 - 78
to provide for the increase of fines imposed for offences committed under certain laws and for matters connected therewith or incidental thereto.	
- referred to the Supreme Court (Article 122(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
- The Attorney-General has agreed to amend Clause 3 of the Bill to provide for the Magistrates Court to retain its jurisdiction in respect of offences that is presently dealt with notwithstanding the enhancing of fines.	
VALUE ADDED TAX (AMENDMENT)	79 - 81
to amend the Value Added Tax Act, No. 14 of 2002.	
- referred to the Supreme Court (Article 122(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
SRI LANKA DISASTER MANAGEMENT	82 - 86
to provide for the establishment of the National Council for Disaster Management; the Natural and Human Disaster Management Centre; the appointment of Technical Advisor Committees ; the preparation of disaster management plans; the declaration of a state disaster; the award of compensation; and for matters connected therewith or incidental thereto.	
- referred to the Supreme Court (Article 122(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	

	Page
BETTING AND GAMING LEVY (AMENDMENT)	87 - 88
to amend the Betting and Gaming Act, No. 40 of 1988. - referred to the Supreme Court (Article 122(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
FINANCE (AMENDMENT)	89 - 90
to amend the Finance Act, No. 11 of 2004; to provide for the imposition of a withholding tax on the registration of motor vehicles; and to provide matters connected therewith and incidental thereto. - referred to the Supreme Court (Article 122(1)(b)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
INLAND REVENUE (AMENDMENT)	91 - 93
to amend the Inland Revenue Act, No. 38 of 2000 - referred to the Supreme Court (Article 122(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
TSUNAMI (SPECIAL PROVISIONS)	94 - 101
to enable special legal provision to be made in respect of persons and property affected by the tsunami; and for matters connected therewith or incidental thereto. - challenged in the Supreme Court (Article 121(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
SRI LANKA CENTRAL TRANSPORT BOARD	102 - 103
to provide for the establishment of the Central Transport Board; to provide for the repeal of the Sri Lanka Transport Board Law, No. 19 of 1978 and for consequential amendments to the National Transport Commission Act, No. 37 of 1991; and for matters connected therewith or incidental thereto. - referred to the Supreme Court (Article 122(1)(b)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1)) subject to the correction of an error in Article 26 sub clauses (2), (3), (4) and (5)	

APPROPRIATION **Page**
104 - 105

to provide for the service of the financial year 2006; to authorize the raising of loans in or outside Sri Lanka, for the purpose of such service; to make financial provisions 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 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 herewith or incidental thereto.

- referred to the Supreme Court (Article 122(1)(b)) -
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1)) subject to the amendments mentioned in the determination

PROTECTION OF GOVERNMENT REVENUE 106 - 108
(SPECIAL PROVISIONS)

to provide for the protection of Public Revenue and for matters connected therewith or incidental thereto.

- referred to the Supreme Court (Article 122(1)(b))
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))

S.C. (S. D.) No. 3/2005

"Finance Bill"

BEFORE : Sarath N. Silva, Chief Justice
 C. N. Jayasinghe, Judge of the Supreme Court
 A. R. N. Fernando Judge of the Supreme Court

COUNSEL : P.A. Ratnayake, P.C., Addl. Solicitor General with Mrs. Indika Demuni de Silva, S.S.C., for the Attorney-General

Court assembled for hearing on 19th January 2005 at 12.00 p.m.

Her Excellency the President has addressed a written reference to this Court in terms of Article 122(1)(b) of the Constitution requesting the Court to make a special determination whether the Bill bearing the above title or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement of the Secretary to the Cabinet of Ministers that it is urgent in the national interest.

Addl. Solicitor General assisted the Court in examining the constitutionality of the provisions of the Bill.

The Bill has been prepared on the basis of the proposals contained in the Budget Speech, 2005 of the Hon. Minister of Finance and Planning.

Part I of the Bill provides for the imposition of a Social Responsibility Levy from 1.1.2005. A levy of 0.25% on all taxes and levies chargeable in terms of the enactments specified in the First Schedule would be collected and utilized for "expenditure incurred for the implementation of activities connected with the National Action Plan for children, approved by the Government". The levy is imposed on a general basis to benefit a specifically classified group, namely, children. Hence we are of the view that the imposition of the levy is not inconsistent with Article 12 of the Constitution.

Part II of the Bill provides for the imposition of a Share Transaction Levy from 1.1.2005. The levy is payable on the turnover of every share trading transaction, by the buyer and the seller at the rate of 02.%. There is a corresponding repeal of the taxes currently applicable in respect of share transactions. The generalized levy imposed at a uniform rate is not inconsistent with Article 12(1) of the Constitution.

Part III introduces the Construction Industry Guarantee Fund Levy, which is also contained in the Budget Speech. The levy is recoverable by the ICTAD and its proceeds are intended to establish a guarantee fund for the benefit of local construction firms who find it difficult to submit bid bonds and raise funds due to lack of proper securities. It is submitted that the Government will also contribute Rs. 250 Million towards this fund.

Hence this levy is imposed not as a revenue measure but as a means of accumulating a fund to benefit the industry as such.

Part IV of the Bill is an amendment to the Finance Act to vary the currently applicable Port and Airport Development Levy.

For the reasons stated above we make a determination in terms of Article 123(1) of the Constitution that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

C. N. Jayasinghe
Judge of the Supreme Court

A.R.N. Fernando
Judge of the Supreme Court

First Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Col. 429)

Bill No : 58

Sponsor : Minister of Finance and Planning

Decision of the Supreme Court conveyed to Parliament :

08.02.2005 (Hansard Vol. 158, No. 02, Cols. 166 - 167)

Second Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Col. 485)

Committee of whole Parliament and Third Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Cols. 485 - 494)

Hon. Speaker's Certificate :

30.03.2005

Hon. Speaker's Certificate announced on :

05.04.2005 (Hansard Vol. 158, No. 15, Col. 2101)

Title :

Finance Act, No. 5 of 2005.

S.C. (S. D.) No. 1/2005

"Increase of Fines Bill"

BEFORE : Sarath N. Silva, Chief Justice
C. N. Jayasinghe, Judge of the Supreme Court
A. R. N. Fernando Judge of the Supreme Court

COUNSEL : P.A. Ratnayake, P.C., Addl. Solicitor General with Mrs. Indika Demuni de Silva, S.S.C., for the Attorney-General

Court assembled for hearing on 19th January 2005 at 10.30 a.m.

Her Excellency the President has addressed a written reference to this Court in terms of Article 122(1)(b) of the Constitution requesting the Court to make a special determination whether the Bill bearing the above title or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement of the Secretary to the Cabinet of Ministers that it is urgent in the national interest.

Addl. Solicitor General assisted the court in examining the constitutionality of the provisions of the Bill.

The Bill has been prepared on the basis of the Budget Speech, 2005 of the Minister of Finance and Planning. The Hon. Minister has specifically stated that in keeping with the Government's commitment to make law enforcement effective it has become necessary to review fines and penalties currently in operation in various statutes. He has further stated that in respect of certain statutes fines and penalties have remained unchanged for several years. The proposed revision was set out in Schedule I of the Budget speech.

The Bill contains two Schedules. In the First Schedule, the relevant Law has been identified with reference to its title in Column I and in Column II, the Section which sets out the fine has been referred to by its number with the new fine to be substituted in place of the fines that is currently in operation.

The Second Schedule follows a slightly different form and in which, Column II gives the currently operative fines in the Law and Column III states the new fine that is to be substituted in place of the currently operative fines. The Addl. Solicitor General submitted that such a method has been resorted to since in these Laws the fine laid down is similarly in respect of all offences and as such it is convenient to make the amendment in the manner contained in the Second Schedule.

By increasing the quantum of the fines that could be imposed the Act would in effect be enhancing the punitive jurisdiction of the relevant courts without any variation of the Constitution elements of the respective offences. Hence it is a matter coming within the Reserved List (List II) in the Thirteenth Amendment to the Constitution.

The Addl. Solicitor General submitted that he has examined the relevant provisions of the currently applicable laws and has found that the statement of the current fines as contained in Column II of the First and Second Schedules are correct. In any event

the particular amounts would not involve any issue of constitutionality and it is not incumbent on the Court to examine each item in respect of the amount of the fine that has been stated.

The only question to be addressed is whether there is an erosion of judicial power in the matter of imposing fines. We note that the amendment does not remove the jurisdiction of the Court to make a conditional discharge of an offender without imposing any fines at all, in terms of Section 306 of the Code of Criminal Procedure Act or to make community based correction order in lieu of imposing a fine in terms of Section 5 of the Community Based Corrections Act, No. 46 of 1999.

The only effect of the Amendment is that where a Court decides to impose a fine, such fine will be within the limits that are specified.

Therefore we are of the view that the Amendment would not amount to an erosion of judicial power.

Clause 3 of the Bill provides that a Magistrate's Court "granted" jurisdiction in respect of offences set out in the First and the Second Schedules will have such jurisdiction notwithstanding the amendment of the relevant Sections effected by the Bill.

Addl. Solicitor General agreed that the provision as presently worded may not achieve its objective. In terms of the Code of Criminal Procedure Act, No. 15 of 1979, the Court having jurisdiction to try offences in the Penal Code is set out in the First Schedule to the Act. It is stated in this Schedule, that the Court having jurisdiction in respect of offences against other Laws have to be decided in terms of Section 11 of the said Act. In which, Section 11 (b) (ii) provides that a Magistrate's Court will have jurisdiction to try an offence, where the offence is punishable with imprisonment not exceeding 2 years or with a fine not exceeding Rs. 1500/-.

Further it is provided in Section 14(b) of the said Act that the Magistrate's Court may impose inter alia, a fine not exceeding Rs. 1500/-.

In the circumstances the Addl. Solicitor General agreed that it would be necessary to amend Clause 3 to specifically provide that the Magistrate's Court would have jurisdiction to try any of the offences specified in the First and Second Schedules and to impose the fines as provided notwithstanding the provisions in Sections 11 and 14 of the Code of Criminal Procedure Act.

The Addl. Solicitor General submitted such an amendment will be effected in Parliament. In any event this does not involve any question of constitutionality.

Clause 4 specifically provides that the enhanced fines would not be operative in respect of offences committed prior to the coming into operation of this Act. This provisions is consistent with Article 13(6) of the Constitution which reads as follows :-

"No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed."

For the reasons set out above we make a determination in terms of Article 123(1) of the Constitution that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

C. N. Jayasinghe
Judge of the Supreme Court

A.R.N. Fernando
Judge of the Supreme Court

First Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Col. 429)

Bill No : 60

Sponsor : Minister of Finance and Planning

Decision of the Supreme Court conveyed to Parliament :

08.02.2005 (Hansard Vol. 158, No. 02, Cols. 168 - 170)

Second Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Col. 494)

Committee of whole Parliament and Third Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Cols. 494 - 496)

Hon. Speaker's Certificate :

11.05.2005

Hon. Speaker's Certificate announced on :

17.05.2005 (Hansard Vol. 159, No. 05, Col. 704)

Title :

Increase of Fines Act, No. 12 of 2005.

S.C. (S.D.) No. 2/2005

“Value Added Tax (Amendment) Bill”

BEFORE : Sarath N. Silva, Chief Justice
 C. N. Jayasinghe, Judge of the Supreme Court
 A. R. N. Fernando Judge of the Supreme Court

COUNSEL : R. Ameen, State Counsel for the Attorney-General

Court assembled for hearing on 19th January, 2005 at 11.30 a.m.

Her Excellency the President has addressed a written reference to this Court in terms of Article 122(1)(b) of the Constitution requesting the Court to make a special determination whether the Bill bearing the above title or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement of the Secretary to the Cabinet of Ministers that it is urgent in the national interest.

The Bill seeks to amend the Value Added Tax (Amendment) Act, No. 14 of 2002, as amended by Act, No. 7 of 2003 and Act, No. 13 of 2004.

State Counsel assisted the Court in examining the constitutionality of the provisions of the Bill. The Bill has been prepared on the revenue proposals contained in the Budget Speech, 2005 of the Hon. Minister of Finance and Planning.

Clause 2 of the Bill has the effect of changing the rate of taxation. By the first Act, No. 14 of 2002 there were two rates fixed at 10% and 20%. The amendment effected by Act, No. 13 of 2004 introduced a single rate fixed at 15% commencing on or after 1.1.2004. The present amendment introduces three bands of taxation described as the Basic, Luxury and Standard rates, respectively.

The Basic rate is 5%, the Luxury rate is 18% and the Standard rate is 15%, being the generally applicable rate at present.

This Court has consistently held that in revenue matters in making classifications for granting of concessions and imposing liabilities, there is a wide discretion. These measures are taken not only to raise resources necessary for the State but also to direct economic activities properly, for the general welfare of the society.

On this premises, it has been held that revenue measures sought to be introduced by any Bill would not generally be considered as inconsistent with Article 12 of the Constitution unless they are manifestly unreasonable or discriminatory.

In this connection we refer to the determinations made by this Court in respect of the Inland Revenue (Amendment) Bill (SCSD 27/2004), Finance (Amendment) Act of 1978 (Constitutional Court of Sri Lanka - Vol. VI - 1978) and in Inland Revenue (Amendment) Bill S.C.(SD) 3/1980.

On the basis of the said reasoning we are of the view that the separation of the supply of goods and services to three bands for the imposition of different rates, is not inconsistent with Article 12 of the Constitution.

Further, on an examination of the Third Schedule to the Bill which gives the classification of the particular goods and services we note that the basic rate is applicable in relation to articles of food consumed by the larger section of the population whereas the luxury rate is specified in relation to goods other than items of food. We are of the view that there is a rational basis for this classification.

A further amendment to Clause 2 relates to the manufacture of garments for export, which is now placed under the supervision of the Textile Quota Board. The payment of VAT in respect of imports for the manufacture of garments is deferred and finally set off upon the relevant export being certified. By this means the presently applicable system of payment of VAT at the point of import of the raw material and a claim for a refund on the export of the finished product, is eliminated by the relevant entries being made and set off without actual payments and re-payments. We see no unconstitutionality in this amendment which provides for a simplified form of tax administration.

State Counsel submitted that Clause 3 has been introduced to make any increase of reduction of the rates operative upon the Minister affixing his signature to prevent the evasion of tax which would result from the time lag between the Ministry making the order and the order being published in the Government Gazette. We note that the order has to be published in the Government Gazette as soon as convenient and be placed before Parliament for approval.

In the circumstances this provision does not amount to an abdication of Parliamentary control of public finance as laid down in Article 148 of the Constitution.

Clause 6 contains amendment to zero rate the services provided by the Garment Buying Offices. It is submitted that this concession is granted as an incentive to the particular services in order to maintain international competitiveness. Since the benefit is granted to a service that can be rationally classified, Court is of the view that this provision is not inconsistent with Article 12 of the Constitution. The same reasoning would apply to the exemptions that are granted (or withdrawn) in terms of Clause 12 of the Act.

For the reasons set out above we make a determination in terms of Article 123(1) of the Constitution that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

C. N. Jayasinghe
Judge of the Supreme Court

A.R.N. Fernando
Judge of the Supreme Court

First Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Col. 429)

Bill No. : 59

Sponsor : Minister of Finance and Planning

Decision of the Supreme Court conveyed to Parliament :

08.02.2005 (Hansard Vol. 158, No. 02, Cols. 170 - 172)

Second Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Cols. 433 - 481)

Committee of whole Parliament and Third Reading :

08.02.2005 (Hansard Vol. 158, No. 02, Cols. 481 - 485)

Hon. Speaker's Certificate :

30.03.2005

Hon. Speaker's Certificate announced on :

05.04.2005 (Hansard Vol. 158, No. 15, Col. 2101)

Title :

Value Added Tax (Amendment) Act, No. 6 of 2005

S.C. (S.D.) No. 4/2005

"Sri Lanka Disaster Management Bill"

BEFORE : Sarath N. Silva Chief Justice
 Raja Fernando Judge of the Supreme Court
 R.A.N.G. Amaratunga Judge of the Supreme Court

COUNSEL : P. A. Ratnayake, P.C., A.S.G. with Janak de Silva S.C., for
 the Attorney-General
 K. Kanag Isvaran P.C., with Ms. I. R. Rajapakse instructed
 by Ms. Lilanthi de Silva for the Petitioner- Citizens' Trust
 M. A. Sumanthiran with Ms. V. Arulanantham and M.
 Balendra for the Intervient
 Elmore Perera for himself and the Citizens Movement for
 Good Governance and the Free Media Movement.

Court assembled for hearing at 10.30 a.m. on 14th February 2005.

Her Excellency the President has by written reference made in terms of Article 122(1)(b) of the Constitution requested a special determination to be made by this Court as to the constitutionality of the Bill bearing the above title. The Secretary to the Cabinet of Ministers has made an endorsement that in view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. Ratnayake, Addl. Solicitor General representing the Attorney-General assisted the Court in examining the provisions of the Bill. Mr. K. Kanag Isvaran P.C., Mr. Sumanthiran and Mr. Perera, made submissions regarding the general conspectus of the Bill and of specific Clauses dealt with hereinafter.

A Bill containing substantially the same provisions bearing the title "Sri Lanka Disaster Counter-Measures" was published in the Government Gazette issued on 25.11.2002, and placed on the Order Paper of Parliament. A petition dated 13.01.2003, was filed challenging the constitutionality of the said Bill. The first ground of objection was with regard to the provision that the Prime Minister shall be the Chairman of the Council. It was contended that this provision detracts from the position and status of the President. Senior State Counsel agreed with this submission and stated that an amendment would be made to provide for the President to be the Chairman of the Council. Since the Bill was not proceeded with in Parliament, this amendment was not made. The amendment has been made in Clause 3 of the present Bill which provides in Clause 3 that the President shall be the Chairman and the Prime Minister shall be the Vice Chairman of the Council.

The second ground of objection, was with regard to Clause 23 of that Bill, which provides for immunity to members of the Council and other organizations from suits or prosecutions on the basis that it amounts to an erosion of judicial power. The amendment then agreed upon to restrict such immunity to any action taken in good faith, has been included in Clause 23 of the present Bill.

The third ground of objection was that certain matters included in the Bill comes within item 7 of List III in the Ninth Schedule to the Constitution being the Concurrent List and that it would be necessary to consult all Provincial Councils as required by Article 154G(5) (a) of the Constitution. This ground of objection would apply in relation to the present Bill formulated on the same lines. In the circumstances we would repeat here the relevant portion of the determination made in respect of the previous Bill (S.C. Special Determination No. 1 of 2003) which reads as follows :-

"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 Ninth 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 the circumstances.

The provision of relief in respect of any distress as provided for in 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 disaster 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 subject 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."

Addl. Solicitor General and other Counsel for the Intervient in this matter, agreed that the determination already made by this Court could apply and that they would not seek to canvass that question once again.

Although this Court made the determination enabling the enactment of the "Sri Lanka Disaster Counter - Measures" Bill in January 2003, it is noted that Parliament did not take up the Bill for debate. President's Counsel submitted that in Clause 25 of that Bill, which is similar to Clause 25 of the present Bill, a disaster has been defined to include "a tsunami (seismic wave)" Clause 25(f).

We have to note that if the Bill in respect of which the determination was made by this Court in January 2003 was proceeded with in Parliament, a National Disaster Management Plan would have been in place to cover natural disasters including a "tsunami". For some reason the Bill was not proceeded with by Parliament and the Court has once again to make a determination on substantially the same Bill, two years later, after a devastating "tsunami" has affected Sri Lanka, at a time when the country was totally unprepared to meet that situation.

Be that as it may, we have heard submissions on the Bill now referred for a special determination with the assistance of learned Counsel. As noted above, since Counsel agree with the determination made with regard to the application of Article 154G(5)(a) of the Constitution, it would not be necessary to consider this aspect of the matter.

Addl. Solicitor General and Counsel for the intervenient raised a particular objection with regard to an additional element introduced in the present Bill, to bring within a scope a phenomenon described as "human disaster". It was submitted that the reference to "human disaster" in the preamble and in the definition in Clause 25, is vague and would therefore be inconsistent with Article 12(1) of the Constitution since it would enable action to be taken in an arbitrary manner. It was also submitted that since the definition of "disaster" as contained in Clause 25 include "man-made" events and the specific items from "h" to "n" relate to such events, it would not be necessary to have a general definition of another phenomenon under the label "human disaster".

Addl. Solicitor General agreed with this submission and stated that the ambit of the Bill would be restricted to the phenomenon of disasters as defined in Clause 25 without any descriptive division into "natural" and "human" disasters.

If an amendment is made in the manner agreed to by Additional Solicitor General, it would not affect the content of the Bill as such and would obviate an inconsistency with Article 12(1) of the Constitution, as contended by Counsel.

Addl. Solicitor General and Counsel for the intervenient made specific submissions in regard to the composition of the Technical Advisory Committees as provided in Clause 9(1) of the Bill. They conceded that the establishment of two committees in respect of natural and man made events would be in order considering the definition in Clause 25 of the Bill. However, it was submitted that the members of the Advisory Committees should be professionals and experts who have specialised knowledge in respect of the particular functions and responsibilities of the Council. That, the general requirement for the members to be professionals or experts is sufficient.

Addl. Solicitor General agreed with this submission and stated that an amendment would be made to provide that professionals and experts would be persons who have specialised knowledge in relation to the respective functions and responsibilities of the Council. Though this matter does not relate to any question of constitutionality we are of the view that the amendment would enhance the effectiveness of the Bill.

Addl. Solicitor General and counsel for the intervenient submitted that a proclamation made by the President in terms of Clause 11(1) declaring that a state of disaster exists, would in terms of Clause 11(2) remain in force until it is revoked.

It was submitted that if such proclamation remains valid in the manner stated, the provisions of the law could be misused resulting in arbitrary acts inconsistent with Article 12 (1) of the Constitution.

Addl. Solicitor General agreed that Clause 11(2) would be amended to provide that a proclamation would remain in force subject to Clause 11(3) for a period of 2 months and may be extended for a further periods not exceeding 2 months at a time. Such an amendment would in our view remove the inconsistency that is complained of.

Addl. Solicitor General and Counsel for the intervenient submitted that the description in Clause 14 of powers of an appropriate organization is not proper and that the respective functions should be couched in the form of duties of an appropriate organization for the discharge of which action as provided for the Clause will be taken.

We are inclined to agree with the submission that description of the function as a "power" would be inappropriate in the circumstances. The organization would in fact be taking steps to assist persons who are in distress as a result of the disaster and to alleviate the hardship that has been caused and invasive action, if any would be directed only towards that end.

In the circumstances Addl. Solicitor General agreed that the Clause would be re-formulated in the manner suggested by Counsel without detracting from the functions of an appropriate organization, as provided in the Clause.

Counsel also raised an objection with regard to Clause 14(e) which empowers an appropriate organization to requisition movable and immovable property. The manner and basis of such requisitioning are not laid down and we are not laid down and we are of the view that this provision is inconsistent with Article 12(1) of the Constitution, since it enables arbitrary action to be taken affecting property rights of persons.

Counsel had no objection for a provision being included to take over temporarily any movable or immovable property as may be necessary for implementation of any disaster counter measures, provided that it is done only with the consent of the owner, if such owner is available, and in any event for a period not exceeding one week. Addl. Solicitor General agreed to an amendment in the manner stated above.

An objection was also raised in respect of Clause 15(3) which provides that a person who has incurred any loss or damage to property as a result of any act, omission or default of an appropriate organization would not have any remedy or relief in any Court, otherwise than by way of compensation.

It was submitted that this would be an erosion of judicial power and in any event inconsistent with the provisions of Article 17 read with Article 126 of the Constitution which vest with the Supreme Court sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right.

We are inclined to agree with the submissions of Counsel on this matter. The action of appropriate organization would amount to administrative action as contemplated in the Constitution and where it is alleged that such action amounts to an infringement of any fundamental right, the law cannot restrict the remedy of a person affected only to claim for compensation. Therefore we are of the view that Clause 15(3) is inconsistent with Article 17 read with 126 of the Constitution.

For the reasons stated above we make a determination in terms of Article 123 of the Constitution as follows :-

- (i) that Clause 15(3) is inconsistent with Article 17 read with Article 126 of the Constitution and that it is required to be passed by a special majority as provided under Article 84(2) of the Constitution;

- (ii) that the inconsistency referred to in (i) above would cease if the said Clause 15(3) is deleted or suitably amended to exclude an inconsistency with Article 17 read with Article 126 of the Constitution;
- (iii) that the provisions in Clauses 11(2); 14(e) and 25 (in relation to human disaster) would be inconsistent with Article 12(1) of the Constitution but such inconsistency would cease if amended in a manner agreed to by Additional Solicitor General;
- (iv) The Bill as a whole, and the specific provisions excluding those referred to in (i) and (iii) above are not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

Raja Fernando
Judge of the Supreme Court

R.A.N.G. Amaratunga
Judge of the Supreme Court

First Reading :

24.02.2005 (Hansard Vol. 158, No. 07, Col. 1128)

Bill No. : 68

Sponsor : Minister of Women's Empowerment and Social Welfare

Decision of the Supreme Court conveyed to Parliament :

22.02.2005 (Hansard Vol. 158, No. 06, Cols. 964-968)

Second Reading :

25.02.2005 (Hansard Vol. 158, No. 08, Cols. 1237 - 1279)

09.03.2005 (Hansard Vol. 158, No. 09, Cols. 1333 - 1416)

Reference of the Legislative Standing Committee of Parliament :

09.03.2005 (Hansard Vol. 158, No. 09, Col. 1416)

Nomination to the Legislative Standing Committee of Parliament :

22.03.2005 (Hansard Vol. 158, No. 12, Col. 1701)

Report of the Legislative Standing Committee of Parliament :

03.05.2005 (Hansard Vol. 159, No. 01, Cols. 17-18)

Consideration and Third Reading :

04.05.2005 (Hansard Vol. 159, No. 02, Cols. 322-323)

Hon. Speaker's Certificate :

13.05.2005

Hon. Speaker's Certificate announced on :

17.05.2005 (Hansard Vol. 159, No. 05, Col. 704)

Title :

Sri Lanka Disaster Management Act, No. 13 of 2005.

S.C. (S.D.) No. 07/05

"Betting and Gaming Levy (Amendment) Bill"

BEFORE : C. N. Jayasinghe Judge of the Supreme Court
 Raja Fernando Judge of the Supreme Court
 N.G. Amaratunga Judge of the Supreme Court

COUNSEL : P. A. Ratnayake, P.C., A.S.G. with Ms. Indika Demuni de Silva, S.S.C. and Riad Ameen, S.C., for the Attorney-General.

Court assembled for hearing on 22nd March, 2004 at 10.00 a.m.

Her Excellency the President has addressed a reference dated 31.03.2005 to this Court in terms of Article 122(1) (b) of the Constitution requesting this Court to make a special determination as to whether the Bill bearing the title "Betting and Gaming Levy (Amendment) Act" or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement in terms of Article 122(1) of the Constitution made by the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Attorney-General was noticed in terms of Article 134(1) of the Constitution and Mr. P. A. Ratnayake, P.C., A.S.G. assisted Court in considering the constitutionality of the Bill and its Clauses.

Learned Additional Solicitor General submitted that the Bill is based on Budget Proposals 2005 found in the address delivered by the Honourable Minister of Finance on 18.11.2004 in Parliament and that the relevant reference is found at page 50 paragraph 104 under the "Betting and Gaming Levy". Learned Additional Solicitor General submitted that all the amendment seeks to do is to amend Part I of the Schedule in the Bill which deals with Betting and Part II dealing with Gaming. The Schedule of the Bill seeks to amend Part I with the inclusion of a new item which is referred to as item 4 which would be applicable for every year commencing 1st April 2005 with a corresponding Column 2 which stipulates the Levy. The proposed amendment in Part II which deals with the business of Gaming also introduced a further item as item 4 in Column 1 with a corresponding Column 2 which stipulates the levy commencing on or after 1st April 2005. The amendment to the schedule in Part I item 4 seeks to introduce a new category for the purpose of taxation "for betting business done by agents" and with a levy of Rupees One Million stipulated in the corresponding Column 2.

We have examined the Clauses in the Bill and we make a determination in terms of Article 123 that neither the Bill nor any of its Clauses nor the Schedules are inconsistent with the Constitution.

C. N. Jayasinghe
 Judge of the Supreme Court

Raja Fernando
 Judge of the Supreme Court

N.G. Amaratunga
 Judge of the Supreme Court

First Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Col. 1989)

Bill No : 74**Sponsor :**

Minister of Finance and Planning

Decision of the Supreme Court conveyed to Parliament :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 1944 - 1945)

Second Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 2092, 1996-2080)

* [Two items debated together.]

Committee of whole Parliament and Third Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 2092-2093)

Hon. Speaker's Certificate :

31.03.2005

Hon. Speaker's Certificate announced on :

05.04.2005 (Hansard Vol. 158, No. 15, Col. 2101)

Title :*Betting and Gaming Levy (Amendment) Act, No. 9 of 2005.*

S.C. (S.D.) No. 06/2005

"Finance (Amendment) Bill"

PRESENT : C. N. JAYASINGHE Judge of the Supreme Court
RAJA FERNANDO Judge of the Supreme Court
R.A.N.G. AMARATUNGA Judge of the Supreme Court

COUNSEL : Mr Riad Ameen, S.C., for the Attorney-General.

Court assembled for hearing on 22nd March, 2004 at 10.00 a.m.

Her Excellency the President has addressed a reference dated 31.03.2005 to this Court in terms of Article 122(1) (b) of the Constitution requesting this Court to make a special determination as to whether the Bill bearing the title "Finance Act (Amendment)" or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement in terms of Article 122(1) of the Constitution made by the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Attorney-General was noticed in terms of Article 134(1) of the Constitution and Mr. Riad Ameen, S.C., assisted Court in considering the constitutionality of the Bill and its Clauses.

Learned State Counsel submitted that the Budget Proposals are given effect to in the draft Bill in Clauses 2, 3, 5, 8 and 9 and the said proposals are found in the Budget Speech delivered by the Honourable Minister of Finance and Planning on 18.11.2004 in paragraphs 84, 85 and 90(a). Clause 4 of the Bill incorporates Chapter XXII of the Inland Revenue Act, No. 38 of 2000 into the Finance Act No. 11 of 2004 in relation to Returns. Clause 6(1) incorporates the definition for "company" contained in the Inland Revenue Act, No. 38 of 2000 into the Finance Act, No. 11 of 2004. Clause 6(2) modifies the definition for B.O.I. Enterprises in order to limit its applicability for the duration for which the B.O.I. Enterprise would be exempt from Income Tax. Clause 6(3) (a) exempts Co-operative Societies registered under Co-operative Societies Law, No. 5 of 1972 from the applicability of the Economic Service Charge. Clause 3(b) exempts non-resident persons carrying on business as owner or charterer of aircrafts or ships from the applicability of the Economic Service Charge. Clause 7(1) defines the date on which the provisions of the Bill will come into effect. Clause 7(2) contains a provision for retrospective application of some of the Clauses in the Bill. The imposition of retrospective income tax liability was considered in S.C.(S.D.) No. 28/2004. This Court permitted retrospective imposition of tax liability in terms of Article 75 of the Constitution.

The substantive provisions of the Bill seeks to provide concessions from levying Economic Service Charge or impose and clarify liability for the purpose of revenue. We note that in taxation matters the Legislature has the greatest freedom of classification. Concessions granted or liabilities imposed have been held not to be inconsistent with Article 12 which provides for the equal protection of the law. The former Constitutional Court and this Court have both taken this view. In connection with the Finance Amendment Act of 1978 the former Constitutional Court observed that;

"In taxation matters, even more than in other fields, it is well established that the legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the 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 that it cannot be justified on the basis of any valid classification" (The Constitutional Court of Sri Lanka - Vol. VI - 1978)

In relation to the Inland Revenue Bill S.C. (S.D.) 03/1980 this Court has made a similar observation.

We have examined the Clauses in the Bill and we make a determination in terms of Article 123 that neither the Bill nor any of its Clauses are inconsistent with the Constitution.

C.N. Jayasinghe
Judge of the Supreme Court

Raja Fernando
Judge of the Supreme Court

N.G. Amaratunga
Judge of the Supreme Court

First Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Col. 1989)

Bill No. : 75

Sponsor : Minister of Finance and Planning

Decision of the Supreme Court conveyed to Parliament :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 1941 - 1942)

Second Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 1990 - 2081)

Committee of whole Parliament and Third Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 2081-2082)

Hon. Speaker's Certificate :

31.03.2005

Hon. Speaker's Certificate announced on :

05.04.2005 (Hansard Vol. 158, No. 15, Col. 2101)

Title :

Finance (Amendment) Act, No. 7 of 2005

S.C. (S.D.) No. 05/05

"Inland Revenue (Amendment) Bill"

BEFORE : C. N. Jayasinghe Judge of the Supreme Court
 Raja Fernando Judge of the Supreme Court
 N.G. Amaratunga Judge of the Supreme Court

COUNSEL : Ms. Indika Demuni de Silva, S.S.C., for the Attorney-General.

Court assembled for hearing on 22nd March, 2004 at 10.00 a.m.

Her Excellency the President has addressed a reference dated 31.03.2005 to this Court in terms of Article 122 (1) (b) of the Constitution requesting this Court to make a special determination as to whether the Bill bearing the title "Inland Revenue (Amendment) Act" or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement in terms of Article 122(1) of the Constitution made by the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Attorney-General was noticed in terms of Article 134(1) of the Constitution and Ms. Indika Demuni de Silva, S.S.C. assisted Court in considering the constitutionality of the Bill and its Clauses.

Learned Senior State Counsel submitted that the several Clauses contained in the Bill seeks to give effect to Budget Proposals 2005 found in address delivered by the Honourable Minister of Finance on 18.11.2004 in Parliament. Learned Senior State Counsel referred to the various Clauses in the Bill also adverting to the corresponding Budget Proposals embodied in the Budget Speech. Clauses 4, 7, 12, 13, 17, 18, 21, 23, 24, 32, 33, 34, 35, 36, 37, and 38 seeks to eliminate certain ambiguities in the Inland Revenue Act, No. 38 of 2000.

Clause 42 of the Bill seeks to amend the item 20 of Schedule six in order to eliminate an error in the percentages set out in the principal enactment by the substitution of the words "maximum of 10 per centum" in place of "maximum of 10 per centum" in place of "maximum of 15 per centum". It also seeks to add a new item No. 24 which is consequent upon the Budget Proposal which seeks to introduce a rate of income tax applicable to the profit on receipt of any fund set up or funds received by a non-governmental organization. While the Clauses set out above seek to eliminate ambiguities Clauses 2, 3, 5, 6, 8, 9, 10, 11, 14, 15, 16, 19, 20, 22, 25, 26, 27, 28, 29, 30, 31, 39, 40 and 41 gives effect to the Budget proposals of 2005.

The substantive provisions of the Bill seeks to provide concessions from levying income tax or impose and clarify liability for the purpose of revenue. We note that in taxation matters the Legislature has the greatest freedom of classification. Concessions granted or liabilities imposed have been held not to be inconsistent with Article 12 which provides for the equal protection of the law. The former Constitutional Court and this Court have both taken this view. In connection with the Finance Amendment Act of 1978 the former Constitutional Court observed that;

"In taxation matters, even more than in other fields, it is well established that the Legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the 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 that it cannot be justified on the basis of any valid classification" (The Constitutional Court of Sri Lanka - Vol. VI - 1978).

In relation to the Inland Revenue Bill S.C. (S.D.) 03/1980 this Court has made a similar observation.

We have examined the Clauses in the Bill and we make a determination in terms of Article 123 that neither the Bill nor any of its Clauses are inconsistent with the Constitution.

C. N. Jayasinghe
Judge of the Supreme Court

Raja Fernando
Judge of the Supreme Court

N.G. Amaratunga
Judge of the Supreme Court

First Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Col. 1989)

Bill No. : 76

Sponsor : Minister of Finance and Planning

Decision of the Supreme Court conveyed to Parliament :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 1943 - 1944)

Second Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 2082, 1993-2080)

* [3 items debated together.]

Committee of whole Parliament and Third Reading :

24.03.2005 (Hansard Vol. 158, No. 14, Cols. 2082 - 2092)

Hon. Speaker's Certificate :

31.03.2005

Hon. Speaker's Certificate announced on :

05.04.2005 (Hansard Vol. 158, No. 15, Col. 2101)

Title :

Inland Revenue (Amendment) Act, No. 8 of 2005

S.C. (S.D.) No. 9/2005
S.C. (S.D.) No. 8/2005

“Tsunami (Special Provisions) Bill”

Citizens’ Trust
No. 56, 6th Lane, Nawala Road,
Rajagiriya.

Petitioner

Hasanthi Ratnayake, Attorney-at-Law
Coordinator, Children’s Desk
Lawyers for Human Rights and
Development
No. 233/1, Cotta Road, Colombo 8.

Petitioner

Legal Aid Commission of Sri Lanka
No. 129, Hilftsdorp Street,
Colombo 12.

Intervient Petitioner

Vs.
The Attorney-General
Attorney-General’s Department
Hulftsdorp, Colombo 12.

Respondent

BEFORE : Ms. S. Tilakawardane J
N. K. Udalgama J
S. Marsoof PC J.

COUNSEL : K. Thiranagama with M. F. D. Hassan, S. G. Punchihewa
and Rohan Wijesena instructed by Nilanthi Muthinayake
for Petitioner in SD 08/2005.

I.R. Rajapakse with Rasika Mendis instructed by Lilanthi
de Silva for Petitioner in SD 09/2005.

Manohara de Silva with D. Dissanayake for Intervient
Petitioner in SD 09/2005.

P.A. Ratnayake P.C. Additional Solicitor General with
Anusha Navaratne, SSC, M. Gopallawa, SC and R Ameen
SC for the Respondent.

ARGUED ON : 25.04.2005

WRITTEN SUBMISSIONS ON : 26.04.2005

DECIDED ON : 26.04.2005

This Court assembled for hearing at 10.00 a.m. on the 25th of April, 2005.

A Bill entitled "Tsunami (Special Provisions)" was presented to Parliament and has been placed on the order paper of Parliament.

Whether a tsunami is caused by earthquakes, volcanic eruptions next to or underneath the oceans, displacement of submarine sediments, coastal landslides that enter the sea, or large scale explosions caused by man made detonations or meteorites, the effect and impact is one that causes extreme devastation to both life and the environment. In the wake of the tsunami that occurred on the 26th of December, 2004 a disaster of unprecedented magnitude unfolded leaving in its trail devastation and havoc. Large numbers of people were displaced and in particular the unprecedented damage and devastation that was left behind severely impacted a large segment of the population. The exceptional and unparalleled affects of the aftermath gave rise to circumstances that needed cogent and effective intervention by the State. Special legislation to bring about effective countermeasures was therefore warranted to alleviate in some measure the suffering of those affected. The introduction of the Bill, subject of course to scrutiny as to its constitutionality and the legality of its objectives, is reasonable and could not be categorized as denial of equal opportunity to those who were unaffected. The special circumstances status and attributes of those affected create a special classification that is based on intelligible differentia.

Petitioners challenged the constitutionality of certain provisions of the said Bill by petitions dated 8th of April 2005. The Interventient Petitioner has also filed petition dated 25th April 2005 with a view to seeking a determination by this court that the said Bill was not inconsistent with any provisions of the Constitution and that the same need not be passed by the special majority required under the provisions of paragraph 2 of Article 84 insofar as the said Bill does not require the approval of the People at a Referendum as contemplated by Article 83 of the Constitution.

It is significant that this Bill is a special legislation to provide legal provision in respect of persons and property affected by the tsunami and for matters connected therewith or incidental thereto. Clearly therefore the object of the Bill is not only to ensure and grant adequate protection to those who have been adversely affected and also to alleviate the impediments and disadvantages which may arise specially of those concerning children and young persons who are left without adequate parental care. It is necessary to ensure that their special needs under the circumstances are provided for and that their rights and privileges are safeguarded. The legal provisions appear to have been made with a view to circumventing legal obstacles and existing legal barriers in order to accommodate the disadvantages situation in which such affected persons have been placed in by the adverse effects of the tsunami.

In the petitions filed by the petitioners, several grounds of challenge have been setout. The first ground pertains to the long title of the Bill. Counsel for the Petitioners submitted that the long title should contain specific words referring to the date on which the tsunami occurred. This was particularly so as the Bill seeks to depart from normal regular legal procedures and provide remedies for the exceptional situation caused by the disaster. As such disaster occurred on a specific date namely the 26th of December

2004, the long title of the Bill should include after the word "tsunami" "the 26th of December 2004". The Additional Solicitor General agreed to amend the long title of the Bill as follows,

"An Act to enable special legal provisions to be made in respect of persons and property affected by the Tsunami that occurred on 26th December 2004 and for matters connected therewith or incidental thereto."

Ms. I. R. Rajapakse, who appeared for one of the petitioners namely the Citizen's Trust, submitted that the reference to "national policy" in the first paragraph of the preamble might have been included with a view to circumventing the provisions of the Thirteenth Amendment to the Constitution. She further submitted that in terms of the aforesaid Amendment "Social Services and Rehabilitation" including "Probation and Child Care Services" is a subject contained in List 1 (Provincial Council List) of the Ninth Schedule (vide items 7 and 7.1 in the said list) and that in terms of Article 154 G (3) of the Constitution, no Bill in respect of such a matter shall be placed on the Order Paper of Parliament until it has first been referred by the President to every Provincial Council for the expression of its views thereon. Although, "National Policy on all subjects and functions" is a matter reserved under List II (Reserved List), she submitted that this Court will look to the substance rather than the form as it is manifest that changes are sought to be made to the substantive laws and procedures governing the operation of both probation and child care services by the Bill in question.

The Counsel for the Petitioner also submitted that the provisions in the Bill related to subjects that devolved on the Provincial Council under the Thirteenth Amendment to the Constitution. Counsel referred to items 7:1 and 7:2 of the Provincial Council List (List 1 of the Ninth Schedule) and submitted that in terms of Article 154 G (3) of the Constitution 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 to every Provincial Council for the expression of its views thereon.

Counsel has also contended that in a previous determination of this court under Article 121 (1) of the Constitution, namely S.C. Special Determination No. 24 and 25/2003 concerning the Water Services Reform Bill, notwithstanding that the Preamble to the Bill declared that it was for the purpose of giving effect to "National Policy on the Supply of Water Services", the Court has held that the provisions of the said Bill were "functional in nature" and that the Bill was required to follow the procedure laid down in Article 154G (3) in as much as the Bill had the effect of eroding the functions of Local Authorities in the provision of water services.

However, the Learned Counsel for the Intervient - Petitioner cited S.C Special Determination No. 1/2003 concerning the Sri Lanka Disaster Counter Measures Bill in support of the argument that the Bill presently under review dealt with a matter of policy on which the Parliament was competent to legislate. He also submitted that the said Determination is distinguishable for SC Special Determination No. 24 and 25/2003 on two grounds. Firstly, "relief of distress due to floods, droughts, epidemics or other exceptional causes" is listed as an item on the concurrent List (List III) and not on the Provincial Council List, thus giving a measure of joint responsibility to the Government and the Provincial Councils. Secondly, the said Bill in fact dealt with the creation of apex national bodies to study and coordinate disaster management and did not seek to take over operational functions of existing provincial agencies.

The learned Additional Solicitor General submitted that the proposed legislation was to be enacted under List II (Reserved List) under the topic of "National Policy on all subjects and functions". The Additional Solicitor General also referred to "Sri Lanka Disaster Counter measures Bill" S.C. SD 1/2005 of 23.01.2005 where it has been stated thus :

"The provisions of relief in respect of any distress as provided for in item 7:2 referred to above and the objectives 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 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 154 g(5) (a) of the Constitution."

The Additional Solicitor General further submitted that the Bill also relates to "Justice in so far as it relates to the Judiciary and Court structure" a defined in List II (Reserved List). He submitted that as this relates to powers of court, it was not within the legislative competence of Provincial Councils and therefore it was imperative that it is dealt under a national policy and plan.

It is indeed at times of such disasters that it becomes incumbent upon the State to formulate and provide direct National Policy to meet the consequent contingencies. Therefore the contention that Article 27(2)(a) and 27(9) of the Constitution precluded the State from formulating any National Policy, and that even under such catastrophic conditions as the devastation and indescribable havoc caused by the tsunami that the State must refrain or was precluded from formulating such policy, it untenable.

Ensuring substantive equality to those affected by the tsunami could only be assured by the provision of special legislation that accommodated and recognized the disadvantages position they were placed rendering a compulsive need for affirmative action by the State.

Counsel appearing for the Petitioners also made submissions regarding Clause 2 of the Bill relating to the presumption of death that would arise in respect of persons "who have been resident in the area referred to in the First Schedule to the Bill as at December 26th, 2004 or was known to have been travelling in or travelling through such area on that date...". She stated that the presumption of death was originally amended from seven years to one year by an amendment to Section 108 of the Evidence Ordinance. Clause 2 of the aforesaid Bill seeks to reduce this period where the presumption would be operative to one month from the 26th of December, 2004. Counsel submitted that many of the survivors had lost several members of their families. She also submitted that as they were living in refugee camps and shelters away from their normal places of residence suffering from physical injury and mental physiological truman, including amnesia, they could be incapable of effectively communicating their whereabouts or identifying themselves to any relevant person in authority within the short the short time frima of one month that had been specified in Clause 2 of the said Bill.

The Additional Solicitor General agreed that a period of one month from the date of the tsunami was under all the facts and circumstances, too short a period and it was agreed that a period of at least six months should elapse before the presumption of death could operate.

The Additional Solicitor General agreed to amend the Bill by the substitution of the words "six months" for "one month" in Clause 2 of the Bill.

Furthermore, it was also agreed by the Additional Solicitor General that in Clause 3(2), words "Shall be..." should be deleted and substituted with the words "may at any time be". This amendment takes into account the fact that the formality of the procedure and the formalization of the structures of access to legal measures should not be a bar to those who due to the fortuitous consequences of the tsunami lack the necessary resources or status to access justice. Additionally, he agreed that a proviso should be included in Clause 3(2) to the effect that the order "shall not be made until the expiry of period of six months" contemplated by Clause 2 of the said Bill, especially as a period of four months since the event.

It was also agreed by the Additional Attorney General that Clause 3(3) of the said Bill should be amended to read, that after the words, the Registrar General, the words "upon being satisfied" should be included. This was on the basis that some measure of responsibility should be placed upon the Registrar General to assess the matters that had been placed before him.

Additionally, the Additional Solicitor General concurred with the submissions of the petitioner agreeing that the additional precaution must be provided for the publication and display of a notice in the Grama Niladhari's Office in the area to inform the public of any application made under Clause 3 of the Bill in order that an opportunity would be granted for any objections to the application to be preferred.

Part II of the Act dealt with custody of children and young persons. Undoubtedly this is in recognition of the need for the State to extend particular care to a child as enunciated in the Geneva Declaration of Rights of a child in 1924 and the Declaration of the Rights of the Child adopted by the General Assembly in 1959. This also incorporates the concept that children by reason of their physical and mental immaturity need special safeguards including appropriate legal protection. The fact is that children affected by the Tsunami, and living in its aftermath of trying and difficult conditions needs special consideration and protection for the harmonious and full development of their body and mind. Every child after all, has an inherent Right to live an individual life in Society, and be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom equality and solidarity. Several salutary protective measures have been included in this Bill.

However, all parties to this matter agreed that it appeared that the Bill in Clause 9 (1) (a) had not considered the inclusion of a parent who had adopted a child and therefore Clause 9(1) (a) of the Bill needed to include parents by legal adoption.

The Additional Solicitor General, agreed to delete the word "natural" in order to exempt parents of an adopted child from their obligation to register the child.

Additionally Counsel for the petitioner has submitted that the reference to the Commissioner of Probation and Child Care Services in Clause (9) (1) was inconsistent with the provisions of the Thirteenth Amendment of the Constitution, in as much as probation and child care is a devolved subject the assigned powers and functions are operational and functional. But the Commissioner in areas like the North and the East are non functional and there is no office which is functioning or known as Commissioner of childcare. Therefore authority for applications referred to in Clause 9(1) should be widened, especially in view of the Penal sanctions it carries, to include both the probation Commissioners of childcare and the Divisional Secretary.

The Additional Solicitor General agreed to make these amendments and accordingly a new proviso after Clause 9(1) should be included to read as follows: "Provided the Commissioner may delegate to the Divisional Secretary of the area the power to accept such an application and forward the same to the Commissioner".

The Counsel for the petitioners also directed the attention of Court to Clause 9(2) pointing out that those in the remote areas may not have a way of knowing the provision of this Bill. Where such persons had acted bona fide or in good faith they should be precluded from liability and the punitive consequences of the Bill. Therefore Additional Solicitor General agreed to amend Clause 9(2) of the Bill by the inclusion of the words "without just cause" after the word "register" in order to facilitate an inquiry by the Magistrate as to whether there was any reasonable cause or circumstance which had prevented such person from complying with the provisions relating to the registration of the child in accordance with the Bill.

Counsel for the Petitioner also submitted that Clause 9(3) conflicted with the interest of the child as an emotional attachment could have been formed with a bona fide caregiver or an extended family member. Under these circumstances the removal of a child from its caregiver should only be by a competent court and only if such removal was indeed necessary and in the best interest of the child always paramount consideration being given to the child.

Therefore the Additional Solicitor General agreed to the amendment to Clause 9(3) by adding the following words "upon an order obtained from the Magistrate's Court issued in the best interest of the child after the word "person" in order to ensure that the Commissioner obtained the sanction of the Magistrate's Court prior to the removal of the child from a persons custody.

Counsel for Petitioner submitted that upon a reading of Clause 12(1) of the Bill that it ex facie took away the status of the Courts as the upper guardian, which was of unparalleled importance for the protection of the child. It appeared that the Bill excluded the Tsunami affected children of this safe guard, which was available and afforded to the other children. The Additional Solicitor General concurred wholeheartedly with this submission and it was agreed that Clause 12(1) of the Bill should be amended by the inclusion of the words "Subject to the upper guardianship of Court" before the commencement of this provision.

Counsel also proposed an amendment for the petitioner on a consideration of the overriding interest of the children for a home study report as defined under the Adoption of Children Ordinance No. 34 of 1941 as amended. The home study report is required to report on the mental health of the applicants, their social, religious and financial background and their suitability to adopt a child. The Additional Solicitor General agreed that Clause 13(2) of the Tsunami (Special Provisions) Bill should include the condition that prior to the Magistrate's Court order being made it would also be necessary for "a home study report as defined in Section 3 of the Adoption of Children Ordinance which was to be prepared by one or more of the persons referred to in the Seventh Schedule to this Act as may be appointed by "The Authority".

The Learned Additional Solicitor General agreed to the following amendments to Clause 14 of the procedure to evaluate and ascertain the suitability of a foster parent. These amendments were with a view to permitting a broad spectrum of expert on childcare and welfare to participate and contribute to the process of evaluation. To obtain efficacy in the process of making foster care orders in Clause 14 effective, and so that it may accrue in favor of the best interest of the children affected by the tsunami its co-position should be amended. The Additional Solicitor General agreed to the amendment of the following Clauses :-

1. that Clause 14(2)(a) should be amended to read as "Chairman of the Authority or his nominee." at the commencement of the Clause
2. The amendment to Clause 14(2) (f) of the Bill by deleting the provision and substituting it with the words "the relevant Provincial Director of Education or his nominee".
3. The amendment to Clause 14(4) of the Bill by deleting the words "including the quorum for a meeting of the panel" and the substitution of the following "The quorum for a meeting of the panel shall be three members".
4. The amendment to Clause 14(5) of the Bill by replacing the word "shall" with the word "may".

The Learned Solicitor General agreed with the submission of Counsel for the Petitioners that Clause 16(1) of the Bill should be amended by replacing the words "the Magistrate's Court shall" with the word "the Magistrate's Court may" in order to vest a measure of discretion in the Magistrate in the exercise of his or her powers.

The Learned Additional Solicitor General also agreed that certain changes were needed by the amendment to some of the Schedules. These are :-

1. The amendment to item 3 in the Sixth Schedule to the Bill by replacing the number "40" with the number "45".
2. The amendment to item 10(a) in the Sixth Schedule to the Bill by including the word "adequate" at the commencement of the Clause and deleting the words "and medical services according to national guidelines".

3. The amendment to the Seventh Schedule to the Bill by deleting the words "Samurdhi Development Officers" and "Peace Animators".

Based on 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 by learned Senior State Counsel) is inconsistent.

Judge of the Supreme Court

N. K. Udalgama. J.

I agree.

Judge of the Supreme Court

S. Marsoof. J.

I agree.

Judge of the Supreme Court

First Reading :

05.04.2005 (Hansard Vol. 158, No. 15, Cols. 2125 - 2126)

Bill No. : 81

Sponsor : Minister of Justice and Judicial Reforms

Decision of the Supreme Court conveyed to Parliament :

03.05.2005 (Hansard Vol. 159, No. 01, Cols. 03 - 09)

Second Reading :

04.05.2005 (Hansard Vol. 159, No. 02, Cols. 279 - 316)

Committee of whole Parliament and Third Reading :

04.05.2005 (Hansard Vol. 159, No. 02, Cols. 316 - 322)

Hon. Speaker's Certificate :

13.06.2005

Hon. Speaker's Certificate announced on :

22.06.2005 (Hansard Vol. 159, No. 13, Cols. 1467 - 1468)

Title :

Tsunami (Special Provisions) Act, No. 16 of 2005.

S.C. (S.D.) No. 10/2005

“Sri Lanka Transport Board Bill”

BEFORE : C. N. Jayasinghe Judge of the Supreme Court
Shiranee Tilakawardene Judge of the Supreme Court
N. E. Dissanayake Judge of the Supreme Court

COUNSEL : Nerin Pulle S.C., for the Attorney-General.

Court assembled for hearing on 24th August, 2005 at 10.00 a.m.

Her Excellency the President has addressed a reference dated 23.08.2005 to this Court in terms of Article 122 (1) (b) of the Constitution requesting this Court to make a special determination as to whether the Bill bearing the title

“An Act to provide for the establishment of the Central Transport Board; to provide for the repeal of the Sri Lanka Transport Board Law, No. 19 of 1978 and for consequential amendments to the National Transport Commission Act, No. 37 of 1991; and for matters connected therewith or incidental thereto”.

or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate by the Acting Secretary to the Cabinet of Ministers by which the Cabinet of Ministers has certified that the Bill is urgent in the national interest. State Counsel assisted in the consideration of the Bill.

We observe that in Clause 26 sub clauses (2), (3), (4) and (5), the minimum fine is stipulated as Rupees two hundred and fifty thousand. State Counsel however submitted that it was an error and should be Rupees Two Hundred and Fifty.

Subject to the aforementioned we have examined the Clauses in the Bill and we make a determination in terms of Article 123 that neither the Bill nor any of its Clauses are inconsistent with the Constitution.

C. N. Jayasinghe
Judge of the Supreme Court

Shiranee Tilakawardene
Judge of the Supreme Court

N. E. Dissanayake
Judge of the Supreme Court

First Reading :

26.08.2005 (Hansard Vol. 160, No. 09, Col. 1895)

Bill No. : 114

Sponsor : Minister of Transport

Decision of the Supreme Court conveyed to Parliament :

25.08.2005 (Hansard Vol. 160, No. 08, Cols. 1647 - 1648)

Second Reading :

26.08.2005 (Hansard Vol. 160, No. 09, Cols. 1914 - 1986)

30.08.2005 (Hansard Vol. 160, No. 10, Cols. 2029 - 2101)

Committee of whole Parliament and Third Reading :

30.08.2005 (Hansard Vol. 160, No. 10, Cols. 2101 - 2118)

Hon. Speaker's Certificate :

15.09.2005

Hon. Speaker's Certificate announced on :

20.09.2005 (Hansard Vol. 160, No. 11, Col. 2120)

Title :

Sri Lanka Transport Board Act, No. 27 of 2005

S.C. (S.D.) No. 11/2005

"Appropriation Bill"

PRESENT : Sarath N. Silva Chief Justice
 Raja Fernando Judge of the Supreme Court
 R.A.N. G. Amaratunga Judge of the Supreme Court

COUNSEL : Mrs. Indika Demuni de Silva, S.S.C., for the Attorney-General
 assisted the Court in examining the provisions of the Bill.

Court assembled for hearing at 10.30 a.m. on 2nd December, 2005.

The Bill bearing the above title has been certified as being urgent in the national interest and referred to this Court for a special determination as to its constitutionality, in terms of Article 122(1) of the Constitution.

The Bill is intended to make legal provision for the service of the Financial Year 2006. The Bill previously presented for the purpose lapsed with the prorogation of Parliament giving rise to the urgency in presenting this Bill for enactment prior to the end of the current year. The substantive provisions of the Bill are similar in content to that of the lapsed Bill and preceding Appropriation Acts, the variants being in the estimated expenditure in certain sums payable for General Services.

The sums payable for "General Services" as contained in the First Schedule to the Bill reflect to a large measure the policy of the Government as to the allocation of resources. Generally, no issue of Constitutionality arises in regard to such allocation. However, it is necessary to state a matter that was referred to in the submissions made in Court. Head 103 relates to Judges of the Supreme court and under Programme 33 a total sum of Rs. 29,405,000 is allocated as recurrent expenditure with no allocation of any capital expenditure. Whereas under Head 103 "Office of the former President" as Programme I, a sum of Rs. 25,406,000 is allocated as recurrent expenditure and a sum of Rs. 4,500,000 is allocated as capital expenditure. Thus the total allocation for the office of the Former President exceeds the allocation for all the Judges of the Supreme court. Whilst the allocation of resources is a matter of Government policy we have to note that the facts stated above have the effect of undermining the Judiciary of this country at its highest level.

In this context it is also relevant to note that under Head 116 the allocation for the former President D. B. Wijetunga is Rs. 6,610,000 with a Capital expenditure of Rs. 100,000/-.

The general content of the Bill is well within the legislative competence of Parliament in view of the provisions of Article 148 of the Constitution which reads as follows :-

148 "Parliament shall have full control over public finance. 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."

For these reasons we make a determination in terms of Article 123(1) of the Constitution that neither the Bill nor any of its provisions are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

Raja Fernando
Judge of the Supreme Court

R. A. N. G. Amaratunga
Judge of the Supreme Court

First Reading :

08.12.2005 (Hansard Vol. 162, No. 03, Col. 299)

Bill No. : 128

Sponsor : Prime Minister and Minister of Internal Administration, and Deputy Minister of Defence, Public Security, Law and Order

Decision of the Supreme Court conveyed to Parliament :

07.12.2005 (Hansard Vol. 162, No. 02, Cols. 170 - 171)

Second Reading :

08.12.2005 (Hansard Vol. 162, No. 03, Cols. 301 - 449)

09.12.2005 (Hansard Vol. 162, No. 04, Cols. 453 - 547)

12.12.2005 (Hansard Vol. 162, No. 05, Cols. 556 - 628)

13.12.2005 (Hansard Vol. 162, No. 06, Cols. 634 - 751)

14.12.2005 (Hansard Vol. 162, No. 07, Cols. 761 - 872)

22.12.2005 (Hansard Vol. 162, No. 08, Cols. 881 - 991)

Committee of whole Parliament and Third Reading :

19.12.2005 (Hansard Vol. 162, No. 08, Col. 991)

20.12.2005 (Hansard Vol. 162, No. 09, Cols. 1004 - 1202)

21.12.2005 (Hansard Vol. 162, No. 10, Cols. 1214 - 1401)

19.12.2005 (Hansard Vol. 162, No. 11, Cols. 1412 - 1646)

Hon. Speaker's Certificate :

30.12.2005

Hon. Speaker's Certificate announced on :

18.01.2006 (Hansard Vol. 163, No. 02, Col. 20)

Title :

Appropriation Act, No. 39 of 2005

S. C. (S. D.) No. 12/2005

"Protection of Government Revenue (Special Provisions) Bill"

PRESENT : Sarath N. Silva Chief Justice
Raja Fernando Judge of the Supreme Court
R.A.N. G. Amaratunga Judge of the Supreme Court

COUNSEL : Mrs. Indika Demuni de Silva, S.S.C., for the Attorney-General
assisted the Court in examining the provisions of the Bill.

Court assembled for hearing at 10.30 a.m. on 2nd December 2005.

The Bill bearing the above title has been certified as being urgent in the national interest and referred to this Court for a special determination as to its constitutionality, in terms of Article 122(1) of the Constitution.

The Bill is intended to protect Government revenue and for that purpose lays down specifically that any order made by the Minister in terms of the Excise Ordinance as amended and the Excise (Special Provisions) Act as amended, shall come into force on the date the Minister has affixed his signature on such Order.

These are revenue orders that impose taxes, duties or levies and have to be published in the Gazette and placed before Parliament for approval. Any order which the Parliament refuses to approve is deemed to be revoked from the date of such refusal.

The imposition of the duty is done "under the authority of a law passed by Parliament" as provided in Article 148 of the Constitution.

The law provides for the Orders to be published in Gazette and for it to be operative on the date of its publication or on a later date as may be specified.

In earlier times publication in the Gazette may have served the purpose of communication to the public. Information Technology and electronic media that characterize the modern age has denuded the efficacy of the Gazette as a means of communication. It was correctly submitted by the Senior State Counsel that several days may lapse between the order being made by the Minister and its publication in the Gazette resulting in a considerable loss of revenue. The element of surprise and swiftness of imposition are vital to the proper recovery of revenue and the equal application of revenue orders. Therefore we accept the submissions of the Senior State Counsel that the specific provision in Clause 2 for the Order to come into force from the date on which the Minister has affixed his signature on such Order provides for the proper recovery of revenue and the equal application of the Order.

The publication in the Gazette will serve an evidential purpose and as provided in Section 171 (f) of the Interpretation Ordinance the production of a copy of the Gazette containing the Order shall be prima facie evidence for all purposes of the due making and content of the Order.

This is in line with Article 80(1) of the Constitution that a "Bill passed by Parliament shall become law when the certificate of the Speaker is endorsed thereon." Not, on the day the Bill is published as an Act of Parliament. Other revenue laws such as Section 2A(2) of the Value Added Tax Act, No. 14 of 2002 as amended by Act, No. 6 of 2005 and Section 2(3) of the Revenue Protection Act, No. 17 of 1962 provide for Orders to be effective, from the date the Minister affixes his signature thereto. Thus the provision in Clause 2 is consistent with the Constitution and the general legislative scheme now in operation.

The next matter to be considered is the retrospective effect given by Clause 3.

Article 75 of the Constitution states the legislative power of Parliament as follows :-

75. "Parliament shall have power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision of the Constitution :

Provided that Parliament shall not make any law -

- (a) suspending the operation of the Constitution or any part thereof,
or
- (b) repealing the Constitution as a whole unless such law also enacts
a new Constitution to replace it"

Therefore, Clause 3 comes within the legislative competence of Parliament. Since it is only a revenue measure and not an imposition of a penalty for an offence the bar against retrospectivity contained in Article 13(6) would not apply.

For these reasons we make a determination in terms of Article 123 of the Constitution that neither the Bill nor any of its provisions are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

Raja Fernando
Judge of the Supreme Court

R.A. N.G. Amaratunga
Judge of the Supreme Court

First Reading :

09.12.2005 (Hansard Vol. 162, No. 04, Col. 452)

Bill No. : 148

Sponsor : Prime Minister and Minister of Internal Administration, and Deputy
Minister of Defence, Public Security, Law and Order

Decision of the Supreme Court conveyed to Parliament :

07.12.2005 (Hansard Vol. 162, No. 02, Cols. 168 - 169)

Second Reading :

19.12.2005 (Hansard Vol. 162, No. 08, Cols. 992 - 993)

Committee of whole Parliament and Third Reading :

19.12.2005 (Hansard Vol. 162, No. 08, Cols. 993 - 996)

Hon. Speaker's Certificate :

06.01.2006

Hon. Speaker's Certificate announced on :

18.01.2006 (Hansard Vol. 163, No. 02, Col. 20)

Title :

***Protection of Government Revenue (Special Provisions) Act,
No. 1 of 2006.***

**DECISIONS
OF
THE SUPREME COURT
ON PARLIAMENTARY BILLS**

2006

D I G E S T

Page

LOCAL AUTHORITIES (SPECIAL PROVISIONS)

115 - 116

to provide for the 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 unforeseen and urgent circumstances; and to provide for matters connected therewith or incidental thereto.

- referred to the Supreme Court (Article 122(1)) - determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))

NATIONAL AUTHORITY ON TOBACCO AND ALCOHOL

117 - 129

to provide for the establishment of the National Authority on Tobacco and Alcohol for the purpose of facilitating the implementation of a national policy on Tobacco and Alcohol, and for the elimination of tobacco and alcohol related harm through the assessment and monitoring of the production, marketing and consumption of Tobacco and Alcohol products; to make provision to deter persons especially children from taking up to smoking and alcohol consumption by reducing their access to tobacco and alcohol products; and for matters connected therewith or incidental thereto :

- Presented by Ven. (Dr.) Omalpe Sobitha Thero, M.P.
Fourteen Petitions have been presented to the Supreme Court challenging the constitutionality of the Bill in its entirety and of several of specific provisions, in terms of Article 121(2) of the Constitution. On the basis of this challenge ten petitions have been filed to intervene in support of the Bill.

For the reasons stated above the Court has determined Article 123(1) of the Constitution as follows :

- (i) that the Bill taken as a whole is not inconsistent with the Constitution on of the other grounds that have been urged by the Petitioners;

- (ii) that Clause 29 is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution. The objective of this Clause could be achieved by substituting this Clause with a suitable provision that prohibits the sale of tobacco and alcohol products to persons below the age of 21 years;
- (iii) that Clause 16 be amended to provide that any direction that may be issued should be subject to the provisions of any law that is specifically applicable;
- (iv) that Clause 33(2)(f) be substituted with a provision worded in the manner stated above;
- (v) that Clause 37 be amended to provide for the tests that may be prescribed to be formulated in consultation with the Government Analyst;
- (vi) that Clause 38 be amended by substituting the word "shall" appearing in line 20 with the word "may";
- (vii) that on the basis of the submission made on behalf of the Bishops and Heads of Christian Churches, a suitable provision may be included to prohibit smoking in enclosed public places;

NATIONAL AUTHORITY ON TOBACCO AND ALCOHOL

130 - 139

to provide for the establishment of the National Authority on Tobacco and Alcohol for the purpose of identifying the policy on protecting public health; for the elimination of tobacco and alcohol related harm through the assessment and monitoring of the production, marketing and consumption of tobacco products and alcohol products; to make provision discouraging persons especially children from smoking or consuming alcohol, by curtailing their access to tobacco products and alcohol products; and for matters connected therewith or incidental thereto.

A Bill substantially similar in content bearing the same title was presented as a Private Member's Bill by Ven. Omalpe Sobitha Thero, M.P. The contents of that Bill formed the subject matter of S.C. (SD) No. 13/2005 to 22/2005 heard on 10.01.2006. In those proceedings the Petitioners challenged the constitutionality of the entire Bill, on the basis that it is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution.

Presumably in view of the determination on the previous Bill being substantially same in content the Petitioners have not challenged the present Bill in its

Page

entirety. The challenge by the tobacco industry and related business interests is in reference to Clause 40 of the Bill, which seeks to prohibit smoking in enclosed public places.

The Court was of the view that all 3 grounds of objection raised by the intervenient Petitioners in regard to the increase of alcohol content in the definition of 'alcohol product' in Clause 46 of the Bill which is intended to circuitously exempt the sale of brewery products from the prohibitions and restrictions in the Bill is inconsistent with Article 12(1) of the Constitution. Irrespective of legal considerations it is a reversal of the proclaimed policy of Government of there being a 'stop to intoxicants' (ප්‍රතිපත්ති).

Accordingly the Court was of the view that this Clause should be amended to include the previous definition that had been considered by this Court and found to be consistent with the Constitution.

For the reasons stated above the Court has determined that the Bill is not inconsistent with the Constitution subject to the amendment of Clause 40(5) and the amendment of the definition of "alcohol product" appearing in Clause 46 to be the same as in Clause 42 of the previous Bill.

**RECOVERY OF LOANS BY BANKS (SPECIAL PROVISIONS)
(AMENDMENT)**

140 - 141

- to amend the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990
- referred to the Supreme Court (Article 122(1)) - -
- determined that the provisions of the Bill not inconsistent with the Constitution. (Article 123 (1))

**CEYLON ELECTRICITY BOARD (AMENDMENT)
SRI LANKA ELECTRICITY**

142

**SRI LANKA ELECTRICITY BILL
CEYLON ELECTRICITY BOARD (AMENDMENT)**

143 - 149

- referred to the Supreme Court (Article 122(1)) - -
- determined that the provisions of the Bill not inconsistent with the Constitution. (Article 123 (1))

	Page
HIGH COURT OF THE PROVINCES (SPECIAL PROVISIONS) (AMENDMENT)	150 - 152
- To amend the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.	
- referred to the Supreme Court (Article 122(1))	
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
EXCISE (SPECIAL PROVISIONS) (AMENDMENT)	153 - 154
- To amend the Excise (Special Provisions) (Amendment) Act, No. 13 of 1989	
- referred to the Supreme Court (Article 122(1))	
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
VALUE ADDED TAX (AMENDMENT)	155 - 156
- To amend the Value Added Tax Act, No. 14 of 2002	
- referred to the Supreme Court (Article 122(1))	
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
REGIONAL INFRASTRUCTURE DEVELOPMENT LEVY	157 - 158
- To provide for the imposition of a levy to be called the Regional Infrastructure Development Levy consequent to a 2007 Budget Proposal, which shall be utilised for Regional Infrastructure Development; and to provide for matters connected therewith or incidental thereto.	
- referred to the Supreme Court (Article 122(1))	
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	
FINANCE (AMENDMENT)	159 - 160
- To amend the Finance Act, No. 11 of 2002	
- referred to the Supreme Court (Article 122(1))	
- determined that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution (Article 123 (1))	

S.C. (S.D.) No. 01/06

"Local Authorities (Special Provisions) Bill"

BEFORE : C. N. Jayasinghe Judge of the Supreme Court
Shiranee Thilakawardene Judge of the Supreme Court
N. K. Udalgama Judge of the Supreme Court

COUNSEL : P.A. Ratnayake, P.C., Addl. Solicitor General with Mrs. Indika Demuni de Silva, Senior State Counsel, and Riad Ameen, State Counsel, for the Attorney-General.

Court assembled for hearing on 16th January 2006 at 10.00 a.m.

His Excellency the President has addressed a reference dated 11.01.2006 to this Court in terms of Article 122 (1) (b) of the Constitution requesting this Court to make a special determination as to whether the Bill bearing the title "Local Authorities (Special Provisions) Bill" or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement in terms of Article 122(1) of the Constitution made by the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Attorney-General was noticed in terms of Article 134 (1) of the Constitution and Mr. P. A. Rathnayake PC, Additional Solicitor General, assisted Court in considering the constitutionality of the Bill and its Clauses.

The Preamble of the Bill provides that nominations were received in respect of several Local Authorities referred to in the Schedule to the Bill and that the Poll was fixed for 25.03.2002. The Preamble of the Bill also provides that thereafter the said Poll had been postponed from time to time in terms of Section 38(3) of the Local Authorities Elections Ordinance; that persons who have tendered nominations have either died or have been displaced or have changed their political association or have migrated or ceased to be less than 35 years. The Clauses in the Bill seek to render the nomination papers submitted to be of no force and effect and contain provisions for the publication of a fresh notice of nomination.

We have examined the Clauses in the Bill and we make determination in terms of Article 123 that neither the Bill nor any of its Clauses are inconsistent with the Constitution.

C. N. Jayasinghe
Judge of the Supreme Court

Shiranee Thilakawardene
Judge of the Supreme Court

N. K. Udalgama
Judge of the Supreme Court

First Reading :

18.01.2006

(Hansard Vol. 163, No. 02, Col. 45)

Bill No. :

137

Sponsor :

Minister of Local Government and Provincial Councils

Decision of the Supreme Court conveyed to Parliament :

17.01.2006

(Hansard Vol. 163, No. 01, Cols. 4-5)

Second Reading :

18.01.2006

(Hansard Vol. 163, No. 02, Cols. 46 - 47)

Committee of whole Parliament and Third Reading :

18.01.2006

(Hansard Vol. 163, No. 02, Cols. 46 - 47)

Hon. Speaker's Certificate :

19.01.2006

Hon. Speaker's Certificate announced on :

19.01.2006 (Hansard Vol. 163, No. 03, Col. 53)

Title :**Local Authorities (Special Provisions) Act, No. 2 of 2006**

S.C. (S.D) Nos. 13-22/05

"National Authority on Tobacco and Alcohol Bill"

S.C.(S.D.)No. 13/2005

Petitioner The Lion Brewery Ceylon Ltd. Col.01

Intervient Petitioners Life Mathdravya Nivarana Vyaparaya
Kandy.

Sri Lanka Amadyapa Samithi
Sammelanaya, Colombo 5.

Alcohol & Drug Information Centre,
Colombo 05.

I.O.G.T. Regional Council for South East
Asia, Colombo 5

Sri Lanka Temperance Association,
Colombo 11.

Rev. Kingsley Perera, Sri Lanka Baptist
Sangamaya, Colombo 8.

Rt. Rev. Kumara Illangasinghe, Bishop of
Kurunegala,

Rt. Rev. Duleep de Chickera, Bishop of
Colombo.

Rev. W.P. Ebenezer Joseph, President,
Methodist Church of Sri Lanka,

Rev. Charles N. Jansz, President, Dutch
Reformed Church in Sri Lanka

Lawyers for Human Rights & Development,
Colombo 08.

S.C.(S.D.)No. 14/2005 Petitioner The Ceylon Brewery Ltd., Colombo 01.

S.C.(S.D.)No. 15/2005 Petitioner Ceylon Tobacco Co. Ltd., Colombo 15.

S.C.(S.D.)No. 14/2005 Petitioner Ceylon Tobacco Co. Ltd., Distributors'
Association, Colombo 02.

Intervient Petitioner Swarna Hansa Foundation, Battaramulla.

S.C.(S.D.)No. 17/2005 Petitioner I.D. Lanka Ltd., Kotalawela, Kaduwela.

S.C.(S.D.)No. 18/2005 Petitioner Kudagoda Bopearachchige Priyantha Saman
Kumara, New Saman Hotel & Bakery, Malabe.

S.C.(S.D.)No. 19/2005 Petitioner R.A.S. Wijesekara, Wilegoda, Kalutara North.

S.C.(S.D.)No. 20/2005 Petitioner Distilleries Co. of Sri Lanka Ltd., Colombo 10.

Intervient Petitioner Green Movement of Sri Lanka Ltd.,
Colombo 10.

BEFORE : S. N. Silva
Ms. Shiranee Thilakawardene, J
N. E. Dissanayake, J.

COUNSEL : K.N. Choksy, P.C. with Maithri Wickremasinghe, Ms. Kissan Wijetunga and Avindra Rodrigo for Petitioner instructed by F.J. & GDe Saram in 13/05.

K.N. Choksy, P.C. with Maithri Wickremasinghe, Ms. Kissan Wijetunga and Avindra Rodrigo for Petitioner instructed by Sudath Perera Associates in 14/05.

K.N. Choksy, with Kissan Wijetunga, V.K. Choksy, Shanaka Amarasinghe and Ms. Sunethra Gunaratne for petitioners instructed by Julius & Creasy in 15/05.

Nigel Hatch, P.C., with Ms. K. Geekiyanage and Shanaka Amarasinghe for petitioner instructed by Julius & Cresy in 16/05.

S.L. Gunasekera with Maithri Wickremasinghe and Shanaka Amarasinghe for petitioner instructed by Julius & Creasy in 17/05.

K. Kanag-Iswaran. P.C., with S. Kanag-Iswaram. Shanaka Amarasinghe for Petitioner instructed by Julius & Creasy in 18/5.

Gomin Dayasiri with Ms. Minoli Jinadasa for Petitioner in 19/05.

Sanjeeva Jayawardane for Petitioners in 20/05 & 21/05 instructed by Sudath Perera Associates.

Sanjeeva Jayawardane for Petitioner in 22/05 instructed by Dissanayake Amaratunga Associates.

Manohara de Silva with Govinda Jayasinghe, Bandara Thalagune, W.D. Weeraratne, K.H.C. Kahandawela and Auska Perusinghe for 2nd Respondent and intervenient Petitioner in 13-15/05.

Kalyananda Tiranagama with M.J.A. Hassen, H.Ratnayake, Niluni Manthrinayake and C.Bandara for intervenient petitioner in 13-15/05 & 17/05.

Chandana Prematilleke with Lilan Weerasooriya for intervenient petitioners in 13/05 & 15/05.
P.A.D. Samarasekera, P.C., with S.Nanayakkara for intervenient Petitioners in 13/05 & 15/05.
Kanishka Witharana with Medha N. Gamage for intervenient Petitioner.

Ms. Ruwana Rajapakse with Upul Deshapriya for intervenient Petitioner in 20/05.

Mohan Peiris, P.C., for intervenient Petitioner in 22/05.

M.A. Sumanthiran with Vijula Arulanathan and Viran Corea instructed by Moahan Balendra for intervenient Petitioners :-

- (1) Rev. Kingsley Perera, Head of Sri Lanka, Baptist Sangamaya.
- (2) Rt. Rev. K. Illangasinghe, Bishop of Kurunegala, Church of Ceylon
- (3) Rt. Rev. Duleep de Chickera, Bishop of Colombo, Church of Ceylon.
- (4) Re. W.P. Ebenezer Joseph, President, Methodist Church.
- (5) Rev. Charles Jansz, President, Dutch Reformed Church of Sri Lanka.

Shavindra Fernando, D.S.G. with Nedrin Pulle, S.S.C., for the Attorney-General

Court assembled for hearing at 10.30 a.m. on 10th January, 2006.

Written Submissions tendered by Counsel on 16th January, 2006.

A Bill bearing the above title has been presented as a Private Member's Bill by Ven. (Dr.) Omalpe Sobitha Thero, Member of Parliament and it has been published in the Government Gazette as required and placed on the Order Paper of Parliament. Fourteen Petitions have been presented to this Court challenging the Constitutionality of the Bill in its entirety and of several of specific provisions, in terms of Article 121(2) of the Constitution. On the basis of this challenge ten petitions have been filed to intervene in support of the Bill.

Broadly, the challenge to the Bill and its provisions come from leading manufacturers and producers of tobacco and alcohol products and those engaged in the wholesale and retail distribution and sale of these products. Whereas, the intervenients represent various organizations engaged in activities to curb the use and consumption of tobacco and alcohol products. The Hon. Member of Parliament who presented the Bill and who is cited as the 2nd Respondent has also filed papers in support of the Bill. A significant feature is that the Bill presented by a Member of the Buddhist Clergy is supported in its content by several Bishops and Heads of Christian Churches. Counsel representing them submitted that there should be further provisions included in the Bill prohibiting smoking in public places, which would be adverted to later.

The Bill contains provisions to set up a National Authority on Tobacco and Alcohol, for purposes inter alia -

- (i) to advise the Government on the implementation of the National Policy on tobacco and alcohol;
- (ii) to recommend the measures to minimize harm arising from the consumption of tobacco and alcohol products;
- (iii) to make necessary recommendations to minimize illicit drug use and to monitor progress of investigations and criminal proceedings relating to alcohol, tobacco and illicit drug trade;

The Bill also creates new offences, particularly with regard to the sale of tobacco and alcohol products and the promotion of such sale by means of advertising and sponsorship of sports and cultural events.

The particular challenge to the Bill as a whole is on the basis that it amounts to an infringement of the fundamental rights of the Petitioners guaranteed by Articles 10, 12(1) and 14(1)(g) of the Constitution.

It is their case that the production and sale of tobacco and alcohol, directly affected by the Bill, are lawful trades carried on by the Petitioners unlike the illicit trade in alcohol and drugs. That, since the lawful trade of the petitioners is sought to be restricted in the manner set out in the Bill, it is discriminatory and denies them the equal protection of the law as guaranteed by Article 12(1) of the Constitution. It is contended that the Bill would in effect be a boon to the illicit trade.

It is submitted that since the petitioners' trade is lawful, any legislative measures to control advertising and promotion of such trade would affect the freedom of thought and conscience as guaranteed by Article 10 of the Constitution and the freedom of expression including publication guaranteed by Article 14(1) (a). That, the Bill is a restriction of their freedom to engage in a lawful trade, business or enterprise, guaranteed by Article 14(1) (g) of the Constitution.

The submission of the 2nd Respondent and of the Intervient Petitioners in this regard is that the illicit trade that may be there in particular in alcohol and drugs is not comparable with the permitted trade of alcohol and tobacco products as envisaged in the Bill. That, there is no question of any regulation or control on an illicit trade which is per se outside the pale of law and punishable as provided in several Penal Statutes. On the other hand, the measures that may be taken in terms of the Bill to promote good health by the avoidance of alcohol and tobacco consumption and use, would deter persons from use of all substances having addictive and harmful effects, whatever be their source. Finally, it was submitted that restrictions imposed are warranted in terms of Article 15(7), which permit restrictions of the fundamental rights guaranteed by Articles 12 and 14 inter alia for the protection of public health. This submission is based on the premise that the consumption of alcohol and tobacco products is per se harmful to health.

As regards the challenge to the Bill in its entirety, we have considered the two lines of submissions stated above. The parties have tendered extensive material from national and international research, studies and publications. The limited time available does not permit the Court to set down separately the content of these material and we would restrict to a general statement of what is revealed.

The publication, particularly of the World Bank that have been produced by the Intervient Petitioners reveals certain findings that have been made as regards the health consequences of smoking and states in particular that "tobacco contains nicotine, which substance is recognized to be addictive by international medical organizations. Tobacco dependence is listed in the International Classification of Diseases".

The publication proceeds to set out the manner in which nicotine addiction can be established quickly in young adolescents who have recently taken up smoking and states that tobacco will kill 4 million people in the next 12 months and is anticipated at present level to kill 10 million people by the year 2030. It is expected that 7 million of these deaths will be in "low income and middle income countries where cigarettes were once rate. As educated and prosperous people abandon smoking, the practice is becoming increasingly concentrated among the poor in most societies."

The intervenient Petitioners have also produced the statement issued by the Fifty-eighth World Health Assembly at its plenary meeting on 25.05.2005, which relates to the public health problems caused by harmful use of alcohol. The preamble of this statement sets out that according to the World Health Report 2002, 4% of the burden of disease and 3.2% of all deaths globally are attributed to alcohol which is the foremost risk to health in low-mortality developing countries and the third in the developed countries. The Assembly has requested the member states "to develop, implement and evaluate effective strategies and programmes for reducing the negative health and social consequences of harmful use of alcohol."

The Petitioners who are from the alcohol and tobacco industries and trade do not dispute the findings disclosed in these publications that manage from specialized Agencies of the United Nations; their contention is that the health risk of the illicit trade is far worse and the restrictions sought be placed on the lawful trade would aggravate the health risk resulting from the illicit trade. This argument fails to account for the basic premise that the harmful impact of alcohol, tobacco and for that matter drug, whether the source of supply of such substance is lawful or illicit, is a common pattern of use, addiction and dependence. Undoubtedly, the health risk of illicit use is worse. But, the behavioural tendency of use, addiction and dependence being the same, the lawful trade and the illicit trade would have the effect aggravating such behavioural tendency. The user would have recourse to the licensed sources as well as illicit sources when the behavioural trend is set in motion. Hence, from the point of public health, there is a harmful interlink. The likely pattern is that addiction will start from the licensed source and get aggravated in the fold of the illicit trade. The illicit trade is per se contrary to law, punishable under various statutes and there is no question of regulating an illicit trade. On the contrary the trade that is carried out on the basis of a licence or authority of the law, which is found to be harmful to public health should necessarily be subject to restraint in order to minimize the harmful consequences to public health. In this

connection we cite the observations made by Supreme Court of India in the case of Vincent vs Union of India 1987 All India Reporter - S.C.1- page 990 at page 995 which reads as follows :

"..... maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore, is of high priority - perhaps the one at the top."

Therefore the Bill taken as a whole considering its objects would constitute a permitted restriction in terms of Article 15(7) of the Constitution and is not inconsistent with 14(1)(g) of the Constitution which guarantees the freedom to engage in a lawful trade.

The alleged inconsistency with Article 12(1) of the Constitution on the basis of unequal protection of the law in relation to the 'illicit trade' is misconceived. An illicit trade and a trade that is permitted by law cannot be classified together for the purpose of legislation. In this instance what is permitted by law is classified separately in a law intended to minimize harm to public health. It is indeed the bounden duty of the State to take such measures in the face of proven a risk to public health. The classification is therefore not inconsistent with Article 12(1) of the Constitution.

We are also of the view that there is no basis whatsoever to allege that the provisions of the Bill are inconsistent with the freedom of thought guaranteed by Article 10 of the Constitution. The Bill is intended to safeguard public health and would to that extent promote the freedom of thought. The harmful effects of the consumption of alcohol and tobacco as indicated in the publications of the World Bank and the World Health Organization referred to above, directly impair the functioning of the human brain. Any measures to prevent the impairment of brain cells resulting from the use of alcohol and tobacco products as indicated in the medical research would promote the freedom of thought. Therefore we reject in its entirety the submission that the provisions of the Bills inconsistent with Article 10 of the Constitution.

From this point it is necessary to proceed to consider the challenge made by the Petitioners in respect of the particular provisions of the Bill. The main thrusts of the Petitioners was in relation to Clause 29 of the Bill which makes it an offence to sell any tobacco or alcohol product within a radius of 100 meters of any premises, frequented mainly by children or young adults.

Clause 29(2) defines the term 'children' to mean persons who are under 18 years of age and "young adults" to mean persons between 18 and 25 years. The phrase "premises frequented by young adults or children" is defined to include schools, tutorials, playgrounds and Higher-Education Institutions. The contention of the Petitioners is that the wide ambit of this offence would make it impossible to sell any tobacco or alcohol product within the city of Colombo or any other town in Sri Lanka, considering that there are so many schools, tutorials, playgrounds and so on. The Petitioners produced detailed evidence in relation to Colombo.

It is also contended that the provision is lacking in rationality since the total ban on sale within the area cannot be reasonably related to the object that is sought to be achieved, namely, the prevention of sale to children and young adults. The wide ambit of the provision would prevent the sale to all persons including adults and in effect amount to a total prohibition which is not intended by the Bill. On this basis it is contended that the provisions of this Clause are inconsistent with Article 12(1) and 14(1)(g) of the Constitution.

The object of the Bill is not to impose a total prohibition on the sale of tobacco and alcohol products. As contended by the Petitioners, the long title of the Bill states specifically that it intended to make provision to "deter persons, specially children from taking up to smoking and alcohol consumption by reducing their access to tobacco and alcohol products."

If the objective in relation to children and young persons is to be achieved the prevention and sale should be in relation to such persons and not in relation to the entirety of the public. The prohibition in Clause 29 would in effect result in a prevention of sale to all in Colombo and other cities. Therefore we are inclined to agree with the Petitioners that Clause 29 as presently formulated is not rationally related to the objective that is sought to be achieved and is therefore inconsistent with Article 12(1) of the Constitution.

Since the provision would in effect prevents a sale of these products, which is now permitted by law in the city of Colombo and other populated areas. We are of the view that it is also inconsistent with Article 14(1)(g) of the Constitution.

At the hearing before Court the Petitioners and the Intervient Petitioners agreed that the Clause be replaced with a suitable provision to prohibit the sale of tobacco and alcohol products to young persons. The submission of the Petitioners was that the prohibition should apply to those below 18 years since persons above the age of 18 are entitled to exercise of the franchise. We have to note that the consumption and use of alcohol and tobacco on the one hand and the exercise of franchise on the other, are not comparable instances. The exercise of franchise is not by any means harmful to health. On the other hand the consumption of tobacco and alcohol are per se harmful to health. Therefore a person should make an informed decision having considered the harmful consequences before taking to the consumption and use of tobacco and alcohol. An informed choice as opposed to what we would call an "impressionable choice". In the circumstances we are of the view that it would not be inconsistent with any provision of the Constitution to impose a total ban on the sale of tobacco and alcohol products as defined in the Bill to persons below the age of 21 years. A suitable amendment should be made in this regard to substitute Clause 29 of the Bill with a provision to prohibit the sale of tobacco and alcohol products to persons below the age of 21 years.

The next main contention of the Petitioners is with regard to Clause 33 of the Bill which contains a prohibition of alcohol and tobacco advertisements. The Petitioners contended that the prohibition would be inconsistent with Article 14(1)(a) and 14(1)(g) of the Constitution. We have to consider the prohibition on advertising on the basis of the findings stated above that the consumption and use of tobacco and alcohol is per se harmful to public health.

The contention of the Petitioners is two fold-

- (i) that advertisements would give an opportunity to any person consuming these products to make a choice of that is more suitable to his liking and thereby promote a better choice;
- (ii) that advertisements would also carry a warning of risk factors, thereby promote the public to make an informed choice whether they should use a particular product or not:

The two fold contention in our view cannot overcome the basic premise that the consumption or use of tobacco and alcohol are harmful to health. Whether it is in the guise of promoting a choice or making an informed decision of what should be purchased, since the end result is going to be harmful to public health the restriction in our view would in any event be permissible in terms of Article 15(7) of the Constitution.

Further on the question whether a prohibition on the advertisement of any article could per se constitute a restriction on the freedom of speech and expression, it is relevant to cite the findings of the Supreme Court of India in the case of *Hamdard Dawakhana vs Union of India* AIR 1960 S.C. page 544. In this case it was held that a total prohibition on advertisement imposed by the Drug and Magic Remedies (Objectionable Advertisement) Act was not inconsistent with the corresponding Article 19(1)(a) of the Indian Constitution. It was held that if the prohibition merely deprives a trader from commending his wares it would not fall within the freedom of speech as guaranteed by the Constitution. The Supreme Court of India adopted a useful observation made by Justice Mc. Kenna in *John W. Rast vs Van Deman & Lewis Co.*, 191560 U.S. Lawyers Ed. 679 at 690 where it was stated as follows:

"Advertising is merely identification, and description appraising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase."

It was further held that advertising does not come within the objective of the freedom of speech which is intended to safeguard the natural right of an organized freedom loving society to impart and acquire information about a matter of common interest. We are inclined to accept this statement as to the ambit of the freedom of speech and expression and hold that advertising does not come within its scope.

For these reasons we are of the view that the prohibition in Clause 33 on advertisement is not inconsistent with any provision of the Constitution.

We would now deal with other Clauses on which specific submissions have been made by the Petitioners. They are --

Clause 3 - As to the membership of the Authority'

It was contended that this provision is inconsistent with Article 12(1) of the Constitution, since there is no representative from the Alcohol and Tobacco Trade or Industry in the Authority. It was contended that this absence of representation in the Authority denies to persons in the "trade" the equal protection of the law guaranteed by Article 12(1) of the Constitution.

We are of the view that questions of policy far outweigh questions of legality in determining the constitution of the Authority and no trade or group could claim a right to secure membership. Furthermore, in this instance the object of the Bill is to limit tobacco and alcohol related harm being per se contrary to the interests of the trade which is to promote its consumption and use.

The strenuous objections raised by the trade against the enactment of the Bill itself in its entirety demonstrates the hostile attitude of the trade to the Bill. They are certainly not inclined to promote the objective of the Bill. Therefore they cannot demand by means of Article 12(1) of the Constitution, a right to be represented in the Authority. Accordingly we see no merit in this ground of objection.

Clause 2 -

It is submitted that the Secretary of the Ministry of Finance should also be an ex-officio member of the Authority, since the State levies revenue on the alcohol and tobacco trade by means of duties and fees. In regard to this matter as well we are of the view that representation in the Authority, especially in relation to officials, is a matter of policy. The object of the Bill does not relate to revenue measures in respect of alcohol and tobacco trade. Therefore we are of the view that the absence of the Secretary of Ministry of Finance from the membership of the Authority is not a matter that could be raised as an inconsistency with Article 12(1) of the Constitution.

Clause 3 -

In terms of Clause 5(2) the President may remove an appointed member of the Authority for reasons to be assigned. It was submitted that since Article 35(1) gives the President immunity from suit and it would not be possible to seek redress from any decision of the President to remove a member from the Authority.

We are of the view that the immunity granted to the President cannot be the basis to prevent discretionary power being vested in him by law. The President being Head of State and Head of Government would undoubtedly act for good reason in the exercise of any discretion vested in him. In this instance the President is required to assign reasons for the removal of an appointed member.

We are of the view that this is a sufficient safeguard against the arbitrary exercise of power by the President. Therefore we do not see any merit in this ground of objection.

Clause 16 -

of the Bill empowers the Minister on the advice of the Authority to issue general or special directions to any Government Department or Statutory Institution requiring any such Department or Institution to carry out such acts as are specified in such direction relating to the use of tobacco and alcohol products. It was submitted that existing law such as the Excise Ordinance, contain comprehensive and stringent

provisions to control the liquor industry. Therefore it was submitted that the directions the Minister is empowered to issue in terms of Clause 16 may be in conflict with the special legislation now in force covering these subjects. Although this does not raise any specific issue of constitutionality there should not be room for conflict in the application of different laws. Therefore we are of the view that it was appropriate, to amend Clause 16 by providing that any direction to be issued should not be inconsistent with applicable law.

Clause 18(2)(a) - provides for sums to be made available to the Authority from the Consolidated Fund to be paid into the Fund of the Authority. It was submitted that this provision is inconsistent with Article 152 of the Constitution which requires that a Bill or a motion affecting public revenue could only be presented by a Minister with the approval of the Cabinet of Ministers. The basis of this submission is that since this is a Private Member's Bill, Clause 18(2)(a) would be inconsistent with the specific requirements of Article 152.

We are of the view that the provisions of Clause 18(2)(a) do not provide for any specific amount to be paid out of the Consolidated Fund but is a mere enabling provision. It is not a charge on the Consolidated Fund. If a specific amount is to be paid out from the Consolidated Fund, such amount would have to be authorized by Parliament upon a motion as set out in Article 152. In the circumstances there is no inconsistency with Article 152 of the Constitution.

Clause 31 - It was submitted that this Clause, which prohibits the manufacture and sale of any tobacco product which does not generate smoke may prevent the sale of articles such as "Nicotine Patches" that are intended to assist people in giving up smoking altogether. This submission presupposes a beneficial use of tobacco products of which the Court has not been furnished with sufficient material. The material produced before Court is all consistent in the opinion that tobacco products are harmful to public health. In any event we are of the view that if there be any tobacco product the use of which is to eliminate tobacco related harm, by a process of interpretation, the prohibition in Section 31 would not apply to such article since its sale would promote the objective of the Act as stated in the long title.

Clause 33(2) - is an exception to the prohibition on advertisements and it was submitted that in place of Clause (f), a Clause should be introduced which specifically permit the publication of material beneficial to the public. In these circumstances we are of the view that there is merit in the submission to which all Counsel agreed that in place of Clause 33(2)(f) the following Clause be included -

"to publish, transmit, or broadcast any scientific, educational, social, medical, technical or other material or information beneficial to the public pertaining to Alcohol Products or Tobacco Products."

Clause 34 - It was submitted that the use of the name only of any manufacturer of tobacco or alcohol product be permitted to be used in connection with the sponsorship of any of the events as specified in paragraph (a) (b). It was further contended that the reference to cultural and social activities in sub-paragraph (a) be deleted and International Sporting events be excluded from this prohibition.

We are of the view that the prohibition is intended to achieve the objective of the Bill. The purpose is to prevent any form of sponsorship of educational, cultural, social or sporting events as provided in sub-paragraph (a) since these events have the objective of enhancing health and the quality of life of people. These objectives cannot be reconciled with the harmful effects of tobacco and alcohol products.

In the circumstances we are of the view that the provisions of Clause 34 promote the objective of the Bill and are not inconsistent with the Constitution.

Clause 37 - It was submitted that this Clause be amended to provide for tests to be done only as formulated by the Government Analyst. We are of the view that there is merit in this submission and that if no qualification is made the prescribed tests may require heavy expenditure to be incurred as submitted by the Petitioners. In these circumstances we are of the view that provisions in Article 37 should be amended by specifying that the tests be prescribed in consultation with the Government Analyst.

Clause 42 - It was submitted that the definition of the alcohol products contained in Clause 42 of the Bill may include some pharmaceutical products and ayurvedic drugs which are said to contain as much as 4% alcohol. The Petitioners have no interests in the trades in respect of which the submissions have been made. Those in the pharmaceutical and ayurvedic drug industry have not submitted any petition to this Court on this matter. The alcohol content to be specified is a matter of policy and the Court has not been provided with any material to demonstrate that the definition is per se unreasonable or arbitrary so as to be inconsistent with Article 12(1) of the Constitution.

Clause 38 - It was submitted that the provisions in this Clause for the suspension of a driving licence where a person is accused or suspected of committing an offence under Section 151(1), 151(1)(a) or 152 of the Motor Traffic Act, would be inconsistent with the presumption of innocence contained in Article 13(5) of the Constitution. The basis of the submission is that such suspension would in effect be a punishment imposed in advance. We are not inclined to agree with the submission that the suspension of the licence is per se a finding of guilt as contemplated in Article 13(5) of the Constitution. A person is authorized to drive a motor vehicle in terms of the Motor Traffic Act on the basis

of a licence or authority granted under Law. The Sections of the Motor Traffic Act included in the Clause relate to driving under the influence of liquor and the suspension of the licence is intended to protect the public from a misuse or abuse of authority granted under the law.

In the circumstances considering the grave danger posed to the public by a person driving under the influence of liquor, we are of the view that provision for immediate action to be taken by the suspension of the driving licence of such a person would not be inconsistent with Article 13(5) of the Constitution. However, this matter should be left in the discretion of Court and of Clause 38 should be suitably amended to substitute the word "shall" in line 20 with the word "may".

A submission was made by Counsel representing the Bishops and the Heads of Several Christian Churches in Sri Lanka that in view of the harmful effects of smoking in public places which constitute a serious health hazard to those who do not smoke, a provision should be included in the Bill for the prohibition of smoking in public places that are enclosed. The evidence that has been adduced support this submission of the harmful effects of what is described as "passive smoking".

The long title of the Bill states that it is intended for the elimination of tobacco and alcohol related harm. In the circumstances we are inclined to agree with the submission that a suitable provisions should be included in the Bill for the prohibition of smoking in enclosed public places. Such a prohibition would not be inconsistent with any provision of the Constitution. A suitable amendment for this purpose may be made in Parliament.

For the reasons stated above we make a determination in terms of Article 123(1) of the Constitution as follows :

- (i) that the Bill taken as a whole is not inconsistent with the Constitution on of the other grounds that have been urged by the Petitioners;
 - (ii) that Clause 29 is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution. The objective of this Clause could be achieved by substituting this Clause with a suitable provision that prohibits the sale of tobacco and alcohol products to persons below the age on 21 years;
 - (iii) that Clause 16 be amended to provide that any direction that may be issued should be subject to the provisions of any law that is specifically applicable;
 - (iv) that Clause 33(3)(f) be substituted with a provision worded in the manner stated above;
 - (v) that Clause 37 be amended to provide for the tests that may be prescribed to be formulated in consultation with the Government Analyst;
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- (vi) that Clause 38 be amended by substituting the word "shall" appearing in line 20 with the word "may";
- (vii) that on the basis of the submission made on behalf of the Bishops and Heads of Christian Churches, a suitable provision may be included to prohibit smoking in enclosed public places;

In conclusion we wish to place on record our appreciation for the valuable assistance rendered by the Deputy Solicitor General and the learned Counsel who made submissions on behalf of the Petitioners and Intervient Petitioners.

Sarath N. Silva
Chief Justice

Shirani Thilakawardena
Judge of the Supreme Court

N. E. Dissanayake
Judge of the Supreme Court

First Reading :

20.12.2005
(Hansard Vol. 162, No. 09, Cols. 1003 - 1004)

Bill No. :

134

Sponsor :

Ven. (Dr.) Omalpe Sobhitha Thero, M.P.

Decision of the Supreme Court conveyed to Parliament :

01.02.2006
(Hansard Vol. 163, No. 04, Cols. 69 - 80)

Withdrawal of the Bill

05.07.2006
(Hansard Vol. 164, No. 17, Col. 2114)

S.C. (S.D.) Nos. 1 to 6/2006

"National Authority on Tobacco and Alcohol Bill"

S.C.(S.D.) No. 1/2006	Ceylon Tobacco Company Ltd., Colombo 15 (Petitioner)
Intervient Petitioners	1. H. S. Dhamika de Saram 2. Lion Brewery of Ceylon Ltd., 3. H.C.H.D. Liyanagama 4. Jayavimal Perera 5. M.R. Rizvi and Mohamed Faiz 6. Dr. Sisira Kodagoda - Sri Lanka Amadyapa Samithi Sammelanaya 7. K.K. Kumari - Lawycers for Human Rights and Development 8. Rev. Kingsley Perera 9. Rt. Rev. Duleep de Chickera 10. Rev. W.P. Ebenezer Joseph 11. Alcohol and Drug Information Centre 12. Swarna Hansa Foundation
S.C.(SD) No. 2/2006	1. Trans Asia Hotels Ltd., Colombo 2. 2. Blue Oceanic Beach Hotel Ltd., Colombo 2. 3. Pearl Beach Hotel Ltd., Colombo 2. (Petitioners)
S.C.(SD) No. 3/2006	1. N.J.H. Mahinda Cooray, President Toursit Hotels' Association of Sri Lanka 2. J.E.P. Kehelpannala, Vice President Tourist Hotels' Association of Sri Lanka 3. Tourist Hotels' Association of Sri Lanka (Petitioners)
S.C.(SD) No. 4/2006	All Ceylon Barn Owners Association Kohona, Pallepola (Petitioner)
Intervient Petitioner S.C.(SD) No. 5/2006	Ven. Dr. Omalpe Sobitha Thero Jagathpriy Hennayake, Malabe. (Petitioner)
S.C.(SD) No. 6/2006	K.B.P. Saman Kumara Malabe (Petitioner) 1. Hon. Nimal Siripala de Silva 2. The Hon. Attorney-General Respondents SC(SD) Nos 1/06, 2/06, 3/06, 4/06, 5/06 and 6/06)

BEFORE S.N. Silva, Chief Justice,
Shiranee Thilakawardane Judge of the Supreme Court
Amaratunga, Judge of the Supreme Court

COUNSEL : Kanag Iswaran, P.C., with Nigel Barathlemuz instructed by D.L. and S. De Seram for Petitioners in SC(SD) 5 & 6 of 2006.

K. Tirangama with Hasanthi Ratnayake for intervenient Petitioner in SC (SD) 1/06

Manohara de Silva for Intervenient Petitioners with Udaya Gammanpila, Bandara Thalagune, Anusha Perusinghe (Ven. Omalpe Sobitha Thero and Sri Lanka Temperance Associates in SD. 4/2006)

Nihal Jayamanne P.C., for Intervenient Petitioner instructed by Dissanayake Amaratunga Associates.

Chamantha Weerakoon Unamboowa with Shaky Nanayakkara for Alcohol - Drug Information Centre.

M.A. Sumanthiran with Viran Corea for intervenient for Petitioner.
(President, Baptist Church, Methodist Church & Bishop of Colombo)

Chandana Premathilake for Intervenient Petitioner with Sampath de Seram in SC SD 1/06.

Sanjeeva Jayawardena with Mohan Wijesinghe, Nilshantha Sirimanne and Rajeev Amarasuriya for the Petitioner in SC.SD 1/106.

Sanjeeva Jayawardena with Nilshantha and Sirimanne for Petitioner in SD 2/06.

Sanjeeva Jayawardena with Senani Dayaratne for Petitioner in SD 3/06.

D.S. Wijesinghe P.C. with Kaushalya Molligoda for the Petitioner in SC SD 4/06.

C. Witharana with Medha N. Gamage for the Petitioner in SC.SD, 1/2006.

Mohan Peiris, P.C., with Nuwanthi Dias instructed by G.G. Arulpragasam for the Intervenient Petitioners in SC.SD 1/06

(M.R. Rizvi, and Mohamed Faiz)

Avindra Rodrigo with Ms. D. Ilukpitiya for the Intervenient Petitioner (The Lion Brewery Ltd.)

P.A. Rathnayake ASG with A. Gnanadasan DSG and Indika Demuni de Silva, SSC, for the Attorney-General.

Court assembled for hearing at 10.30 a.m. on 14th June 2006.

Written submissions tendered on 20th June 2006.

A Bill bearing the above title has been published in the Government Gazette of 5.5.2006 and placed on the Order Paper of Parliament.

The parties named above have filed petitions in this Court, in terms of Article 121(1) of the Constitution to invoke the jurisdiction of this Court to determine the constitutionality of the provisions on ground that would be hereinafter referred to, others have sought to intervene.

At the outset it is necessary to state that a Bill substantially similar in content bearing the same title was presented as a Private Member's Bill by Ven. Omalpe Sobitha Thero, M.P. The contents of that Bill formed the subject matter of S.C. (SD) No. 13/2005 to 22/2005 heard on 10.01.2006. In those proceedings the Petitioners challenged the constitutionality of the entire Bill, on the basis that it is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution. The challenge in terms of Article 14(1)(g) was on the basis that the Bill amounted to a restriction of the freedom to engage in a lawful trade, business or enterprise, since the trade in alcohol and tobacco products which the Petitioners were engaged in was permitted by law. It was contended by the Ven. Thero who presented the Bill and some of the Intervient Petitioners that the restriction of trade as contained in the Bill is warranted in terms of Article 15(7), which permits restrictions of the fundamental rights guaranteed by Articles 12 and 14, inter alia, for the protection of public health.

The Court examined the contentions of both parties exhaustively and determined that the Bill taken as a whole considering its objects would constitute a permitted restriction in terms of Article 15(7) of the Constitution and is not inconsistent with Article 14(1)(g) of the Constitution. It was held that the alleged inconsistency with Article 12(1) of the Constitution on the basis of unequal protection of the law in relation to the "illicit trade" of alcohol is misconceived, since the petitioners who were engaged in permitted trades cannot be classified together with those who commit offences by engaging in an illicit trade.

In this connection the Court noted that "its indeed the bounden duty of the State to take such measures as envisaged in the Bill in the face of the proven risk to public health resulting from the use/consumption of tobacco and alcohol products.

Presumably in view of the determination on the previous Bill being substantially the same in content the Petitioners have not challenged the present Bill in its entirety. The challenge by the tobacco industry and related business interests is in reference to Clause 40 of the Bill, which seeks to prohibit smoking in enclosed public places. A similar provision was not included in the previous Bill and Clause 40 has been included on the basis of an observation made in the previous determination. This observation was made on the submissions of counsel representing the Bishops and Heads of several Christian Churches in Sri Lanka. Counsel relied on the evidence that was adduced as to the harmful effects of what is described as "passive smoking". Having considered the objectives of the Bill which was intended for the elimination of the tobacco and alcohol related harm the Court agreed with the submission that a suitable provision

should be included in the Bill for the prohibition of "smoking in enclosed public places." It was further noted that such a prohibition would not be inconsistent with any provision of the Constitution.

Clause 40 included in the Bill was challenged by the Petitioners on certain grounds some of which need not be dealt with since the Deputy Solicitor General submitted that the Hon. Minister who presented the Bill in Parliament and who was present in Court at the time of the hearing, would move a Committee Stage amendment in Parliament to replace Clause 40 in its present form and substitute it with another Clause which takes into account some of the objections raised by the Petitioners.

In these circumstances the amended Clause was made available to the Counsel and it was agreed that submissions be restricted to the amended formulation. The re-formulation of Clause 40 as drafted by the Legal Draftsman and submitted to Court is as follows :

- 40(1) No person shall smoke or allow any person to smoke any tobacco product within any enclosed public place.
- (2) Any person who being the owner, occupier, proprietor, manager, trustee or person in charge of any enclosed public place shall ensure that no person smokes any tobacco product within any such enclosed public place;

Provided however --
 - (a) any hotel, guest house or lodge having thirty rooms or more;
 - (b) any restaurant or club having the capacity to accommodate the minimum of thirty persons ; or
 - (c) an airport
may, notwithstanding the provisions of sub-section (1), have within its premises an enclosed space or enclosed area as the case may be set aside exclusively for smoking. Such area shall be provided with adequate ventilation and conform to the prescribed air quality standards.
- (3) The Minister may, in consultation with the Director-General of Health Services, from time to time, issue general or special directions not inconsistent with any written law, as may be required for the enforcement and monitoring of the provisions of this Section.
- (4) Any person who contravenes the provisions of sub-sections (1) and (2) 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 two thousand rupees or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.

The Counsel for the Petitioners are substantially in agreement that the re-formulated Clause 40 obviates some of the grounds of inconsistency with the Constitution alleged by the Petitions. They have submitted further amendments to ensure the constitutionality of the Clause.

Prior to dealing with the different contentions of parties it is necessary to briefly state the object of the Clause and its general content as submitted by the State.

The Deputy Solicitor General submitted that Clause 40 which is intended to prohibit smoking in enclosed public places is based primarily on the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), being the first treaty negotiated under the auspices of the WHO. The forward of the FCTC specifically states it is "an evidence based treaty that reaffirms the right of all people to the highest standards of health."

As submitted by the State and in particular the Intervient Petitioner H.S. Dhamika De Saram, who supported the contents of the Bill, Sri Lanka became a signatory to the WHO (FCTC) on 23.09.2003 and ratified the same on 11.11.2003. It was submitted that altogether 168 countries are signatory to the WHO (FCTC) and 116 countries are parties thereto. In terms of Article 5 of the FCTC it is incumbent on each party State to inter alia, adopt and implement effective legislative, executive, administrative and other measures to prevent and reduce tobacco consumption, nicotine addiction and exposure of tobacco smoke. The provisions of Clause 40 of the Bill now in issue relates to what is described in the FCTC as 'protection from exposure to tobacco smoke or in ordinary parlance "passive smoking"'. Article 8(1) states as follows : "The Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability."

Article 8(2) requires each Party (including Sri Lanka) to adopt by national law "effective legislative measures" providing for "protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate other public places.

In this background there would be no basis to any general challenge of the contents of Clause 40 intended to prohibit smoking in enclosed public places. The restriction comes well within the ambit of Article 15(7) of the Constitution which permits restrictions by law of any of the fundamental rights guaranteed inter alia, by Articles 12 and 14, for "the protection of public health". Exposure to tobacco smoke as envisaged in the WHO (FCTC) or "passive smoking in common parlance which would necessarily result from smoking in public places is undoubtedly harmful to public health and a law could be validly enacted to prevent such exposure to tobacco smoke in enclosed public places.

We would now deal with the specific amendments suggested by the Petitioners. They are :

- (i) that the prohibition in Clause 40(1) that no person shall "allow any person to smoke any tobacco product within any enclosed public place", should have a limitation that the prohibition is restricted in its operation only to persons referred to in Clause 40(2), namely owner, occupier and the like of place;

We are of the view that the ambit of sub-clause (1) and (2) are different. Sub-clause (1) deals with an actual state of affairs where any person who could take steps to prevent "allows" any other person to smoke in an

enclosed public place, whereas sub-clause (2) relates to general preventive measures that have to be taken by the owner/occupier and the like, to 'ensure' that no person shall smoke within an enclosed public place. In the circumstances we do not see any merit in this ground of objection. It certainly does not involve any question of unconstitutionality in view of the findings stated above.

- (ii) That in proviso (a) and (b) to sub-clause (2) the requirement of "having thirty rooms or more" and of having the capacity to "accommodate the minimum of thirty persons", be deleted. The submission is that the proviso should permit any hotel, guest house, lodge or restaurant irrespective of the capacity to have exclusive areas for smoking with adequate ventilation. It appears from the material submitted that the restriction in the proviso with reference to thirty rooms or seating capacity of thirty persons, is based on the Act now operative in India bearing the title "The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulations of Trade and Commerce, Production, Supply and Distribution) Act -2003" - Act, No. 34 of 2003.

A similar provision appears in Section 4 of the Indian Act. The rationale for permitting exclusive smoking areas based on the capacity of the establishment is to prevent a possible avoidance of liability. It is clear that only large establishments could afford in economic terms the provision of sufficiently ventilated places exclusively for smoking. In view of the harm to the smoker by smoking in such places, the exception should be limited in its application. The restriction adopted in the Indian legislation is in our view is reasonable.

- (iii) We have to make similar observation with regard to submission that provision should be included to have one or more enclosed spaces or enclosed areas which could be set aside exclusively for smoking. The entire objective of the Bill would be defeated by a proliferation of exclusive smoking areas ;
- (iv) that the definition in sub-clause (5) be restricted to what is meant by the phrase "public place" and that it should not be a definition of "enclosed public place."

The submission is that whether any "public place" is enclosed in order to attract the prohibition would be a question of fact to be determined by a Court depending on the facts and circumstances of each alleged contravention.

The present formulation would involve certain difficulties primarily in interpretation. The first part of Clause 5 reads as follows :

"For the purpose of this Section "enclosed public place" means any place to which public have access, whether as a right or otherwise of a permanent or semi-permanent nature".

The second part specifies certain places, included in the definition.

In our view the first part of the definition that an enclosed public place mean any place to which public have access, whether as a right or otherwise of a permanent or semi permanent nature, includes a degree of artificiality. A place to which public have access, would indeed be a public place. But the law cannot go further and define such place as being "an enclosed public place".

Therefore in our view the definition should be separated as follows :

The first part will define the phrase "public place" to mean any place to which public have access, whether as a right or otherwise and the second part to define an "enclosed public place" to include the places that are specified in the definition.

Further we are of the view that the reference at the end to "kiosk or any other similar place" extends the operation of the definition to a wide and imprecise area which would be both, unreasonable considering that smoking is yet lawful and incapable of proper enforcement.

Therefore in our view the prohibition should be limited to what would ordinarily come within the meaning of phrase "enclosed public place."

Whilst the other places specified in the definition would generally have the characteristic of being enclosed public places and warrant the prohibition the word "kiosk" does not have a generally operative meaning of being a place which is enclosed. In the circumstances we are of the view that inclusion of the words "kiosk or any other similar place" would be unreasonable and be in conflict with Article 12(1) of the Constitution. Subject to the foregoing we are of the view that Clause 40 as appearing above would not be inconsistent with the Constitution.

The other main objection to the Bill is by the intervenient Petitioners including Ven. Dr. Omalpe Sobitha Thero, M.P., who presented the previous bill, who submit that the definition of "alcohol products" as appearing in Clause 46 has been changed from the definition contained in Clause 42 of the previous Bill after its content was specifically considered by this Court in the previous determination and found to be reasonable and constitutional. It was submitted that the amendment has been made to remove the Brewery Industry from the operation of the proposed law and as such the amendment -

- (i) defeats the purpose of the Bill,
- (ii) is contrary to Government policy, and
- (iii) confer an undue advantage on those engaged in the Brewery Industry, so as to be inconsistent with Article 12(1) of the Constitution.

It was specifically submitted on behalf of the Ven. Thero that the prohibition on the sale of inter alia of alcohol products to persons below the age of 21 years, being an amendment done after consideration by Court to Clause 29 of the previous Bill will be defeated entirely by the new definition of "alcohol product" in the present Bill.

In view of the serious submissions that have been made the touch on the bona fides of the amendment that has been now been presented by Government, it is necessary to consider this matter in its entirety.

The term "alcohol product" was defined in the previous Bill as follows:

"Alcohol product means a beverage containing a volume of one per centum or more of alcohol"

Objections were raised to this provision especially the Brewery Industry and certain others on the basis that some pharmaceuticals contain more than 1% alcohol. The Court in its previous determination has specifically held that there is no evidence of any pharmaceutical product that would come within the definition and that the Petitioners have in any event no interest in pharmaceutical or ayurvedic drug industry. The Court further noted that the alcohol content to be specified is a matter of policy and that there was no material to demonstrate that the definition is per se unreasonable so as to be inconsistent with Article 12(1) of the Constitution.

The submissions of the Intervient Petitioners is that the definition in the previous Bill based on a lower percentage of alcohol so as to include brewery products is consistent with the policy of the Government as contained in the "Mahinda Chintanaya" which proclaimed that there should be a stop to intoxicants (මත්ස්‍ය නිවැරදි කිරීම).

In this context it was submitted that the definition in Clause 46 of the present Bill which provides that only a beverage containing in volume of 4.5% or more of alcohol would be an alcohol product, would in effect remove beer from the definition of alcohol products and permit the sale of beer to persons below the age of 21 years and also permit beer advertisements.

On this basis the Intervient Petitioners supported in grounds of objection that the amendment is (1) consistent with the proclaimed Government policy of there being a "stop to intoxicants (මත්ස්‍ය නිවැරදි කිරීම)" (2) that the purpose of the Bill in prohibiting the sale of liquor of persons below the age of 21 and the advertisement of alcohol products, will be defeated and (3) gives an unduly favourable treatment to those in the Brewery Industry by exempting them from the operation of the restrictions as contained in the Bill.

Having considered the submissions we are in agreement with the grounds of objections raised. These grounds of objection are in our view well founded. Addl. Solicitor General when questioned by Court was not able to make any submission as to the basis on which the present Bill departs from the definition as affirmed by this Court in the previous determination.

The submission that the amendment has been made to accommodate the interests of the Brewery Industry is also well founded, since in the petition dated 13.06.06 in SD 1/2006 filed by the Intervient Petitioner - Lion Brewery Ceylon Ltd., in paragraph 17 it is stated as follows : "The Intervient Petitioners state that some of the products manufactured by the Intervient Petitioners fall outside the definition of the word "alcohol product" as defined in Clause 46 of the new Bill.

Thus it is manifest that what the Brewery Industry failed to achieve when the Bill was considered by this Court previously as to its constitutionality, it has obtained by having the Bill presented again by Government including an amendment which substantially exempts its products from the operation of the law.

The more serious aspect of this amendment is in relation to certain amendments that were suggested by Court in the previous Bill which originally contained a prohibition of sale and promotion of sale of any tobacco or alcohol product within the of 100 meters of any premises frequented mainly by children or young adults (Clause 29 of the previous Bill). The term "children" was defined to mean persons who are 18 years of age and young adults to persons who are of 18 out below 25 years. It was strenuously contended before this Court that this provision would amount to an effective prohibition of sale of tobacco and alcohol products within a city such as Colombo.

In these circumstances it was agreed by all parties that this provision be deleted and substituted with a provision which prohibits the sale of tobacco and alcohol products to persons below the age of 21. The entire purpose of this Clause was to protect the younger generation from early use and addiction to tobacco and alcohol products. This amendment was specifically agreed upon on the basis that brewery products would come within the ambit of the prohibition and that there would be no sale of brewery products to persons below the age of 21 years and there would be no advertisements of those products.

In the circumstances we are of the view that all 3 grounds of objections raised by the Intervient Petitioners in regard to the increase of alcohol content in the definition of 'alcohol product' in Clause 46 of the Bill which is intended to circuitously exempt the sale of brewery products from the prohibitions and restrictions in the Bill is inconsistent with Article 12(1) of the Constitution. Irrespective of legal considerations it is a reversal of the proclaimed policy of Government of there being a "stop to intoxicants" (මත්ස්‍ර නිවැරදි කිරීම).

Accordingly we are of the view that this Clause should be amended to include the previous definition that had been considered by this Court and found to be consistent with the Constitution.

For the reasons stated above we make a determination that the Bill is not inconsistent with the Constitution subject to the amendment of Clause 40(5) and the amendment of the definition of "alcohol product" appearing in Clause 46 to be the same as in Clause 42 of the previous Bill.

Sarath N. Silva
Chief Justice

Shiranee Tilakawardena
Judge of the Supreme Court

Gamini Amaratunga
Judge of the Supreme Court

First Reading :

26.05.2006 (Hansard Vol. 164, No. 07, Col. 665)

Bill No. :

166

Sponsor :

Minister of Healthcare and Nutrition

Decision of the Supreme Court conveyed to Parliament :

04.07.2006

(Hansard Vol. 164, No. 16, Cols. 1901-1908)

Second Reading :

05.07.2006

(Hansard Vol. 164, No. 17, Cols. 2113 - 2179)

Committee of whole Parliament and Third Reading :

05.07.2006

(Hansard Vol. 164, No. 17, Cols. 2179 - 2186)

Hon. Speaker's Certificate :

29.08.2006

Hon. Speaker's Certificate announced on :

05.09.2006 (Hansard Vol. 165, No. 08, Col. 960)

Title :

National Authority on Tobacco and Alcohol Act, No. 27 of 2006

S.C. (S.D.) No. 7/2006

"Recovery of Loans by Banks (Special Provisions) (Amendment) Bill"

BEFORE:

Sarath N. Silva, C.J.,
Raja Fernando, J.
Gamini Amaratunga, J.

COUNSEL: Harsha Fernando, Senior State Counsel for the Attorney-General

Court assembled for hearing at 11.00 a.m. on 26th June 2006.

A Bill for the amendment of the above Act has been certified by the Secretary to the Cabinet of Ministers as being urgent in the national interest, in terms of Article 122 of the Constitution and referred to this Court for a Special Determination by His Excellency the President.

The single Clause in the Bill is to be introduced as Section 5 A to the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990.

Senior State Counsel who assisted Court in considering the constitutionality of the amendment submitted that its purpose is to limit the operation of the provisions of Act, No. 4 of 1990, only to instances where at the time default is made the amount due and owing to the Bank is more than Rs. 5 million excluding interest and penalty. Consequently, the Bank would not be empowered to take steps in terms of Sections 3,4 and 5 of the Act where the principal amount in default is more than Rs. 5 million.

In a previous determination made by this Court (S.C. (S. D.) 23/2003) five Judges of this Court considered the constitutionality of certain amendments that were sought to strengthen the provisions of Act, No. 4 of 1990. The Court examined the entire constitutional basis of the Act and held that a Bank being the lender and a borrower are parties to a civil transaction and belong to a single class of persons in the perspective of Article 12(1) of the Constitution which provides that all persons are equal before the law and are entitled to equal protection of the law. On this basis it was observed that the conferment of a special power on a bank to make recovery of the loan upon its own decision (*parate executie*) would be inconsistent with Article 12(1) of the Constitution.

Subsequently another Divisional Bench of this Court has held that the provisions of the Act will not apply where the principal debtor himself is not the mortgagee.

The proposed amendment is intended to limit the operation of the Act to instances where the amount due as principal is more than Rs. 5 million and thereby give a measure to relief to borrowers whose indebtedness is relatively low. The bank would in any event be entitled to have recourse to the ordinary process of law under the Mortgage Act to enforce the liability of the borrower.

In the circumstances there could be no objection to the proposed amendment on any ground of constitutionality.

Senior State Counsel submitted that the word “instituted” as appearing in line 2 of Section 5 A in the Bill should be substituted with word “initiated”. It would also be necessary to specify in line 7 that the reference is to amount due on such loan. Appropriate amendments could be considered at the Committee Stage in Parliament.

Accordingly we make a determination that the Bill is not inconsistent with any provision of the Constitution.

Sarath N. Silva
Chief Justice

Raja Fernando
Judge of the Supreme Court

Gamini Amaratunga
Judge of the Supreme Court

First Reading :

07.07.2006
(Hansard Vol. 164, No. 19, Col. 2381)

Bill No. :

178

Sponsor :

Prime Minister, Minister of Internal Administration, and Deputy Minister of Defence, Public Security, Law and Order

Decision of the Supreme Court conveyed to Parliament :

04.07.2006
(Hansard Vol. 164, No. 16, Cols. 1908-1909)

Second Reading :

18.07.2006
(Hansard Vol. 164, No. 20, Cols. 2446-2574)
* (Debate Adjourned)

S.C. (S.D.) No. 8/2006 and 9/2006

**"The Ceylon Electricity Board (Amendment) Bill"
"Sri Lanka Electricity Bill"**

Hon. Attorney-General
Vs.
Lanka Viduli Sevaka Sangamaya
Intervenant

BEFORE : Sarath N. Silva, C.J.,
Ms. Tilakawardane, J.
Marsoof, J.

COUNSEL : Harsha Fernando, SSC for Attorney General.
Chandana Wijesooriya for the "Lanka Viduli Sevaka Sangamaya",
Intervenant

Decided on : 4th July, 2006

S.N. SILVA, C.J.

1. The Ceylon Electricity Board Act, No. 17 of 1969 (Amendment) Bill
2. Sri Lanka Electricity Bill

The above mentioned Bills have been referred to the Chief Justice by His Excellency the President by communication dated 30.06.2006 in terms of Article 122 of the Constitution. There is a decision of the Cabinet of Ministers that the Bills are urgent in the national interest.

Senior State Counsel submits that the Attorney-General has received instructions by letter dated 3.7.2006 from the Secretary to His Excellency the President that the Bills are not giving to be proceeded with in the present form and may require amendment. Thus it appears that His Excellency the President has now withdrawn the references that have been made to this Court. In the circumstances it is unnecessary to make determinations in respect of these Bills submitted to Court.

Register to communicate this order to His Excellency the President and the Honourable Speaker of Parliament.

Sarath N. Silva
Chief Justice

Ms. S. Tilakawardane, J.
Judge of the Supreme Court

S. Marsoof, J.
Judge of the Supreme Court

S.C. (S.D.) No. 10/2006

"Sri Lanka Electricity Bill"

S.C. (S.D.) No. 11/2006

**"The Ceylon Electricity Board
(Amendment) Bill"****COUNSEL :**Milinda Gunatilake, Senior State Counsel for
the Attorney-General assisted Court.**Court assembled for hearing on 26th July, 2006 at 10.30 a.m.**

Written submissions tendered on 27th July, 2006.

The above mentioned Bills have been referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution for a special determination as to whether any Bill or any provision thereof is inconsistent with the Constitution. The Bills bear an endorsement of the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers they are urgent in the national interest.

The Bills contain extensive provisions with regard to the generation, transmission and supply of electricity and the regulation thereof. Considering the importance of an efficient, co-ordinated and economical supply of electricity from the perspectives of the day to day lives of the People on the one hand and industry and commerce vital to the economy of the country on the other, a careful scrutiny of the provisions is necessary for a proper determination as to constitutionality. Such a task is made more arduous by the limited time permitted in the Constitution for urgent Bills and the absence of submissions in parties that will be affected. In the circumstances we have taken the Bills as a whole and addressed the salient aspects relevant to make the determination that is required.

The generation, transmission, distribution, supply and use of electricity has been regulated by the Electricity Act, No. 19 of 1950, as amended.

The basis of the regulatory framework contained in this Act is that electricity could be supplied only under a licence granted by the Minister. The Act contains provisions for licensing of the supply of electricity and, the construction and maintenance of works for such purpose. The generation and transmission of electricity was carried out as a governmental function by the Department of Government Electrical Undertakings (DGEU). The necessary implication of Section 61 of the Act was the supply to consumers being done by local authorities.

The Ceylon Electricity Board Act, No. 17 of 1969 established a statutory body by that name (CEB) and in terms of Section 18, the DGEU, its movable and immovable property, rights and obligations were transferred to the CEB. By an amendment to Section 2(1) of the Electricity Act the requirement of licensing was made inapplicable in respect of the supply of electricity by the CEB.

Sections 20 to 30 of the Electricity Board Act provided for the voluntary or compulsory transfer of electrical undertaking of local authorities for the supply of electricity within their areas, to the CEB. In terms of Section 19 no licence could be granted under the Electricity Act, except in consultation with the CEB. Thus the CEB virtually became the sole authority for generation, transmission and supply of electricity. Under this legal regime there has been a large increase in generation capacity under both from hydro and thermal sources. The CEB has also entered into power purchase

agreements to meet the growing demand. The expansion of the national grid, supply of electricity to industries, enterprises, urban centres and rural electrification have been carried out by the Board. It is in this context that the two Bills referred to above that make extensive amendments have to be considered.

Electricity Reforms Act, No. 28 of 2002 was certified on 11.12.2002, which provided for the repeal of the Electricity Act and the Ceylon Electricity Board Act. Certain parts of this Act have been brought into operation by an Order in Gazette No. 1283/1 of 4.7.2003. A scheme for reorganization for the electricity industry was published in the Gazette No. 1321/21 dated 2.1.2004. But, the 9 Companies envisaged to be incorporated in terms of the scheme (Company X; Company Z, Disco 1 to 5, GENCO and TRANSCO) were not in fact incorporated and therefore the pre-existing legal regime has continued.

Senior State Counsel submitted that the two Bills referred to proceed on the basis of repealing Act, No. 28 of 2002, which never become effective.

The regulatory framework in the Electricity Act and Act, No. 28 of 2002 and the present Electricity Bill is broadly similar with the significant difference that the power of licensing vested in the Minister under the first Act passes to the Public Utilities Commission (PUC) established by Act, No. 35 of 2002. The main aspects regarding the generation and the supply of electricity are dealt with in the Bill to amend the Ceylon Electricity Board Act. Hence the issues of constitutionality have to be dealt with from the perspective of this Bill.

The purpose of the Bill as evidenced in the amendment to the long title to Act, No. 17 of 1969 is to provide for the generation, transmission, distribution and supply of electricity now vested in the C.E.B. to be carried out through Electricity Utility Companies (EUC's) to be incorporated for that purpose in terms of the Bill.

Part 1 A introduced by Clause 7 requires the Board of the CEB, within one month of the date of coming into force of this Part to prepare a scheme for the re-organization of the powers, duties and functions of the Board, in consultation with the Public Utilities Commission (PUC) (Section 13 A (1)).

The Object of the scheme thus prepared is as stated in Section 13A(3) and (4) to identify the functions, presently discharged by the Board and notionally separate them into three categories. They are :

- (i) electricity generation;
- (ii) transmission (and bulk power procurement)
- (iii) distribution and supply

The scheme should propose to the Minister the functions to be taken over by the Electricity Utility Companies (EUC's), one each for generation and transmission and two or more for distribution and supply.

In terms of Section 13B, the Minister is required to submit the scheme prepared by the Board to Cabinet of Ministers and upon approval, in consultation with the Minister of Finance to direct Registrar of Companies to incorporate Companies in terms of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987.

In regard to constitutionality we have examined certain aspects that emerge from these provisions. These aspects are :

- (i) The properties of the C.E.B and its assets from the perspective of its duties and transference thereof to the proposed EUC's;
 - (ii) Pending litigation of the C.E.B. and its obligations;
 - (iii) The capital of EUC's, required for their functions; payment for procurements of EUC's;
 - (iv) The employees of the CEB and their continuance in service or retirement;
- (1) The properties of the C.E.B. and its assets from the perspective of its duties and transference thereof to the proposed E.U.C's;

The transfer of properties and assets that are extensively spread throughout the country has to be viewed from the perspective of their being owned, possessed and managed as an integrated single unit from the time of vesting from the DGEU and the continued acquisition over the past 40 years. The distribution in terms of the Bill has to be based on functions and not on the basis of severable units or installations. Such a process of breaking up of a well entrenched single proprietary and functional entity into distinct units, to be vested in different companies having separate legal personality, would raise a range of legal issues. However, there is only a single provision contained in Clause 13A(4)(d) of the Bill with regard to this matter. This provision requires for the scheme to;

"identify property both movable and immovable belonging to the Board, that shall be required to be vested in any one or more of the companies proposed to be incorporated which would enable such company or companies to discharge its functions efficiently and effectively"

Some property may be vested in more than one Company.

Senior State Counsel was unable to point out to any other provision containing further guidelines as to the exercise of discretion in this regard. As noted above all the installations of the C.E.B. have been managed hitherto as one entity e.g.; the Kelanitissa Power Station built and developed as one entity is the focal point of the national grid and is the place of generation of a bulk of thermal energy. Thus generation, transmission and distribution are all unified in this installation. The manner of separation of this unified entity which has functioned efficiently for several decades would be in itself a electrifying experience.

Senior State Counsel submitted that the separation could be done in the scheme to be prepared. The vesting of a discretion without adequate guidelines in the law is inconsistent with Article 12(1) of the Constitution, since it could result in an abuse of power thereby denying to the People the equal protection of law.

Counsel relied on the scheme published in the Gazette in terms of Act, No. 28 of 2002 and cited two examples. They are :

"As a general principle the boundary between Genco and Transco shall be at high voltage bushings of the generator transformer" (Page 8A)

"As a general principle the boundary between Transco and Discos shall be at the distribution line isolator of the grid substation" (page 15A)

We have to note that they are only "general principles". They cannot be the basis of separation establishing distinct ownership of property and the creation of rights and liabilities. More importantly, there would be a dereliction of the clearly identified responsibility now vested in law on the CEB by Section 11(1) of the Ceylon Electricity Board Act, No. 17 of 1969 which reads as follows:

"It shall be duty of the Board, with effect from the date of transfer to the Board of the Government Electrical Undertakings under Section 18, to develop and maintain an efficient, co-ordinated and economical system of electricity supply for the whole of Sri Lanka."

This is the foremost duty of the CEB in respect of which several ancillary duties are specified in Section 11(2), (a) to (g).

Sub-paragraph (g) reads as follows :

"to develop a sound, adequate and uniform electricity policy, and, for that purpose, to control and utilize national power resources"

These provisions in Section 11 are in our view an essential legal safeguard to ensure an efficient co-ordinated and economic service that is vital to the life of the community. A disruption of a vital service has a serious impact on the People as evidenced in the disruptions of Petroleum Supplies and Port Services. A disruption of electricity would have far more serious consequences. Hence if at all the vital duty as contained in Section 11 should, be strengthened. But, on the contrary, the amending Bill by Clause 5 repeals Section 11. The responsibility is fragmented into imprecise units and only a semblance of Section 11 is contained in the proposed Section 13A which reads as follows :

"(d) identify property both movable and immovable belonging to the Board, that shall be required to be vested in any one or more of the companies proposed to be incorporated, which would enable such company or companies to discharge its functions efficiently and effectively;"

This would be in our view a denial of the protection of law assured to the People by Section 11 and be inconsistent with Article 12(1) of the Constitution.

The next aspect to be considered in this regard is the manner in which the property and assets of the Ceylon Electricity Board would become vested in the respective EUC's. A sufficient legal regime is required in this aspect to assure to the People an efficient and effective supply of electricity.

Senior State Counsel submitted that the vesting would take place in terms of the provisions of the Conversion of Public Corporation of Government Owned Business undertakings into Public Companies Act, No. 23 of 1987. The provision of the Bill that links up to Act, No. 23 of 1987 is contained Clause 13C(1), which provides for the Minister to direct the Registrar of Companies to incorporate the ECU's in terms of Section 2(1) of Act, No. 23 of 1987 to take over the three functions of the Board relating to generation, transmission distribution and supply.

There is no provision for the Minister to submit the scheme to the Registrar for the purpose of separating the assets and properties of the CEB into three or more EUC's that are to be incorporated. Indeed, the Registrar has no capacity or competency to engage in the exercise of separating the properties and installations of the CEB located throughout the country to the EUC's that are to be incorporated.

In the circumstances we would be left with the provisions of Section 3(1) of Act, No. 23 of 1987 which merely states that upon publication of the incorporation order in the Gazette that all property movable and immovable, rights, powers and privileges, books of accounts of the Corporation shall be vested in the Company, referred to in the order. If the entirety of the functions of the C.E.B. are vested in one Company, the provisions of Section 3(1) would be adequate. However, in terms of the Bill the position is quite to the contrary. The C.E.B. itself will continue as a legal entity and there will be three or more other EUC's. In the circumstances there would be considerable uncertainty with regard to the particular assets and properties that would remain with the C.E.B. or vested in the three or more EUC's to be established. This uncertainty would result in the EUC's being unable to function efficiently and effectively so as to supply electricity to the people who would be thereby denied the equal protection of the law guaranteed in terms of Article 12(1) of the Constitution.

(2) Pending litigation of the CEB and its obligations

There is no provision in the Bill with regard to transfer of pending litigation, contracts and outstanding liabilities of the CEB.

Senior State Counsel submitted that the entirety of the proposal for restructuring has been conceived in view of the current indebtedness of the CEB and its failure to levy a market rate for the electricity supplied to the consumers. If so a serious question arises as to the manner in which these liabilities are to be retained or transferred to the EUC's. There is no provision whatsoever in the Bill in respect of this vital aspect which seriously impacts on the rights of the creditors and third parties who have entered into transaction with the CEB. A similar problem would arise with regard to pending litigation. The resulting position in our view is an inconsistency with Article 12(1) of the Constitution.

(3) The capital of EUC's, required for their functions; payments for procurements of EUC's.

Although EUC's would be incorporated in terms of Clause 13C and Section 2(1) of Act, No. 23 of 1987 as noted above, there is no provision with regard to the capital of an EUC. The only provision is contained in Section 2(3) of Act, No. 23 of 1987 which states that upon publication of the order in the Gazette, the Registrar of Companies shall allot all the shares into which share capital of the companies shall allot all the shares into which share capital of the company is divided to the Secretary to the Treasury (in his official capacity) for and on behalf of the State.

Hence the EUC's would not have a liquid share capital and be devoid of resources to carry out its functions.

Senior State Counsel submitted that the assets of the CEB would be the capital of an EUC. This argument merely begs the question since as noted above there is no provision in the scheme for the separation of each asset. In any event capital here should

be liquid assets and if the CEB is heavily indebted as claimed there will certainly be none for transfer to EUC's. There may be no possibility of EUC's raising capital by a share issue, since a minimum of 50% of shares and the control of each ECU's would remain with the CEB. The absence of any capital for the EUC to discharge its vital functions of generation, transmission and supply of electricity of consumers would deny people of the equal protection of the law guaranteed to them by Article 12(1) of the Constitution.

As envisaged in the law a Generating Company has to meet its procurement payments and recover from the Transmission Company that will recover from the Distribution Company who will recover from Consumers. This is a fragile procurement payment system which would impact on the financial strength of EUC's.

(4) The employees of the C.E.B. and their continuance in service of retirement.

Section 13D of the Bill deals with the officers and servants of the CEB. The re-organization scheme provides for an option being offered to present employees as follows :

- (a) to accept employment in EUC which is offered;
- (b) to continue in service as an employee of the CEB;
- (c) to accept neither and be paid compensation in terms of the Voluntary Retirement Scheme (VRS).

We note that employment in an EUC is only dependant on such employment being offered by the CEB. The Section does not contain any guidelines on the basis of which such offer would be made. The absence of an assurance of employment being offered in the same post that an officer is working or of guidelines as to the exercise of discretion when making an offer of employment in an EUC, results in our view an inconsistency and Article 12(1) of the Constitution.

For the reasons stated above we make a determination that the provisions of the Ceylon Electricity Board Amendment Act referred to above and the Ceylon Electricity Bill that necessarily gets interlinked with the provisions of the former Bill, taken as a whole are inconsistent with Article 12(1) of the Constitution and require to be passed with a special majority as specified in Article 84(2) of the Constitution.

Sarath N. Silva
Chief Justice

Shiranie Tilakawardena
Judge of the Supreme Court

Saleem Marsoof
Judge of the Supreme Court

First Reading :

09.05.2006

(Hansard Vol. 164, No. 01, Col. 43)

Bill No. :

162

Sponsor :

Minister of Power and Energy

Decision of the Supreme Court conveyed to Parliament :

08.05.2006

(Hansard Vol. 165, No. 01, Cols. 2-8)

Withdrawal of the Bill

08.06.2007

(Hansard Vol. 169, No. 8, Col. 1207)

S.C. (S.D.) No. 12/2006

"High Court of the Provinces (Special Provisions) (Amendment) Bill"

BEFORE : Sarath N. Silva, Chief Justice
N. E. Dissanayake Judge of the Supreme Court
A. M. Somawansa Judge of the Supreme Court

COUNSEL : P. A. Ratnayake, P.C., Addl. Solicitor General with Ms. Anusha Navaratne, Deputy Solicitor General for the Attorney-General.

Court assembled for hearing on 20th November 2006 at 10.30 a.m.

The Bill to amend the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 bears the endorsement of the Secretary to the Cabinet of Ministers in terms of Article 122(1)(b) of the Constitution that it is urgent in the national interest. The President has in terms of Article 122(1)(b) made a written reference to this Court requiring a special determination as to the constitutionality of the Bill.

Addl. Solicitor General who assisted the Court in examining its constitutionality submitted that the background to the Bill is the large backlog of civil appeals now pending in the Court of Appeal. He submitted that as at 31.12.2005, there was a backlog of 13,345 appeals from judgements and orders of the District Courts. Some of them have been pending for the past 11 years. As an example he submitted that whereas 1792 appeals were filed in the Court of Appeal in the year 2004, according to the statistics available only 396 appeals have been concluded within the year. On the basis of these statistics he submitted that the delay in the Court of Appeal would increase by a large measure and that appeals now filed would be heard and disposed of only in the years 2013 - 2015. It is obvious that the situation submitted by the Addl. Solicitor General would seriously erode public confidence in our system of administration of justice. It is in these circumstances that the Cabinet of Ministers has rightly certified the Bill to be urgent in the national interest.

The Court of Appeal was established by the present Constitution and it took over the back-log of cases then pending in the Supreme Court. Thus the Court 'inherited' a back-log of cases. With the increase in litigation the back-log increased tremendously. From time to time legislative measures have been taken to transfer the appellate jurisdiction of the Court of Appeal in respect of specific matters to the Provincial High Court.

Accordingly, the Thirteenth Amendment to the Constitution in Article 154P vested the appellate jurisdiction in respect of convictions and orders of the Magistrate's Court and Primary Courts in the Provincial High Court.

Article 154P(4) vested a writ jurisdiction (writs of habeas corpus, certiorari, mandamus and the like) ordinarily exercised by the Court of Appeal in the Provincial High Court, in respect of specific matters. This was followed by the High Court (Special Provisions) Act, No. 19 of 1990, which vested in the High Court the appellate jurisdiction

in respect of orders of the Labour Tribunal and orders made in terms of certain provisions of the Agrarian Services Act (Section 3). These measures contributed greatly to reduce the backlog of appeals in respect of Magistrate's Courts, Labour Tribunals and Agrarian Services matters.

The present Amendment is a continuance of that trend and the Provincial High Court is now vested with the appellate and revisionary jurisdiction in respect of judgements, orders and proceedings of the District Court, within the Province (Vide : Clause 5A (1).

The only possible issue of constitutionality is whether the jurisdiction presently exercised by the Court of Appeal could concurrently be vested in the Provincial High Court. In this regard the Addl. Solicitor General submitted that this Court has already dealt with the question in the case of Swastika Textile Industries Ltd., vs. Thanthrige Dayaratne (1993) 2 SLR 348. At page 353 the Court held "that the provisions of Article 111(1) and 138 of the Constitution enabled Parliament by ordinary law to transfer an existing jurisdiction of the Court of Appeal under Article 138 to the High Court." The Court also relied on Article 154P(3)(c) of the Thirteenth Amendment to the Constitution which states that the Provincial High Court shall "exercise such other jurisdiction and powers as Parliament may by law provide." Accordingly this Court determined in the Swastika Textile Industries case that the vesting of a current appellate and revisionary jurisdiction in the High Court is "beyond argument."

It is to be further noted that under the proposed Amendment the jurisdiction in respect of judgements, orders and proceedings of the District Courts has to be exercised by not less than two Judges of the Provincial High Court sitting together (Clause 5B).

As regards pending appeals Clause 5D(2) empowers the President of the Court of Appeal to issue directions from time to time that such appeals stand removed the Provincial High Court. Such directions may be made in reference to the year in which the appeals were filed in the Court of Appeal. These provisions in our view would contribute to an expeditious disposal of the alarming backlog of cases now pending in the Court of Appeal.

In addition to the expeditious disposal of civil appeals the proposed amendment has the further virtue of taking the process of administering justice closer to the People. Persons from distant parts of the country would not have to travel to Colombo for their appeals in civil cases.

The amendment is both timely and essential.

We make a determination in terms of Article 123(1) of the Constitution that neither the Bill nor any of its provisions are inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

N. E. Dissanayake
Judge of the Supreme Court

A. M. Somawansa
Judge of the Supreme Court

First Reading :

23.11.2006

(Hansard Vol. 166, No. 07, Col. 1036)

Bill No. :

199

Sponsor :

Minister of Justice and Law Reforms

Decision of the Supreme Court conveyed to Parliament :

21.11.2006

(Hansard Vol. 166, No. 05, Cols. 673 - 675)

Second Reading :

23.11.2006

(Hansard Vol. 166, No. 07, Cols. 1037 - 1038)

Committee of whole Parliament and Third Reading :

23.11.2006

(Hansard Vol. 166, No. 07, Cols. 1038 - 1039)

Hon. Speaker's Certificate :

28.12.2006

Hon. Speaker's Certificate announced on :

09.01.2007 (Hansard Vol: 167, No. 01, Col. 3)

Title :**High Court of the Provinces (Special Provisions) (Amendment)
Act, No. 54 of 2006**

S.C. (S.D.) No. 13/2006

"Excise (Special Provisions) (Amendment) Bill"

BEFORE: Sarath N. Silva, C.J., Chief Justice
R.A.N.G. Amaratunga Judge of the Supreme Court
Saleem Marsoof Judge of the Supreme Court

COUNSEL: Ms. Farzana Jameel, Senior State Counsel, for the Attorney General,
assisted Court.

Court assembled for hearing on 29.11.2006 at 10.30 a.m.

The Bill bearing the above title has been referred to this Court for a Special Determination by the President in terms of Article 122(1) (b) of the Constitution. It bears the endorsement of the Secretary to the Cabinet of Ministers, that in the view of the Cabinet of Ministers, the Bill is urgent in the national interest.

Senior State Counsel submitted that the Bill gives effect to a revenue proposal contained in the Budget presented to Parliament.

Clause 2 of the Bill amends Section 5 of the Excise (Special Provisions) Act which was introduced by the Excise (Special Provisions) Amendment Act, No. 8 of 1994.

The particular amendment is of Section 5 (2) (b), which deals with the ascertainment of the value of an article on which excise duty is levied. At present, in terms of subparagraph (ii), the value is increased by five per centum on account of banking and other charges. This is to be further increased to ten per centum by the proposed amendment.

We agree with the submission of Senior State Counsel that the proposed amendment does not involve any issue of constitutionality.

In terms of Article 123 of the Constitution we make a determination that the Bill is not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

R. A. N. G. Amaratunga
Judge of the Supreme Court

Saleem Marsoof
Judge of the Supreme Court

First Reading :

06.12.2006

(Hansard Vol. 166, No. 16, Col. 2654)

Sponsor :

203

Sponsor :

Minister of Finance and Planning

Decision of the Supreme Court conveyed to Parliament :

01.12.2006

(Hansard Vol. 166, No. 14, Col. 2302)

Second Reading :

06.12.2006

(Hansard Vol. 166, No. 16, Col. 2800)

Committee of whole Parliament and Third Reading :

06.12.2006

(Hansard Vol. 166, No. 16, Cols. 2800-2801)

Hon. Speaker's Certificate :

15.12.2006

Hon. Speaker's Certificate announced on :

09.01.2007 (Hansard Vol. 167, No. 01, Col. 3)

Title :*Excise (Special Provisions) (Amendment) Act, No. 50 of 2006*

S.C. (S.D.) No. 14/2006

"Value Added Tax (Amendment) Bill"

BEFORE : Sarath N. Silva, C.J., Chief Justice
 R.A.N.G. Amaratunga Judge of the Supreme Court
 Saleem Marsoof Judge of the Supreme Court

COUNSEL : Ms. Farzana Jameel, Senior State Counsel, for the Attorney-General, assisted Court.

Court assembled for hearing on 29.11.2006 at 11.00 a.m.

The Bill bearing the above title has been referred to this Court for a Special Determination by the President in terms of Article 122 (1)(b) of the Constitution.

It bears the endorsement of the Secretary to the Cabinet of Ministers, that in the view of the Cabinet of Ministers, the Bill is urgent in the national interest.

Senior State Counsel submitted that the Bill gives effect to a revenue proposal contained in the Budget presented to Parliament.

The Section 6 amended by Clause 2 deals with the manner of ascertaining the value of goods that are imported for the purpose of imposing a Value Added Tax thereon. The original Section was repealed and substituted by a new provision by the Amending Act, No. 6 of 2005. In terms of Section 6(a) the value of goods is determined on the basis of the value ascertained for customs duty increased by five per centum. This was amended by Act, No. 8 of 2006 by increasing the five per centum to seven per centum. The proposed amendment is to further increase it to ten per centum.

We agree with the Senior State Counsel that the amendment proposed does not involve any issue of constitutionality.

In terms of Article 123 of the Constitution we make a determination that the Bill is not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

R. A. N. G. Amaratunga
Judge of the Supreme Court

Saleem Marsoof
Judge of the Supreme Court

First Reading :

06.12.2006 (Hansard Vol. 166, No. 16, Col. 2654)

Sponsor :

Prime Minister, Minister of Internal Administration, and Deputy Minister of Defence, Public Security, Law and Order

Decision of the Supreme Court conveyed to Parliament :

01.12.2006 (Hansard Vol. 166, No. 14, Cols. 2299-300)

Second Reading :

06.12.2006 (Hansard Vol. 166, No. 16, Col. 2799)

Committee of whole Parliament and Third Reading :

06.12.2006 (Hansard Vol. 166, No. 16, Cols. 2799-2800)

Hon. Speaker's Certificate :

15.12.2006

Hon. Speaker's Certificate announced on :

09.01.2007 (Hansard Vol. 167, No. 01, Col.3)

Title :

Value Added Tax (Amendment) Act, No. 49 of 2006

S.C. (S.D.) No. 15/2006

"Regional Infrastructure Development Levy Bill"

BEFORE : Sarath N. Silva, Chief Justice
R.A.N.G. Amaratunga Judge of the Supreme Court
Saleem Marsoof Judge of the Supreme Court

COUNSEL : Ms. Farzaana Jameel, Senior State Counsel, for Attorney-General,
assisted Court.

Court assembled for hearing on 29.11.2006 at 11.15 a.m.

The Bill bearing the above title has been referred to this Court for a Special Determination by the President in terms of Article 122(1)(b) of the Constitution.

It bears the endorsement of the Secretary to the Cabinet of Ministers, that in the view of the Cabinet of Ministers, the Bill is urgent in the national interest.

Senior State Counsel submitted that the Bill gives effect to a revenue proposal contained in the Budget presented to Parliament.

Clause 2 imposes a charge called the Regional Infrastructure Development Levy imposed on all motor vehicles liable to the payment of Excise Duty under the Excise (Special Provisions) Act, No. 13 of 1989, calculated at the rate of 2.5 per centum on the aggregate amount comprising of the customs value, taxes, duties and levies charged thereon.

This charge is not imposed on auto trisaws.

Senior State Counsel submitted that for the purpose of greater clarity Clause 2 would be submitted with the following provision.

"There shall be charged and levied at the point of import a levy called the regional Infrastructure Development Levy (hereinafter referred to as "the levy") on all motor vehicles liable to the payment of Excise Duty under the Excise (Special Provisions) Act, No. 13 of 1989, an amount calculated at the rate of 2.5 per centum on the aggregate value comprising of the customs value of such motor vehicle determined in terms of Schedule E of the Customs Ordinance (Chapter 235) and all taxes, duties and levies charged thereon at the point of import."

We agree with the submissions of Senior State Counsel that the proposed amendment does not involve any issue of constitutionality.

In terms of Article 123 of the Constitution we make a determination that the Bill is not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

R. A. N. G. Amaratunga
Judge of the Supreme Court

Saleem Marsoof
Judge of the Supreme Court

First Reading :

06.12.2006 (Hansard Vol. 166, No. 16, Col. 2655)

Sponsor :

Prime Minister, Minister of Internal Administration, and Deputy Minister of Defence, Public Security, Law and Order

Decision of the Supreme Court conveyed to Parliament :

06.12.2006 (Hansard Vol. 166, No. 14, Cols. 2303 - 2304)

Second Reading :

06.12.2006 (Hansard Vol. 166, No. 16, Col. 2801)

Committee of whole Parliament and Third Reading :

06.12.2006 (Hansard Vol. 166, No. 16, Cols. 2801-2802)

Hon. Speaker's Certificate :

15.12.2006

Hon. Speaker's Certificate announced on :

09.01.2007 (Hansard Vol. 167, No. 01, Col. 3)

Title :*Regional Infrastructure Development Levy Act, No. 51 of 2006*

S.C. (S.D.) No. 16/2006

"Finance (Amendment) Bill"

(1)

BEFORE: Sarath N. Silva, Chief Justice
R.A.N.G Amaratunga Judge of the Supreme Court
Saleem Marsoof Judge of the Supreme Court

COUNSEL: Ms. Farzaana Jameel, Senior State Counsel, for Attorney-General,
assisted Court.

Court assembled for hearing on 29.11.2006 at 11.30 a.m.

The Bill bearing the above title has been referred to this Court for a Special Determination by the President in terms of Article 122(1) (b) of the Constitution.

It bears the endorsement of the Secretary to the Cabinet of Ministers, that in the view of the Cabinet of Ministers, the Bill is urgent in the national interest.

Senior State Counsel submitted that the Bill gives effect to a revenue proposal contained in the Budget presented in Parliament.

Senior State Counsel submitted that Clause 2 of the Bill will replace the first proviso to Section 2 of the principal Act, which imposes a levy called the Port and Airport Development Levy. The Levy was first imposed by Finance Act, No. 4 of 2002 at the rate of 1 per centum on the CIF value of the article. By the Finance Act, No. 5 of 2005 two provisos were introduced to the original Section. The first proviso increased the levy to 1.5 per centum from 19.11.2004.

There was a further amendment by Finance Act, No. 11 of 2006 which imposed a higher rate of 2.5 per centum from 1.1.2006.

The proposed amendment increases the rate to 3 per centum from 1.1.2007.

The Minister is empowered to grant exemptions or levy a concessionary rate, in the interests of the national economy. Such order of the Minister has to be approved by a Resolution in Parliament.

Senior State Counsel submitted that in Act, No. 11 of 2006 to which reference is made, in Clause 2 there is a printing error where the Finance Act, No. 6 of 2005 is referred to instead of Act, No. 5 of 2005. It was submitted that an amendment would be made at the Committee Stage to include a correction.

We agree with the Senior State Counsel that the proposed amendment does not involve any issue of constitutionality.

In terms of Article 123 of the Constitution we make a determination that the Bill is not inconsistent with the Constitution.

Sarath N. Silva
Chief Justice

R. A. N. G. Amaratunga
Judge of the Supreme Court

Saleem Marsoof
Judge of the Supreme Court

First Reading : 06.12.2006

06.12.2006 (Hansard Vol. 166, No. 16, Col. 2654)

Bill No. :

201

Sponsor :

Minister of Finance and Planning

Decision of the Supreme Court conveyed to Parliament :

01.12.2006

(Hansard Vol. 166, No: 14, Cols : 2300 - 2301)

Second Reading :

06.12.2006

(Hansard Vol. 166, No. 16, Col. 2797)

Committee of whole Parliament and Third Reading :

06.12.2006

(Hansard Vol. 166, No. 16, Cols. 2797 - 2799)

Hon. Speaker's Certificate :

15.12.2006

Hon. Speaker's Certificate announced on :

09.01.2007 (Hansard Vol. 167, No. 01, Col. 3)

Title :

Finance (Amendment) Act, No : 48 of 2006



**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
2007, 2008 AND 2009**