



DECISIONS OF THE SUPREME COURT  
OF THE REPUBLIC OF SRI LANKA  
UNDER ARTICLES 120 AND 121 OF  
THE CONSTITUTION OF THE  
DEMOCRATIC SOCIALIST REPUBLIC OF  
SRI LANKA  
FOR THE YEAR  
2018



## CONTENTS

| <i>Title of the Bill</i>                          | <i>Page No.</i> |
|---|-----------------|
| Active Liability Management                       | 5               |
| Judicature (Amendment)                            | 17              |
| National Audit                                    | 32              |
| Land (Restrictions on Alienation) (Amendment)     | 39              |
| Mutual Assistance in Criminal Matters (Amendment) | 43              |
| Office for Reparations                            | 51              |
| Medical (Amendment)                               | 60              |
| Twentieth Amendment to the Constitution           | 67              |
| Counter Terrorism                                 | 83              |

-----



**DECISIONS  
OF  
THE SUPREME COURT  
ON  
PARLIAMENTARY BILLS  
2018**



D I G E S T

| Subject   | Determination<br>No.          | Page<br>No. |
|---|-------------------------------|-------------|
| <b>Active Liability Management</b>  |                               |             |
| to authorise the raising of loans in or outside Sri Lanka for the purpose of Active Liability Management to improve public debt management in Sri Lanka and to make provisions for matters connected therewith or incidental thereto.   | <b>1/2018 to<br/>6/2018</b>   |             |
| <i>The Supreme Court determined that the provisions of the Bill are not inconsistent with the Constitution.</i>   |                               |             |
| <b>Judicature (Amendment)</b>   |                               |             |
| to amend the Judicature Act, No. 2 of 1978  | <b>07/2018 to<br/>13/2018</b> |             |
| <i>The Supreme Court determined that Section 12A (1) of the Bill is inconsistent with the Article 154P (3)(a) of the Constitution and an amendment is required to be made to the Constitution to give effect to the Section 12A (1) of the Bill. This requires the Bill to be passed by a two- third majority. However, if the jurisdiction is conferred on the High Court of Provinces under Article 154P (3)(C) like in Act No. 10 of 1996 and Act No.54 of 2006 this amending Section will cease to be inconsistent.</i> |                               |             |
| <i>The amending Section 12A (2) of the Bill requires the Judicial Service Commission to nominate judges to the Permanent High Court at Bar. This is inconsistent with the Article 154P (2) of the Constitution and an amendment is required to be made to the Constitution to give effect to the Section 12A (2) of the Bill which requires a two-third majority.</i>   |                               |             |
| <i>The Supreme Court further determined that if 12A (2) of the Bill is removed and Article 154P (2) remains as it is this inconsistency will cease. The amending Section 12 (A)(7) is inconsistent with Article 12 (1) of the Constitution and if the Chief Justice is given the power to decide whether to hold a Trial at Bar or not this amending Section will cease to be inconsistent.</i>   |                               |             |

**National Audit**

**14/2018**

to provide for the powers, duties and functions of the Audit Service Commission; the establishment of the office of the National Audit Office and the Sri Lanka State Audit Service; to specify the role of the Auditor General over public finance and to make provisions for matters connected therewith or incidental thereto.

*The Supreme Court determined that the Bill is not inconsistent with the Constitution.*

**Land (Restrictions on Alienation) (Amendment)**

**15/2018**

to amend the Land (Restrictions on Alienation) Act, No. 38 of 2014

*The Supreme Court determined that the provisions of the Bill are not inconsistent with the Constitution.*

**Mutual Assistance in Criminal Matters (Amendment)**

**16/2018 to  
18/2018**

to amend the Mutual Assistance in Criminal Matters Act, No. 25 of 2002

*The Supreme Court determined in terms of Article 123 (1) of the Constitution that Clauses 5 (3) and 5B of the Bill are inconsistent with Article 12 (1) of the Constitution and may only be passed by a special majority required under the provision of Paragraph 2 of Article 84.*

*The Supreme Court further determined that the inconsistency would cease if the Clauses are amended as opined by the Court.*

**Office for Reparations**

**19/2018 to  
20/2018**

to provide for the establishment of the Office for Reparations; to identify aggrieved persons eligible for reparations, and to provide for the provision of individual and collective reparations to such persons; to repeal the Rehabilitation of Persons, Properties and Industries Authority Act, No. 29 of 1987 and to provide for all matters connected therewith or incidental thereto.

*The Supreme Court determined that in terms of Article 123 (1) of the Constitution that Clauses 27 (a) and 27 (a) (iii) of the Bill are inconsistent with Article 4(c) and Article 3 of the Constitution and could only become law if the number of*



*votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum. However, the Supreme Court has stated that the inconsistency would cease and may be passed with a simple majority if the Clauses are amended as opined by this Court.*

*The Supreme Court further determined that other provisions of the Bill are not in conflict with the Constitution.*

**Medical (Amendment)**

**25/2018 to  
28/2018**

to amend the Medical Ordinance (Chapter 105)

*The Supreme Court determined that the provisions of the Bill are not inconsistent with the Constitution and may be passed by Parliament by a simple majority.*

**Twentieth Amendment to the Constitution**

**29/2018 to  
40/2018**

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

*The Supreme Court determined that Clauses 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 32, 34, 35, 36 and 37 of the Bill will have to be passed by a special majority required under the provision of Article 84 (2) of the Constitution and approved by the People at a Referendum.*

*The Supreme Court further determined that Clauses 17, 18, 24, 25, 31 and 33 of the Bill can be passed by a special majority specified in Article 82 (5) of the Constitution.*

**Counter Terrorism**

**41/2018 to  
47/2018**

to make provisions for the protection of Sri Lanka and the people of Sri Lanka from acts of terrorism and other offences associated with terrorism; for the prevention of terrorism and other offences associated with terrorism committed within or outside Sri Lanka; for the prevention of the use of Sri Lankan territory and its people for the preparation for terrorism outside Sri Lanka; to provide for the detection of acts of terrorism and other offences associated with terrorism; and to provide for the identification, apprehension, arrest, custody, detention, investigation, prosecution and punishment of any person who has committed an act of terrorism or any other offence associated with terrorism; for the repeal of the Prevention of

Terrorism (Temporary Provisions) Act, No. 48 of 1979; and for matters connected therewith or incidental thereto.

*The Supreme Court determined that in terms of Article 123 (1) of the Constitution that Clauses 4 (a), 4 (b) and 68 (5) of the Bill violate Article 3 of the Constitution and Clause 93(3) of the Bill violates Articles 3 and 4 of the Constitution and could only become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum. However, the Supreme Court has stated that the above inconsistencies would cease if the Clauses are amended as per the determination of the Court.*

*The Supreme Court further determined that other Clauses of the Bill can be passed by simple majority of the Parliament.*

**S.C. (SD) No. 1/2018 to S.C. (SD) No. 6/2018**

**“ACTIVE LIABILITY MANAGEMENT BILL”**

**BEFORE:**

|                    |                              |
|--------------------|------------------------------|
| Sisira J. de Abrew | - Judge of the Supreme Court |
| Nalin Perera       | - Judge of the Supreme Court |
| Vijith Malalgoda   | - Judge of the Supreme Court |

**S.C. (SD) No. 1/2018**

|            |                         |
|------------|-------------------------|
| Petitioner | : N. Dharshana Weraduwa |
| Counsel    | : Petitioner in person  |

**S.C. (SD) No. 2/2018**

|            |                          |
|------------|--------------------------|
| Petitioner | : Nagananda Kodithuwakku |
| Counsel    | : Petitioner in person   |

**S.C. (SD) No. 3/2018**

|            |   |
|------------|---|
| Petitioner | : Jayakodi Arachchige Sisira Jayakodi                     |
| Counsel    | : Kushan de Alwis, PC with C.G. Witharana and C. Fernando |

**S.C. (SD) No. 4/2018**

|            |  |
|------------|--|
| Petitioner | : Bandula Chandrasiri Gunawardane                        |
| Counsel    | : Manohara de Silva, PC with C. Witharana and C. Botheju |

|                       |                                   |
|-----------------------|-----------------------------------|
| Intervient Petitioner | : Kalyananda Thiranagama          |
| Counsel               | : Intervient Petitioner in person |

**S.C. (SD) No. 5/2018**

|            |  |
|------------|--|
| Petitioner | : Mohamad Fuvard Mohamad Muzammil              |
| Counsel    | : W. D. Rodrigo, PC with Canishka G. Witharana |

**S.C. (SD) No. 6/2018**

|            |   |
|------------|---|
| Petitioner | : Kapila Gamage   |
| Counsel    | : Canishka G. Witharana with Chandra Perera   |
| Respondent | : Hon. Attorney-General,<br>Hon. Ranil Wickremesinghe, The Prime Minister<br>(only for the petition No. SC (SD) 2/2018) |
| Counsel    | : Arjuna Obeysekara, Senior Deputy Solicitor General with S. Gnanaraj, State Counsel                                    |

**The Court assembled for the hearing at 10.00 a.m. on 27.02.2018, 28.02.2018 and 02.03.2018.**

A Bill titled “Active Liability Management Act No. 2018” was published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 19<sup>th</sup> January 2018 and placed on the Order Paper of Parliament on 19<sup>th</sup> February 2018.

The long title of the Bill reads as ‘An Act to authorize the raising of loans in or outside Sri Lanka for the purpose of Active Liability Management to improve public debt management in Sri Lanka and to make provisions for matters connected therewith or incidental thereto.’

The above named Petitioners presented petitions to this Court in respect of the above Bill in terms of Article 121 of the Constitution. The said petitions were taken up for consideration. Learned Counsel appearing for the Petitioners and the Learned Senior Deputy Solicitor General made submissions. The Petitioners, in their petitions have stated that several Clauses of the Bill titled ‘Active Liability Management Bill’, (hereinafter referred to as the Bill) are inconsistent with Articles 3, 4 (a), 12 (1), 12 (2), 14 (1)(g), 27 (2)(a), 27 (3), 148, 149 and 150 of the Constitution. The Petitioners made submissions and filed written submissions. The Petitioners contended that in terms of Clause 3 of the Bill, the Parliament can, almost every month, raise a loan during a particular financial year; that the total of loans so raised would exceed ten percent of the total outstanding debt; and that the Parliament ignoring the limits given in the Appropriation Act and/or budget debt, can raise loans. They contended that as a result of Clause 3 of the Bill, the country would fall into serious debt and that therefore this Clause would violate Article 3 and 4 (a) of the Constitution. In order to consider the above contention of the Petitioners, it is necessary to consider Articles 3 and 4(a) of the Constitution and Clause 3 of the Bill. Article 3 of the Constitution reads as follows:-

*“In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of Government, fundamental rights and the franchise.”*

Article 4 (a) of the Constitution reads as follows:-

*“The Sovereignty of the People shall be exercised and enjoyed in the following manner:-*

*(a) The legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;”*

Clause 3 of the Bill reads as follows:-

*"The Parliament may, from time to time, by resolution, approve to raise a sum of money during a particular financial year which shall not exceed ten percentum of the total outstanding debt as at the end of the preceding financial year, as a loan whether in or outside Sri Lanka, in terms of the relevant laws for moneys to be raised including the provisions of the Monetary Law Act (Chapter 422), the Local Treasury Bills Ordinance (Chapter 417), Registered Stocks and Securities Ordinance (Chapter 420), or the Foreign Loans Act, No. 29 of 1957, for and on behalf of the Government for the purposes of refinancing and pre-financing of public debts of the Government."*

Does Clause 3 of the Bill permit the Parliament to approve loans total of which would exceed ten percent of the total outstanding debt as at the end of the preceding financial year? In considering this question the following words in Clause 3 of the Bill are important.

*"The Parliament may, from time to time, by resolution, approve to raise a sum of money during a particular financial year which shall not exceed ten percentum of the total outstanding debt as at the end of the preceding financial year."* When we consider the Clause 3 of the Bill and especially the aforementioned words in Clause 3 of the Bill, we are unable to agree with the contention of the Petitioners. When we consider the Clause 3 of the Bill, we are of the opinion that the Parliament can, in terms of this Bill, only approve loans total of which would not exceed ten percent of the total outstanding debt as at the end of the preceding financial year. For the above reasons, this court rejects the above contention of the Petitioners and hold that Clause 3 of the Bill does not violate any of the Articles of the Constitution. However for the purpose of avoiding doubts, the Learned Senior Deputy Solicitor General submitted an amended version of Clause 3 of the Bill which reads as follows:-

*"The Parliament may, **during a particular financial year**, from time to time, by resolution, approve to raise **sums of money the total of** which shall not exceed ten percentum of the total outstanding debt as at the end of the preceding financial year, as a loan whether in or outside Sri Lanka, in terms of the relevant laws for moneys to be raised including the provisions of the Monetary Law Act (Chapter 422), the Local Treasury Bills Ordinance (Chapter 417), Registered Stocks and Securities Ordinance (Chapter 420), or the Foreign Loans Act, No. 29 of 1957, for and on behalf of the Government for the purposes of refinancing and pre-financing of public debts of the Government."*

Before we deal with the arguments advanced regarding Clause 4 of the Bill, we would like to state below the said Clause. Clause 4 of the Bill reads as follows:-

**“Clause 4**

- (1) The Minister shall with the approval of the Cabinet of Ministers and subject to the provisions of Section 3 of this Act and Section 114 of the Monetary Law Act (Chapter 422), decide on the matters pertaining to and incidental to the refinancing and pre-financing of public debts including –*
- (a) the sum of money to be raised by a loan;*
  - (b) the mode of raising such loan; and*
  - (c) the manner in which such payment obligations of the Government are settled as he may deem fit including the buying-back of existing debt and switching existing debt with new debt.*
- (2) The decision made by the Minister under subsection (1) shall be communicated in writing to the Registrar through the Minister assigned the subject of Central Bank of Sri Lanka.*
- (3) The Registrar may, subject to the terms of such communication and to any direction as the Minister may issue in that behalf –*
- (a) make all such arrangements as may be necessary to raise such loan; and*
  - (b) effect such arrangements to settle obligations of the Government upon the most favourable terms that may be obtained in the interest of the Government.”*

The contention of the Petitioners was that under Clause 4 of the Bill, the Minister can, without disclosing the details of the loan, seek approval of the Cabinet to act under this Clause. The Petitioners therefore contended that the Minister can arbitrarily raise loans. Therefore, they contended that the Parliament would not have the full control over the public finance and as such Article 148 of the Constitution would be violated.

The Petitioners next contended that the Minister can, after getting the approval of the Cabinet of Ministers, act on his own to raise loans and as such raising of loans would not be brought to the notice of the Parliament; that thereby Clause 4 of the Bill would violate Article 148 of the Constitution; and that violating Article 148 of the Constitution would amount to a violation of Articles 3 and 4 (a) of the Constitution. We would first consider whether the Clause 4 of the Bill would violate Article 148 of the Constitution. Article 148 of the Constitution reads as follows:-

*“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.”*

According to Clause 4 of the Bill before the Minister proceeding to take the loan stipulated in this Bill, he first will have to take the approval of the Cabinet of Ministers. At this stage it is necessary to consider Articles 42 (2) and 44(4) of the Constitution which read as follows:-

**Article 42 (2) -**

*“The Cabinet of Ministers shall be collectively responsible and answerable to Parliament.”*

**Article 44 (4) -**

*“Every Minister appointed under paragraph (1) shall be responsible to the Cabinet of Ministers and to Parliament.”*

From the above Articles of the Constitution it is clear that every Minister is responsible to the Cabinet of Ministers and to the Parliament. Under Clause 4 of the Bill, the Minister first will have to take the approval of the Cabinet of Ministers. Then how can the Minister arbitrarily raise loans?

Further we would like to consider the following words in Clause 4 of the Bill: *The Minister shall with the approval of the Cabinet of Ministers and **subject to the provisions of Section 3 of this Act and Section 114 of the Monetary Law Act (Chapter 422), decide on the matters.....** ..’ (Emphasis added).* Thus, the Minister has to take the decision to raise the loan stipulated in this Bill subject to the provisions of Clause 3 of this Bill. The following words in Clause 3 of the Bill are important: *‘The Parliament may, from time to time, by resolution, approve to raise a sum of money...’*. Therefore, according to Clause 3 of the Bill, the approval of the Parliament has to be obtained to raise the loan. Thus, the decision to raise the loan will have to be brought to the notice of the Parliament. Under these circumstances, how can one argue that the Parliament will not have control over the loan that is going to be raised under this Bill? The loan will have to be obtained with the approval of the Parliament. The Parliament can take a decision to approve or disapprove the loan. Thus, the Parliament has full control over loan that is going to be raised and as such the Parliament will have full control over public finance. Therefore, the argument that when a loan is raised under and in terms of the provisions of the above Bill, the Article 148 of the Constitution would be violated is without merit. Considering all the aforementioned matters, we hold that when the Minister obtains a loan under and in terms of this Bill, it would not violate Article 148 of the Constitution. If it does not violate Article 148 of the Constitution,

the contention raised by the Petitioners that it would violate Article 3 and 4(a) of the Constitution does not arise for consideration.

The Petitioners made submissions regarding the post of 'Registrar' stated in Clause 4 (2) and 4 (3) of the Bill. For the purpose of convenience we will reproduce below Clause 4 (2) and 4(3) of the Bill.

**Clause 4 (2): -**

*“The decision made by the Minister under subsection (1) shall be communicated in writing to the Registrar through the Minister assigned the subject of Central Bank of Sri Lanka.”*

**Clause 4 (3):-**

*“The Registrar may, subject to the terms of such communication and to any direction as the Minister may issue in that behalf –*

- (a) make all such arrangements as may be necessary to raise such loan; and*
- (b) effect such arrangements to settle obligations of the Government upon the most favourable terms that may be obtained in the interest of the Government.”*

The Petitioners made following submissions with regard to the 'Registrar' stated in Clause 4 (2) and 4 (3) of the Bill:

1. The Bill does not indicate whether the 'Registrar' is a Public Servant.
2. The Bill does not indicate that the ' Registrar' is a citizen of this country.
3. The Bill does not contain a Clause that the 'Registrar' should take oaths under 6<sup>th</sup> Amendment to the Constitution.

All the above matters would arise for consideration if the post of Registrar has been newly created by this Bill. Has it been newly created by this Bill. Clause 14 of the Bill defines the 'Registrar'. It reads as follows:-

*“‘Registrar’ means the Registrar appointed under the provisions of the Registered Stock and Securities Ordinance (Chapter 420)”*

Section 48 of the Registered Stock and Securities Ordinance (Chapter 420) reads as follows:-

*“For the purpose of this Ordinance -*

- (a) The Monetary Board of the Central Bank shall appoint a person to be or act as the Registrar, and*
- (b) Such Monetary Board shall be the trustees of the sinking fund established for each loan.”*



Therefore it is seen that the post of 'Registrar' stated in Clause 4 (2) and 4 (3) of the Bill is not a new post created by this Bill and it is a post that has been created by the Registered Stock and Securities Ordinance (Chapter 420). Further we would like to point out Section 120 of the Monetary Law. It states that every member of the Monetary Board and every officer or servant of the Central Bank shall be deemed to be a Public Servant within the meaning and for the purpose of the Penal Code. The above legal provision would nullify the above contentions of the Petitioners. For the above reasons, we reject the above contention of the Petitioners.

The Petitioners made submissions regarding Clause 5 of the Bill which reads as follows:-

*“Any loan raised for and on behalf of the Government for the purposes of refinancing and pre-financing of public debts of the Government shall be exempted from the application of the provisions of Section 2 (1)(b) of the Appropriation Act, No. 30 of 2017 and also from the application of the provisions of any annual Appropriation Act which is enacted after the date of commencement of the Appropriation Act No. 30 of 2017.”.*

The Petitioners contended that since the loans raised under this Bill are exempted from the application of the provisions of Section 2 (1) (b) of the Appropriation Act No. 30 of 2017 and future Appropriation Acts, the loans so raised would not be within the knowledge of the Parliament and that therefore Clause 5 of the Bill would violate Article 148 of the Constitution and as a result the said Clause would also violate Articles 3 and 4 (a) of the Constitution. We now advert to this contention. Although the loans raised under the Bill are exempted from the application of the provisions of Section 2 (1) (b) of the Appropriation Act No. 30 of 2017 and future Appropriation Acts, the loans stipulated under this Bill will have to be raised with the approval of the Parliament. This situation is evident when one reads Clause 3 and 4 of the Bill. Further under Clause 7 of the Bill, the details of all the loans raised should be tabled in the Parliament. Thus how can one argue that the loans are raised under this Bill would not be within the knowledge of the Parliament? If the loans are raised with the approval of the Parliament, the Parliament will have full control of public finance. Therefore the Clause 5 of the Bill would not and cannot violate Article 148 of the Constitution. If the Clause 5 of the Bill does not violate Article 148 of the Constitution, the argument that it would violate Articles 3 and 4 (a) of the Constitution does not arise for consideration. For the above reasons, we reject the said contention advanced by the Petitioners and hold that Clause 5 of the Bill does not violate Article 148 of the Constitution.

We will state below Clause 6 of the Bill since the Petitioners made submissions regarding the said Clause. Clause 6 of the Bill reads as follows:-

6 (1) “Any loan raised under this Act where –

- (a) the monetary unit is Sri Lanka rupees shall be retained in one or more accounts maintained by the Deputy Secretary to the Treasury as may be nominated by the Secretary to the Treasury, in writing, on that behalf, at the Central Bank of Sri Lanka or at a licensed commercial bank subject to the provisions of Section 107 of the Monetary Law Act (Chapter 422);
- (b) the monetary unit is foreign currency shall be retained in one or more accounts maintained by the Deputy Secretary to the Treasury as may be nominated by the Secretary to the Treasury, in writing, on that behalf, at the Central Bank of Sri Lanka.

(2) The principal money and the interest, if any, which is in any account maintained at the Central Bank of Sri Lanka or at a licensed commercial bank shall be part of the Consolidated Fund as assets of Sri Lanka but as a ring-fenced account;

(3) The Moneys retained under subsection (1) shall only be used for the purposes of refinancing and pre-financing of public debts in achieving the objective of this Act.”.

The Petitioners contended that depositing the money in the loans raised under this Bill at a licensed commercial bank would violate Article 148 of the Constitution and if it violates Article 148 of the Constitution, it would amount to a violation of Articles 3 and 4 (a) of the Constitution. We now advert to this contention. In order to appreciate the above contention it is necessary to consider Section 107 of the Monetary Law Act (Chapter 422) which reads as follows:-

*“The Central Bank shall be the official depository of the Government and or Agencies or institutions referred to in subsection (1) of Section 106.*

*Provided, however that the Monetary Board may authorize one or more commercial banks operating in Sri Lanka to accept Government deposits, subject to such rules and regulations as the board may prescribe.”*

According to Clause 6 of the Bill, depositing of money in the loans raised under the Bill should be done subject to the provisions of Section 107 of the Monetary Law Act. According to Section 107 of the Monetary Law Act (Chapter 422), the Monetary Board has the power to deposit Government

deposits in one or more commercial banks operating in Sri Lanka. Therefore, the money raised in the form of loans under this Bill would be deposited in accordance with the law prevailing in this country. Thus depositing of money raised in the form of loans under this Bill cannot violate the Constitution. If a person or an agency of the Government acts in accordance with the law prevailing in this country, can such an act be construed as a violation of the Constitution? If this question is answered in the affirmative, we would be declaring that acting in accordance with the prevailing law of the country is a violation of the Constitution. Further if this question is answered in the affirmative, this Court would indirectly challenge the validity of the prevailing law. At this stage we would like to consider Articles 16 (1) and 80 (3). Article 16 (1) of the Constitution reads as follows:-

*“All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.”*

Article 80 (3) of the Constitution reads as follows:-

*“Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.”*

When the above Articles of the Constitution are considered, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. For the above reasons, we hold that if a person or an agency of the Government acts in accordance with the law prevailing in this country, such an act cannot be construed as a violation of the Constitution. Thus, when money raised in the form of a loan under this Bill is deposited in a licensed commercial bank subject to the provisions of Section 107 of the Monetary Law Act (Chapter 422), such an act cannot violate the Constitution. When we consider all the above matters, we reject the above contention of the Petitioners and hold that Clause 6 of the Bill would not violate Article 148 of the Constitution. Therefore, the argument that Clause 6 of the Bill would violate Articles 3 and 4(a) of the Constitution would not arise for consideration.

The Petitioners made submissions regarding Clause 10 (3) and 10 (4) of the Bill which read as follows:-

10 (3) – *“Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of such publication, or on such later date may be specified in the regulation.”*

10 (4) – *“Every regulation made by the Minister shall, within three months after its publication in the Gazette, be brought before Parliament for approval. Any such regulation which is not so approved shall be deemed to be rescinded as from the date of its disapproval, but without prejudice to anything previously done thereunder.”*

According to Clause 10 (4) of the Bill, if the Parliament disapproves the regulations made by the Minister it shall be deemed to be rescinded from the date of its disapproval but what was done during the period of publication and its disapproval will not be rescinded. However, we note that according to Clause 3 of the Bill, loans will have to be raised with the approval of the Parliament. Thus, the Minister cannot make regulations to nullify the said Clause or to deviate from the procedure laid down in the Bill. Although the Petitioners contended that Clause 10 (4) of the Bill violates the Constitution, similar provision has earlier been enacted by the Parliament when Foreign Exchange Act No. 12 of 2017 was enacted by the Parliament. Section 29 (3) of Foreign Exchange Act No. 12 of 2017 reads as follows:-

*“Every regulation made under subsection (1) shall, within three months from the date of its publication in the Gazette, be placed before Parliament for approval. Every regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval, but without prejudice to anything previously done thereunder.”*

It has to be stated here that similar provisions are found in Excise (Special Provisions) Act No. 13 of 1989 [Section 29(3)] and Value Added Tax Act No. 14 of 2002 [Section 75(3)]. Therefore, the provisions found in Clause 10(4) of the Bill have become the existing law of the country. If this Court makes a declaration that Clause 10(4) violates the Constitution, this Court would be indirectly declaring that Section 29(3) of Foreign Exchange Act No. 12 of 2017, Section 29(3) of Excise (Special Provisions) Act No. 13 of 1989 and Section 75(3) of Value Added Tax Act No. 14 of 2002 violate the Constitution. But, when we consider Articles 16 and 80(3) of the Constitution, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. Court must accept the existing law enacted by the Parliament as valid law. For the above reasons, we reject the above argument of the Petitioners and hold that Clauses 10(3) and 10(4) of the Bill do not violate the Constitution.

The Petitioners made submissions regarding Clause 13 of the Bill which reads as follows:-

*“In the event of any conflict or inconsistency between the provisions of this Act and the provisions of any other written law, the provisions of this Act shall prevail.”*

The Petitioners contended that on the strength of this Clause the Minister can bypass the existing laws and raise loans. But, according to Clauses 3 and 7 of the Bill, if the Minister is going to raise a loan mentioned in the Bill, he should first obtain the approval of the Parliament. Therefore, we are unable to accept the above argument.

The Petitioners made submissions regarding Clause 9 of the Bill. Therefore, it is necessary to state below the said Clause. It reads as follows:-

*“A person, being -*

- (a) a member of the Monetary Board;*
- (b) an officer, employee, servant or agent of Central Bank of Sri Lanka; or*
- (c) an officer, employee, servant or agent of the Ministry of the Minister,*

*shall not be held liable in any suit, prosecution or other legal proceeding for anything done or purported to be done in the discharge or intended discharge of his obligations under this Act or any regulation, Order, decision or directive issued and made thereunder, if he proves that he acted in good faith and exercised all due diligence, reasonable care and skill.”*

They contended that this Clause would violate Article 12 (1) of the Constitution. We now advert to this contention. Article 12 (1) of the Constitution reads as follows:-

*“All persons are equal before the law and are entitled to the equal protection of the law.”*

When considering the above argument, the following words of the said Clause should be noted. *“If he proves that he acted in good faith and exercised all due diligence, reasonable care and skill.”*

Therefore, the burden is on the said person to prove the said ingredients. Thus, the contention that Clause 9 of the Bill would violate Article 12 (1) of the Constitution cannot be accepted. For the above reasons, we hold that Clause 9 of the Bill does not violate Article 12 (1) of the Constitution.

This Court has examined the provisions of the Bill and in our opinion they do not violate the Constitution. For the reasons stated above, we make a determination that the Active Liability Management Bill is not inconsistent with the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Sisira J. de Abrew**

Judge of the Supreme Court.

**Nalin Perera**

Judge of the Supreme Court.

**V. K. Malalgoda, PC**

Judge of the Supreme Court.

|  |   |
|--|---|
| <b><i>First Reading:</i></b>   | 19.02.2018 (Hansard Vol. 258;<br>No. 5; Col. 327)                           |
| <b><i>Bill No:</i></b>   | 231   |
| <b><i>Sponsor/Relevant Minister:</i></b>                                     | Prime Minister and Minister of<br>National Policies and Economic<br>Affairs |
| <b><i>Decision of the Supreme<br/>Court Announced in<br/>Parliament:</i></b> | 20.03.2018 (Hansard Vol. 259;<br>No. 5; Col. 485- 494)                      |
| <b><i>Second Reading:</i></b>  | 23.03.2018 (Hansard Vol. 259;<br>No. 08; Col. 920- 1034)                    |
| <b><i>Committee of the Whole<br/>Parliament and Third<br/>Reading:</i></b>   | 23.03.2018 (Hansard Vol. 259;<br>No. 08; Col. 1034- 1046)                   |
| <b><i>Hon. Speaker's Certificate:</i></b>                                    | 28.03.2018  |
| <b><i>Title:</i></b>   | Active Liability Management Act,<br>No. 8 of 2018                           |

**S.C. (SD) No.07/2018 to S.C. (SD) No.13/2018**

**“JUDICATURE (AMENDMENT) BILL”**

**BEFORE:**

|                    |                              |
|--------------------|------------------------------|
| Priyasath Dep, PC  | - Chief Justice              |
| B.P. Aluvihare, PC | - Judge of the Supreme Court |
| Nalin Perera       | - Judge of the Supreme Court |

**S.C. (SD) No.07/2018**

|                       |  |
|-----------------------|--|
| Petitioner            | : Udaya Rohan de Silva, PC   |
| Counsel               | : Ramesh de Silva, PC with Sudath Kaldera, Niran Anketell, Manjuka Fernandopulle & Harith de Mel instructed by Athula de Silva.  |
| Intervient Petitioner | : Ajith Pathmakantha Perera  |
| Counsel               | : J. C. Weliamuna, PC with Viran Korea, Sarita De Fonseka, Suren Fernando, Pulasthi Hewamanna, Senura Abeywardana, Ms. Khyati Wickremanayake, Ms. Subashini Samararachchi, Ms. Chathuri Wickremasinghe and Ms. Thilini Vidanagamage. |
| Intervient Petitioner | : Prof. Sarath Wijesuriya  |
| Counsel               | : Saliya Peiris, PC, with Thanuka Nandasiri, Anjana Ratnasiri and Danushka Rahubadda instructed by S. Kaluarachchi.  |
| Intervient Petitioner | : Harsha de Silva  |
| Counsel               | : Suren Fernando with Senura Abeywardana, Ms. Khyati Wickremanayake, Nabeela Raja and Shiloma David.   |
| Intervient Petitioner | : Mr. Jagath Hemachandra   |
| Counsel               | : Jayampathi Wickremarathne, PC with Ms. Pubudini Wickremarathne and Sandun Yapa Karunaratne.  |
| Intervient Petitioner | : Dr. Gamini Viyangoda   |
| Counsel               | : M. A. Sumanthiran, PC with Pulasthi Hewamanne  |

*Decisions of the Supreme Court on Parliamentary Bills - 2018*

Intervient Petitioner : K. W. Janaranjana  
Counsel : Pulasthi Hewamanne with Ms. Thilini Vidanagamage

Intervient Petitioner : D. M. D. Abeyrathne  
Counsel : Pulasthi Hewamanne with Ms. Thilini Vidanagamage

Intervient Petitioner : Aruna Laksiri Unawatuna  
Intervient Petitioner : Nagananda Kodithuwakku

**S.C. (SD) No.08/2018**

Petitioner : Professor G. L. Pieris  
Counsel : Gamini Marapana, PC with Navin Marapana  
Intervient Petitioner : Ajith P. Perera  
Counsel : Viran Korea, Sarita De Fonseka, Ms. Subashini Samararachchi.  
Intervient Petitioner : Hon. Patali Champika Ranawaka  
Counsel : Mr. Panditharatne  
Intervient Petitioner : Karunaratna Paranavithana  
Counsel : J. C. Weliamuna, PC with Senura Abeywardana, Ms. Khyati Wickremanayake, Ms. Chathuri Wickremasinghe.

**S.C. (SD) No.09/2018**

Petitioner : Mallika Arachchige Channa Sudath Jayasumana,  
Counsel : Sanjeewa Jayawardena, PC with Charitha Rupasinghe  
Intervient Petitioner : Saman Rathnapriya  
Counsel : Geoffrey Alagaratnam, PC with Luwie Ganeshathasan and T. Vidanagamage instructed by S. Kaluarachchi

**S.C. (SD) No.10/2018**

Petitioner : Dinesh Gunawardana  
Counsel : Manohara de Silva, PC with Canishka Witharana and Boopathy Kahathuduwa



*Judicature (Amendment) Bill*

**S.C. (SD) No.11/2018**

Petitioner : Kalyananda Tiranagama

Counsel : Petitioner in person

**S.C. (SD) No.12/2018**

Petitioner : Janitha Abewickrema Liyanage

Counsel : Kushan D'Alwis, PC with Kaushalya  
Molligoda and Chamath Fernando

Intervient Petitioner : Eran Wickremaratne

Counsel : Shantha Jayawardena with Niranjana  
Arulpragasam, Chamara Nanayakkarawasam  
and Hiranya Damunupola instructed by  
S. Kaluarachchi.

**S.C. (SD) No.13/2018**

Petitioner : Walawe Durage Raja Dharmasiri Gunarathne

Counsel : Shavindra Fernando, PC

Respondent : Hon. Attorney-General

Counsel : Yasantha Kodagoda, PC, Senior Additional  
Solicitor General with Priyantha Nawana,  
PC, Additional Solicitor General, Nerin  
Pulle, Deputy Solicitor General, Ms. Yuresha  
de Silva, Senior State Counsel.

**The Court assembled for hearing at 10.30 a.m. on 16.03.2018,  
19.03.2018, 20.03.2018 and 22.03.2018.**

A Bill in its short title referred to as "Judicature (Amendment) Act No. of 2018" was published in the Government *Gazette* dated 02.02.2018 and placed on the Order Paper of Parliament on 06.03.2018.

Seven Petitions numbered above were filed by citizens and associations invoking the jurisdiction of the Supreme Court in terms of Article 120 and 121 to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution.

Upon receipt of the Petitions the Court issued notice on the Attorney-General as required by Article 134 (1) of the Constitution.

The Counsel representing the Petitioners, the Intervient Petitioners and the Attorney-General were heard before this bench at the sittings held on 16<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup> of March 2018.

The Act cited as the Judicature (Amendment) Act No. of 2018 proposed to amend the Judicature Act, No. 2 of 1978 (hereinafter referred to as the "principal enactment") by the insertion immediately after Section 12 thereof, of the following new Sections which shall have effect as Sections 12A, 12B and 12C of that enactment:

### **Statement of Legal Effect**

The statement of legal effect gives the scope and objects of the Act.

Clause 2: This Clause amends the Judicature Act No. 2 of 1978 ("principal enactment") by the insertion immediately after Section 12, of the new Sections 12A, 12B and 12C and the legal effect of the new Sections is to –

- (a) Make provisions for the Permanent High Court at Bar to try, hear and determine the trials of the offences specified in the Sixth Schedule to the principal enactment and any other offence committed in the course of the same transaction of any such offence;
- (b) Specify the composition of the Permanent High Court at Bar;
- (c) Enable the Minister to specify the location or locations of the Permanent High Court at Bar;
- (d) Enable the Attorney-General and the Director General for the Prevention of Bribery and Corruption to institute criminal proceedings in the Permanent High Court at Bar;
- (e) Make certain other provisions which shall apply for the trials of the Permanent High Court at Bar;
- (f) Make provisions for an appeal from the Permanent High Court at Bar to be heard by a Bench of not less than five judges of the Supreme Court; and
- (g) Make provisions for the construction of other written law, in consistent with the provisions of this amendment.

Clause 3: This Clause amends Sections 63 of the principal enactment by the insertion of the definition of the expression "Director General for the Prevention of Bribery and Corruption."

Clause 4: This Clause amends the principal enactment by the addition of the Sixth Schedule immediately after the Fifth Schedule of that enactment.

The Petitioners challenged that the Bill is inconsistent with the provisions of Articles 10, 12, 13 and 14 of the Constitution, the doctrine of separation of powers as enshrined in Article 3 read with Article 4 of the Constitution

*Judicature (Amendment) Bill*

and for that reason Bill cannot become law unless passed by the special majority of two-thirds of the whole number of Members of Parliament (including those not present) and being approved by the People at a Referendum, as provided for under Article 83 of the Constitution, in as much as *inter alia*.

The Petitioners challenged the constitutionality of the Bill on following grounds:-

There is no provision in the Bill for the establishment of a Permanent High Court at Bar. Therefore in law there is no Court called and known as Permanent High Court at Bar, and thus this Bill cannot be enacted.

The proposed new Sections 12A (1), (3) (Clauses 2 and 4), confer jurisdiction on the Permanent High Courts at Bar to try several categories of offences referred to in the Sixth Schedule committed by any person [wholly or partly in Sri Lanka or by a citizen of Sri Lanka elsewhere] which are not mandatorily triable by the High Courts at Bar.

The said Bill confers on the Attorney-General and the Director General for the Prevention of Bribery and Corruption, the sole discretion of selectively forwarding indictment, to the Permanent High Court at Bar in respect of offences amongst the categories of offences set out in the Sixth Schedule, taking into consideration certain criteria specified in the proposed new Section 12A (7) and (8)(a).

As the law stands now under Section 450 of the Code of Criminal Procedure Act No. 15 of 1979 the discretion is vested with the Chief Justice who may owing to the nature of the offence or the circumstances, direct that the trial of any person for an offence be held by three Judges without a Jury. The proposed amendment to the Judicature Act confers on officers who constitute part of the Executive, a discretion which was hitherto vested exclusively with the Chief Justice thereby eroding and undermining the doctrine of separation of powers as enshrined in Article 3 read with Article 4 of the Constitution.

As the discretion will be conferred on the prosecutors, the Accused will be deprived of his right to a fair trial as enshrined in Article 13 (3) of the Constitution.

The discretion to be exercised based on criteria which is set out in 12A (7) are arbitrary and discriminatory. 12A (7) empowers the Attorney-General or the Director General for the Prevention of Bribery and Corruption, as the case may be, to forward indictments having taken into consideration (a) the nature and circumstances (b) the gravity, (c) the complexity, and the impact on the victim on the state. When the discretion is conferred on prosecuting agencies the power could be used arbitrarily and proceedings could be

instituted against selected persons in the Permanent High Court at Bar, thus discriminating between persons accused of such offences.

The power hitherto granted to the Commission to Investigate Allegations of Bribery or Corruption by Act No. 19 of 1994, upon being satisfied that an offence is disclosed, to direct, the Director General, to institute proceedings including in the High Court by indictment is now directly conferred on the Director General thereby transferring a power from the said Commission which is recognized by Article 156A of the Constitution, to a mere Public Officer, the Director General of the Commission.

Section 12 (8) (c) of the amending Bill which states unless exceptional circumstances require which shall be recorded, be heard from day to day, to ensure the expeditious disposal. The inability of a particular Attorney-at-Law to appear before the Permanent High Court at Bar on a particular day for any reason including engagement to appear on that date in any other court or tribunal, shall not be a ground for postponing the date of commencement of the trial or be regarded as an exceptional circumstance which requires the postponement of the trial which violates an accused right to a fair trial under Article 13 (3) and the right of an Attorney-at-law to engage in the profession which violates Article 14 (1) (g) of the Constitution.

The said Bill provides for the expeditious conclusion of trials before the High Court at Bar in respect of offences specified in the Sixth Schedule. This Schedule does not include more serious offences such as murder, which attract capital punishment and rape, trafficking in drugs etc. Therefore the Bill is discriminatory, arbitrary, capricious and violative of Article 12 of the Constitution.

This Bill confers on the Minister, a member of the Executive, the sole authority to specify by Order published in the Gazette the location or locations of Permanent High Court at Bar and to increase (and in effect to determine) the number of such Courts of the Permanent High Court at Bar after consulting the Chief Justice. Thus conferring powers to the Minister that belong to the Judiciary, erodes and undermine the doctrine of separation of powers as enshrined in Article 3 read with Article 4 of the Constitution.

These are the main issues raised by the Petitioners.

The main question that has to be determine is whether the Bill creates or establishes a Permanent High Court at Bar or make provision for a division or Bench in the existing High Court. A new High Court at Bar could be established under Article 105 or 154P of the Constitution. It is pertinent to trace the legislative history of the High Court.

### **Legislative History of the High Courts**

The Supreme Court of Ceylon under Section 19 (a) of the Courts Ordinance of 1889 exercised 'original criminal jurisdiction for the inquiry into all crimes and offences committed throughout Ceylon, and for the hearing, trying and determining all prosecutions and charges which shall be commenced, and all indictments and information, which shall be presented therein against any person for or in respect of any such crimes or offences, or alleged crimes or offences'.

Under Section 3 of the Courts Ordinance the courts for administration of justice were:

- (a) The Supreme Court
- (b) District Courts
- (c) Courts of Request
- (d) Magistrates' Courts

The Administration of Justice Law No. 44 of 1973 repealed the Courts Ordinance and established a High Court and the original criminal jurisdiction hitherto exercised by the Supreme Court was vested in the High Court. Thus, the High Court became the highest Court of original criminal jurisdiction. The Magistrates' Court continued to be a subordinate Court exercising criminal jurisdiction. The Supreme Court continued to exercise appellate jurisdiction in respect of civil and criminal matters.

1978 Constitution by Article 105 recognized the establishment of High Courts, which is known as High Courts of the Republic of Sri Lanka. 105 (1) reads as follows:-

**105 (1)** *Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the people, shall be:-*

- (a) *the Supreme Court of the Republic of Sri Lanka,*
- (b) *the Court of Appeal of the Republic of Sri Lanka,*
- (c) *the High Court of the Republic of Sri Lanka and such other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.*

This situation existed till the 13<sup>th</sup> Amendment which was enacted and certified on 14<sup>th</sup> November 1987. Under Article 154P (1) Provincial High Courts were established. Article 154 reads thus:

**154P. (1)** *There shall be a High Court for each Province with effect from the date on which this Chapter comes into force. Each*

*such High Court shall be designated as the High Court of the relevant Province.*

*(2) The Chief Justice shall nominate, from among judges of the High Court of Sri Lanka, such number of judges as may be necessary to each such High Court. Every such judge shall be transferable by the Chief Justice.*

*(3) Every such High Court shall,-*

- (a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;*
- (b) notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates' Courts, Primary Courts within the Province;*
- (c) exercise such other jurisdiction and powers as Parliament may, by law, provide.*

After the 13<sup>th</sup> Amendment there came to exist two High Courts. One is High Court of the Republic of Sri Lanka and the other is High Court of Provinces. The original criminal jurisdiction based on territorial jurisdiction is now exercised by the Provincial High Courts. High Court of Provinces (Special Provisions) Act No. 19 of 1990 was enacted to make provisions regarding the procedure to be followed and the right to appeal to, and from the High Courts established under Article 154P of the Constitution.

High Court of the Provinces (Special Provisions) Act No. 10 of 1996 conferred jurisdiction on the Provincial High Courts to exercise civil jurisdiction in respect of actions, applications, proceedings specified on the 1<sup>st</sup> Schedule to the Act and in respect of commercial matters where monetary value exceeds 1 million (subsequently it was increased to 5 million).

High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 amended Section 5 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 by introducing Section 5A, 5B to hear Appeals from the District Courts and Family Courts and by 5C to appeal to the Supreme Court from the decision of the High Court.

Under Section 5B High Court of Provinces referred to in 5A shall be ordinarily exercised at all times by not less than two judges of that court sitting together at High Court.

Act No. 10 of 1996 and Act No. 54 of 2006 conferred additional jurisdiction on the High Court of Provinces under Article 154P (3)(c) but did not create

or establish new Courts.

Under Article 154P (3)(a) the original criminal jurisdiction in respect of the offences committed within the Province is vested with the High Court of Provinces. The territorial jurisdiction exercised by the High Court of Sri Lanka is transferred to the High Court of Provinces by a constitutional amendment. The High Court of Sri Lanka exercises jurisdiction in respect of offences committed outside Sri Lanka such as:

- a) Any offence committed by any person on or over the territorial waters of Sri Lanka;
- b) Any offence committed by any person on the high seas where such offence is piracy by the law of nations;
- c) Any offence committed on the high seas on board any ship or upon any aircraft registered in Sri Lanka; or
- d) Any offence committed by any person who is a citizen of Sri Lanka on the high seas or upon any aircraft.

These offences are committed outside the territory of Sri Lanka and therefore do not fall within a Province. Some offences are extra territorial in nature, some are based on nationality of the accused and other attracts on universal jurisdiction. The High Court of Sri Lanka also exercises jurisdictions such as admiralty, extraditions etc.

Section 12A (1) of the Bill refers to a Permanent High Court at Bar. The Section read thus:

*'Notwithstanding anything to the contrary in this Act or any other written law, the Permanent High Court at Bar shall hear, try and determine in the manner provided for by written law, subject to the provisions of subsection (7), all prosecutions on indictment against any person, in respect of offences specified in the Sixth Schedule to this Act, and any other offence committed in the course of the same transaction of any such offence;*

*(2) Such Permanent High Court at Bar shall consist of three judges sitting together, nominated by the Judicial Service Commission from among the judges of the High Court of the Republic of Sri Lanka of which one Judge shall be nominated by the Judicial Service Commission as the Chairman of such Court.'*

This amending Section is not clear as to whether it establishes a separate High Court or a separate division of the High Court of Sri Lanka, established under Article 105 of the Constitution. If the High Court is established under Article 105 of the Constitution the nomination of judges to the High Court are made by the Judicial Service Commission under Article 111 (1) of the



Constitution. However, the offences in the 6<sup>th</sup> Schedule are offences committed within the jurisdiction of a Province and in view of Article 154P (3)(1) these cases are to be tried before the High Court of the Province. If that jurisdiction is to be conferred on the High Court of Sri Lanka it is inconsistent with Article 154P (3)(a) of the Constitution and an amendment is required to be made to the Constitution to give effect to the Section 12 (a) and (b) of the Bill. This requires the Bill to be passed by a two third majority. However, if a jurisdiction is conferred on the High Court of Provinces under Article 154P (3)(c) like in Act No. 10 of 1996 and Act No. 54 of 2006 this inconsistency could be removed.

Under 154 (P)(2) the Chief Justice shall nominate, from among judges of the High Court of Sri Lanka, such number of judges as may be necessary to each such High Court. Every such judge shall be transferable by the Chief Justice.

As proposed in the amending Act if the Judicial Service Commission is required to nominate judges to the Permanent High Court at Bar it requires a two-third majority. If the Article 154 (P) (2) remains as it is this inconsistency will not arise.

This Section enables the Permanent High Court at Bar to hear, try and determine in the manner provided for by written law, subject to the provisions of subsection (7), all prosecutions on indictment against any person, in respect of offences specified in the Sixth Schedule to this Act, and any other offence committed in the course of the same transaction of any such offence.

This Section enables the prosecution to institute action in respect of offences such as theft, misappropriation, criminal breach of trust, receiving stolen property, cheating, forgery and offences which could be ordinarily tried in the Magistrates' Court. The purpose of the establishment of Permanent High Court is to expeditiously dispose of cases referred to in the Schedule. This will be discriminatory of the victims and aggrieved parties who are seeking justice and accused facing serious charges awaiting trial not included in the Schedule. Learned Additional Solicitor General submitted that the purpose of the Amendments is to expeditiously dispose serious cases of economic and financial crimes as the delay in disposing such cases adversely affects the national economy and the investors' confidence in the administration of Justice machinery. To justify this amendment the Learned Additional Solicitor General agreed to make reference in the text that the object of the amendment is to try serious cases of economic and financial crimes. However, the Schedule should restrict to serious offences relating to economic crimes, thereby eliminating the possibility of discrimination.

The criteria to select offences in respect of which criminal proceedings that



are to be instituted in the Permanent High Court at Bar is given in Section 12A (7) of the amending Bill which reads thus:

*(7) The Attorney-General or the Director General for the Prevention of Bribery and Corruption, as the case, may be, shall, taking into consideration –*

*(a) the nature and circumstances;*

*(b) the gravity;*

*(c) the complexity;*

*(d) the impact on the victim; or*

*(e) the impact on the state,*

*of the offence, referred to in subsection (1), in the interest of justice and the public and national interest, institute criminal proceedings in the Permanent High Court at Bar.*

The Learned Counsel for the Petitioners submitted that by giving the discretion to the Attorney-General and Director General of Bribery and Corruption there is a possibility of the discretion not being properly exercised and exercised in a discriminatory manner. Under Section 450 of the Criminal Procedure Code the discretion to decide whether a Trial at Bar should be held or not is exercised by the Chief Justice. This will eliminate the risk of the arbitrary use of the discretion. The amending Section 12A (7) is inconsistent with Article 12 (1) of the Constitution. However, if the Chief Justice is given the power to decide whether to hold a Trial at Bar or not, this inconsistency could be removed.

The power hitherto granted to the Commission to Investigate Allegations of Bribery or Corruption by Act No. 19 of 1994, to direct, the Director General, to institute proceedings including in the High Court by indictment is now directly conferred on the Director General and the proposed amendment (amending Section 12A) has the effect of transferring a power from the said Commission which is recognized by Article 156A of the Constitution, to a mere Public officer, namely the Director General of the Commission. It will be prudent to give the power to the Commission to direct the Director General Bribery and Corruption to institute action.

It is to be noted that in Act No. 10 of 1996, the commercial disputes over five million and an action filed under Acts specified in the Schedule could be filed without any distinction subject to Section 9 of the Civil Procedure Code dealing with jurisdiction. In terms of the provisions of Act No. 54 of 2006 all civil appeals from the District Court are heard by two Judges of the High Court.

In the draft Bill the prosecution has a discretion to select cases and file indictment in the Permanent High Court at Bar. The danger is that there is a possibility of wrongly exercising of the discretion although it may not happen. Therefore, like in Section 450 of the Criminal Procedure Code Chief Justice should be given the power to decide whether a Trial at Bar should be held or not. This will remove the inconsistency in the Bill.

The Petitioners impugn Clause 12A (8)(c) of the proposed Bill on three grounds; **the Clause erodes the Judge's discretion to allow a postponement, it violates an accused's right to retain a counsel of his choice under Article 13 (3) and it violates the Attorney-at-Law's right under Article 14 (g).**

In this regard, it must first be noted that Clause 12A (8)(c) in no way violates Article 14 (g) of the Constitution.

Clause 12A (8)(c) was challenged on the premise that the Clause only takes cognizance of exceptional circumstances when allowing a postponement and this violates the accused's right to a fair trial under Article 13(3) of the Constitution.

Whereas Section 450 (5)(b) of the Code of Criminal Procedure Act No. 15 of 1979, by express language has ruled out a wide range of grounds for postponement *including* personal grounds, Clause 12A (8)(c) of the Bill is limited to exceptional circumstances and engagement to appear in any other court/tribunal.

The relevant provision in the Code of Criminal Procedure Act reads as follows:

Section 263 (as amended by Act No. 14 of 2005):

*“(1) If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the court may from time to time order a postponement or adjournment on such terms as it thinks fit for such time as it considers reasonable and may remand the accused if in custody or may commit him to custody or take bail in his own recognizance or with sureties for his appearance:*

*Provided however that every trial in the High Court, with a jury or without a jury, shall as far as practicable, be held day to day.”*

Although we are of the opinion that Clause 12A (8)(c) is not inconsistent with the Constitution, we are, however, of the view that the language should be imbued with sufficient laxity to allow the Judge to use his discretion

when deciding what amounts to 'exceptional circumstances' under Clause 12A (8)(c).

Clause 12A (6)(b) of the Bill is identical to paragraph (f) of Section 450 (5) of the Code of Criminal Procedure Act No. 15 of 1979. The Clause stipulates that it shall not be necessary for any evidence taken prior to such nomination to be retaken and the Permanent High Court at Bar shall be entitled to continue the trial from the stage at which it was immediately prior to such nomination.

It is to be noted that this Clause takes away the right given to an accused under Section 48 of the Judicature Act to have a witness resummoned and reheard.

Given the permanent character of the Trial at Bar that is proposed to be established, taking away the right given to an accused to have a witness resummoned and reheard cannot be justified. Thus it is recommended that Clause 12 (6)(b) of the Bill be made operational subject to the proviso to Section 48 of the Judicature Act.

#### **Institution of Prosecutions under the existing Law**

Criminal Procedure Code Act No. 15 of 1979 lays down the procedure in respect of institution of proceedings and the jurisdiction of the High Court and the Magistrate's Court. Powers of Criminal courts are laid down in Section 10 of the Code of Criminal Procedure Act which states:

*“Subject to the other provisions of this Code any offence under the Penal Code whether committed before or after the appointed date may be tried save and otherwise specially provided for in any law:-*

- a) by the High Court; or*
- b) by the Magistrate's Court where that offence is shown in the eighth column of the First Schedule to be triable by a Magistrate's Court”.*

The Magistrate's Court has jurisdiction to try offences such as misappropriation, criminal breach of trust, cheating, robbery, and several other serious offences. However, the sentencing power is restricted to two year term of imprisonment. The High Court, in addition to offences which are exclusively triable by the High Court, has jurisdiction to try any offence triable by the Magistrates' Court under the Penal Code and has the power and impose any sentence or other penalty prescribed by written law. The Attorney-General has the discretion to forward indictments to the High Court in offences of serious nature which are triable by the Magistrates' Court and where no adequate sentence could be imposed by the Magistrate

that commensurate with the gravity of the offence due to the limitation in the sentencing powers.

Under Section 450 of the Code of Criminal Procedure Act where the Chief Justice is of the opinion that owing to the nature of the offence or the circumstances of and relating to the commission of the offence, in the interests of justice, a Trial at Bar should be held, the Chief Justice may by order under his hand direct that the trial of any person for that offence shall be held before the High Court at Bar by three judges without a jury.

Therefore, in an appropriate case the Attorney-General can request the Chief Justice to order a Trial at Bar. Therefore, several options are available to the prosecution to institute actions. The Parliament having considered the delay in the justice delivery system had amended the Judicature Act and had increased the number of High Court judges from 75 to 110. Once the additional Court houses are constructed and High Court judges are appointed, delays could be minimized.

The purpose of this amending Bill is to expeditiously dispose of cases involving economic and financial crimes as there is a severe delay in disposing cases. As there is a need to expeditiously try grave and complex cases of economic and financial crimes, which have an impact on victims and state, it may be necessary that such cases to be tried by a Trial at Bar. However, the discretion conferred on the prosecuting authority might lead to abuse of the process.

We determine that Section 12A (1) of the Bill is inconsistent with the Article 154P (3)(a) of the Constitution and an amendment is required to be made to the Constitution to give effect to the Section 12A(1) of the Bill. This requires the Bill to be passed by a two- third majority. However, if the jurisdiction is conferred on the High Court of Provinces under Article 154 (P)(3)(c) like in Act No. 10 of 1996 and Act No. 54 of 2006 this amending Section will cease to be inconsistent.

The amending Section 12A (2) of the Bill requires the Judicial Service Commission to nominate judges to the Permanent High Court at Bar. This is inconsistent with the Article 154P (2) of the Constitution and an amendment is required to be made to the Constitution to give effect to the Section 12A (2) of the Bill which requires a two-third majority. However, if 12A (2) of the Bill is removed and Article 154P (2) remains as it is this inconsistency will cease.

The amending Section 12A (7) is inconsistent with Article 12 (1) of the Constitution. However, if the Chief Justice is given the power to decide whether to hold a Trial at Bar or not this amending Section will cease to be inconsistent.

*Judicature (Amendment) Bill*

We wish to place on record our deep appreciation of the assistance given by the Hon. Attorney-General, Learned President's Counsel and Learned Counsel who appeared for the Petitioners and the Learned President Counsel who appeared for the Intervenant Petitioners and made submissions in this matter.

**Priyasath Dep**

Chief Justice

**B. P. Aluwihare**

Judge of the Supreme Court

**H. N. J. Perera**

Judge of the Supreme Court

|  |  |
|--|--|
| <b><i>First Reading:</i></b>   | 06.03.2018 (Hansard Vol. 259; No. 1; Col. 34)        |
| <b><i>Bill No:</i></b>   | 235  |
| <b><i>Sponsor/Relevant Minister:</i></b>                             | Minister of Justice                                  |
| <b><i>Decision of the Supreme Court Announced in Parliament:</i></b> | 03.04.2018 (Hansard Vol. 259; No. 9; Col. 1057-1065) |
| <b><i>Second Reading:</i></b>  | 09.05.2018 (Hansard Vol. 260; No. 2; Col. 62-158)    |
| <b><i>Committee of the Whole Parliament and Third Reading:</i></b>   | 09.05.2018 (Hansard Vol. 260; No. 2; Col. 158-163)   |
| <b><i>Hon. Speaker's Certificate:</i></b>                            | 15.05.2018   |
| <b><i>Title:</i></b>   | Judicature (Amendment) Act, No. 9 of 2018.           |

**S.C. (SD) No. 14/2018**

**“NATIONAL AUDIT BILL”**

**BEFORE:**

|                           |                              |
|---------------------------|------------------------------|
| Sisira J. de Abrew        | - Judge of the Supreme Court |
| Priyantha Jayawardena, PC | - Judge of the Supreme Court |
| L.T.B. Dehideniya         | - Judge of the Supreme Court |

**S.C. (SD) No.14/2018**

|             |   |   |
|-------------|---|---|
| Petitioners | : | Transparency International Sri Lanka<br>(Guarantee) Limited<br><br>Stanley Christoffel Asoka Obeysekere |
| Counsel     | : | Viran Corea with Sankhitha Gunaratne,<br>Maheshi Herath and Mangalesswary Shankar                       |
| Respondent  | : | Hon. Attorney-General   |
| Counsel     | : | Yuresha de Silva, Senior State Counsel with<br>Anusha Jayatilake, State Counsel                         |

**The Court assembled for hearing at 10.00 am. on 18.04.2018.**

A Bill titled “National Audit Act No. of 2018” was published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 16<sup>th</sup> March 2018 and placed on the Order Paper of Parliament on 3<sup>rd</sup> April 2018.

The long title of the Bill reads as “An Act to provide for the powers, duties and functions of the Audit Service Commission; the establishment of the office of the National Audit Office and the Sri Lanka State Audit Service; to specify the role of the Auditor General over public finance and to make provision for matters connected therewith or incidental thereto.”.

The jurisdiction of this Court to determine the constitutionality of the said Bill has been invoked in terms of Article 121(1) by a petition presented to the Court by the Petitioners.

The Petition to this Court filed on 9<sup>th</sup> April 2018, within one week of the Bill being placed on the Order Paper of Parliament as required by Article 121 (1).

The said Petition was taken up for consideration. Learned Counsel appearing for the Petitioners and the Learned Senior State Counsel made submissions. The Petitioners, in their Petition have stated that several Clauses of the Bill titled “National Audit Bill (hereinafter referred to as the Bill) are inconsistent with Article 14A (1) and/or Article 14A (2) of the

Constitution. The Petitioners made submissions and filed written submissions. Learned Counsel for the Petitioners submitted that Clause 9 of the Bill violates Article 14A (1) of the Constitution. The Petitioners further submitted that Clause 9 (1) of the Bill thus seeks to create a blanket bar to secure disclosure of any information by the members of the Audit Service Commission, any person appointed under the Act and others assisting such persons, and unduly curtails access to information, even if no harm or prejudice to the public interest would be caused, in a given instance. When considering the submissions of learned Counsel for the Petitioners, it is necessary to examine Clause 9 of the Bill and Article 14A of the Constitution.

Clause 9 of the Bill reads as follows:-

*“(9) (1) The members of the Audit Service Commission, any person appointed to any office under this Act or any other person assisting any such person for the purpose of carrying out the provisions under this Act or a qualified Auditor engaged by the Auditor General for such purpose, except in the performance of his duties under this Act, shall not disclose any information received by him in the performance of his duties under this Act, and shall-*

- (a) not be compelled by any person to disclose any information except on a request of Parliament or by an Order of Court or subject to paragraph (b) to give effect to the provisions of any written law;*
- (b) not disclose any information under any law requiring the disclosure of information without prior consent given in writing of the relevant person or institution providing such information and until the report or statement prepared by the Auditor General relating to such information has been presented in Parliament, as may be required; and*
- (c) not enter upon the duties of his office until he makes and subscribes an oath of secrecy as set out in the Schedule hereto. The members of the Audit Service Commission shall subscribe an oath of secrecy before the Speaker of Parliament, while all other persons specified herein shall subscribe the said oath before the Auditor General.*

*(2) Subject to the provisions of subsection (1) of this Section, any such member or person or qualified Auditor who communicates any such matter to any person or suffers or permits any unauthorized person to have access to any books, papers or other records relating to any such matter, commits an offence.”*

Article 14A of the Constitution reads as follows:-

*“(1) Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen’s right held by:-*

- (a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;*
- (b) any Ministry of a Minister of the Board of Ministers of a Province or any Department or any Statutory body established or created by a statute of a Provincial Council;*
- (c) any local authority; and*
- (d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraph (a), (b) or (c) of this paragraph.*

*(2) No restriction shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of Court, protection of Parliamentary privilege, for preventing the disclosure of information communicated in confidence or for maintaining the authority and impartiality of the judiciary.”[Emphasis added].*

According to Clause 9 of the Bill the members of the Audit Service Commission and other officers attached to the Commission etc. shall not disclose any information received by them without prior written consent of the relevant institution or the person who provided the information and until the report or statement prepared by the Auditor General has been presented in Parliament. Further Clause 9 of the Bill places restrictions on the said officers to release information on their own.

Contention of Learned Counsel for the Petitioners is that when an application is made to provide information, the officers attached to Audit Service Commission is precluded from releasing information without the consent of the institution that provided the information under the Clause 9 of the Bill. Learned Counsel for the Petitioners therefore, contended that Clause 9 of the Bill violates Article 14A of the Constitution.

When considering the above contention, Article 14A of the Constitution should be examined. Although Article 14A (1) of the Constitution gives a right to people to request for information discussed in the said Article,



Article 14A (2) of the Constitution places certain restrictions. They are the restrictions that may be prescribed by law as are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of Parliamentary privilege, for preventing the disclosure of information communicated in confidence or for maintaining the authority and impartiality of the judiciary. In short restrictions can be placed by way of legislations on information discussed in Article 14A regarding the following subjects:-

1. In the interest of national security, territorial integrity or public security.
2. For the prevention of disorder or crime.
3. For the protection of health or morals and of the reputation or the rights of others.
4. For prevention of contempt of court.
5. For protection of Parliamentary privilege.
6. For preventing the disclosure of information communicated in confidence.
7. For maintaining the authority and impartiality of the judiciary.

Therefore, if the information requested by a person relates to the matters set out in Article 14A (2) of the Constitution, the person requesting information will not be entitled to receive such information. Further if a law prescribes certain restrictions on any information stipulated in Article 14A of the Constitution, the said information can be refused. Such a decision to refuse the release of information would not violate Article 14A of the Constitution. When I consider all the above matters, I hold the view that restrictions regarding information stated in Article 14A of the Constitution can be prescribed by law.

What is law? Article 170 of the Constitution defines what the law is. It reads as follows:-

*“Law means any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes Order in Council.”*

Thus legislature can bring in legislation prescribing restrictions on information discussed in Article 14A of the Constitution. National Audit Bill intends to achieve the above purpose. In my view, restrictions of this nature are permitted by Article 14A (2) of the Constitution and a Bill prescribing such restrictions cannot violate Article 14A of the Constitution.

When I consider all the above matters, I am unable to agree with the contention of Learned Counsel for the Petitioners. For the above reasons, I reject the above contention of Learned Counsel for the Petitioners and hold that the Clause 9 of the Bill does not violate the Constitution.

Learned Counsel for the Petitioners next made submissions regarding the schedule of the Bill relating to Oath of Secrecy. The Oath of Secrecy described in the said schedule reads as follows:-

*“Oath of Secrecy*

*In terms of Section 9 of the National Audit Act No. .... of 2018.*

*I, ..... being member of the Audit Service Commission/an employee of National Audit Office/Auditor General’s Department/Combined Services, an expert person assisting in the discharge of the duties of the Auditor General as referred to in Section 8 (a), do solemnly declare and affirm/swear that I shall maintain in utmost secrecy the information whatsoever which is given, stated, discussed or otherwise gathered in the performance of my duties and such information will not be disclosed, discussed or stated in any form whatever to any person in public or private, except –*

- a) when required to do so by a Court of Law;*
- b) when required by Parliament; or*
- c) when specified under any written law, subject to Section 9 (b) of the National Audit Act No. .... 2018.*

*The obligations herein set out shall bind me during my term of office in the National Audit Office/ Auditor General’s Department/Combined Services and shall continue thereafter except in relation to any information that has come into public domain due to no breach of my obligations hereunder.*

*I append my signature to this oath on this ..... day of ..... Two Thousand .....*

*Signature”*

Learned Counsel for the Petitioners stressed the following words in the Oath of Secrecy: “*subject to Section 9(b) of the National Audit Act No .... 2018*”. He submitted that the above words would violate Article 14A (1) of the Constitution since Clause 9 (b) of the Bill violates Article 14A (1) of the Constitution. But I have earlier held that Clause 9 of the Bill does not violate the Constitution. Therefore, I am unable to agree with the above contention of Learned Counsel for the Petitioners and I reject the same.

Learned Counsel for the Petitioners next made submissions regarding Clause 13 of the Bill. Clause 13 of the Bill reads as follows:-

*“The Auditor General shall report to Parliament on any audit carried out during any financial year and may make such report publicly available through the official website of the National Audit office and shall not publish the report if he has or intends to provide any report, information, document, book, record or computer generated transcript obtained in the course of the audit to the law enforcement authorities.”*

According to Clause 13 of the Bill, the Auditor General shall not publish the document mentioned therein if he intends to provide it to law enforcement authorities. Learned Counsel for the Petitioners submitted that the said Clause of the Bill therefore violates Article 14A (1) of the Constitution.

I now advert to this contention. Why does the Auditor General want to submit it to law enforcement authorities? If some fraud or offence has been disclosed in the said report, shouldn't he submit it to law enforcement authorities? The answer should obviously be in the affirmative. If such a report is published, person who is suspected to have committed the fraud would take steps to negate the allegation mentioned in the report before the law enforcement authorities start investigation. Thus publishing such a report would benefit the alleged offender. As I have pointed out earlier, legislature can bring in legislation prescribing restrictions on information regarding prevention of disorder or crimes. When I consider all the above matters, I hold the view that Clause 13 of the Bill would not violate any Article of the Constitution. For the above reasons, I reject the above contention of Learned Counsel for Petitioners.

We have examined the provisions of the Bill and in our opinion they do not violate the Constitution.

For the reasons stated above, we make determination that the National Audit Bill is not inconsistent with the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Sisira J. de Abrew**

Judge of the Supreme Court

**Priyantha Jayawardena, PC**

Judge of the Supreme Court

**L. T. B. Dehideniya**

Judge of the Supreme Court

*Decisions of the Supreme Court on Parliamentary Bills - 2018*

|  |  |
|--|--|
| <b><i>First Reading:</i></b>   | 03.04.2018 (Hansard Vol. 259; No. 9; Col. 1107-1108)                       |
| <b><i>Bill No:</i></b>   | 236  |
| <b><i>Sponsor/Relevant Minister:</i></b>                             | Hon. Prime Minister and Minister of National Policies and Economic Affairs |
| <b><i>Decision of the Supreme Court Announced in Parliament:</i></b> | 09.05.2018 (Hansard Vol. 260; No. 2; Col. 41-46)                           |
| <b><i>Second Reading:</i></b>  | 05.07.2018 (Hansard Vol. 261; No. 10; Col. 1412-1539)                      |
| <b><i>Committee of the Whole Parliament and Third Reading:</i></b>   | 05.07.2018 (Hansard Vol. 261; No. 10; Col. 1539-1566)                      |
| <b><i>Hon. Speaker's Certificate:</i></b>                            | 17.07.2018   |
| <b><i>Title:</i></b>   | National Audit Act, No. 19 of 2018   |

**S.C. (SD) No.15/2018**

**“LAND (RESTRICTIONS ON ALIENATION) (AMENDMENT)  
BILL”**

**BEFORE:**

Sisira J. de Abrew - Judge of the Supreme Court  
Prasanna Jayawardena, PC - Judge of the Supreme Court  
Murdu N. B. Fernando, PC - Judge of the Supreme Court

**S.C. (SD) No.15/2018**

Petitioner : Polpagoda Gamage Salochana Vincent

Counsel : Kanishka Witharana

Respondent : Hon. Attorney-General

Counsel : Dr. Avanthi Perera, Senior State Counsel with Suren  
Gnanaraj, State Counsel

**The Court assembled for the hearing at 10.00 a.m. on 04.06.2018.**

A Bill titled “Land (Restrictions on Alienation) (Amendment)” was published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 12<sup>th</sup> April 2018 and placed on the Order Paper of Parliament on 22<sup>nd</sup> May 2018.

The long title of the Bill reads as “An Act to amend the Land (Restrictions on Alienation) Act No.38 of 2014.”

The jurisdiction of this Court to determine the constitutionality of the said Bill has been invoked in terms of Article 121 (1) of the Constitution by a petition presented to the Court by the Petitioner.

The petition to this Court was filed on 28.5.2018, within one week of the Bill being placed on the Order Paper of Parliament as required by Article 121 (1).

When the said petition was taken up for consideration, Learned Counsel appearing for the Petitioner and the Learned Senior State Counsel made submissions. The Petitioner, in his petition has stated that Clauses 2 and 3 of the Bill are inconsistent with Articles 3, 4, 12 (1), 12 (2) 75 and 154G of the Constitution of the Democratic Socialist Republic of Sri Lanka. But Learned Counsel did not make submissions as to how the Bill would violate Articles 3, 4, 12 (1), 12 (2) and 75 of the Constitution.

Clause 2 of the Bill reads as follows:-

*“Section 3 of the Land (Restrictions on Alienation) Act No. 38 of 2014 (hereinafter referred to as the Principal enactment) is hereby amended in subsection (1):-*

*(a) by the repeal of paragraph (b) of that subsection and the substitution therefor of the following paragraph:-*

*“(b) a condominium parcel specified under the Apartment Ownership Law:*

*Provided that, the entire value shall be paid upfront through an inward foreign remittance prior to execution of the relevant deed of transfer.”.*

*(b) in paragraph (h) of that sub Section by the substitution for the words "transfer of such land" of the words "transfer of such lands; and";*

*(c) immediately after paragraph (h) of that subsection by the addition of the following new paragraph:-*

*“(i) any land, the title of which is transferred on or after April 1, 2018 to a company referred to in paragraph (b) of subsection (1) of Section 2, listed in the Colombo Stock Exchange.”.*

Clause 3 of the Bill reads as follows:-

*“Section 5A of the Principal enactment is hereby amended:-*

*(a) by the substitution for the words and figures “January 8, 2017” of the words and figures “January 1, 2016.”;*

*(b) in the marginal note thereof, by the substitution for the words and figures “January 8, 2017” of the words and figures “January 1, 2016.”.*

Learned Counsel for the Petitioner contended that the Bill deals with the subject of land; that the subject of land is in Provincial Council List of the Constitution; and that it should be referred to every Provincial Council by His Excellency the President in terms of Article 154G (3) of the Constitution before the Bill is enacted by the Parliament.

Article 154 G (3) of the Constitution reads as follows:-

*“(3) No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the*

*expression of its views thereon within such period as may be specified in the reference, and-*

*(a) where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting; or*

*(b) where one or more Councils do not agree to the passing of the Bill, such Bill is passed by the special majority required by Article 82:*

*Provided that where on such reference, some but not all the Provincial Councils agree to passing of a Bill, such Bill shall become law applicable only to the Provinces for which the Provincial Councils agreeing to the Bill have been established, upon such Bill being passed by a majority of the Members of Parliament present and voting.”.*

The Bill seeks to amend Section 3 and 5 of the 'Land (Restrictions on Alienation)' Act No. 38 of 2014. The preamble of Act No. 38 of 2014 reads as follows:-

*“WHEREAS in furtherance of the development policies being promoted by the Government in the backdrop of a globally integrated environment, it is deemed expedient and necessary to ensure the prudent use of land which is a limited resource, in a manner that preserves the national interest:*

*AND WHEREAS it is the National Policy to regulate the use of lands, in a sustainable manner, having imposed restrictions on the alienation of lands to foreigners, foreign companies and certain institutions with foreign shareholding and having granted concessions to citizens of Sri Lanka for certain development projects, as specified in this Act: ”.*

Therefore, it appears that the subject of Act No. 38 of 2014 is with regard to 'National Policy' and not 'land'. Thus, the subject of the Bill is also 'National Policy' and not 'land'. The subject of National Policy is not a subject in the Provincial Council List. It is a subject in the Reserved List.

Article 154G (7) reads as follows:-

*“A Provincial Council shall have no power to make statutes on any matter set out in List II of the Ninth Schedule (hereinafter referred to as "the Reserved List"). ”.*

Therefore, it is seen that a Provincial Council shall have no power to make statutes in respect of the subjects set out in the Reserved List.

When we consider the above matters, we hold the view that compliance under Article 154G (3) of the Constitution is not required before placing the

Bill in the Order Paper of the Parliament. For the above reasons, we hold that the contention of Learned Counsel for the Petitioner that the subject of the Bill being the subject of land and therefore Article 154G (3) of the Constitution should be complied with cannot be accepted is hereby rejected. We have examined the provisions of the Bill and in our opinion they do not violate the Constitution. For the above reasons, we make determination that the Bill titled “Land (Restrictions on Alienation) (Amendment)” is not inconsistent with the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Sisira J. de Abrew**

Judge of the Supreme Court

**Prasanna Jayawardena, PC**

Judge of the Supreme Court

**Murdu N. B. Fernando, PC**

Judge of the Supreme Court

|  |   |
|--|---|
| <b><i>First Reading:</i></b>   | 22.05.2018 (Hansard Vol. 260; No. 5; Col. 389)                    |
| <b><i>Bill No:</i></b>   | 250   |
| <b><i>Sponsor/Relevant Minister:</i></b>                             | Minister of Finance and Mass Media                                |
| <b><i>Decision of the Supreme Court Announced in Parliament:</i></b> | 19.06.2018 (Hansard Vol. 261; No. 04; Col. 556-558)               |
| <b><i>Second Reading:</i></b>  | 18.07.2018 (Hansard Vol. 262; No. 2; Col. 325)                    |
| <b><i>Committee of the Whole Parliament and Third Reading:</i></b>   | 18.07.2018 (Hansard Vol. 262; No. 2; Col. 325-326)                |
| <b><i>Hon. Speaker’s Certificate:</i></b>                            | 30.07.2018  |
| <b><i>Title:</i></b>   | Land (Restrictions on Alienation) (Amendment) Act, No. 21 of 2018 |



**S.C. (SD) No.16/2018 to S.C. (SD) No.18/2018**

**“MUTUAL ASSISTANCE IN CRIMINAL MATTERS  
(AMENDMENT) BILL”**

**BEFORE:**

|                     |   |                            |
|---------------------|---|----------------------------|
| B. P. Aluwihare, PC | - | Judge of the Supreme Court |
| Sisira J. de Abrew  | - | Judge of the Supreme Court |
| H. N. J. Perera     | - | Judge of the Supreme Court |

**S.C. (SD) No.16/2018**

Petitioner : Rear Admiral (Dr.) Sarath Weerasekara  
Counsel : Manohara de Silva, PC, with Canishka G. Witharana  
and Boopathi Kahathuduwa and H. M.  
Thilakaratna

**S.C. (SD) No.17/2018**

Petitioner : Ven. Maduruoye Dhammissara Thero  
Counsel : Sanjeewa Jayawardena, PC with Lakmini  
Warusavithana and Kethmini Dharmasena

**S.C. (SD) No.18/2018**

Petitioner : Hewa Kurumburege Yasasvi Kumarajith Dharmadasa  
Counsel : Canishka Witharana with H. M. Thilakarathne  
Respondent : Hon. Attorney-General  
Counsel : Sanjay Rajaratnam, PC Senior Additional Solicitor General with Parinda Ranasinghe, Additional Solicitor General, Mahen Gopallawa, Deputy Solicitor General and Dr. Avanthi Perera, Senior State Counsel

**The Court assembled for the hearing on 18.06.2018 and 20.06.2018.**

A Bill in its short title referred to as “MUTUAL ASSISTANCE IN CRIMINAL MATTERS (AMENDMENT)” was published in the Government *Gazette* on 18<sup>th</sup> May 2018 and placed on the Order Paper of Parliament on 5<sup>th</sup> June 2018.

Three petitions numbered S.C.S.D. 16/18, S.C.S.D. 17/18 and S.C.S.D. 18/18 were filed by citizens invoking the jurisdiction of the Supreme Court in terms of Article 120 to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution. Upon receipt of the petitions, the Court issued notice on the Attorney-General as required under Article 134 (1) of the Constitution.

At the outset, the learned President's Counsel for the Petitioner in S.C. S.D. 16/18 contended that this Bill ought not even to have been placed on the Order Paper on the premise that Parliament has sought to legislate, circumventing the Constitutional process in Article 154G (3), on matters within the Provincial Council List.

According to Article 154G (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, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference, and –*

*(a) where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting; or*

*(b) where one or more Councils do not agree to the passing of the Bill, such Bill is passed by the special majority required by Article 82:*

*Provided that where on such reference, some but not all the Provincial Councils agree to the passing of a Bill, such Bill shall become law applicable only to the Provinces for which the Provincial Councils agreeing to the Bill have been established, upon such Bill being passed by a majority of the Members of Parliament present and voting.”.*

The Learned President's Counsel contended that the objects of the Bill as set out in Clause 3 broadly fall in the category of '*prevention, detection and investigation*' of offences, which is a subject delegated to the Provincial Police Division under Item 12.1 of Appendix I in the 9<sup>th</sup> Schedule. Accordingly, the Bill cannot be allowed to stand as the President has not in terms of Article 154G (3), referred the Bill to Provincial Councils for expression of their views.

We have carefully considered the submission made by the Learned President's Counsel in relation to the relevant provision of the Constitution and observed certain factors, which militate against the said construction.

Although Clause 3 of the Bill lists down the instances in which the provisions of the Act, as amended by the Bill shall be made applicable, it is clear that the overarching object of the Bill is to streamline a national policy on receiving and extending international assistance in criminal related activities. This is fortified by the language in Clause 3 (1) of the Bill which states that "*The object of this Act is to facilitate the provision and obtaining by Sri Lanka of assistance in criminal and related matters.*" Within the framework of the Bill, State and its instrumentalities assume a single identity for the purposes of rendering and receiving assistance in relation to criminal matters of national and transnational character. It is untenable to construe Clause 3 as one inviting the Provincial provenance when the Bill intends to regulate matters not between the center and the periphery but between the state and the international forums. The object in simple terms is not one falling within the subject of Police Powers which, as correctly contended by the Learned President's Counsel, is shared between the Centre and the Periphery; but an object which falls within the subject of Foreign Affairs defined in the Reserved List in the Ninth Schedule as including "*all matters which bring the Government of Sri Lanka into relation with any foreign country.*".

Furthermore, the arrangement which the 13<sup>th</sup> Amendment to the Constitution has put in place is one that gravitates around the Centre. It presupposes the central intervention whenever a subject matter requires coordination among one or more provinces. This is made bare by the reference to "All Subjects and Functions not Specified in List I or List III" in the Reserved List and Item 10 (Any Offence in respect of which Courts in more than one Province have jurisdiction) in the Schedule to the Provincial List in the Ninth Schedule all of which leave to the center matters that transcend a purely provincial level. To the extent that a subject has an impact on more than one province, it invites the Central intervention as oppose to the Provincial. If we were to interpret otherwise, it would have the undesirable consequence of altering the power sharing arrangement from one of delegation to that of a partnership.

This scheme must be borne in mind when approaching Sub-Clauses (a) to (q) in Clause 3. The unambiguous intention of the legislature as adverted to above, is to streamline a policy on international co-operation. The several instances set out therein cannot be artificially classified into matters falling exclusively within one province. The direct reference to intellectual property in Clause 3 (h), which is also a matter left to the center under the Reserved List, is illustrative of this rationale. Functions stipulated under Clause 3 require a uniform policy and extensive coordination. The actual implementation of the decisions would no doubt be carried out by the provincial level, where it is necessary. Thus, the instances stipulated under Clause 3 cannot be deemed a violation of or an encroachment on the

provincial powers. To all intents and purposes, those powers remain unaffected and intact within this legislative framework.

In any event, Article 154G (11) of the Constitution overrides Article 154G (3) when Parliament legislates for the purposes of upholding the State's international obligations.

*“Notwithstanding anything in paragraph (3) of this Article, Parliament may make laws, otherwise than in accordance with the procedure set out in that paragraph, in respect of any matter set out in the Provincial Council List for implementing any treaty, agreement or convention with any other country or countries or any decisions made at an international conference, association, or other body”.*

As observed earlier, the principal objective of this Bill is to facilitate the relationship between Sri Lanka and subjects of international law. The international character of the Bill is further reflected in Clause 2 of the Bill, which extends the application of this Bill to situations where the State has either a direct or an indirect international obligation to foster the best interests of sovereign nations. Thus, the Bill falls under the purview of 154G (11) which permits Parliament to legislate otherwise than in accordance with Article 154G (3).

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

Petitioners' second ground of challenge was made with regard to the powers vested in the Competent Authority under Clause 5 (3) and Clause 10 of the Bill.

One of the principal features of the Bill under review is introducing a 'Competent Authority' under Clause 4 to receive and process the Mutual Legal Assistance Requests. The Bill bifurcates the reception and sending points of Mutual Legal Assistance requests by a Central Authority and in certain instances by the Competent Authority, in order to provide efficient administration of the Act.

However, while Section 6 of the principal enactment obliges the Central Authority to refuse a request in whole or in part when the said request, *inter alia*, violates the Constitution, no such restrictions have been put in place to regulate the conduct of the Competent Authority. This omission carries significant constitutional implications for the reason that Clause 5 (3) of the Bill makes it mandatory for the said Competent Authority to directly receive and immediately proceed to implement Mutual Legal Assistance requests.

*“Notwithstanding the provisions of subsection (1), a request which conforms to the provisions of subsection (2) may be forwarded through electronic means directly to the relevant competent authority*

*through the appropriate authority of a specified country or specified organization. Such competent authority shall, subject to subsection (4), immediately proceed to implement the request”.*

During his submission, the Learned Senior Additional Solicitor General proposed to amend Clause 5 (3) by the deletion of the second sentence.

The amended Clause 5 (3) will henceforth include;

*“Notwithstanding the provisions of subsection (1), a request which conforms to the provisions of subsection (2) may be forwarded through electronic means directly to the relevant competent authority through the appropriate authority of a specified country or specified organization.”.*

While this prevents the Competent Authority from processing the request immediately, it is observed that the Competent Authority still remains, in strict sense, denude the power to refuse a request on the grounds stipulated under Section 6. The issue is confounded by Clause 5 (4) of the Bill which only requires the Competent Authority to *“inform the Central Authority by forwarding copy of the relevant request.”* The statutory language and the framework does not indicate that the onus to filter the request reverts to the Central Authority. *Ex facie*, the Competent Authority could still act outside the statutory framework. In those circumstances, we observe that the said Clause, even in its amended form remains inconsistent with Article 12 (1) of the Constitution. It is imperative that the Competent Authority be amenable to Section 6 of the principal enactment to allow the refusal of, in whole or in part, a request. This would enable both the Competent Authority and the Central Authority to filter requests at their respective ends without compromising on expediency or the legal safeguards imbued in the framework.

Extensive submissions were also made on Clause 10 of the Bill which amends Section 10 (1) of the principal enactment to expedite the process of taking evidence or receiving documents or Articles.

The said Clause 10 (1) reads;

*“(1) where the appropriate authority of a specified country makes request to the Central Authority that -*

*(a) evidence be taken in Sri Lanka; or*

*(b) documents or other Articles in Sri Lanka produced*

*for the purposes of a proceeding in relation to a criminal matter in the specified country or specified organization, the Central Authority shall promptly refer such request to a competent authority or where necessary, to the Chief Magistrate of the Colombo Magistrate's Court*

*to take such evidence or to receive such documents or Articles, and shall, upon receipt of such evidence, documents or Articles from such Magistrate or competent authority, as the case maybe, transmit the same to the appropriate authority of the specified country or specified organization.”.*

The Learned President's Counsel in S.C.S.D 17/18 strenuously argued that the phrase ‘*as necessary*’ in the Clause would have the undesirable consequence of normalizing the practice of evidence taking by the Competent Authority and make the Magistrate's intervention the exception. In the result, it would leave a section of witnesses unprotected and deprived of the numerous safeguards provided under Section 10 (3) to Section 10 (9) in the principal enactment.

In response, the Learned Senior Additional Solicitor General submitted that Clause 10 (1) envisages two types of requests - those that specify *evidence and documents to be made and produced under oath* and requests pertaining to obtaining *only statements and documents*. Between the two, it was submitted that the Central Authority will only forward the latter to the Competent Authority which would rule out any apprehension of making the Magistrate’s intervention the exception.

He also agreed to amend the Clause by the substitution of the words ‘where necessary’ with ‘as required’. Accordingly, the new Clause 10 (1) would read;

*“(1) where the appropriate authority of a specified country makes a request to the Central Authority that –*

*(a) evidence be taken in Sri Lanka; or*

*(b) documents or other Articles in Sri lanka produced*

*for the purposes of a proceeding in relation to a criminal matter in the specified country or specified organization, the Central Authority shall promptly refer such request to a competent authority or **as required**, to the Chief Magistrate of the Colombo Magistrate’s Court to take such evidence or to receive such documents or articles, and shall, upon receipt of such evidence, documents or Articles from such Magistrate or competent authority, as the case may be, transmit the same to the appropriate authority of the specified country or specified organization.”.*

Bearing in mind the objective of expediency, we nevertheless observe that the distinction which the Learned Senior Additional Solicitor General elaborated in his submission is not reflected in the statutory language.

However, considering the scheme of the Act and safeguards embodied in Section 8 of the Act, we are of the view that Clause 10 (1) of the Bill is not inconsistent with the Constitution.

An observation is also made in respect of Clause 5B which enables the Central Authority to direct a Competent Authority to spontaneously transmit information notwithstanding the provisions of the Act. This Court agrees with the submission made by the Learned Senior Additional Solicitor General that Clause 5B is a legislative response to address the issue of expediency. Nevertheless, to the extent that Clause 5B sets an exception to the normal process, there must be a corresponding justification or a circumstance which warrants the invocation of Clause 5B. The Clause in its present form permits digression from the normal process *ad hoc* and *ad hominem* and thereby violates Article 12 (1) of the Constitution. If the Legislature amends Clause 5B reserving it as a response to exigent situations, the inconsistency would cease to be. The Petitioners further challenged Clause 2 (1) (c), 2 (1) (d) and Clause 20 (definition of Competent Authority) during their submissions.

Amendments to the said Clauses:-

Clause 2 (1)(d) will be amended by the substitution of the word “organization” with the words “an intergovernmental organization combatting corruption, money laundering, or terrorism financing” and will be read as follows:-

*“an intergovernmental organization combatting corruption, money laundering, or terrorism financing, on such terms and conditions as may be necessary and on the assurance of reciprocity.”.*

Clause 2 (1) (c) will be amended by the addition of words “on the basis of reciprocity” and will be read as follows:-

*“a country which has not entered into any agreement with Sri Lanka, where the Minister may determine that it is in the best interests of the sovereign nations that Sri Lanka extends and obtains assistance on the basis of reciprocity”.*

The definition of Competent Authority in Clause 20 will be amended as follows:-

*“competent authority” means a law enforcement authority or any other authority established by law”.*

In view of the assurances given by the Learned Senior Additional Solicitor General with the concurrence of the Minister, we do not consider it is necessary to make a determination in respect of these matters.



For the aforesaid reasons, we determine in terms of Article 123 (1) of the Constitution that Clauses 5 (3) and 5B of the Bill are inconsistent with Article 12 (1) of the Constitution and may only be passed by a special majority required under the provision of Paragraph 2 of Article 84. However, if the said Clauses are amended as opined by this Court the said inconsistency would cease to be.

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

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

**Sisisra J. de Abrew**  
Judge of the Supreme Court

**H. N. J. Perera**  
Judge of the Supreme Court

***First Reading:*** 05.06.2018 (Hansard Vol. 260; No. 9;  
Col. 932)

***Bill No:*** 251

***Sponsor/Relevant Minister:*** Minister of Justice

***Decision of the Supreme Court Announced in Parliament:*** 03.07.2018 (Hansard Vol. 261; No. 8;  
Col. 1155-1161)

***Second Reading:*** 07.08.2018 (Hansard Vol.262; No.5;  
Col. 842- 903)

09.08.2018 (Hansard Vol. 262; No. 7;  
Col. 1045-1060)

***Committee of the Whole Parliament and Third Reading:*** 09.08.2018 (Hansard Vol. 262; No. 7;  
Col. 1061-1064)

***Hon. Speaker's Certificate:*** 15.08.2018

***Title:*** Mutual Assistance in Criminal Matters  
(Amendment) Act, No. 24 of 2018.



**S.C. (SD) No. 19/2018 to S.C. (SD) No. 20/2018**

**“OFFICE FOR REPARATIONS BILL”**

**BEFORE:**

Buwaneka Aluwihare, PC - Judge of the Supreme Court  
Priyantha Jayawardena, PC - Judge of the Supreme Court  
Prasanna Jayawardena, PC - Judge of the Supreme Court

**S.C. (SD) No.19/2018**

Petitioner : Ganga Dinesh de Silva  
Counsel : Nayantha Wijesundera

**S.C. (SD) No.20/2018**

Petitioner : Wijesuriya Arachchige Palitha Senadeera  
Counsel : Manohara Silva, PC with Canishka Witharana, Anura Wickramanayake, Boopathy Kahathuduwa and Imalka Abeysinghe  
Respondent : Hon. Attorney-General  
Counsel : Nerin Pulle, Deputy Solicitor General with Kanishka Balapatabendi, State Counsel

**The Court assembled for the hearing on 26. 07. 2018.**

A Bill in its short title referred to as “OFFICE FOR REPARATIONS” was placed on the Order Paper of Parliament on 17<sup>th</sup> July 2018.

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

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

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

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

The thrust of the State's argument is that the concept of reparations must be viewed within the broad objective of the Bill. The Bill is a special legislative response to promote the State policy on reconciliation. It introduces a form of compensation that transcends the mere provision of monetary compensation and includes even psycho-social services in an effort to reorganize civil life. This rationale is reflected in the interpretation given to the terms 'individual and collective reparations' in the Bill. It is an emerging concept that espouses values stretching beyond the concept of rehabilitation and as correctly pointed by the Deputy Solicitor General is a subject that is not already recognized in the Ninth Schedule. By virtue of its novelty, it would fall under the heading '*all subjects and functions not specified in List I or III*' in the Reserved List.

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

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

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

The second and the more contentious ground of challenge centered on the definition of an ‘aggrieved person’ in Clause 27, which reads;

*“(a) persons who have suffered a violation of human rights or humanitarian law (as contained in the First, Second, Third and Fourth Geneva Conventions of 1949), as applicable –*

*(i) in the course of, consequent to, or in connection with the conflict which took place in the Northern and Eastern Provinces or its aftermath; or*

*(ii) in connection with political unrest or civil disturbances; or*

*(iii) in the course of systematic gross violations of the rights of individuals, groups or communities of people of Sri Lanka; or*

*(iv) due to an enforced disappearance as defined in the International Convention for the Protection of all Persons from Enforced Disappearance Act, No. 5 of 2018”.*

The said Clause also proceeds to define ‘Human Rights’ to mean;

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

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

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

Having carefully considered the jurisprudence on judicial and quasi-judicial powers and legislative enactments relevant to this subject, we are of the view that the term judicial power is a dynamic concept to which no rigid interpretation ought to be given. On this point, we agree with Justice Weeramantry's prudent observation in **Tucker vs The Ceylon Mercantile Union** [73 NLR 313] that ‘each case of alleged encroachment upon the judicial power must be considered in the light of its own particular facts and circumstances, and no general rule can be formulated for determining whether such encroachment has taken place’. It is not, as contended, confined simply to an *inter-partes* determination of rights and obligations.

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

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

law, the law to be applied by the Office for Reparations will be the body of jurisprudence which is relevant to humanitarian law.

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

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

In the present instance, the Bill leaves it solely to the discretion of the Office for Reparations to set the limits of a right, apply the facts at hand to the said interpretation and arrive at a correct and reliable determination as to whether or not a person has suffered a violation of 'human rights' or has been the subject of a violation of 'humanitarian law'. We are of the view that the function of making a judgment based on an objective examination, assessment and evaluation of facts placed before the Office for Reparations, and the parallel task of interpreting a complex body of law, in the present circumstances, amounts to a judicial function.

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

Accordingly, we are of the view that Clause 27 (a) read with Clause 11 (c) vests judicial powers in the Office for Reparations, and thereby attracts Article 4 (c) of the Constitution. In light of previous determinations by this

Court where it has been held that Article 4 is intrinsically linked with Article 3, we are also of the view that Clause 27(a), as it now stands, violates Article 3 of the Constitution and could only become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

By the same token, we are of the view that, Clause 27 (a)(iii) as it now stands also vests judicial power in the Office of Reparations since it requires a determination by the Office of Reparations that, a “*systematic gross violation of the rights of individuals, groups or communities of people of Sri Lanka*” has occurred. Accordingly, we are of the view that Clause 27 (a)(iii) as it now stands, violates Article 4(c) and Article 3 of the Constitution and could only become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

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

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

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

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

Additionally, Clause 27 (a)(i) in the Bill in the English language requires the insertion of the word “**armed**” before the word ‘conflict’ to align it with the word “සන්නද්ධ” Clause 27 (a)(i) of the Bill in the Sinhala language.

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



However, a careful examination of the words in Clause 13 disproves these concerns. The words expressly stipulate that the Office is only required to maintain confidentiality with regard to matters which are communicated to them in confidence, and that the Office for Reparations must in every other circumstance, particular in the exercise of its exercise and performance of its powers and functions must act in a transparent manner. *“Notwithstanding anything to the contrary in any other written law, except in the exercise and performance of its powers and functions under this Act, every member, officer and servant, appointed to the Office for Reparations shall preserve and aid in preserving confidentiality with regard to matters communicated to them in confidence, except to the extent that the requirement of confidentiality is waived by the person providing such information.”* We also observe that the requirement to maintain confidentiality is an exception recognized in Section 15 (I)(i) of the RTI Act itself.

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

We are not inclined to agree with this argument. Contrary to what the Petitioners have claimed, Clauses 4(1), 5 (1), 5(2) and 7 (2)(b) in no way erode the executive power of the President entrenched in Article 4(a) of the Constitution. Clause 4 (1) provides that the Office for Reparations shall consist of five members appointed by the President on the recommendation of the Constitutional Council. This is not hostile to the executive powers, but in fact reflects a Constitutional mechanism that already finds expression in Article 41B of the Constitution which reads; *“No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Council.”* This process of consultation in relation to power of appointment was introduced by the 19<sup>th</sup> Amendment to the Constitution in the determination of which this Court clearly opined that *“seeking the views of different stakeholders can in no way be offensive to the exercise of the powers of appointments. In fact, a consultative process will only enhance the quality of the appointments concerned.”* In a similar fashion, Clauses 5 (1) and (2) which state that members shall stand appointed to the Office where the President fails to make the necessary appointment within 14 days, are identical to Article 41B (4) of the Constitution. It is also important to note that under Article 41B (5), the

President's power to remove the appointees is subject to the prior approval of the Constitutional Council. In those circumstances, we observe that Clause 7 (2)(b), which requires the President to seek the concurrence of the Prime Minister, the Speaker and the Leader of the Opposition, aligns with the Constitutional framework. We also wish to reiterate this Court's words in SC SD 4-19/2015 that “[...] *the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance*”.

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

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

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

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

For the aforesaid reasons, we determine in terms of Article 123 (1) of the Constitution that Clause 27(a) and Clause 27(a)(iii) are inconsistent with Article 4(c) and Article 3 of the Constitution and could only become law if



the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

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

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

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

**B. P. Aluwihare, PC**

Judge of the Supreme Court.

**Priyantha Jayawardena, PC**

Judge of the Supreme Court.

**Prasanna Jayawardena, PC**

Judge of the Supreme Court.

|  |  |
|--|--|
| <b><i>First Reading:</i></b>   | 17.07.2018 (Hansard Vol. 262; No. 1; Col. 41-42)                           |
| <b><i>Bill No:</i></b>   | 255  |
| <b><i>Sponsor/Relevant Minister:</i></b>                             | Hon. Prime Minister and Minister of National Policies and Economic Affairs |
| <b><i>Decision of the Supreme Court Announced in Parliament:</i></b> | 07.08.2018 (Hansard Vol. 262; No. 5; Col. 738-742)                         |
| <b><i>Second Reading:</i></b>  | 10.10.2018 (Hansard Vol. 263; No. 10; Col. 1189- 1262)                     |
| <b><i>Committee of the Whole Parliament and Third Reading:</i></b>   | 10.10.2018 (Hansard Vol. 263; No. 10; Col. 1262- 1264)                     |
| <b><i>Hon. Speaker's Certificate:</i></b>                            | 22.10.2018   |
| <b><i>Title:</i></b>   | Office for Reparations Act, No. 34 of 2018.                                |

**S.C. (SD) No. 25/2018 to S.C.(SD) No. 28/2018**

**“MEDICAL (AMENDMENT) BILL”**

**BEFORE:**

S. Eva Wanasundera, PC - Judge of the Supreme Court  
H. N. J. Perera - Judge of the Supreme Court  
Prasanna Jayawardena, PC - Judge of the Supreme Court

**S.C. (SD) No. 25/2018**

Petitioner : Government Radiological Technologist Association,  
Epaga Dharmakeerthi  
Counsel : J. C. Weliamuna, PC with Suren Fernando and Ms. Thilini  
Vidanagamage

**S.C. (SD) No. 26/2018**

Petitioner : Academy of Health Professionals, Ravi Kumudesh  
Counsel : Saliya Pieris, PC with Thanuka Nandasiri and Geetha  
Karunarathna

**S.C. (SD) No. 27/2018**

Petitioner : The Nutrition Society of Sri Lanka, Professor  
Gamage Anoma Priyangani Chandrasekera, Roshan  
Kithsiri Delabandara  
Counsel : Sanjeeva Jayawardena, PC with Ranmalee  
Meepagala instructed by Ms. Kethaki Siriwardena

**S.C. (SD) No. 28/2018**

Petitioner : H. A. S. S. Hettiarachchi, J. F. Zimra  
Counsel : Pulasthi Hewamanne with Ms. Thilini Vidanagamage  
Respondent : Hon. Attorney-General  
Dr. Rajitha Senaratne (For petition Nos. S.C. (SD)  
27/2018 & S.C. (SD) 28/2018 only)  
Counsel : Viraj Dayaratne, PC, Additional Solicitor General with  
Dr. Avanti Perera, Senior State Counsel and Ms. Surekha  
Ahmed, State Counsel

**Court assembled for hearing on 31.07.2018 and finalized the Determination on 09.08.2018**

The Bill titled “Medical (Amendment) Bill” was published in the Gazette of the Democratic Socialist Republic of Sri Lanka Part II of 8<sup>th</sup> December, 2017 Supplement and placed on the Order Paper of Parliament on 17<sup>th</sup> July, 2018.

The Petitioners by their petitions filed under the numbers as aforementioned have invoked the jurisdiction of the Supreme Court under Article 121 read with Article 120 of the Constitution challenging the constitutionality of the said Bill on the ground that Clauses 3, 4, 5 and 6 of the said Bill are inconsistent with Articles 3, 4, 12(1), 12(2), 14(1)g, and Chapter IX containing Articles 54 and 55 of the Constitution. The Clauses 3, 4, 5 and 6 of the Bill have suggested amendments to Sections 12, 20, 39, and 74 of the Medical Ordinance (Chapter 105) which is the Principal Enactment.

The petitions were referred to this Bench by His Lordship the Chief Justice on 25<sup>th</sup> July 2018 with an Order to the Registrar to list them for hearing on 31<sup>st</sup> of July 2018. They were taken up for consideration together on the 31<sup>st</sup> of July with the consent of all parties.

The purpose of the Bill proposing the Amendments are summarized in the Statement of Legal Effect. Clause 2 amends Section 12 of the Medical Ordinance (Chapter 105) and the effect of the amendment would be to increase the number of members of the Medical Council by including three medical specialists and one dental specialist into the said council. The submissions made by the Petitioners in all the petitions we are considering at this hearing, moves that the number should be increased to include specialists from all other categories of persons who are already governed by the Medical Ordinance such as Radiologists, Nutritionists, Nurses, Laboratory Technologists, Dieticians, Pharmacists etc. who are included in the professions supplementary to Medicine. The rationale to this argument is that by the introduction of Clause 2, it will help to further advance the monopoly of the Medical Practitioners in the Sri Lanka Medical Council.

The Medical Ordinance No. 26 of 1927 as amended, recognized and regulated only medical practitioners, dentists, midwives, pharmacists, nurses, government apothecaries, estate apothecaries and estate dispensers until the year 1987. It was the Registrar of the SLMC who had to maintain separate registers for the said categories of persons in the health sector. By Medical (Amendment) Act No. 30 of 1987, “Para Medical Assistants” were recognized and a separate register was lawfully maintained for that category. Thereafter by Medical (Amendment) Act No. 40 of 1998, another new category was recognized as “Professions Supplementary to Medicine” and another register was maintained on their behalf. The Personnel included in that category are Radiographers, Medical Laboratory Technologists,

Physiotherapists, Occupational Therapists, Electrocardiograph Recordists, Audiologists, Clinical Psychologists, Speech Therapists, Chiropodists, Dieticians, Ophthalmic Auxiliaries, Electroencephalograph Recordists, Nutritionists and Clinical Psychologists. The Petitioners before this Court are those who represent the said categories of persons coming under “Professions Supplementary to Medicine” and “Para Medical Assistants”.

We observe that they are not persons who are entitled to practice medicine and surgery in terms of Section 41 of the Medical Ordinance. The Medical Ordinance restricts the membership of the SLMC by Section 13 which reads as follows:

“No person shall be eligible to be a member of the Medical Council unless he is a medical practitioner or a person entitled to practice medicine and surgery or a dentist.”. Of course, we observe that persons entitled to practice medicine and surgery include government apothecaries, estate apothecaries and estate dispensers.

The current composition of the Sri Lanka Medical Council is for 8 members to be elected by medical practitioners registered under Section 29 and one member to be elected by dentists registered under Section 43. They are elected by the medical practitioner and dentists. As at present, there is no way to assure that specialist medical practitioners and specialist dental practitioners get into the SLMC. By Clause 2 of the Bill, It is intended to ensure that medical and dental specialists are mandatorily included in the Council which we believe would benefit to regulate the health care service sector in which medical practitioners and dentists practice.

Whenever an Amendment to any Principal Enactment is being brought up by way of Bill in the first instance, it is usually understood as a piece of legislation which cannot totally change the basic provisions already contained in the Principal Enactment. In the determinations in hand, according to the provisions contained in Section 13 of the Medical Ordinance, the Petitioners who come under the categories of “para-medical assistants” and “members in professions supplementary to medicine” cannot secure even any membership in the SLMC, in any event. The threshold qualification to claim to membership in the SLMC is to be 'a medical practitioner or a person entitled to practice medicine and surgery or a dentist'. The Petitioners, according to the provisions of the Medical Ordinance as it is, cannot claim to be included in the categories of which the numbers are expected to be enhanced. The arguments before us to the extent of including the Petitioners into the SLMC fail. It has to be understood clearly that nobody can indirectly challenge the existing provisions of the law which act would be contrary to Article 80(3) of the Constitution. Any argument cannot go beyond the existing law.

The purpose of this proposed amendments by this Bill can be understood by

going through the Cabinet Memorandum dated 23<sup>rd</sup> June, 2015. The intention is quite well seen to be to protect and preserve the standards in health service sector in line with the practice in other countries. When a medical practitioner gets a specialist qualification at one time or another in his career, the practice so far adopted in Sri Lanka has been to just ‘note the “specialist qualification” as an additional qualification’, in the same register where the particular medical practitioner’s name appears as a medical practitioner under his basic qualification MBBS is registered. We ourselves find it quite difficult to understand why it has got continued in that manner all this time. The names of specialists in any subject should be available to be recognized and given prominence to since they are specialized on that subject.

The cabinet memorandum reads thus: “There is no provision in the Medical Ordinance for maintaining a separate register for Special Medical Officers. The practice adopted by the Sri Lanka Medical Council so far is to register the specialist qualification as an additional qualification in the same registry and the same folio of the particular officer whose basic MBBS qualification is registered. In other countries, Separate registries are maintained for separate specialties. Worldwide this is considered as an essential prerequisite to maintain standards in order to safeguard the general public.”.

The benefits of a separate registry for those who are specialists were identified in the said Cabinet Memorandum as follows:-

1. Patients have every right to differentiate a specialist from a non-specialist as the register would be accessible to everyone.
2. This enables the Certifying Authority to define the required criteria one should fulfill to be included in the Register.
3. The Appointing Authority will be compelled to appoint specialists based on standards prescribed by the Certifying Authority.
4. This will enable other organizations such as the private health sector to follow and conform to the above standards in enrolling specialists.
5. This prohibits unqualified and part qualified individuals engaging in specialist practice.
6. Such register would help insurance providers, legal authorities and agents issuing medical certificates for foreign employment to authenticate specialist practitioners.

Since these were the objectives of the proposals contained in the Cabinet Memorandum, the Cabinet had approved the same and thus this Bill has been drafted accordingly.

Clause 2 has moved to increase the number of members of the SLMC to include the specialists. Clause 3 has amended Section 20 of the Medical Ordinance to keep a register of names of medical and dental specialists. Clause 4 has introduced new Sections, namely Section 39A, 39B, and 39C in order to specify the qualifications necessary to be registered as a medical or dental specialist, provide for the SLMC to register medical and dental specialists who have the requisite qualifications and make registration compulsory for practicing as a medical or dental specialist.

The arguments of the Petitioners were that they are specialists in their field and they are qualified but this Bill does not recognize them to be able to become members of the SLMC. We have considered the reason why they cannot become members of the Council earlier in this Determination but in addition we would like to state that if the Petitioners also want to get any register maintained by the Authorities with regard to their specialities, they could do so but not as “medical practitioners” according to the prevailing provisions in the Medical Ordinance. On the other hand, Article 12 of the Constitution envisages that there can be no discrimination among equals. We cannot see the 'medical practitioner specialists' as equals of 'para-medical assistants' and/or 'members in professions supplementary to medicine'. Therefore it cannot be held that the creation of the Specialist Register of the Medical Practitioners violates any fundamental rights of the Petitioners under Article 12.

The arguments of the Petitioners regarding the amendments to Section 39 are different to the arguments regarding the other Clauses. To make it easy to be referred to, we wish to reproduce the proposed amendment as follows:-

“39(A)(1)- A medical practitioner under Sec. 29, who possesses a qualification required for Specialist Medical Officer Grade, as specified in the Medical Service Minute, shall be eligible to be registered as a medical specialist under Section 39B.”

The Petitioners argued that Medical Service Minute referred to in the proposed amended Sec. 39A refers only to a Grade in the Public Service and that it does not refer to any specialities in medicine. The definition of the said Medical Service Minute in the proposed amendment to Section 74 of the Medical Ordinance is impugned as an encroachment on the Parliament's legislative power. They further argued that it gives the Post Graduate Institute of Medicine (PGIM) the monopoly over the selection of the Specialists.

It is necessary to understand that the law maker, the Parliament cannot be expected to be making laws to open up a specialist register for Medical Practitioners who are in the private sector in this Country as well as those who are allowed to practice in this Country for a limited period of time

which is legalized through procedural law by way of an Amendment to the Medical Ordinance. The proposed 'Medical Specialist Register' is surely meant for those who are already registered under MBBS holders, giving priority to the public sector. The private sector Medical Practitioner Specialists have not come before this Court challenging the Bill.

The PGIM is the only body which provides Board Certification to practice a specialty in medicine and dentistry. PGIM was established on 01.01.1980. Still there could be medical practitioners and dentists who had commenced practicing as specialists prior to the date that PGIM came into being. That category of specialists are already recognized in the Medical Service Minute which was published in the Government Gazette Extraordinary No. 1883/17 of 11.10.2014. It is explained thus by the State in their written Submissions that, therefore, the only way to accommodate pre-1980 qualified specialists is by reference to the Medical Service Minute.

The Medical Service Minute in paragraphs I, II, and III of second column in the Table at Clause 11.2.1 relates to a particular Grade in the public service and that is the reason for including the word 'Grade' in the proposed amendment to Section 39 as 39A, meaning the qualifications required for such Grade and not just the 'Grade'. Anyway, it is part of the procedural law which can change from time to time and that is the rationale behind the reference in the proposed Section to the Medical Service Minute. This reference to the Medical Service Minute does not in any way as interpreted in the proposed amendment to Section 74 encroach upon the Parliament's legislative power as argued by the Petitioners.

Section 29 and 38 of the Medical Ordinance are in place to ensure that only those with the requisite qualifications and registration can work as medical practitioners. The proposed Section 39B and 39C are the corresponding similar provisions with regard to Medical Specialists, thus ensuring the safety of patients and preventing misrepresentation. It is obvious that if anyone challenges the proposed Sections 39B and 39C, they are indirectly impugning Sections 29 and 38 of the Principal Enactment which cannot be allowed since it is contrary to Article 80 (3) of the Constitution.

Having gone through the legal authorities submitted by the Petitioners and the arguments in detail re-iterated by the written submissions as well as all other related matters mostly regarding public policy, we are of the view that the provisions of the Bill are not inconsistent with any provisions of the Constitution.

Thus we do hereby make the determination in terms of Article 121(3) of the Constitution that the Medical (Amendment) Bill which is impugned by the Petitioners is not inconsistent with any provisions of the Constitution and as such may be passed by Parliament by a simple majority of members present and voting.

We wish to place on record our appreciation for the assistance rendered to Court by Viraj Dayaratne PC, Additional Solicitor General, Dr. Avanti Perera, Senior State Counsel and Surekha Ahamed, State Counsel.

**S. Eva Wanasundera, PC.**  
Judge of the Supreme Court

**H. N. J. Perera**  
Judge of the Supreme Court

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

|  |   |
|--|---|
| <b><i>First Reading:</i></b>   | 17.07.2018 (Hansard Vol. 262; No. 1; Col.42)          |
| <b><i>Bill No:</i></b>   | 257   |
| <b><i>Sponsor/Relevant Minister:</i></b>                             | Minister of Health, Nutrition and Indigenous Medicine |
| <b><i>Decision of the Supreme Court Announced in Parliament:</i></b> | 09.08.2018 (Hansard Vol. 262; No. 07; Col. 965-970)   |
| <b><i>Second Reading:</i></b>  | 07.09.2018 (Hansard Vol. 263; No. 04; Col. 261-335)   |
| <b><i>Committee of the Whole Parliament and Third Reading:</i></b>   | 07.09.2018 (Hansard Vol. 263; No. 04; Col. 335-342)   |
| <b><i>Hon. Speaker's Certificate:</i></b>                            | 19.09.2018  |
| <b><i>Title:</i></b>   | Medical (Amendment) Act, No. 28 of 2018.              |



**S.C.(SD) No. 29/2018 to S.C.(SD) No. 40/2018**

**“TWENTIETH AMENDMENT TO THE CONSTITUTION BILL”**

**BEFORE:**

Sisira J. de Abrew - Judge of the Supreme Court  
Prasanna Jayawardena - Judge of the Supreme Court  
Murdu Fernando - Judge of the Supreme Court

**S.C.(SD) No. 29/2018**

Petitioner : Udaya Prabhath Gammanpila  
Counsel : Manohara de Silva, PC with Canishka Witharana and  
Boopathi Kahathuduwa  
Intervient Petitioner : Vijitha Herath  
Counsel : Geoffrey Alagaratnam, PC with Suren Fernando  
instructed by Sunil Watagala  
Intervient Petitioner : Gamini Viyangoda  
Counsel : Suren Fernando with K. Wickramanayake and Shiolma  
David  
Intervient Petitioner : Centre for Policy Alternatives (Guarantee)  
Limited  
Counsel : M. A. Sumanthiran, PC with Viran Corea, Bhavani  
Fonseka, Susmitha Thayanandan and Inshira Faliq  
Intervient Petitioner : Dr. Paikiasothy Saravanamuttu  
Counsel :  
Intervient Petitioner : Lal Wijenayake  
Counsel : Suren Fernando

**S.C.(SD) No. 30/2018**

Petitioner : Nagananda Kodithuwakku  
Counsel : Petitioner in person

**S.C.(SD) No. 31/2018**

Petitioner : Prof. Channa Jayasumana

Counsel : M.U.M. Ali Sabry, PC with Ruwantha Cooray, Shehani Alwis instructed by Atula De Silva

**S.C.(SD) No. 32/2018**

Petitioner : Iththakande Saddhathissa Thero

Counsel : Sanjeewa Jayawardena PC with Rukshan Senadheera

**S.C.(SD) No. 33/2018**

Petitioner : Ven. Elle Gunawansa Thero

Counsel : Gamini Marapana with Navin Marapana and Uchitha Wickramasinghe

**S.C.(SD) No. 34/2018**

Petitioner : Dr. Maduruoye Dhammissara Thero,  
Dr. Gunadasa Amarasekera,  
G. Anuradha N. Yahampath

Counsel : Kalyananda Thiranagama instructed by Nimal Wickramasinghe

**S.C.(SD) No. 35/2018**

Petitioner : Raja Gooneratne,  
Gange Dinesh De Silva

Counsel : Nayantha Wijesundara

**S.C.(SD) No. 36/2018**

Petitioner : Mohamed Uwais Mohamed Rizwan

Counsel : Rushdhie with C. M. A. T. Serasinghe and S. Maharoof

**S.C.(SD) No. 37/2018**

Petitioner : R. Ranga Dayananda

Counsel : Uditha Egalahewa PC with Ranga Dayananda

**S.C.(SD) No. 38/2018**

Petitioner : Wijesuriya Arachchige Palitha Senadeera

Counsel : Canishka G. Witharana with Tissa Yapa,  
H.M. Thilakarathna and Chandana Botheju

Intervenant Petitioner : Mohamed Azath Sanoon Sally

Counsel : Chrishmal Warnasuriya

**S.C.(SD) No. 39/2018**

Petitioner : Premanath C. Dolawatte  
Counsel : Canishka G. Witharana

**S.C.(SD) No. 40/2018**

Petitioner : Samaraweera Arachchige Jayantha Samaraweera  
Counsel : Dharshana Weraduwaage with Kapila Gamage instructed  
by G.T. Madhubashini  
Respondent : Hon. Attorney-General  
Hon. Vijitha Herath, M.P. (*for petition S.C.(SD)  
No.30/2018 only*)  
Counsel : Dilrukshi Dias Wickramasinghe, PC, Senior Additional  
Solicitor General with Indika Demuni de Silva, PC,  
Additional Solicitor General, Nerin Pulle, Deputy  
Solicitor General, Shaheeda Barrie, Senior State  
Counsel and Suren Gnanaraj, State Counsel

**The Court assembled for the hearing at 10.00 a.m. on 12.09.2018, 13.09.2018, 14.09.2018 and 17.09.2018.**

A Bill titled “Twentieth Amendment to the Constitution” was published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 09.07.2018 and has been placed on the Order Paper of Parliament on 05.09.2018.

The long title of the Bill reads as “An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka.”.

The above named Petitioners presented petitions to this Court in respect of the above Bill in terms of Article 121 of the Constitution. The said Petitions were taken up for consideration. Learned Counsel appearing for the Petitioners and Interventient Petitioners and the Learned Senior Additional Solicitor General made submissions. The Petitioners, in their petitions have stated that Clauses 1 to 38 of the Bill titled ‘Twentieth Amendment to the Constitution’ are inconsistent with Articles 3, 4, 30(2) and 83 of the Constitution. Learned Counsel appearing for the Petitioners contended that the Bill should be approved by the People at a Referendum.

Learned Counsel who appeared for the Petitioners further contended that the main objects of the proposed 20<sup>th</sup> Amendment Bill are to abolish the election of the President of the Republic by the People (Presidential Election) and to remove the Executive Powers of the President of the Republic. We will now examine whether the proposed 20<sup>th</sup> Amendment Bill would abolish the

election of the President of the Republic by the People. When we consider the above contention, it is necessary to consider Clause 4 of the Bill which reads as follows:-

Clause 4: *“Article 31 of the Constitution is hereby repealed.”*

Article 31 of the Constitution reads as follows:-

**31.** *(1) Any citizen who is qualified to be elected to the office of President may be nominated as a candidate for such office –*

*(a) by a recognized political party; or*

*(b) if he is or has been an elected member of the legislature, by any other political party or by an elector whose name has been entered in any register of electors.*

*(2) No person who has been twice elected to the office of President by the People, shall be qualified thereafter to be elected to such office by the People.*

*(3) The poll for the election of the President shall be taken not less than one month and not more than two months before the expiration of the term of office of the President in office.*

*(3A) (a) (i) Notwithstanding anything to the contrary in the preceding provisions of this Chapter, the President may, at any time after the expiration of four years from the commencement of his first term of office, by Proclamation, declare his intention of appealing to the People for a mandate to hold office, by election, for a further term.*

*(ii) Upon the making of a Proclamation under subparagraph (i) the Commissioner of Elections shall be required to take a poll for the election of the President.*

*(b) If, at any time after the date of Proclamation referred to in paragraph (a), and before the close of the poll at the election held in pursuance of such Proclamation, the President in office dies, such Proclamation shall be deemed to have been revoked with effect from the date of such death and the election to be held in pursuance of such Proclamation shall be deemed to be cancelled. The vacancy in the office of President caused by such death shall be filled in accordance with the provisions of Article 40.*

*(c) (i) If, at any time between the close of the poll at an election held under this paragraph and the declaration*

*of the result of such election, a candidate at such election dies, the Commissioner of Elections shall proceed with the count and declare the result of such election, notwithstanding the death of such candidate.*

*(ii) If the person entitled to be declared elected as President is dead at the time of the declaration of the result of such election, the Commissioner of Elections shall not declare the result of such election but shall take a fresh poll for the election of the President.*

*(iii) If by reason of the death referred to in sub-paragraph (i) there is a vacancy in the office of President, the Prime Minister shall act in the office of President during the period between the occurrence of such vacancy and the assumption of office by the new President and shall appoint one of the other Ministers of the Cabinet to act in the office of Prime Minister:*

*Provided that if the office of Prime Minister be then vacant or the Prime Minister is unable to act, the Speaker shall act in the office of President.*

*(d) The person declared elected as President at an election held under this paragraph shall, if such person-*

*(i) is the President in office, hold office for a term of five years commencing on such date in the year in which that election is held (being a date after such election) or in the succeeding year, as corresponds to the date on which his first term of office commenced, whichever date is earlier; or*

*(ii) is not the President in office, hold office for a term of five years commencing on the date on which the result of such election is declared.*

*(e) A person succeeding to the office of President under the provisions of Article 40 shall not be entitled to exercise the right conferred on a President by sub-paragraph (a) of this paragraph.*

*(f) For the purposes of this paragraph, the first term of office of the first President referred to in Article 160 shall be deemed to have commenced on February 4, 1978.*

*(4) Where a poll for the election of a President is taken, the term of office of the person elected as President at such election shall commence on the expiration of the term of office of the President in office:*

*Provided that notwithstanding anything to the contrary in Article 40 –*

- (a) if any person declared elected as President at a poll for the election of a President dies at any time after his being declared elected as President and before the date on which his term of office would, but for his death, have commenced, the Commissioner of Elections, shall take a fresh poll for the election of a President. If the date fixed for such fresh poll is a date later than such first-mentioned date, the term of office of the person declared elected at such poll shall, notwithstanding the preceding provisions of this Article, be deemed to have commenced on such first-mentioned date. For the purposes only of Article 38(1)(d), the date of commencement of the term of office of the new President shall be the date of his election;*
- (b) where the President in office is not a candidate or is not re-elected, at a poll for the election of a President, his term of office shall be deemed to have expired on the date on which the result of such election is declared. The person elected as President at such election shall assume office forthwith, but not later than two weeks from such date:*

*Provided that the President in office, notwithstanding anything to the contrary in Article 30, shall continue to exercise, perform and discharge the powers, duties and functions of the office of President until the assumption of office by the person declared elected as President. If the office of President becomes vacant, by reason of the person declared elected as President failing to assume office, the President in office shall continue to exercise, perform and discharge the powers, duties and functions of the office of President, until the Prime Minister or if the office of Prime Minister be then vacant or if the Prime Minister be unable to act, the Speaker commences to act in the office of President in terms of Article 40;*

- (c) if by reason of the death referred to in sub-paragraph (a) there is a vacancy in the office of President, the Prime Minister shall act in the office of President during the period between the occurrence of such vacancy and the assumption of office by the new President and shall appoint one of the other Ministers of the Cabinet to act as Prime Minister:*

*Provided that if the office of Prime Minister be then vacant or the Prime Minister is unable to act, the Speaker shall act in the office of President.*

*(5) The election of the President shall be conducted by the Commissioner of Elections who shall fix the date for the nomination of candidates for such election and the date on which the poll shall be taken.*

*(6) Parliament shall by law make provision for-*

- (a) the nomination of candidates for the election of President;*
- (b) the register of electors to be used at and the procedure for the election of the President;*
- (c) the creation of offences relating to such election and the punishment therefor;*
- (d) the grounds and manner of avoiding such election and of determining any disputed election; and*
- (e) all other matters necessary or incidental thereto.*

It is therefore seen that if Article 31 is repealed, it would abolish the election of the President of the Republic by the People. In short it would abolish Presidential Election. Then the power given to the People to elect the President of the Republic would be removed from the People without consulting them. In other words, the franchise of the people which would be exercised at an election of the President of the Republic by the People (Presidential Election) would be withdrawn. Thus the necessary question that would arise is whether the abolition of the election of the President of the Republic by the People (Presidential Election) which would be conducted by the Commissioner of Elections would violate Article 4(e) of the Constitution. Article 4 (e) of the Constitution reads as follows:-

*“The Sovereignty of the People shall be exercised and enjoyed in the following manner :—*

- (a) omitted*
- (b) omitted*
- (c) omitted*
- (d) omitted*
- (e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.”.*

Therefore it is seen that if the election of the President of the Republic by the People (Presidential Election) is abolished, the franchise of the people

that would be exercised by the People at the said election would be removed. Therefore, removal of the franchise of the people that would be exercised by the People at an election to elect the President of the Republic would violate Article 4 (e) of the Constitution.

We have earlier pointed that one of the main objects of the proposed 20<sup>th</sup> Amendment Bill is to remove executive powers of the President of the Republic. Although there are several Clauses in the proposed 20<sup>th</sup> Amendment Bill to establish this contention, we will now point out Clause 14 (1) of the Bill which reads as follows:-

**Clause 14 (1) of the Bill:**

*“Article 42 of the Constitution is hereby amended as follows:-*

*(i) By deletion of the words, “President”, in paragraph (3) thereof, and the substitution therefore of the words “Prime Minister”;*

Therefore if the proposed 20<sup>th</sup> Amendment Bill is enacted, Article 42(3) of the Constitution would read as follows:

*“The Prime Minister shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers.”.*

Therefore if the proposed 20<sup>th</sup> Amendment Bill is enacted, the President of the Republic would cease to be the Head of the Cabinet of Ministers and would also cease to be a member of the Cabinet. Article 4(b) of the Constitution reads as follows:-

*“The Sovereignty of the People shall be exercised and enjoyed in the following manner:-*

- (a) omitted*
- (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People*
- (c) omitted*
- (d) omitted*
- (e) omitted”*

If the proposed 20<sup>th</sup> Amendment Bill is enacted, Article 4(b) after the amendment would read as follows:-

*“The Sovereignty of the People shall be exercised and enjoyed in the following manner:—*

*(c) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic and the cabinet of Ministers as provided for in the Constitution.”.*



It is therefore seen that executive power of the People which is presently with the President of the Republic would, if the proposed 20<sup>th</sup> Amendment Bill is enacted, not be exercised by him as set out in Article 4(b) of the Constitution but by the President of the Republic **and the Cabinet of Ministers**. This clearly demonstrates that there would be removal or erosion of the executive powers of the President of the Republic if the proposed 20<sup>th</sup> Amendment Bill is enacted. To reach a conclusion that the proposed 20<sup>th</sup> Amendment Bill would remove or reduce the executive powers of the President of the Republic by the 20<sup>th</sup> Amendment Bill, it is not necessary to discuss all the Clauses in the Bill relating to the removal of the executive powers of the President of the Republic.

For the above reasons, we hold that the proposed 20<sup>th</sup> Amendment would remove or reduce the executive powers of the President of the Republic. If any Bill intends to remove or reduce the executive powers of the President of the Republic, it would violate Article 4(b) of the Constitution.

We have earlier pointed out that the proposed 20<sup>th</sup> Amendment would remove or reduce the executive powers of the President of the Republic. We therefore hold that the proposed 20<sup>th</sup> Amendment would violate Article 4(b) of the Constitution. Now the question that must be decided is if a Bill violates any one or more of Article 4(a), (b), (c) and (e) of the Constitution whether it would violate Sovereignty of the People. If a Bill violates Sovereignty of the People, it would violate Article 3 of the Constitution and for such a Bill to become law, it has to be passed by 2/3<sup>rd</sup> majority of the Members of Parliament (including those not present) and has to be approved by the People at a Referendum as set out in Article 83 of the Constitution.

Mr. Sumanthiran Learned President's Counsel appearing for one of the Interventient Petitioners however contended that since Article 4 is not found in the list of Articles set out in Article 83 of the Constitution, violation of Article 4 would not attract the provisions of Article 83 of the Constitution. In short his contention was that even if a Bill violates Article 4 of the Constitution, such a Bill need not be approved by the People at a Referendum. Learned Senior Additional Solicitor General who appeared for the Attorney-General submitted that the Bill should be approved by the People at a Referendum in terms of Article 83 of the Constitution. For the purpose of clarity we would state here the Article 83 of the Constitution.

*“Notwithstanding anything to the contrary in the provisions of Article 82 —*

*(a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11 or of this Article, and*

- (b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of, paragraph (2) of Article 62 which would extend the term of office of the President, or the duration of Parliament, as the case may be, to over six years,

*shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80."*

Mr. Sumanthiran further contended that the proposed 20<sup>th</sup> Amendment Bill will not have a prejudicial impact on Sovereignty of the People. We now advert to the above contentions. What is Sovereignty? What is the power that is found in Sovereignty? In order to find an answer to these questions it is necessary to consider Article 3 and 4 of the Constitution which reads as follows:-

Article 3 of the Constitution -

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

Article 4 of the Constitution reads as follows:-

*The Sovereignty of the People shall be exercised and enjoyed in the following manner :-*

- (a) *the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*
- (b) *the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*
- (c) *the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;*
- (d) *the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or*

*denied, save in the manner and to the extent hereinafter provided;  
and*

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

According to Article 3 of the Constitution, Sovereignty includes the powers of the Government. What are the powers of the Government? They are the legislative power of the People, the Executive Power of the People and the Judicial Power of the People. How are the said powers of the Government exercised? The powers of the Government are exercised by and through three organs. They are Legislature, Executive and the Judiciary. The legislative power of the People is exercised by the Parliament consisting of elected representatives of the People and by the People at a Referendum. (Vide Article 4(a) of the Constitution). The executive power of the People is exercised by the President of the Republic elected by the People. (Vide Article 4(b) of the Constitution). The judicial power of the People is exercised by Parliament through courts. (Vide Article 4(c) of the Constitution). According to Article 3 of the Constitution Sovereignty includes the powers of the Government. The way in which the Sovereignty is exercised is explained in Article 4 of the Constitution. When we consider Articles 3 and 4 of the Constitution, we feel that the Sovereignty is

1. the legislative power of the People,
2. the executive power of the People,
3. the judicial power of the People, and
4. the franchise of the People

that would be exercised at Presidential Election, Parliamentary Election and Referendum. Therefore it is correct to say that the franchise of the People that would be exercised at Presidential Election, Parliamentary Election and Referendum is a **part of Sovereignty** and the executive power of the People which would be exercised by the President of the Republic is also a **part of Sovereignty**.

For the above reasons, we hold that if a Bill violates executive power of the People [Article 4(b) of the Constitution] and franchise of the people that would be exercised at a Presidential Election, a Parliamentary and a Referendum, it would violate the Sovereignty of the People and thereby would violate Article 3 of the Constitution. We have pointed out earlier that the proposed 20<sup>th</sup> Amendment Bill violates Article 4(b) of the Constitution. We have earlier held that the executive power of the People which would be

exercised by the President of the Republic [Article 4(b)] is also a part of Sovereignty. Therefore it can be safely concluded that Clauses in the Bill relating to the removal or reduction of the executive power of the People which would be exercised by the President of the Republic would directly violate Article 3 of the Constitution and that therefore they should be approved by the People at a Referendum.

We have earlier pointed out that the franchise that would be exercised at a Presidential Election, a Parliamentary Election, a Referendum is a part of Sovereignty. The proposed Bill seeks to remove this franchise in so far as a Presidential Election is concerned. Therefore the Clauses of the Bill relating to the removal of this franchise would directly violate Sovereignty. Therefore these Clauses would directly violate Article 3 of the Constitution.

The above views are supported by the following judicial literature.

His Lordship Justice R. S. Wanasundera in his dissenting judgment in the case of *In the Thirteenth Amendment to the Constitution* [1987] 2 SLR page 312 at pages 338 and 339 made the following observation:

*“The question as to the extent of the application of Article 4 however could be raised, still, in any particular matter. It is not only Article 4 that we have often linked with Article 3, but by the same token our rulings would cover any Article in the Constitution which the Court considers as being linked with any of the entrenched Articles so as to constitute a basic feature, of the Constitution.*

*There are sufficient guidelines in the wording of the Constitution itself to assist a Court in this task. The Preamble to the Constitution declares the representatives of the People were elected” to constitute SRI LANKA into a DEMOCRATIC SOCIALIST REPUBLIC, whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY, and assuring to all peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that Qua tees the dignity and wellbeing of succeeding generations of the People of SRI LANKA and of all the people of the World, who come to share with those generations the effort of working for the creation and preservation of a JUST AND FREE SOCIETY.”*

*Again, I said earlier Article 4 spells out the concept in Article 3 the Sovereignty of the People is organized into the three great departments of Government-namely, the Legislature, the Executive and the Judiciary. Fundamental Rights is again referred to in Article 4(d), but its substantive provisions lie elsewhere. The franchise is also referred to in Article 4(e), but there are numerous provisions elsewhere relating to the franchise.”.*

**His Lordship Chief Justice S. N. Silva in the case of *In Re Nineteenth Amendment to the Constitution* [2002] 3 SLR 85 at 96 to 98 made the**

following observation:

*“Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People, to include –*

- (1) the powers of Government;*
- (2) the fundamental rights; and*
- (3) the franchise.*

*Fundamental rights and the franchise are exercised and enjoyed directly by the people and the organs of government are required to recognize, respect, secure and advance these rights.*

*The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power “of the People” shall be exercised by Parliament; the executive power “of the People” shall be exercised by the President and the judicial power “of the People” shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.*

*Therefore, the statement in Article 3 that sovereignty is in the People and is “inalienable”, being an essential element which pertains to the sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4. The relevant sub paragraphs would then read as follows :*

- (a) the legislative power of the People is inalienable and shall be exercised by Parliament;*
- (b) the executive power of the People is inalienable and shall be exercised by the President; and*
- (c) the judicial power of the People is inalienable and shall be exercised by Parliament through Courts.*

*The meaning of the word “alienate”, as a legal term, is to transfer anything from one who has it for the time being to another, or to*

*relinquish or remove anything from where it already lies. Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution in one organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution."*

**His Lordship Chief Justice S. N. Silva in the case of In Re Eighteenth Amendment to the Constitution [2002] 3 SLR 71 held as follows:-**

*"Articles 3 and 4 must be read together and hence no organ of government shall alienate the sovereignty of the People in the exercise of its power entrusted to it. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. That would be inconsistent with the Rule of Law."*

When we consider the above judicial literature, we are unable to agree with the contention of Mr. Sumanthiran, President's Counsel.

We would like to point out another aspect as to how the Bill would violate Sovereignty of the People.

Article 3 of the Constitution sets out a very important principle that is to say that Sovereignty is inalienable. We have earlier held that the franchise that would be exercised at a Presidential Election, a Parliamentary Election and a Referendum is a part of Sovereignty. The 'Sovereignty is inalienable'. Therefore if a Bill is enacted removing the franchise of the People which would be exercised at a Presidential election, the principle enshrined in Article 3 of the Constitution that the 'Sovereignty is inalienable' would be violated. If a Bill violates Article 3 of the Constitution it has to be approved by the People at a Referendum. The proposed 20<sup>th</sup> Amendment Bill removes the franchise of the People that would be exercised at a Presidential Election. Therefore it violates the principle enshrined in Article 3 of the Constitution that the 'Sovereignty is inalienable'. Thus, Clauses in the Bill relating to removal of the franchise of the People that would be exercised at a Presidential Election would directly violate Article 3 of the Constitution. If a Clause of a Bill directly violates Article 3 of the Constitution, it has to be approved by the People at a Referendum. Therefore, we hold that provisions relating to removal of the franchise of the People that would be exercised at



a Presidential Election should be approved by the People at a Referendum.

Clauses No. 2, 3, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 and 36 of the Bill relate to the removal or reduction of executive power of the People that would be exercised by the President of the Republic elected by the People. We have earlier held that Clauses in the Bill relating to the removal or reduction of the executive power of the People which would be exercised by the President of the Republic would directly violate Article 3 of the Constitution and that therefore they should be approved by the People at a Referendum. We therefore hold that the above Clauses would directly violate Article 3 of the Constitution. Therefore, they will have to be passed by a special majority required under the provisions of Article 84(2) of the Constitution and approved by the People at a Referendum. We have examined the Bill. In our view, Clauses 2, 3, 4, 7, 10, 26, 27, 28, 29, 30, 32, 34, 35 and 37 of the Bill relate to the removal of the franchise of the People that would be exercised at a Presidential Election. We have earlier held that Clauses in the Bill relating to removal of the franchise of the People that would be exercised at a Presidential Election would directly violate Article 3 of the Constitution. We therefore hold that the above Clauses would directly violate Article 3 of the Constitution. Therefore, they will have to be passed by a special majority required under the provisions of Article 84(2) of the Constitution and approved by the People at a Referendum.

However, Clauses 17, 18, 24, 25, 31 and 33 of the Bill would not violate Article 3 of the Constitution and would not come within the ambit of Article 83 of the Constitution. Therefore, they need not be approved by the People at a Referendum and can be passed by a special majority specified in Article 82(5) of the Constitution.

Clauses 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 32, 34, 35, 36 and 37 of the 20<sup>th</sup> Amendment Bill will have to be passed by a special majority required under the provisions of Article 84 (2) of the Constitution and approved by the People at a Referendum.

Clauses 17, 18, 24, 25, 31 and 33 of the Bill can be passed by a special majority specified in Article 82 (5) of the Constitution.

**Sisira J. de Abrew**

Judge of the Supreme Court

**Prasanna Jayawardana**

Judge of the Supreme Court

**Murdu Fernando**

Judge of the Supreme Court

*Decisions of the Supreme Court on Parliamentary Bills - 2018*

|  |   |
|--|---|
| <b><i>First Reading:</i></b>   | 05.09.2018 (Hansard Vol. 263; No. 2; Col. 120)            |
| <b><i>Bill No:</i></b>   | 266   |
| <b><i>Sponsor/Relevant Minister:</i></b>                             | Hon. Vijitha Herath                                       |
| <b><i>Decision of the Supreme Court Announced in Parliament:</i></b> | 09.10.2018 (Hansard Vol. 263; No.9; Col. 971-983)         |
| <b><i>Current Status</i></b>   | Pending Minister's Report<br>[ Standing Order No. 52(6) ] |



**S.C.(SD) No. 41/2018 to S.C.(SD) No. 47/2018**

**“COUNTER TERRORISM BILL”**

**BEFORE:**

|                         |                              |
|-------------------------|------------------------------|
| Sisira J. de Abrew      | - Judge of the Supreme Court |
| Vijith K. Malalgoda, PC | - Judge of the Supreme Court |
| Murdu Fernando, PC      | - Judge of the Supreme Court |

**S.C.(SD) No. 41/2018**

Petitioner : Duminda Nagamuwa

Counsel : Niran Anketel

**S.C.(SD) No. 42/2018**

Petitioner : Young Lawyers Association, Manju Sri Chandrasekera

Counsel : Nuwan Bopage with Chatura Weththasinghe

**S.C.(SD) No. 43/2018**

Petitioner : Wimal Weerawansa

Counsel : Manohara de Silva, PC with Canishka Witharana, Kapila  
Gamage, Boopathy Kahathuduwa instructed by G. T.  
Madubashini

**S.C.(SD) No. 44/2018**

Petitioner : S. C. C. Elankovan

Counsel : Pulasthi Hewamanne

**S.C.(SD) No. 45/2018**

Petitioner : S. S. Abdul Saroor

Counsel : Pulasthi Hewamanne

**S.C.(SD) No. 46/2018**

Petitioner : Aslam Othman

Counsel : Hejaaz Hizbullah with M. Jegatheeswary, Muneer  
Thaufeek, Mohamed Aslam and Shifan Maharoof  
instructed by Ms. Thusari Jayawardena

**S.C.(SD) No. 47/2018**

- Petitioner : K.M. Rukshan Fernando  
Ilandari Dewa Geethika Dharmasinghe  
Shiran Mario Illanperuma  
Ekeshwara Kottegoda Vithana
- Counsel : Ermiza Tegal with Ms. Swasthika Arulingam, Lakmali Hemachandra and Thiagi Piyadasa instructed by Priyalal Sirisena
- Respondent : Hon. Attorney- General
- Counsel : Yasantha Kodagoda, Additional Solicitor General, PC with Nerin Pulle, Deputy Solicitor General, Ms. Yuresha de Silva, Senior State Counsel and Ms. Kanishka de Silva, State Counsel

**The Court assembled for hearing on 18.10.2018, 19.10.2018, 22.10.2018 and 23.10.2018.**

A Bill titled “Counter Terrorism” was published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 14.09.2018 and has been placed on the Order Paper of Parliament on 09.10.2018.

The long title of the Bill reads as “An Act to make provision for the protection of Sri Lanka and the People of Sri Lanka from acts of terrorism and other offences associated with terrorism; for the prevention of terrorism and other offences associated with terrorism committed within or outside Sri Lanka; for the prevention of the use of Sri Lankan territory and its people for the preparation for terrorism outside Sri Lanka; to provide for the detection of acts of terrorism and other offences associated with terrorism; and to provide for the identification, apprehension, arrest, custody, detention, investigation, prosecution and punishment of any person who has committed an act of terrorism or any offence associated with terrorism; for the repeal of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979; and for matters connected therewith or incidental thereto.”

The above named Petitioners presented petitions to this Court in respect of the above Bill in terms of Article 121 of the Constitution. The said petitions were taken up for consideration. Learned Counsel appearing for the Petitioners and the Learned Additional Solicitor General made submissions. The Petitioners, in their petitions have stated that several Clauses of the Bill titled “Counter Terrorism” are inconsistent with Articles 3, 4, 10, 12 (1), 12 (2) and 14 of the Constitution. Learned Counsel appearing for the Petitioners contended that certain Clauses of the Bill should be approved by the People at a Referendum.

Learned Counsel for the Petitioners referring to Clause 2 (1) of the Bill contended that if a person commits an offence against the Government of Sri Lanka such a person is not covered by this Bill. He contended that any person who commits an offence under this Bill in respect of (1) a citizen of Sri Lanka and (2) a property owned by the Government of Sri Lanka, has been covered by Clause 2 (1) (c) of the Bill but any person who commits an offence in respect of the Government of Sri Lanka has not been covered by this Bill. He further contended that if any person wages war against the Government of Sri Lanka such a person has not been covered by this Bill. Relying on the above submission he submitted that the Bill violates Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the Constitution). I now advert to this contention. The above contention can be nullified if the following Clause is inserted as 2 (1) (c) (iii) in the Bill:

“(iii) the Government of Sri Lanka”. Then Clause 2 (1)(c) would read as follows:-

“(c) any person who commits an offence under this Act, within or outside the territory of the Republic of Sri Lanka in respect of-

- (i) a citizen of Sri Lanka including a citizen deployed in an international peace-keeping or monitoring mission;
- (ii) a property owned by the Government of Sri Lanka;
- (iii) the Government of Sri Lanka.”.

However, we will now consider whether the above argument of Learned Counsel for the Petitioners can be accepted or rejected. At this stage it is necessary to consider Clause 8(a) of the Bill. It reads as follows:-

*“Acts which constitute an offence under paragraph (b) of Section 6 shall be as follows:-*

*(a) Committing-*

- (i) an offence against the State, punishable under Sections 114 and 116 to 126;*
- (ii) an offence relating to Army, Navy, and Air Force, punishable under Sections 128 to 137;*
- (iii) the offence of human trafficking under Section 360c, of the Penal Code;”.*

Section 6 of the Bill deals with offences associated with terrorism. Section 114 of the Penal Code reads as follows:

*“Whoever wages war against the Republic, or attempts to wage such war, or abets the waging of such war, shall be punished with*

*death, or imprisonment of either description, which may be extended to twenty years, and shall forfeit all his property.”*

Thus it is clear that if any person wages war against the Government of Sri Lanka, such a person is covered by Clause 8 of the Bill. If a Foreign National wages war against the Government of Sri Lanka he is also covered under 2<sup>nd</sup> proviso to Clause 2(1) (d) of the Bill which reads as follows.

*“Provided further, that if he does not have his habitual residence in Sri Lanka, provisions of this Act, may be enforced with the concurrence of the foreign State of which he is a citizen;”.*

No argument can be advanced against the words ‘with the concurrence of the foreign State of which he is a citizen’ since it is common sense that the Government of Sri Lanka without the concurrence of the foreign State, cannot prosecute a Foreign National who does not reside in this country and has done acts of terrorism in the foreign country where he resides. For the above reasons, I reject the above contention of Learned Counsel for the Petitioners.

Learned Counsel for the Petitioners referring to the words ‘only if’ found in 1<sup>st</sup> proviso to Clause 2(1)(d) of the Bill contended that a person who had been a citizen of Sri Lanka and continues to have habitual residence in Sri Lanka is only covered by this Bill but not the others. He therefore contended that the Bill violates Article 12(1) of the Constitution. For the purpose of clarity we state below Clause 2(1)(d) of the Bill. It reads as follows:-

*“Any person who had been a citizen of Sri Lanka, and commits an offence under this Act, within or outside the territory of the Republic of Sri Lanka;*

*Provided however, provisions of this Act shall be enforced in respect of such person, only if he continues to have his habitual residence in Sri Lanka:*

*Provided further, that if he does not have his habitual residence in Sri Lanka, provisions of this Act, may be enforced with the concurrence of the foreign State of which he is a citizen;*

But this argument cannot be accepted as the 2<sup>nd</sup> proviso even deals with Foreign Nationals. For the above reasons we reject the above argument.

Learned Counsel for the Petitioners advanced an argument with regard to Clause 4(1)(a) and (b) of the Bill. Therefore it is necessary to state the said Clause below. Clause 4(1)(a) and (b) read as follows:-

**Clause 4 (1) (a) (b):-**

*“4. (1) Any person who -*

- (a) commits an offence under Section 3 with the intention to cause death, and causes the death of any other person in the course of committing such offence, shall, upon conviction by the High Court be punished with life imprisonment;*
- (b) commits an offence under Section 3 and causes the death of any other person in the course of committing such offence, of which the reasonable foreseeable consequence is the death of any other person, shall, upon conviction by the High Court be punished with imprisonment for a period which may extend to life imprisonment; or”.*

Learned Counsel for the Petitioners contended that any person who causes death of a person with the intention of causing death is sentenced to death under Section 296 of the Penal Code but any person with the intention of causing harm to territorial integrity or sovereignty of Sri Lanka and causing death of any other person causes death of a person is sentenced to life imprisonment in terms of Clause 4 of the Bill. Learned Counsel therefore contended that Clause 4 of the Bill violates Article 12(1) of the Constitution. Learned Additional Solicitor General however contended that imposition of death sentence is cruel and violates Article 11 of the Constitution. If this contention is accepted, this court would be indirectly declaring that Section 296 of the Penal Code violates Article 11 of the Constitution. Under and in terms of Articles 16 and 80(3) of the Constitution, this Court cannot make such a declaration. Therefore we hold that imposition of death sentence would not violate Article 11 of the Constitution. I now advert to the contention advanced by learned counsel for the Petitioners. When considering this contention it is necessary to consider Section 294 and 296 of the Penal Code. Section 294 of the Penal Code reads as follows:-

*“Except in the cases hereinafter excepted, culpable homicide is murder—*

*Firstly - If the act by which the death is caused is done with the intention of causing death ; or*

*Secondly - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or*

*Thirdly - If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death ; or*

*Fourthly - If the person committing the act knows that it is so*

*imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”.*

Section 296 of the Penal Code: *“Whoever commits murder shall be punished with death.”.*

Clause 3(1) of the Bill reads as follows:-

*“3. (1) Any person, who commits any act referred to in subsection (2), with the intention of –*

- (a) intimidating a population;*
- (b) wrongfully or unlawfully compelling the government of Sri Lanka, or any other government, or an international organization, to do or to abstain from doing any act,*
- (c) preventing any such government from functioning; or*
- (d) causing harm to the territorial integrity or sovereignty of Sri Lanka or any other sovereign country, shall be guilty of the offence of terrorism.*

Clauses 3(2) (a) read as follows:-

*“(2) An act referred to in subsection (1) shall be –*

- (a) murder, attempted murder, grievous hurt, hostage taking or abduction of any person;”*

It is necessary to consider illustration (a) of Section 294 of the Penal Code. It reads as follows:-

*“A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.”*

When Clauses 3 and 4 of the Bill are considered, we would like to make the following observation:-

When any person with the intention of

1. causing harm to the territorial integrity or sovereignty of Sri Lanka, or
2. wrongfully or unlawfully compelling the government of Sri Lanka to do or to abstain from doing any act

commits murder of a person (causes death of a person with the intention of causing death), he is sentenced to life imprisonment. But as set out in illustration (a) to Section 294 of the Penal Code, when A shoots Z with the intention of killing him and he dies, A is sentenced to death. Thus the principle enunciated in Article 12(1) of the Constitution is violated here.

Article 12(1) of the Constitution reads as follows:-

*“All persons are equal before the law and are entitled to equal protection of law.”*

Considering all the above matters, we hold that Clauses 4(a) and 4(b) of the Bill violate Article 12(1) of the Constitution.

According to Clause 5 of the Bill any person convicted of abetting an offence described in Clause 3 of the Bill will be sentenced to a term of fifteen years imprisonment and to a fine not exceeding rupees one million.

Learned Counsel for the Petitioners contended that according to Section 102 of the Penal Code, if a person is found guilty for abetting the offence of murder, he will be sentenced to death but in terms of Clause 5(1) of the Bill if a person is found guilty for abetting the offence of murder described in Clause 3 of the Bill, Court cannot impose death sentence on him and Court will have to sentence him to a term of fifteen years imprisonment and to a fine not exceeding rupees one million. Therefore, he contended that Clause 5 of the Bill violates Article 12(1) of the Constitution. But this contention cannot be accepted in view of Clause 5(2) of the Bill which reads as follows:-

*“If the offence of terrorism is committed consequent to the commission of an offence under subsection (1), the offender shall be punished with the same penalty as if he has committed the offence of terrorism.”*

For the above reasons, we reject the above contention of Learned Counsel for the Petitioners.

Learned Counsel for the Petitioners referring Clause 24(1) of the Bill contended that the officer-in-charge of a police station in which the suspect is detained can examine the suspect in order to see whether there are visible injuries. If there are injuries that are not visible to the naked eye of the officer-in-charge of the police station, what would be the position? If the suspect is a victim of a sexual assault what would be the position? These were the questions presented during the course of the argument by Learned Counsel for the Petitioners. He therefore contended that above Section would violate Article 11 of the Constitution. In terms of Clause 24(2) of the Bill, the officer-in-charge of a police station is required to produce the suspect before a Judicial Medical Officer (JMO) only if there are visible injuries. Thus, if an allegation is levelled against the officer-in-charge of a police station, he can always take up the defence that he did not see any injuries on the body of the suspect. This was the submission made by Learned Counsel for the Petitioners. But when the above contention is considered one must not forget Clause 27 (3) of the Bill which reads as follows:-

*“The Magistrate before whom the suspect is produced, shall*

- (a) personally see the suspect, and look into his well-being and welfare through a private interview; and*
- (b) record any comment the suspect may provide.”*

Therefore, it is seen if the suspect has any injury, he or she can complain to the Magistrate at the said private interview and the Magistrate can make an order to the effect that the suspect should receive medical treatment and be examined by a Judicial Medical Officer.

Learned Counsel for the Petitioners referring to Clause 27 (1) of the Bill contended that a Police Officer who arrested a suspect can keep the suspect for 48 hours in his custody without producing before the Magistrate and that therefore this Clause would violate Article 13 (2) of the Constitution. But even under Section 7 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, a Police Officer can keep a suspect arrested in connection with an offence under the said Act for a period of 72 hours. Thus, the power of a Police Officer that a suspect arrested in connection with an offence under the said Act can be kept in his custody for a period of 72 hours is a part of existing law. If this Court declares that 48 hours detention of a suspect by a Police Officer violates Article 13 (2) of the Constitution, this Court would be indirectly declaring that Section 7 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 would violate the Constitution. But, when we consider Article 16 and 80 (3) of the Constitution, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. Court must accept the existing law enacted by the Parliament as valid law. By Clause 27 (1) of the Bill the period of 72 hours detention is going to be reduced to 48 hours. When we consider the above matters the above contention of Learned Counsel for the Petitioners cannot be accepted.

According to Clause 27 (1) of the Bill, a suspect who has been arrested and detained by a Police Officer in terms of this Bill should be produced before any Magistrate within 48 hours of the arrest. According to Article 13 (2) of the Constitution such a suspect should be produced before the Judge of the nearest competent Court. It is therefore seen that production of a suspect under the said Clause takes place before **any** Magistrate but according to Article 13 (2) of the Constitution, production of a suspect should take place before the Judge of the **nearest competent Court**. Learned Counsel for the Petitioners therefore contended that Clause 27 (1) of the Bill would violate Article 13 (2) of the Constitution. I now advert to this contention. It has to be noted here, in terms of Clause 27 (1) of the Bill the Police Officer who arrested the suspect will have to produce him within 48 hours before a Magistrate. Therefore, the suspect is brought under the judicial supervision.



What is important in this Clause is the production of the suspect before a Magistrate within 48 hours of the arrest. Learned Additional Solicitor General submitted that there could be a situation where the Police Officer cannot reach the nearest Magistrate due to terrorist activities and in such a situation the most practical way is to produce the suspect before a Magistrate. In our view there is substance in this argument. When we consider all the above matters, we reject the argument of Learned Counsel for the Petitioners as there is no merit in it.

Learned Counsel for the Petitioners referring to Clause 27 (1) of the Bill contended that if a person is arrested by a member of an armed forces and/or a coast guard officer he too will have to be produced before a Magistrate but Clause 27 (1) of the Bill does not provide for such a situation. Learned Additional Solicitor General submitted that the Attorney-General would advise the Minister of Justice to introduce the following amendment as 27 (1) A:

“Following the production of a person who has been arrested by an officer or member of the armed forces or a coast guard officer, before the Officer-in-Charge of a police station or a designated Police Officer in terms of Section 18(1), such person shall be produced before any Magistrate by such Police Officer not later than forty eight hours following such person having been produced before such Police Officer.”. The above contention of Learned Counsel for the Petitioners is nullified with this amendment.

Learned Counsel for the Petitioners whilst referring to Clause 27 (2) (a) of the Bill contended that the words *‘the Magistrate shall make an order to give effect to such Detention Orders’* in the said Clause would violate Article 13(2) of the Constitution. But, it has to be noted here that when a Detention Order issued under The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 for a period of three months was in operation, there is no requirement to produce the suspect before a Magistrate. Clause 27(2) (a) of the Bill seeks to relax the above position and under this Clause even if there is a Detention Order the suspect will have to be produced before a Magistrate; the Detention Order must be placed before the Magistrate for his inspection; and the Magistrate will make an order giving effect to the Detention Order only if it is a valid Detention Order. Since the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 is an existing law. Court will have to consider the fact that it is consistent with the Constitution. If the existing law is consistent with the Constitution, relaxation of that law cannot violate the Constitution. Therefore, we reject the above contention of Learned Counsel for the Petitioners.

Learned Counsel for the Petitioners referring to Clause 27 (2) (b) of the Bill contended that when the officer-in-charge of a police station who fails to

produce a Detention Order before the Magistrate, makes an application to remand the suspect, the Magistrate has no option but to remand him. He therefore contended that the said Clause would violate Article 13 (2) of the Constitution. We now advert to this contention. Although Learned Counsel for the Petitioners, contended so, he has lost sight of the words ‘based on grounds that the Magistrate deems reasonable’ in the said Clause. The above words clearly indicate that the Magistrate has the power to use his discretion to remand or not to remand. For the above reasons we reject the above argument of Learned Counsel for the Petitioners.

Learned Counsel for the Petitioners referring to Clause 36 (6) (b) and 39 (4) of the Bill contended that the Magistrate has no discretion when making Orders under the said Clauses. Therefore these Clauses would violate Article 13 (2) of the Constitution. We now advert to this contention. At this juncture it is necessary to consider Clause 36(6) of the Bill. It reads as follows:-

36 (6)(a):- *“Where the Magistrate refuses to grant the extension of the Detention Order he shall inquire whether there exists any justifiable reason to remand the suspect.”*

36 (6)(b):- *“After the inquiry, if the Magistrate is of the opinion that there exists any reasonable ground to believe that the suspect has committed an offence under this Act, the suspect shall be placed in remand custody.”*

36 (6)(c):- *“Where there is no reason to believe that the suspect has committed an offence under this Act, he shall be released from detention.”*

The words ‘*whether there exists any justifiable reason*’ in Clause 36 (6)(a) of the Bill and the words ‘*there exists any reasonable ground*’ in Clause 36 (6)(b) of the Bill clearly indicate that the Magistrate can use his discretion. Further Clause 36 (6)(c) of the Bill clearly indicates that the Magistrate can use his discretion. Clause 39 (3) and 39 (4) of the Bill reads as follows:-

39(3) *“Upon completion of the period of detention under a Detention Order, the suspect shall be produced before a Magistrate.”*

39(4) *“Where upon such production the officer in charge of the relevant police station or any other Police Officer authorized by him informs the Magistrate that –*

- (a) there exists a well-founded grounds to believe that the suspect has committed an offence under this Act and that further investigations are being conducted: or*
- (b) the investigations have been completed and that the Attorney-General has been, or is to be requested to consider the*

*institution of criminal proceedings against the suspect.*

*the Magistrate shall direct that the suspect be detained in remand custody.”.*

According to Clause 39 (3) of the Bill, the suspect will have to be produced before the Magistrate upon completion of the period of Detention Order. According to Clause 39 (4) of the Bill, the Magistrate shall make a remand order when the officer-in-charge of a police station informs the Magistrate that there are well-founded grounds to believe that the suspect has committed an offence. What happens if the Magistrate decides that there are no grounds to believe that the suspect has committed an offence? Then the Magistrate cannot make an order remanding the suspect. The Magistrate also cannot make an order to detain the suspect as the period of detention has come to an end. Then the Magistrate can act under Section 36 (6)(c) and release him from detention. Clause 36 of the Bill discusses about a situation **before** the completion of the period of Detention Order. Clause 39 (3) and (4) of the Bill discuss about a situation **after** the completion of the period of Detention Order. If the Magistrate has power under Clause 36 (6)(c) of the Bill to release the suspect from detention **before** the completion of the Detention Order why can't the Magistrate under same Clause [36(6)(c)] of the Bill release the suspect from detention **after** the completion of the period of Detention Order when he decides that there are no reasonable or well-founded grounds to believe that the suspect has committed an offence? Therefore, the contention that the Magistrate's discretion has been taken away from this Bill and it would violate Article 13 (2) of the Constitution cannot be accepted and is hereby rejected. However, Learned Additional Solicitor General submitted that the Attorney-General would advise the Minister of Justice to move the following amendment to Clause 39 of the Bill.

*“.... if following the examination of a report submitted by the officer-in-charge of the police station, the Magistrate is satisfied that, there are exists prima facie, a basis to conclude that the suspect has committed an offence under this Act, he shall direct that the suspect be detained in remand custody.”*

Learned Counsel for the Petitioners referring to the words 'confidential report' in Clause 36 submitted that when the officer-in-charge of a police station files a confidential report the suspect would be at a disadvantageous position as he would not get the said report. But this argument is nullified since Clause 36 (3) of the Bill gives the opportunity to the suspect or his Attorney-at-Law to obtain information in the said report.

Learned Counsel for the Petitioners referring to Clause 68 (5) of the Bill contended that this Clause would violate Article 12 (1) of the Constitution. Clause 68 (5) of the Bill reads as follows:-

*“Where the suspect declines to make a statement to the Magistrate, such fact shall be communicated by the Magistrate to the relevant Police Officer and the suspect shall be kept in remand custody.”.*

Learned Counsel for the Petitioners contended that under this Clause even a suspect who is on bail can be remanded if he refuses to make a statement to the Magistrate and it would violate Article 12(1) of the Constitution. In our view Clause 68(5) would violate Article 12(1) of the Constitution. Learned Additional Solicitor General submitted that the Attorney-General would advise the Minister of Justice to move the following amendment to Clause 68(5) of the Bill:

*“Where the suspect declines to make a statement to the Magistrate, such fact shall be communicated by the Magistrate to the relevant Police Officer and if at the time the suspect was being detained in terms of a Detention Order or in remand custody, be returned to detention or remand custody as the case may be. If the suspect was already on bail he shall be enlarged on bail.”*

If this amendment is introduced to Clause 68 (5) of the Bill, violation of the Constitution discussed above would cease to operate.

Learned Counsel for the Petitioners referring to Clause 62 (1) and 81 of the Bill contended that when a proscription order in terms of Clause 81 of the Bill is made by the Minister, it would violate fundamental rights guaranteed by Article 14 (1) of the Constitution. Clauses 62 (1) of the Bill reads as follows:-

**“62 (1)** *“Where a Police Officer not below the rank of a Senior Superintendent of Police receives information that an offence under this Act is committed or likely to be committed, he may issue any one or more of the following directives to the public, for the purpose of protecting persons from harm or further harm, associated with such offence: -*

- (a) not to enter any specified area or premises;*
- (b) to leave a specified area or premises;*
- (c) not to leave a specified area or premises and to remain within such area or premises;*
- (d) not to travel on any road;*
- (e) not to transport anything or to provide transport to anybody;*
- (f) to suspend the operation of a specified public transport system;*
- (g) to remove a particular object, vehicle, vessel or aircraft from*

*any location;*

- (h) to require that a vehicle, vessel, ship or aircraft to remain in its present position;*
- (i) not to sail a vessel or ship into a specified area until further notice is issued;*
- (j) not to fly an aircraft out of, or into, a specified air space;*
- (k) not to congregate at any particular location;*
- (l) not to hold a particular meeting, rally or procession; and*
- (m) not to engage in any specified activity;*

*Provided however, no directive under paragraphs (k),(l) or (m) shall be issued, without the prior approval obtained from a Magistrate, who shall prior to the issuance of such directive satisfy himself the necessity for issuing the same and may make an order to issue such directive subject to such condition.”.*

Clause 81 (1) and (2) of the Bill read as follows:-

**“81. (1)** *“Notwithstanding anything in any other written law where the Minister has reasonable grounds to believe that any organization is engaged in any act amounting to an offence under this Act, or is acting in a manner prejudicial to the national security of Sri Lanka or any other country, he may by order published in the Gazette, (hereinafter referred to as "Proscription Order") proscribe such organization in terms of the provisions of this Act.”*

**(2)** *“A Proscription Order may be made by the Minister, for giving effect to-*

*(a) a recommendation made by the Inspector General of Police; or*

*(b) a request made by the Government of any foreign country to the Government of Sri Lanka.”.*

But, it has to be stated here that according to Article 15 (7) of the Constitution, the exercise of fundamental rights guaranteed by Article 14 of the Constitution shall be subject to restrictions as may be prescribed by law in the interest of national security. Thus, the Parliament can enact legislation placing restrictions in the exercise of fundamental rights guaranteed by Article 14 of the Constitution and enacting such legislation cannot violate the said fundamental rights. This Bill is one such legislation. For the above reasons we reject the above contention of Learned Counsel for the Petitioner.

According to Clause 72 of the Bill, the Attorney-General has the power to suspend and defer the institution of criminal proceedings against a person who is alleged to have committed certain offences under this Bill. The Attorney-General does not have this power in respect of certain offences. They are discussed in Clause 72 of the Bill. Learned Counsel for the Petitioners therefore contended that the Attorney-General encroaches to the judicial power of courts. He therefore contended that this Clause would violate Article 3 and 4 of the Constitution. We now advert to this contention. Although Learned Counsel contended so, the Attorney-General cannot take the above decision on his own. He will have to obtain sanction of the High Court to the imposition of one or more conditions stipulated in Clause 72 (3) of the Bill. The decision of the Attorney-General to suspend and defer the institution of criminal proceedings is also subject to the judicial review. This view is supported by, Clause 96 of the Bill. The Court of Appeal in the exercise of its writ jurisdiction can quash the decision of the Attorney-General. Therefore, we are unable to agree with the said contention and reject the same.

According to Clause 77 of the Bill the Attorney-General has the power to withdraw indictments filed against an accused person who is alleged to have committed an offence under this Bill. Learned Counsel for the Petitioners therefore contended that this power amounts to an encroachment of judicial power of courts. But the withdrawal of indictment has to be done with the permission of the High Court Judge. Under Section 194 (1) of the Code of Criminal Procedure Act No. 15 of 1979 (CPC) the Attorney-General has the power to withdraw indictments. Under Section 194 (3) of the Code of Criminal Procedure Act No. 15 of 1979 (CPC), the Prosecuting Counsel has the power to withdrawal of indictments with the consent of the Presiding Judge. Thus, the power of the Attorney-General to withdraw indictments is a part of the existing law. If this Court declares that the power of the Attorney-General to withdraw indictments violates the Constitution, this Court would be indirectly declaring that Section 194 (1) and Section 194 (3) of the CPC would violate the Constitution. But, under and in terms of Articles 16 and 80 (3) of the Constitution, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. Therefore, we are unable to agree with the said argument and reject the same as there is no merit in it.

Clause 93 (3) of the Bill reads as follows:-

*“For the purpose of this Section the expression “law” includes international instruments which recognize human rights and to which Sri Lanka is a signatory.”*

Article 170 of the Constitution reads as follows: *“Law means any Act of Parliament and any law enacted by any legislature at any time prior to the*



*commencement of the Constitution and includes an Order in Council.”.* Therefore, international instrument cannot be a part of law defined by our Constitution. When we consider this Article, we are of the opinion that Clause 93 (3) of the Bill violates the legislative power of the people discussed in Article 4 (a) of the Constitution. Article 3 of the Constitution needs as follows :-

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

Article 4 of the Constitution reads as follows:-

*"The Sovereignty of the People shall be exercised and enjoyed in the following manner:-*

- (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*
- (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*
- (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;*
- (d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and*
- (e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.”.*

According to Article 3 of the Constitution, Sovereignty includes the powers of the Government. What are the powers of the Government? They are the legislative power of the People, the Executive Power of the People and the Judicial Power of the People. When we consider Articles 3 and 4 of the Constitution, we feel that the Sovereignty is

1. the legislative power of the People,
2. the executive power of the People,
3. the judicial power of the people, and
4. the franchise of the People.

Therefore, it is correct to say that the legislative power of the People is a part of Sovereignty. Therefore, if a Clause of a Bill violates the legislative power of the People it would violate Article 3 and 4 of the Constitution. For the above reasons we hold that Clause 93(3) of the Bill violates Article 3 and 4 of the Constitution.

We have earlier decided that Clause 4 (a) and 4 (b) and 68 (5) of the Bill violate Article 12 (1) of the Constitution and Clause 93 (3) violates Article 3 and 4 of the Constitution.

Learned Additional Solicitor General submitted that death sentence is cruel and it would violate Article 11 of the Constitution. In this connection we would like to consider an observation made by Samarakoon CJ, Sharvananda J and R. S. Wanasundera J in the Determination delivered on the Poisons, Opium and Dangerous Drugs (Amendment) Bill dated 23.02.1984 wherein it says thus “*One member of the Court is of the opinion that the imposition of the death Sentence for offences under this Act violates Article 11 of the Constitution. The majority is of the view that it does not violate Article 11 of the Constitution*”. Imposition of death sentence is a part of existing law. Vide Section 296 of the Penal Code. Under and in terms of Articles 16 and 80 (3) of the Constitution, we are of the opinion that this Court has no jurisdiction to inquire into or pronounce upon the validity of an existing written law enacted by the Parliament. Therefore, we are unable to agree with the above contention of the Learned Additional Solicitor General and hold that imposition of the death sentence would not violate Article 11 of the Constitution. If a Clause of a Bill violates Article 12(1) of the Constitution, such a violation would amount to violation of Article 3 of the Constitution because according to Article 3 of the Constitution, Sovereignty includes fundamental rights of the people. We have earlier decided that Clause 4 (a) and 4 (b) and 68 (5) of the Bill violate Article 12 (1) of the Constitution. Therefore, we hold that they violate Article 3 of the Constitution. However violation of Article 3 of the Constitution by Clauses 4 (a) and 4 (b) of the Bill would cease to operate if same punishment found in Section 296 of the Penal Code is introduced after removing the words ‘life imprisonment’ in Clauses 4 (a) and 4 (b) of the Bill. Violation of Article 3 of the Constitution by Clause 68 (5) of the Bill would cease to operate if the amendment proposed by the Attorney-General to Clause 68 (5) of the Bill is introduced.



We have earlier held that Clause 93 (3) of the Bill would violate Articles 3 and 4 of the Constitution. Learned Additional Solicitor General submitted that the Attorney-General would advise the Minister of Justice to delete Clause 93 (3) of the Bill. If Clause 93 (3) of the Bill is deleted, the violation of Articles 3 and 4 of the Constitution by the said Clause would cease to operate. We have held that Clauses 4 (a) and 4 (b), 68 (5) and 93 (3) of the Bill violate Article 3 of the Constitution. Therefore we are of the opinion that 4 (a) and 4 (b), 68 (5) and 93 (3) of the Bill will have to be passed by a two-third majority referred to in Article 83 of the Constitution and approved by the People at a Referendum. We have examined the Bill and are of the opinion that Clauses other than 4 (a) and 4 (b), 68 (5) and 93 (3) of the Bill, can be passed by simple majority of the Parliament.

**Sisira J. de Abrew**

Judge of the Supreme Court

**Vijith K. Malalgoda**

Judge of the Supreme Court

**Murdu Fernando**

Judge of the Supreme Court

|  |   |
|--|---|
| <b><i>First Reading:</i></b>   | 09.10.2018 (Hansard Vol. 263; No. 9; Col. 1049)   |
| <b><i>Bill No:</i></b>   | 268   |
| <b><i>Sponsor/Relevant Minister:</i></b>                             | Hon. Minister of Foreign Affairs                  |
| <b><i>Decision of the Supreme Court Announced in Parliament:</i></b> | 14.11.2018 (Hansard Vol. 264; No. 1; Col. 6 - 21) |
| <b><i>Current Status:</i></b>  | Listed on the Order Paper for the Second Reading. |

