DECISIONS OF THE SUPREME COURT ON PARLIAMENTARY BILLS

2021

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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 2021

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transactions as provided, of government marketable land and project company marketable land and premises and condominium parcels standing thereon within such Zone; to promote and facilitate international trade, shipping logistic operations, offshore banking and financial services, information technology and business process outsourcing, corporate headquarters operations, regional distribution operations, tourism, and other ancillary services within such Zone; to establish an International Dispute Resolution Centre within such Zone; to promote urban amenity operations and the settlement of a residential community within such Zone; and for matters connected therewith or incidental thereto.

Referred to the Supreme Court in terms of Article 121.

The Supreme Court determined that, the provisions of the Clauses 3(5) proviso, 3(6), 3(7), 6(1)(b), 30(3) first proviso, 30(3) second proviso, 55(2), 58(1), 71 (1) and 74 [interpretation "Regulatory Authority"] of the Bill are inconsistent with Article 12(1) of the Constitution, provisions of 30(1), 33(1), 40(2) and 71 (2)(l) of the Bill are inconsistent with Article 14 (1)(h) of the Constitution, provisions of Clause 60(c) and Clause 60(f) of the Bill are inconsistent with Article 148 of the Constitution, and provisions of Clause 37 of the Bill are inconsistent with Article 12 (1) and 14(1)(g) of the Constitution and the above mentioned Clauses could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution.

And the provisions of Clauses 3(4), 6(1)(u), 68(1)(f) and 68(3)(a) are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution, provisions of Clause 52(3) read with Clauses 52(5) and 71(2) (p) of the Bill are inconsistent with Article 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution, and the provisions of Clause 53(2)(b) read with Clause 53(3)(b) of the Bill is inconsistent with Article 76 of the Constitution read with Articles 3 and 4 of the Constitution and could be validly passed only with the Special Majority provided for

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in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83.

However, the said inconsistency will cease if Clauses are amended as mentioned in the Determination of the Supreme Court.

The Court further determined that, the rest of the Clauses of the Bill are not inconsistent with the Constitution.

CORONAVIRUS DISEASE 2019 (COVID - 19) (TEMPORARY PROVISIONS) **24/2021**

to make temporary provisions in relation to situations where persons were unable to perform certain actions required by law to be performed within the prescribed time periods due to Covid - 19 circumstances; to assign alternative courts where a court cannot function due to Covid - 19 circumstances; to conduct court proceedings using remote communication technology to facilitate the control of coronavirus disease 2019 (Covid - 19); to grant relief in relation to parties to certain contracts who were unable to perform contractual obligations due to Covid - 19 circumstances and for matters connected therewith or incidental thereto.

Referred to the Supreme Court in terms of Article 121.

The Supreme Court determined that,

1) *Clauses 2,3,4,6,7 and 10 of the Bill read together with the definition of "Covid-19 circumstance" in Clause 12 of the Bill are inconsistent with Articles 3 and 4(c) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution and approved by the People at a referendum.*

   However, the inconsistency would cease if the definition of "Covid-19 circumstance" in Clause 12 is amended as opined by the Court and may be passed with a Simple Majority in Parliament.

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2) *Clause 4 of the Bill is inconsistent with Article 136 read together with Article 4(c) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution.*

   The inconsistency of the above Clause would cease if amended as per the proposed amendment tendered to the Court and may be passed with a Simple Majority in Parliament.

3) *Clauses 5, 6, 7 of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution.*

4) *Other provisions of the Bill are not in conflict with the Constitution and may be passed with a Simple Majority in Parliament. However, with regard to Clause 3(1) of the Bill, a provision may be made as opined by the Court.*

Finance — **25/2021 to 32/2021**

to enable persons to voluntarily disclose undisclosed taxable supplies, income and assets required to be disclosed under certain laws; to provide for the imposition of a tax on the taxable supplies, income and assets so disclosed; to indemnify the persons who voluntarily disclose any such taxable supply, income or asset against liability from investigation, prosecution and penalties under specified laws; to grant certain concessions to persons who had already disclosed taxable supplies, income and assets under specified laws; and for matters connected therewith and incidental thereto.

Referred to the Supreme Court in terms of Article 121(1).

The Supreme Court determined that, upon the suggested amendments to Clauses 4(1), 5(1), 5(2), 5(3), 5(4), 5(5), 6(1), 7(1), 12(b), 13(1), 14 and 20 and deletion of Clause 17 in its entirety being

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effected, neither the Bill nor any of the Clauses in the Bill are inconsistent with the Constitution. *The Supreme Court further determined that, upon the suggested amendments the Bill can be passed by a Simple Majority in Parliament.*		
Human Rights Organization (Incorporation) to incorporate the Human Rights Organization. Referred to the Supreme Court in terms of Article 121(1). *The Supreme Court determined that, Clause 6 of the Bill is inconsistent with Article 76(1) of the Constitution and Clause 7 of the Bill is inconsistent with Articles 3, 4 and 12(1) of the Constitution.* *The Supreme Court further determined that, in terms of Article 123(2) of the Constitution that the Bill is required to be passed by the Special Majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.*	**33/2021**	

S.C. (SD) No. 01/2021 to S.C. (*SD*) No. 03/2021

"INLAND REVENUE (AMENDMENT)" BILL

BEFORE:

Priyantha Jayawardena, P.C - Judge of the Supreme Court
L.T. B. Dehideniya - Judge of the Supreme Court
A. L. S. Gooneratne - Judge of the Supreme Court

S.C. (SD) No. 01/2021

Petitioner	:	Raja Nihal Hettiarachchi
Counsel	:	K. Kanag-Ishwaran, P.C. with N.R. Sivendran, Shivan Kanag - Ishwaran, Lakshman Jeyakumar, Aslesha Weerasekara and N.S. Nishendiran

S.C. (SD) No. 02/2021

Petitioner	:	Bar Association of Sri Lanka
Counsel	:	K. Kanag-Ishwaran, P.C. with N.R. Sivendran, Shivan Kanag - Ishwaran, Lakshman Jeyakumar, Aslesha Weerasekara and N. S. Nishendiran

S.C. (SD) No. 03/2021

Petitioner	:	Pathberiya Appuhamillage Nadeeka Suranjana
Counsel	:	Faiz Mustapha, P.C., with Faisza Markar, Keerthi Thillekaratne, Lanknath Pieris and Thusitha Nanayakkara
Respondent	:	Hon. Attorney-General
Counsel	:	Farzana Jameel, P.C., Additional Solicitor-General with N. Wigneshwaran, Senior State Counsel

The Court assembled for hearings at 10.00 a.m, on the 5th of April, 2021 and at 10.30 a.m. on the 7th of April, 2021.

A Bill titled "Inland Revenue (Amendment)" was published in the Government *Gazette* of 18th March, 2021 and placed on the Order Paper of Parliament on 26th March, 2021.

The aforementioned Petitioners have, by forwarding to this Court the Petitions on 31st of March, 2021 and 1st of April, 2021, invoked the jurisdiction of this Court in terms of Article 12l(l) of the Constitution to determine whether Clauses 40 and 47 of the Bill are inconsistent with Article 4(c) read with Article 3 and Articles 11,12(1), 14(l)(a) and l4(1)(g) of the Constitution.

The Attorney-General was noticed in terms of Article 134(1) of the Constitution. The Additional Solicitor-General, and the other two learned President's Counsel for the Petitioners, assisted Court in considering the constitutionality of the Bill and the Clauses therein.

The Clauses contained in the Bill seeks;

i. to give effect to the proposals contained in the Budget presented to the Parliament on the 17th of November, 2020 by the Minister of Finance, which was approved by the Parliament, and

ii. to give clarity to certain sections of the Inland Revenue Act, No. 24 of 2017 (hereinafter refereed to as the "Principal Enactment").

Clause 40

Clause 40 of the Bill seeks to amend section 126(5) of the Principal Enactment.

Section 126(5) of the Principal Enactment states as follows:-

> "Where a return or part of a return was **prepared for reward by** some other person, including by an approved accountant, other than a full-time employee of the taxpayer, that other person shall also sign the return." [Emphasis added]

Further, Clause 40 of the Bill states as follows:-

> "Section 126 of the principal enactment is hereby amended in Sub-section (5) of that section, by the substitution for the words **"prepared for reward by",** of the words "**prepared, filled or assisted to prepare or fill for a payment by**". [Emphasis added]

Learned President's Counsel for the Petitioners submitted that the Principal Enactment and the other Clauses of the Bill have used the words *"any other person"*. However, Clause 40 of the Bill has used the words *"some other person"*. It was submitted that such inconsistency could lead to ambiguity, and thus the said Clause is arbitrary and in violation of Article 12(1) of the Constitution.

It was further submitted that Clause 40 of the Bill which amends section 126(5) of the Principal Enactment excludes *"a full-time*

employee of the taxpayer" from the application of the said Clause. Such exclusion and/or classification is arbitrary, capricious, and in violation of Article 12(1) of the Constitution.

Furthermore, it was submitted that Clause 40 of the Bill will have serious implications for employees of persons and companies providing tax consultancy services, including Attorneys-at-Law providing consultancy services on tax matters. Thus, it was submitted that the said Clause violates the freedom to engage in any lawful occupation or profession enshrined in Article 14(l)(g) of the Constitution.

For the reasons stated above, the learned President's Counsel for the Petitioners submitted that Clause 40 of the Bill is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution.

Clause 47

Clause 47 of the Bill seeks to add a new section 190A to the Principal Enactment.

Clause 47 states as follows:-

> "The following new section is hereby inserted immediately after section 190 of the Principal Enactment, and shall have effect as section 190A of that enactment: -
>
> **Section 190 A.**
>
> "Any **auditor, tax practitioner, tax advisor** or approved accountant **other than a full-time employee of the taxpayer** who -
>
> (a) prepares, fills or certifies or assists in preparing, filling or certifying the tax returns, accounts, records, **appeals and objections** or any other document or information to furnish to the Commissioner-General; and
> (b) intentionally disregards or fails to take reasonable care in discharging the professional duty, or fraudulently prepares and certifies such document or information or deliberately misinterprets any provision of this Act or any other Act administered by the Commissioner-General, or any regulation, rule or order made thereunder.

commits an offence under this Act, and on conviction after summary trial before a Magistrate, be liable to a fine not exceeding one million rupees or to imprisonment of either

> description for a term not exceeding six months or for **a prohibition order preventing him from practicing in such capacity**. [Emphasis added]

Learned President's Counsel for the Petitioners submitted that some of the words used in Clause 47 of the Bill are vague and indefinite. It was further submitted that the term *"approved accountant"* has been defined in section 195(1) of the Principal Enactment. However, the terms "*auditor", "tax practitioner"* and *"tax advisor"* have not been defined in the Principal Enactment. Hence, it was submitted that the use of such words that are not defined would lead to ambiguity and may result in discrimination in the interpretation of such words and in the application of the said section. Therefore, including such words in the said Clause violates the equal protection of the law enshrined in Article 12(1) of the Constitution.

Further, it was submitted that the words *"other than a full-time employee of the taxpayer*" in Clause 47 of the Bill excludes the applicability of the said Clause to full-time employees of the taxpayers. Such classification is arbitrary, capricious, and in violation of Article 12(1) of the Constitution, as a classification can only be applied in relation to the imposition of taxes or giving of concessions to persons and objects of the State.

Moreover, it was submitted that Clause 47 of the Bill is applicable to the preparation of tax appeals and objections, and the restrictions placed on such matters by the said Clause would in effect deter the freedom of expression enshrined in Article 14(1)(a) of the Constitution.

Further, it was submitted that the words *"prohibition order preventing him from practicing in such capacity*" in Clause 47 of the Bill, permanently disbars a person from engaging in a lawful occupation or profession of his choice. Such a punishment is disproportionate and cruel, and therefore violates Article 11 of the Constitution.

Moreover, even Attorneys-at-Law are engaged in providing consultancy services on tax matters. However, the jurisdiction of disciplinary control of Attorneys-at-Law, is exclusively vested with the Supreme Court in terms of the Rules promulgated by the Supreme Court under Article 136(l)(g) of the Constitution. Therefore, the vesting of the said jurisdiction on the Magistrate's Court by Clause 47 of the Bill is an erosion of the judicial power of the Supreme Court, and therefore it was submitted that the said Clause violates Article 4(c) read with Article 3 of the Constitution.

Therefore, the learned President's Counsel for the Petitioners submitted that Clause 47 of the Bill is inconsistent with Article 4(c) read with Article 3, and Articles 11, 12(1), 14(1)(a) and 14(l)(g) of the Constitution.

When the Court assembled for further hearing of the Petitions on the 7th of April, 2021, the Additional Solicitor-General who appeared for the Attorney-General, following the *cursus curiae* set out in ***S.C. (SD) No. 06/2002*** and ***S.C. (SD) No. 01/2020 to S.C. (SD) No. 39/2020,*** submitted to Court that the Cabinet of Ministers have approved amendments to Clauses 40 and 47 of the Bill. Copies of the said proposed amendments were handed over to the learned President's Counsel for the Petitioners and to Court.

Said proposed amended Clauses 40 and 47 of the Bill arc reproduced below;

Clause 40-

> "Where a return or a part of return was prepared for a payment by any person, including by an approved accountant, such person shall certify separately specifying the extent to which he was involved in the preparation of such return and specify the documents examined by him and the information relied upon by him. Such certification shall be submitted along with the return and the said certification shall be deemed to be part and parcel of the said return.''

Clause 47-

> "Any person who fraudulently;
>
> (a) prepares any document or information, or
> (b) certifies a document
>
> to be furnished to the Commissioner General of Inland Revenue, commits an offence under this Act, and on conviction after summary trial before a Magistrate, be liable to a fine not exceeding One Million Rupees or to imprisonment of either description for a term not exceeding six months."

Learned President's Counsel for the Petitioners submitted to Court that the abovementioned proposed new Clauses 40 and 47 of the Bill would address the aforementioned objections raised on behalf of the Petitioners, and are consistent with Constitution.

Thereafter, the remaining Clauses of the Bill were examined by Court with the assistance of the Additional Solicitor-General and the other two learned President's Counsel who appeared for the Petitioners.

Principles applicable to the Bill

It is an established principle that, in fiscal legislation, the Legislature has the greatest freedom of classification in imposing liability and granting concessions, and such classification in imposing liability or

granting concessions have not been held to be inconsistent with Article 12(1) of the Constitution.

In S.C. (SD) No. 02/2005, which considered the Value Added Tax (Amendment) Bill, this Court observed;

> *"This Court has consistently held that in revenue matters in making classifications for granting of concessions and imposing liabilities, there is a wide discretion. These measures are taken not only to raise resources necessary for the State but also to direct economic activities properly, for the general welfare of the society.*
>
> *On this premises, it has been held that revenue measures sought to be introduced by any Bill would not generally be considered as inconsistent with Article 12 of the Constitution* ***unless they are manifestly unreasonable or discriminatory."*** *[Emphasis added]*

Further, the former Constitutional Court in relation to the Finance Amendment Act, of 1978 (Decisions of the Constitutional Court of Sri Lanka (Volume VI) 1978) observed;

> *"In taxation matters even more than in other fields it is well established that the Legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally that it cannot be justified on the basis of any valid classification."*

A similar observation was made in ***S.C. (SD) No. 03/1980***, in relation to the Inland Revenue (Amendment) Bill, which is reproduced below;

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

Further, in ***P.M. Ashwathanarayana Setty v State of Karnataka (1989 Supp (1) SCC 696)*** the Supreme Court of India observed;

> *"Though other legislative measures dealing with economic regulations are not outside Article 14, it is well recognised that the State enjoys the widest latitude where measures of economic regulations are concerned. These measures for fiscal and economic regulations involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways."*

Thus, in considering the objections raised by the learned President's Counsel for the Petitioners, we are of the opinion that the use of the words *"some other person"* in Clause 40 of the Bill, which is different to the words used in the Principal Enactment and the other Clauses of the Bill, would change the structure of the Principal Enactment. Moreover, the lack of uniformity between the Bill and the Principal Enactment would lead to ambiguity in the interpretation and enforcement of the Act.

Further, it is pertinent to note that the exclusion of *"a full-time employee of the taxpayer*" from the applicability of Section 126(5) of the Principal Enactment, was not an amendment brought by Clause 40 of the Bill. In terms of Article 80(3) of the Constitution, once a Bill becomes law, the validity of an Act, or a provision of the Act, cannot be inquired into, pronounced upon or called into question by a court or tribunal.

However, the said sub-Article 80(3) of the Constitution does not act as a bar in examining the constitutionality of a section in an Act already passed by Parliament when such a section is proposed to be amended, as such an amendment could change the entire complexion and effect of the existing section in an Act. Nevertheless, such an approach does not extend to amendments relating to typographical or grammatical errors.

It is clear from the above observations made in the aforementioned determinations, that in revenue matters, the State has a wide discretion in selecting the persons or objects to impose tax or to grant concessions, and such matters will not be inconsistent with Article 12(1) of the Constitution which provides for the equal protection of the law unless they are manifestly unreasonable or discriminatory. However, a classification shall not be made to exclude liability of persons who perform services to taxpayers. Thus, the exclusion of *"a full-time employee of the taxpayer"* from the applicability of section

126(5) of the Principal Enactment will not be captured within the scope of the aforesaid principle, and is therefore inconsistent with Article 12 (1) of the Constitution.

However, the new proposed Clauses 40 and 47 of the Bill have removed the aforementioned inconsistencies with the Constitution.

We have examined the provisions of the Bill and are of the opinion that, upon the suggested amendment being effected, the Bill and its provisions will cease to be inconsistent with the Constitution. We accordingly determine that upon such amendment being given effect to, the provisions of the Bill will not be inconsistent with the Constitution.

In the circumstances, the Bill can be passed by a simple majority in Parliament.

Priyantha Jayawardena, P.C.
Judge of the Supreme Court

L.T.B. Dehideniya
Judge of the Supreme Court

A.L.S. Gooneratne
Judge of the Supreme Court

First Reading:	26.03.2021 (Hansard Vol.282; No. 06; Col.755)
Bill No. :	41
Sponsor/Relevant Minister:	Hon. Prime Minister and Minister of Finance, Minister of Buddhasasana, Religious & Cultural Affairs and Minister of Urban Development & Housing
Decision of the Supreme Court Announced in Parliament:	09.04.2021(Hansard Vol.282; No.11; Col.1477-1478)
Second Reading:	04.05.2021 (Hansard Vol. 283; No.01; Col.36-44)
Committee of the whole Parliament and Third Reading:	04.05.2021 (Hansard Vol.283; No.01; Col.44)
Hon. Speaker's Certificate:	13.05.2021
Title:	Inland Revenue (Amendment) Act, No. 10 of 2021

S.C. (SD) No. 06/2021

"SRI LANKA LAND DEVELOPMENT CORPORATION (AMENDMENT)" BILL

BEFORE:

Justice Vijith K. Malalgoda, PC - Judge of the Supreme Court
Justice E.A.G.R. Amarasekara - Judge of the Supreme Court
Justice Achala Wengappuli - Judge of the Supreme Court

S.C. (SD) No. 06/2021

Petitioner : A.D.P.A. Gooneratna

Counsel : Mayura Gunawansa PC with Sandarenu Peiris, Isuru Siriwardena, Yasanthi Dissanayake, Thanuja Karunarathne instructed by Mahesh N. Pathirana

Respondent : Hon. Attorney - General

Counsel : Indika Demuni de. Silva, PC, Additional Solicitor General with Yuresha de. Silva, Senior State Counsel, lndumini Randenya, State Counsel and Shewanthi Dunuwille, State Counsel

The Court assembled for hearing at 10.00 a.m. on 19.04.2021.

A Bill in its Short Title referred to as "Sri Lanka Land Development Corporation (Amendment) Act, No. of 2021" was published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 10th February 2021 and placed on the Order Paper of Parliament on 8th April 2021.

The Petition to this Court was filed by the Petitioner above named on 15th April 2021, within one week of the Bill being placed on the Order Paper of Parliament as required by Article 12l(l) of the Constitution. Upon receipt of the Petition, the Court issued notice on the Attorney - General as required under Article 134(1) of the Constitution.

The Petition was referred to this bench by His Lordship the Chief Justice on 15th April 2021 with an order to Registrar to list it for hearing on 19th April 2021. The Petition was taken up for consideration on the same day, i.e., on 19th April 2021 with the consent of both parties.

In the Petition filed before this Court, the Petitioner had alleged that the entirety of the Bill violate and inconsistent with Articles 3, 4, 12(l), 12(2), 75 and 154G of the Constitution but restricted his submissions mainly to the alleged violation of Article 154G of the Constitution and submitted that the 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 the proposed amendment deals with the subjects Land, Irrigation and Local Government listed under Items 18,19 and 04 in the list I to the 9th Schedule of the Provincial Council List.

According to the 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 took up the position that the Court is required to go by the strict letter in this matter as the intention of the 13th Amendment was to devolve powers to the Provinces to the proper extent set out therein.

As observed by us, Clause 2, 3 and 4 of the Bill amends sections 2A, 2B and 4A of the Principal Enactment by prescribing a fine and term of imprisonment which was not found in the Principal Enactment and also prescribing a specific procedure to follow when prosecuting violations already identified under Section 2A, 2B, and 4A of the Principal Enactment.

Clause 7 which amends Section 20A of the Principal Enactment also introduces a specific procedure to be followed when applying for restraining orders before the Magistrate's Court when prosecuting violations already identified under the Principal Enactment.

Clause 8 introduces two new Sections as Section 20D and 20E. Section 20D introduces a procedure that should be followed by a Police officer

when a complaint is made for violations already identified under Section 2A, 2B and 4A of the Principal Enactment. The said section further declares those violations as cognizable offence in order to conduct effective investigations. Section 20E makes provisions to identify the liabilities of body of persons or partnerships.

Clause 9 had further clarified Section 22A of the Principal Enactment by identifying the procedure the Magistrate should follow, for offences, no penalty is identified under the Principal Enactment.

In addition to the above, Clause 5 of the Bill amends the Principal Enactment by replacing two ex-officio members of the Board of the Corporation and Clause 6 amend Section 9 of the Principal Enactment by introducing a new paragraph as 9(1)(ea) which reads as follows:-

> "(ea) to enter into join ventures, partnerships or other commercial agreements with foreign or local companies or individuals directly, jointly or otherwise, within or outside Sri Lanka with the concurrence of the Minister and in accordance with other written law to achieve the objects of the Corporation by utilizing the skilled labour, expert knowledge and the experience of the Corporation"

Clause 10 amends Section 28 of the Principal Enactment in order to provide for a new definition.

When considering the amendments referred to above, it appears that the main object of the Bill is to strengthen the legal framework already identified in the Principal Enactment.

In this regard this Court is mindful of the structure and the provisions in the Principal Enactment which clearly demonstrates that the Sri Lanka Land Development Corporation was brought into effect for the purpose of safeguarding low lying marshy, waste or swampy areas as they act as water retention areas for water to decede in cases of huge influx of water. It is for this purpose that the Principal Enactment prohibits person from filling or developing areas that are declared as development areas or low lying, marshy, swampy areas and canal reservations.

The learned Additional Solicitor - General who represented the Hon. Attorney - General relied on several Cabinet decisions which emphasized the need to strengthen the legal framework of the Principal Enactment in order to curb the violations under the Act.

On 1st July 2014 the then Minister of Defence and Urban Development had submitted a Cabinet Memorandum placing before the Cabinet of Minister the need to strengthen the legal framework of the Principal Enactment, in the following terms:-

> "The Corporation is responsible for the preservation of the retention areas, law lying, marshy, waste and swampy lands and canal reservations declared under the SLLR & DC Act. The Corporation is facing legal issues when prosecuting the persons who carryout largescale unauthorized filling of declared areas under the SLLR & DC Act and is hard pressed to stop these activities without having effective legal provisions."

The Cabinet Paper thereafter proceeded to submit five areas that has to be strengthen and the said proposals are as follows:-

1. Even though the Corporation has powers to take legal action against the unauthorized fillings and constructions within the declared areas under Section 2(1) and 2(b) of the Act No. 15 of 1968 as amended by the Act No. 35 of 2006, there is no provision in the existing Act for issuing of interim order by the competent court for the immediate stoppage of unauthorized fillings or development activities. Therefore, an amendment to the Section 2(a)(5), 2(b)(5) and 4(a)(5) of the existing Act expected for issuance of interim order by the Magistrate Court for the immediate stoppage if unauthorized fillings or development activities on the facts of the first complaint to Courts.

2. Further, the Chief Executive Officer of the Corporation should take every action to prevent unauthorized reclamations under Section 2(a)(4) of the existing Act, and CEO may obtain the assistance of the Police where necessary. It is expected to incorporate provisions to the Section 2(a), 2(b) and 4(b) to obtain greater assistance from the Police in respect of persons carrying out an unauthorized activity and to give powers to the Police in respect of persons carrying out the unauthorized filling and arrest them with their equipment and vehicles where unauthorized activity is taking and produce such persons and equipment before Magistrate's Court.

3. To consider offences stipulated under Section 2(a)(3), 2(b)(3), 4(a)(3) and 20(c) as cognizable offences and give power to the Magistrate Courts for hear and determination the case.

4. On conclusion of the case recover the damages as a fine by introducing a procedure with power to demolish construction and reinstate the land by unearthing to its original status and to charge the cost incurred and confiscate the relevant equipment and vehicles as deemed necessary.

5. In terms of Section 22(a) of the existing Act, every person guilty of an offence under this Act for which no penalty is prescribed shall be liable to a fine not less than one hundred

thousand rupees and not exceeding five hundred thousand rupees or to imprisonment for a period not exceeding one year and there is no provisions in the existing Act, that in which court such cause of action should hear and determine. Therefore, to overcome the procedural issues it is expected to incorporate provisions under Section 22(a), to confer judicial powers to the Magistrate to take action regarding all offences.

The Cabinet of Ministers had approval the said Memorandum at the Cabinet meeting held on 17th July 2014 and directed the Legal Draftsman to proceed with the drafting.

Once again, a Cabinet Memorandum was submitted before the Cabinet of Ministers by the then Minister of Megapolis and Western Development emphasizing the need to strengthen the Principal Enactment having effective legal provisions. The said Cabinet Memorandum which was tabled before the Cabinet of Ministers at its meeting on 02.12.2015 contained identical proposals to the earlier Cabinet Paper but had three new paragraphs recommending.

a) It is expected to incorporate provisions to enter into joint ventures/ partnerships and/or other commercial agreements with foreign or local companies or individuals directly, jointly or otherwise for conducting development projects within or out of Sri Lanka by utilizing the skilled labour/expert knowledge of the corporation endowed with experience and technical knowledge.

b) In terms of the prevailing Act, the board shall consist of three ex-officio members wiz; Directors of Irrigation, Director of Town and Country Planning and Commissioner for National Housing. It is proposed to incorporate provisions to appoint the line Ministry Secretary/ his representative in the place of the Commissioner for National Housing and Director General of the National Physical Planning in the place of Director of Town and Country Planning as the said two posts are not functional.

c) Provisions have been laid down in the Act, regarding the powers vested in the Chief Executive Officer of the Corporation in respect of the Seal of Corporation, prevention of unauthorized filling in the areas declared under the Act and prevention of the pollution of canals as well as taking action against the unauthorized activities/ constructions carried out in declared canal reservations.

As there is no interpretation to the word "Chief Executive Officer" in the Act, it is expected to define the post of General Manager of the Corporation as the "Chief Executive Officer".

The said Cabinet Paper too was approved and the Cabinet decision was communicated to the relevant authorities for further steps by the Secretary to the Cabinet including one copy to the "My/ National Policies and Economic Affairs."

Minister of Urban Development and Housing had submitted the draft Bill before the Cabinet, by Cabinet Memorandum dated 18th September 2020 along with the observations of the Minister of Justice and the Cabinet of Ministers at its meeting on 01st December 2020 approval was granted;

i) To publish the Sri Lanka Land Development Corporation (Amendment) Bill annexed to the Memorandum, in the Government Gazette; and
ii) To submit the said Bill referred to at (i) above, thereafter in Parliament for approval.

Sri Lanka Land Development Corporation as it is named at present, was originally established in 1968 as "Colombo District (Law-Lying Areas) Reclamation and Development Board" under Act No. 15 of 1968. The said Act was amended on four occasions by Acts No. 27 of 1976, 52 of 1982, 35 of 2006 and 11 of 2019.

By amending Act, No. 52 of 1982 the name of "Colombo District (Low Lying Areas) Reclamation and Development Board" was changed as "Sri Lanka Land Reclamation and Development Corporation" and the existing Board was converted to a Corporation.

By Section 2 of the amending Act, No. 35 of 2006, the Long Title of the Principal Enactment was repealed and replaced to read as follows:-

> "AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF A CORPORATION, TO BE KNOWN AS THE SRI LANKA LAND RECLAMATION AND DEVELOPMENT CORPORATION FOR THE DEVELOPMENT AND RECLAMATION IN ACCORDANCE WITH THE NATIONAL POLICY RELATING TO LAND RECLAMATION AND DEVELOPMENT OF SUCH AREAS AS MAY BE DECLARED BY ORDER OF THE MINISTER; FOR SUCH CORPORATION TO UNDERTAKE CONSTRUCTION WORK AND CONSULTANCY ASSIGNMENTS IN THE FIELD OF ENGINEERING; AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO."

Even though the Long Title of the Principal Enactment was amended only to change the name of the Corporation as, Sri Lanka Land

Development Corporation by the amending Act, No. 11 of 2019, the Long Title of the Principal Enactment remained unchanged.

Accordingly, it is clear that, since the amendment introduced to the Principal Enactment by amending Act, No. 35 of 2006, it was the function of the Corporation to implement the National Policy of Land Reclamation and Development of the Areas identified by the Act.

In the said circumstances it is clear that the main objective of the Bill is to give effect to the National Policy on Land Reclamation and Development, where the Cabinet of Ministers in three successive Cabinets since 2014, had observed the need to strengthen the Principal Enactment in order to "empower the Sri Lanka Land Development Corporation to demolish unauthorized developments and to reinstate the land by unearthing the land to the original status, to empower the Magistrate's Courts to take action regarding all offences stipulated under the Sri Lanka Land Development Corporation Act" (Principal Enactment) and "to obtain greater assistance from the Police in respect of persons carrying out an unauthorized activity and give powers to arrest them with their equipment and vehicles where unauthorized activity is taking place".

When the Principal Enactment was amended in 2006 to entrust the implementation of the National Policy on Land Reclamation and Development, to the Corporation, "undertake construction work and consultancy assignments in the field of Engineering" was also identified as part of the implementations of the National Policy.

However, no detailed provisions were made at the time the amendment was introduced but, when the Government Policy on Land Reclamation and Development was once again considered before the Cabinet in the year 2015, the said requirement was also included into the Cabinet Paper and obtained approval to include those requirements in to the Bill.

In these circumstances it appears that the provisions of the Bill fall within the subject of National Policy which is identified as Item 1 in List II to the Ninth Schedule or the Reserve List, and the Provisions of the Bill does not fall within the subjects of Land, Land Development, Irrigation and/or Local Government as submitted by the Petitioner.

For the aforesaid reasons 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 determination in terms of Article 121(3) of the Constitution, that the Sri Lanka Land Development Corporation (Amendment) Bill which is impugned by the Petitioner, 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 place on record our deep appreciation of the assistance given by the learned Counsel for the Petitioner and learned Counsel who appeared on behalf of the Hon. Attorney - General.

Justice Vijith K. Malagoda, PC
Judge of the Supreme Court

Justice E.A.G.R. Amarasekara
Judge of the Supreme Court

Justice Achala Wengappuli
Judge of the Supreme Court

First Reading:	08.04.2021 (Hansard Vol.282; No.10; Col. 1409)
Bill No. :	46
Sponsor/Relevant Minister:	Hon. Prime Minister and Minister of Finance, Minister of Buddhasasana, Religious & Cultural Affairs and Minister of Urban Development & Housing
Decision of the Supreme Court Announced in Parliament:	04.05.2021 (Hansard Vol.283; No. 01; Col.1-2)
Second Reading:	22.06.2021 (Hansard Vol.283; No.07; Col.1154 -1217)
Committee of the whole Parliament and Third Reading:	22.06.2021 (Hansard Vol. 283; No. 07; Col.1218)
Hon. Speaker 's Certificate:	30.06.2021
Title :	Sri Lanka Land Development Corporation (Amendment) Act, No.13 of 2021

S.C. (SD) No. 04/2021, 05/2021 and 07/2021 to 23/2021

"COLOMBO PORT CITY ECONOMIC COMMISSION" BILL

BEFORE :

Jayantha Jayasuriya, PC	-	Chief Justice
Buwaneka Aluwihare, PC	-	Judge of the Supreme Court
Priyantha Jayawardena, PC	-	Judge of the Supreme Court
Murdu N.B. Fernando, PC	-	Judge of the Supreme Court
Janak De Silva	-	Judge of the Supreme Court

S.C. (SD) No. 04/2021

Petitioner: 1. Centre for Policy Alternatives (Guarantee) Limited
2. Dr. Paikiasothy Saravanamuttu

Counsel: Dr. K. Kanag-Isvaran, PC. with Shivan Kanag-Isvaran, Lakshmanan Jeyakumar, Bhavani Fonseka and Aslesha Weerasekera

S.C. (SD) No. 05/2021

Petitioner: G. Kapila Renuka Perera

Counsel: Dharshana Weraduwage with Dhanushi Kalupahana

S.C. (SD) No. 07/2021

Petitioner: 1. Gamini Viyangoda
2. Kotawila Withanage Janaranjana

Counsel: M. A. Sumanthiran, PC. with Dr. Gehan Gunatilleka and Divya Mascranghe

S.C. (SD) No. 08/2021

Petitioner: Palitha Range Bandara

Counsel: Eraj De Silva with Manjuka Fernandopulle, Daminda Wijerathna, Janagan Sundhamoorthy

S.C. (SD) No. 09/2021

Petitioner: Vagira Abeywardena

Counsel: Ronald Perera, PC. with Dinesh Vidanapathirana, Yasas de Silva and N. Fernando

S.C. (SD) No. 10/2021

Petitioner: Rathnayake Mudiyanselage Ranjith Madduma Bandara

Counsel: Thisath Wijayagunawardane, PC, with Gihan Liyanage, Jithen de Silva and Amanda Abeysinghe

S.C. (SD) No. 11/2021

Petitioner: Harshana Supun Rajakaruna

Counsel: Farman Cassim, PC. with Tharaka Nanayakkara, Budwin Siriwardena, Mithun Imbulamure, Vinura Kularatne

S.C. (SD) No. 12/2021

Petitioner: Wasantha Samarasinghe

Counsel: Shantha Jayawardane with Niranjan Arulpragasam and Chamara Nanayakkarawasam

S.C. (SD) No. 13/2021

Petitioner:
1. Lesley Shelton Devendra
2. Warahena Liyanage Don Marcus
3. Palitha Athukorale
4. Maxwell Sylvester Jayakody
5. Pulukkudiarachige Don Anthony Linus Jayathilake

Counsel: S. H. A. Mohammed with Laknath Senevirathne

S.C. (SD) No. 14/2021

Petitioner: Galgamuarachchige Sudharma Shyamali

Counsel: S. H. A. Mohammed with Laknath Senevirathne

S.C. (SD) No. 15/2021

Petitioner:
1. Ven. Muruthettuwe Ananda Nayaka Thero
2. Nagashenage Dasun Yasas Sri Nagashena

Counsel: Dr. Wijeyadasa Rajapakshe, PC. with Mayura Gunawansa, PC., Gamini Hettiarachchi, Suraj Walgama, Rakitha Rajapakshe, Madhava Jayawardhana, Harsha Liyanaguruge and Dharani Pallewatte

S.C. (SD) No. 16/2021

Petitioner: Rajika Kodithuwakku

Counsel: Chrishmal Warnasuriya with Wardani Karunaratne, Kumudu Hapuarachchi, Selvarajah Arjunkumar and Maduwanthi Konara

S.C. (SD) No. 17/2021

Petitioner: 1. Dr. Ajantha Perera
2. H. D. Oshala Lakmal Anil Herath
3. Jeran Jegatheesan

Counsel: Chrishmal Warnasuriya with Wardani Karunaratne, Kumudu Hapuarachchi, Selvarajah Arjunkumar and Maduwanthi Konara

S.C. (SD) No. 18/2021

Petitioner: Kandhana Arachchige Bandula Charasekara

Counsel: Shiral Lakthilake with Chathura Galhena, Manoja Gunawardane

S.C. (SD) No. 19/2021

Petitioner: 1. Transparency International Sri Lanka (Guarantee) Limited
2. Ashala Nadishani Perera

Counsel: Dr. K. Kanag-Isvaran, PC. with Shivan Kanag-Isvaran, Lakshmanan Jeyakumar, Sankhitha Gunaratne

S.C. (SD) No. 20/2021

Petitioner: Nagananda Kodithuwakku

Counsel: Appeared in person

S.C. (SD) No. 21/2021

Petitioner: Saliya Kithsiri Mark Pieris, PC

Counsel: Ikram Mohamed, PC. with A. M. Faaiz, M. S. A. Wadood, Roshan Hettiarachchi, Shivan Cooray

S.C. (SD) No. 22/2021

Petitioner: Rajeev Amarasuriya

Counsel: Uditha Egalahewa, PC. with N.K. Ashokbharan, Vishva Vimukthi and Niranjan Arulpragasam

S.C. (SD) No. 23/2021

Petitioner: 1. Raveena Gayendri de Silva
2. Rafeek Mohamed Fathima Shahla

Counsel: Rushdhie Habeeb with Azard Musthapha, Sandeepa Gamaathige, Samadhi Lokuwaduge and Nayanathara Mendis

Respondent:	1. Hon. Attorney-General (Respondent in all cases) 2. Secretary - General of Parliament (1st Respondent in S.C. (SD) No. 12/2021 and S.C. (SD) No. 15/2021)
Counsel for the State:	Farzana Jameel, PC, Additional Solicitor General, Milinda Gunathilake, Senior Deputy Solicitor General, Nerin Pulle, Senior Deputy Solicitor General, Dr. Avanthi Perera, Senior State Counsel, Suranga Wimalasena, Senior State Counsel, Suren Gnanaraj, Senior State Counsel, Kanishka De Silva Balapatabendi, Senior State Counsel

Intervenient - Petitioners

Petitioner:	Prof. G. L. Pieris
Counsel:	Gamini Marapana, PC. with Navin Marapana, PC., Nishanthi Mendis, Kaushalya Molligoda, Uchtha Wickremesinghe, Nandana Kumara Thanuja Meegahawatta and Saumya Hettiarachchi
Petitioner:	Dr. P. B. Jayasundera
Counsel:	Romesh de Silva, PC. with Palitha Kumarasinghe, PC., and Dhuthika Wickramanayake
Petitioner:	Luxman Peiris Wickramarathna Siriwardena
Counsel:	Anura Meddegoda, PC, with Yasa Jayasekera, Asela Muthumudalige, Lakshman Siriwardane and Nadeesha Kannangara
Petitioner:	S. R. Attygalle
Counsel:	Sanjeewa Jayawardena, PC., with Lakmini Warusavithana, Rukshan Senadheera and Dr. Milhan Mohommed
Petitioner:	Donald Fernando
Counsel:	Sanjeewa Jayawardena, PC., with Lakmini Warusavithana, Rukshan Senadheera and Dr. Milhan Mohommed

Petitioner: Vidana Gamage Sampath Chaminda

Counsel: Nihal Jayawardene, PC., with Harsha Fernando, Shamalie Gunawardene and Gamunu Chandarasekera

Petitioner: Sagara Kariyawasam

Counsel: Kushan D' Alwis, PC., with Kaushalya Nawarathne, Chamath Fernando, Prabuddha Hettiarachchi, Sashendra Mudannayake, Nuwan D' Alwis and Manil Madugalla

Petitioner: H. M. Vijitha Herath

Counsel: Kaushalya Nawaratne with Prabudda Hettiarachchi, Hansika Iddamalgoda, Manoda Mohotti and Jeewanthi Bodhinayake

Petitioner: Ekanayake Walawwe Nalin Samarakoon

Counsel: Nishan Premathirathne with Nadun Wijeysiriwardena and Krishan Fernandopulle

Petitioner: Bataleeya Pathirannahalage Chathura Pravi Karunaratne

Counsel: Nishan Premathirathne with Nadun Wijeysiriwardena and Krishan Fernandopulle

Petitioner: Wijethunga Appuhamyge Herman Kumara

Counsel: S. N. Vijithsingh

Petitioner: Rajapakse Mudiyanselage, Chintaka Pradeep Rajapakse

Counsel: S. N. Vijithsingh

Petitioner: Duminada Nagamuwa

Counsel: Nuwan Bopage

Petitioner: Athula Priyadharshana De Silva

Counsel: V. K. Choksy, PC., with D. S. Ratnayake, Kamin Dissanayake and Minolie Alexander

A Bill titled "Colombo Port City Economic Commission" was

published in the Government *Gazette* of the Republic of Sri Lanka of 19th March 2021 and was placed on the Order Paper of Parliament on 8th April 2021.

Nineteen Petitions were filed on 15th April 2021 invoking the jurisdiction of this Court in terms of Article 121 to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution. Upon receipt of the Petitions, the Attorney-General was noticed in terms of Article 134(1) of the Constitution.

The Court assembled for the hearing on 19th, 20th, 21st, 22nd and 23rd of April 2021. The Court heard all the Petitioners, Intervenient Petitioners and the Attorney-General.

The Preamble to the Bill reads as follows:-

> "WHEREAS in furtherance of the Directive Principles of State Policy enshrined in the Constitution of the Democratic Socialist Republic of Sri Lanka, which requires the State to ensure by means of public and private economic activity, the rapid development of the country, whilst co-ordinating public and private economic activity in the national interest, the Government of Sri Lanka has considered it necessary to establish a Special Economic Zone within which there is ease of doing business that will attract new investments primarily to facilitate the diversification of the service economy, to promote the inflow of foreign exchange into such Zone, to generate new employment opportunities within such Zone whilst facilitating the Development of technical, professional, technological and entrepreneurial expertise and to facilitate the promotion of urban amenity operations within such Zone, through the settlement of a residential community:
>
> AND WHEREAS it has become necessary having regard to the national interest or in the interest of the advancement of the national economy, to establish a Special Economic Zone to be called "the Colombo Port City Special Economic Zone" which will be an international business and services hub with specialized infrastructure and other facilities within such Zone, for the promotion and facilitation of economic activity including international trade, shipping, logistic operations, offshore banking and financial services, information technology and business process outsourcing, corporate headquarters operations, regional distribution operations, tourism and other ancillary services:"

The Bill seeks to establish a Commission called the Colombo Port City Economic Commission (hereinafter referred to as the "Commission") which is to be entrusted with the administration, regulation and control of matters connected with businesses and other operations in and from

the Area of Authority of the Colombo Port City. The Bill provides for -

Part I - Establishment of the Colombo Port City Special Economic Zone and the Commission

Part II - Objectives and powers, duties and functions of the Commission

Part III - Composition of and the administration and management of the affairs of the Commission

Part IV - Fund of the Commission

Part V - The Director-General and the staff of the Commission

Part VI - Application for and approval as an authorized person, agreement required to be signed, single window investment facilitation, Sri Lanka citizens engaging in business, employment, purchasing, leasing or renting property or utilizing facilities or services

Part VII - Offshore companies to operate within the Area of Authority of the Colombo Port City

Part VIII - Offshore banking business in and from the Area of Authority of the Colombo Port City

Part IX - Determination and grant of exemptions or incentives for the promotion of businesses of strategic importance

Part X - Applicability of the Condominium Management Authority Law and the Apartment Ownership Law

Part XI - Applicability of the Securities and Exchange Commission Act

Part XII - Estate Manager and provision of general services

Part XIII - International Commercial Dispute Resolution Centre

Part XIV - Priority in hearing legal proceedings

Part XV - Interim provisions and investment protection

Part XVI - Miscellaneous Provisions

This Court is exercising the jurisdiction vested on it in terms of Article 120 of the Constitution which requires it to determine whether the Bill in its entirety or any of its provisions is inconsistent with the Constitution. When a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is required to make are specified in Article 123(2) which reads:

"(2) Where the Supreme Court determines that the Bill or any

provision thereof is inconsistent with the Constitution, it shall also state -

(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82;

or

(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or

(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,

and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent."

During the hearing, the Petitioners raised objections to several clauses in the Bill on its constitutionality.

In addition to those objections, Dr. Kanag-Isvaran, PC., appearing for the Petitioners in S.C.(S.D.) No. 4/2021 and S.C.(S.D.) No. 19/2021 challenged the legislative competence of Parliament to legislate for the Colombo Port City on two grounds.

His first ground was that as a matter of Municipal Law, Parliament does not have legislative power to pass the Bill since the Colombo Port City is not part of the territory of Sri Lanka. It was contended that Article 5 defines the territory of the Republic of Sri Lanka and that the Bill seeks to add, to this territory, an artificially created area.

Secondly, it was submitted that it is beyond the competence of the Parliament to enact this Bill into law as a matter of 'Applicable Law'. Dr. Kanag-lsvaran, P.C., submitted that any claim of sovereignty to artificially created areas is governed by section 5(3) of the Maritime Zones Law read with Article 56 of the United Nations Convention on the Law of the Sea (UNCLOS) and that as a matter of Sri Lankan Law and International Law, an artificially created area of land cannot constitute sovereign territory.

Article 5 of the Constitution reads :

"The territory of the Republic of Sri Lanka shall consist of the twenty five administrative districts, the names of which are set out in the First Schedule and its territorial waters:

Provided that such administrative districts may be subdivided or amalgamated so as to constitute different administrative

districts, as Parliament may by resolution determine. "

Dr. Kanag-Isvaran, PC., submitted that the Bill proposes to add to this territory an artificially created area of land in extent 446.6153 ha.. In this connection, he submitted that Clause 2 of the Bill provides:

> *"There shall be established a Special Economic Zone to be called the Colombo Port City Special Economic Zone (hereinafter referred to as the "Colombo Port City"). The Area of Authority of the Colombo Port City herein established shall consist of the boundaries as set out in Schedule I to this Act."*

Thus, it was submitted that the artificially created land described in Schedule I to the Bill is being added to the '*Western Boundary of the Colombo Divisional Secretary's Division, Colombo District'* at the connection points set out in the said Schedule I and thereby it is sought to confer on it, the status of *'sovereign territory of the Republic of Sri Lanka*' in violation of Article 5 of the Constitution, and vitiates the Bill in its totality as a matter of Applicable Law.

Moreover, the learned President's Counsel submitted that Clause 65(1) of the Bill states:

> *"From and after the date of commencement of this Act, all land comprising the Area of Authority of Colombo Port City, shall be vested with the Commission in the manner set out in subsection (3)."*

Further, it was submitted that the Bill proceeds on the assumption that the artificially created area of land is "crown land" and therefore it is untenable in law.

At the outset, it is pertinent to note that the Bill does not make provision to add any artificially created area to the territory of Sri Lanka. As described in the Preamble to the Bill, the object of the Bill is to establish a Special Economic Zone to be called "the Colombo Port City Special Economic Zone". Clause 2 specifically makes provision to establish such Zone and when read with Schedule I, provides the boundaries of the aforesaid Zone. Therefore, this Bill seeks to establish this Special Economic Zone within the area of which the boundaries are defined.

Furthermore, in Schedule I, the extent and the location of this land is described as "...containing in extent of 446.6153 ha. situated in Colombo, in the Western Province ...". On 23rd July 2019, the Minister of Internal and Home Affairs and Provincial Councils and Local Government had moved a resolution under section 3 of the Administrative Districts Act No. 22 of 1955 to alter the area of authority and the limits of the Administrative District of Colombo by the inclusion of the reclaimed area of land known as "Port City

Colombo" and to annex the said area of land to the Divisional Secretary's Division of Colombo in the Administrative District of Colombo. The extent and the boundaries of the relevant land are described in the schedule to the said resolution.

The resolution reads:

> "That this Parliament resolves under Section 3 of the Administrative Districts Act, No. 22 of 1955 that: -
>
> (a) the area of authority and the limits of the Administrative District of Colombo specified in the First Schedule to the Administrative Districts Act, No. 22 of 1955 shall be altered by the inclusion of the reclaimed area of land known as "Port City Colombo" described in the Schedule hereto, within the area of authority and the limits of the Administrative District of Colombo; and
>
> (b) such reclaimed area of land shall be annexed to the Divisional Secretary's Division of Colombo in the Administrative District of Colombo."

The Minster of Internal and Home Affairs and Provincial Councils and Local Government by a notice under the Administrative Districts Act, No. 22 of 1955, published in the *Gazette* (Extraordinary) No. 2135/13 dated 5th August 2019, informed the public "that the area of authority and the limits of the Administrative Districts of Colombo specified in the First Schedule to the Administrative Districts Act, No. 22 of 1955 shall be altered by inclusion of the reclaimed area of land known as 'Port City Colombo' described in the Schedule hereto", based on the resolution passed in Parliament on 23rd July 2019. Therefore, the alteration of the boundaries of the Colombo Administrative District had been made effective in the year 2019 through the process provided in the Administrative Districts Act, No. 22 of 1955.

It is pertinent to note that Article 5 of the Constitution read with First Schedule lists out the names of twenty five districts which forms part of the territory of the Republic but does not describe the extent or the boundaries of those specified districts. Furthermore, Article 5 makes provision for subdivision and amalgamation of the existing districts to constitute different Administrative Districts. It is through section 2 of the Administrative Districts Act read with the Schedule of the said Act that established the Administrative Districts and describes their boundaries and the extent of such districts. Therefore, alteration of the limits of such districts as provided under section 3 of the said Act is lawful and is not inconsistent with the Constitution. The Court also observes that the boundaries and the extent of the land described in Schedule I of the Bill and the Schedule in the aforementioned notice of the Minister as well as the Schedule of the resolution passed in Parliament on 23rd July 2019, refers to the same area of land and

therefore, the contention that the Bill under consideration makes provision to add a reclaimed area of land to the territory of Sri Lanka is without merit.

The passing of the resolution referred to earlier by the Parliament and the consequential publication of the Order in the *Gazette* had taken place in 2019. The fact remains that this process has not been challenged in any court. Thus, its validity must be presumed.

Dr. Kanag-Isvaran, PC., drew the attention of Court in his written submissions to the words of Lord Denning in *Macfoy* v. *United Africa Company Limited* (1961) 3 All E.R. 1169 (PC) at 1172:

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*

However, Court observes that Clive Lewis, *Judicial Remedies in Public Law*, 5th ed., South Asian Edition (2017) in discussing the meaning of null and void in Administrative Law states (page 185):

> *"The primary concern here is the meaning of nullity or voidness solely in the context of the remedies granted by courts. The concept of nullity has been used to solve other problems arising in administrative law. For remedial purposes, the orthodox view is that an ultra vires act is regarded as void and a nullity. An act by a public authority which lacks legal authority is regarded as incapable of producing legal effects.* ***Once its illegality is established, and if the courts are prepared to grant a remedy,*** *the act will be regarded as void from its inception and retrospectively nullified in the sense that it will be regarded as incapable of ever having produced legal effects." (emphasis added)*

Thus, even where an act of a public authority is ultra vires and a nullity, for remedial purposes the illegality must be established before a court. As stated by Wade and Forsyth, *Administrative Law*. 9th Ed., Indian Edition, page 281:

> *"... the court will treat an administrative act or order invalid only if the right remedy is sought by the right person in the right proceedings."*

Prior to *Macfoy v. United Africa Co. Ltd.* (supra), this approach was

reflected in the statement of Lord Radcliffe in *Smith v. East Elloe Rural District Council* (1956) AC 736, 769-770 where it was held:

> *"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."*

In fact, Wade and Forsyth (supra, page 305), states that the statement of Lord Denning in *Macfoy v. United Africa Co. Ltd.* (supra) is not the correct position of the law.

Wade and Forsyth, *Administrative Law*, (supra, page 304), after restating the above statement of Lord Radcliffe states as follows:

> *"This must be equally true even where the 'brand of invalidity' is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court.* ***The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects****. Lord Diplock spoke still more clearly [F Hoffmann-La Roche & Co. v. Secretary of State for Trade and Industry (1975) AC 295 at 366], saying that;*
>
> *It leads to confusion to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction."* (emphasis added)

This approach is consistent with the 'presumption of validity' according to which administrative action is presumed to be valid unless or until it is set aside by a court *[Hoffmann-La Roche & Co.* v. *Secretary of State for Trade and Industry* (1975) AC 295]. However, this 'presumption of validity' exists pending a final decision by the court [Lord Hoffmann in *R* v. *Wicks* (1998) AC 92 at 115, Lords Irvine LC and Steyn in *Boddington* v. *British Transport Police* (1999) 2 AC 143 at 156 and 161, and 173-4].

Court observes that by this Bill, the Colombo Port City is not been made part of the Administrative District of Colombo. It became part of the Administrative District of Colombo by virtue of the steps taken under the Administrative Districts Act, No. 22 of 1955 described above. Its validity has not been challenged and the presumption of validity applies.

Furthermore, Dr. Kanag-Isvaran, PC., submitted that, artificially created area of land not being part of the territory of the Republic of Sri Lanka as set out in Article 5 of the Constitution, the President cannot 'issue a Land Grant under the Crown Lands Ordinance' since the said artificially created land does not form 'Crown Land'. In the circumstances it was submitted that the aforementioned clauses are violative of Article 5 of the Constitution and null and void.

It was further submitted that reclamation of land is statutorily provided for in the Sri Lanka Land Reclamation and Development Corporation Act, No. 27 of 1968 (as amended). Section 2(1) of the said Act provides *inter alia* that the Minister may where satisfied that *'any area of land is a low-lying, marshy, waste or swampy area ... declare such area to be a Reclamation and Development Area for the purpose of this Act.*' Therefore, it was submitted that it cannot be contended that the artificially created land is reclaimed land.

The learned Additional Solicitor General in response, drew the attention of Court to section 58 of the State Lands Ordinance which reads:

> *"The administration, control, custody and management of the foreshore are hereby declared to be vested in the State."*

Section 60 of the State Lands Ordinance, *inter alia*, states as follows;

> *"The President is hereby authorized -*
> *(1) ...*
> *(2) ...*
> *(3) to reclaim any part of the foreshore or bed of the sea;*
> *(4) to erect buildings on any areas of land reclaimed from the sea;"*

Thus, it is the considered view of the Court that the State Lands Ordinance authorises the President to reclaim the foreshore or bed of the sea and to erect buildings on any areas of land so reclaimed from the sea.

Section 110 of the State Lands Ordinance as amended defines "State Land" to mean '*all land in Sri Lanka to which the State is lawfully entitled or which may be disposed of by the State and includes all rights and privileges attached or appertaining to such land.'* Further, section 60(5) of the State Lands Ordinance confers power on the President to lease or otherwise dispose of any such reclaimed area.

Therefore, once a land is reclaimed it becomes State Land by virtue of the aforementioned sections in the State Lands Ordinance. Thus, once a land is reclaimed it becomes part of the territory of Sri Lanka by operation of law.

For the aforementioned reasons, Court holds that the Colombo Port City

is part of the territory of Sri Lanka in terms of the law and Parliament has legislative power over the reclaimed area.

Mr. Dharshana Weraduwage and several other Counsel appearing for the respective Petitioners submitted that the Bill has been placed on the Order Paper of Parliament in breach of the provisions in Article 154G(3) of the Constitution inasmuch it was not referred to every Provincial Council for the expression of its views. It was their contention that the procedure set out in Article 154G(3) must be followed where the Bill is in respect of any matter set out in the Provincial Council List. Furthermore, it was submitted that the Bill deals with matters such as land, planning, local government and betting which are matters falling under the Provincial Council List. Learned Counsel referred to Clauses 3(1), 6(1)(a), 6(l)(b), 6(l)(p), 6(l)(ga), 52, 53 and 73 of the Bill.

The attention of Court was drawn to the determination of this Court in *Land (Special Provisions) Bill* S.C.(S.D.) Nos. 01 to 05/2019 where it was observed:

> *"Non-adherence to the procedure stipulated under the Constitution in placing the Bill on the Order Paper of Parliament has been the preliminary ground of challenge. Accordingly, Court determines that, for the reason set out earlier, which led us to hold that the proposed Bill deals with the alienation of State land, and that the Bill should be regarded as one relating to a subject listed in the Provincial Council List insofar as the procedure to be followed is concerned, this Bill must be referred to Provincial Councils for the expression of their views, in terms of Article 154G(3) of the Constitution."*

Learned Additional Solicitor General submitted that in determining whether the Bill is in respect of any matter set out in the Provincial Council List, it would be necessary to consider the nature of the provisions contained in the Bill, its purpose and object as a whole and not to the particular words that are used in a section of the Bill which may correspond with an item in any of the three lists in the Constitution. It was further submitted that the approach adopted by Court in *Divineguma Bill* S.C.(S.D.) Nos. 01 to 03/2012, where the words contained in sections of the Bill were compared with items in List I of the Ninth Schedule to the Constitution, is not consistent with several other determinations of this Court on this issue. She drew our attention to the determinations in *Agrarian Services (Amendment) Bill* S.C.(S.D.) Nos. 02/91 and 04/91, *Microfinance Bill* S.C.(S.D.) Nos. 05, 06 & 08/2016, *Town and Country Planning (Amendment) Bill* S.C. (S.D.) No. 03/2011 and *State Land (Special Provisions) Bill* S.C.(S.D.) Nos. 01-05/2019 where Court adopted the purpose and object test.

Finally, learned Additional Solicitor General submitted that the Bill which relates to National Policy concerning economic development and planning, falls within List II (Reserved List) of the Ninth Schedule to the Constitution as it deals with National Policy. It was further submitted that the subject of "National Policy on all Subjects and Functions" is a matter that falls within the ambit of List II (Reserved List) of the Ninth Schedule to the Constitution. Reliance was placed on the determinations of this Court in *Revival of Underperforming Enterprises and Underutilised Assets Bill* S.C.(S.D.) No. 02/2011, *Land (Restrictions on Alienation) Amendment Bill* S.C.(S.D.) No. 15/2018 and *Mutual Assistance in Criminal Matters (Amendment) Bill* S.C.(S.D.) No. 16-18/2018. Several of the Intervenient Petitioners supported this position taken by the learned Additional Solicitor General.

Court will now consider the aforementioned objection raised by some of the Petitioners.

Article 154G(3) of the Constitution reads:

> *"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."*

This requires any Bill in respect of any matter set out in the Provincial Council List to be referred to every Provincial Council for the expression of its views. Such reference has to be made by the President after the publication of the Bill in the Gazette and before it being placed on the Order Paper.

Provincial Councils were *established* in accordance with Article 154A (1) of the Constitution and they are *constituted* upon election of the members of such Council in accordance with the law relating to Provincial Council elections as provided under Article 154A(2).

The object and the purpose of the reference of a Bill to a Provincial

Council is to obtain its views. This Court had observed that the views of the Governor of a Provincial Council does not amount to the views of the Provincial Council and therefore, the requirement in Article 154G(3) cannot be satisfied by referring a Bill to a Governor of a Provincial Council when such Council has not been constituted in accordance with the law. It is the view of the Provincial Council and the view of no other person or body will satisfy this requirement. [*Divineguma Bill* S.C.(S.D.) Nos. 04 to 14/2012].

In *Agrarian Services (Amendment)* Bill S.C.(S.D.) Nos. 02/91 and 04/91, Court opined that the words 'every Provincial Council' in Article 154G(3) of the Constitution *"may well mean every Council in existence, so that reference to a dissolved Council is unnecessary (unless perhaps such dissolution is being challenged as being a nullity)."*

However, in *Divineguma Bill* (supra), Court took a different view and held that the only workable interpretation that could be given to Article 154G(3) of the Constitution is that where the views of one Provincial Council cannot be obtained due to it being not constituted, the Bill could be passed only by the special majority required by the Constitution.

It is the view of the Court that the requirement to refer a Bill to every Provincial Council is a procedural step in the legislative process. However, in interpreting this provision (in a situation where a Bill has not been referred to a Provincial Council) it is necessary to consider the application of the maxim *'lex non cogit ad impossibilia'* - law does not compel a man to do that which he cannot possibly perform.

Court has previously held in *Ananda Dharmadasa and Others v. Ariyaratne Hewage and Others* (2008) 2 SLR 19, that the principle *lex non cogit ad impossibilia* is applicable in interpreting procedural requirements in the Constitution.

The existence of a Provincial Council constituted in accordance with the law is a pre-requisite to decide whether there is non-compliance with this procedural step in a given situation. It is pertinent to note that at present, none of the Provincial Councils have been constituted in accordance with the law. Therefore, referring a Bill to Provincial Councils at this point of time, for the expression of its views is an act which cannot possibly be performed. Thus, non- compliance with this procedural step which cannot be performed, in the present circumstances, should not adversely impact on the legislative power of Parliament, which is a part of inalienable sovereignty of the People.

Under Article 75 of the Constitution, Parliament has the power to make laws and Article 78(2) provides that "The passing of a Bill or a

Resolution by Parliament shall be in accordance with the Constitution and the Standing Orders of Parliament". The requirement to obtain a special majority for the passing of a Bill forms a part of legislative process and therefore, has to be provided for in accordance with the provisions of the Constitution and Standing Orders. Articles 82(5), 83, 84(2), 154G(2)(b) and 154G(3)(b) identify situations in which a Bill has to be passed by a special majority. Article 154G(3)(b) recognizes the situation where such a special majority is required in relation to a Bill in respect of any matter set out in the Provincial Council List. Such requirement is confined to a situation where *"one or more Provincial Councils do not agree to the passing of the Bill"*. Any further extension of this requirement to other situations is in our view a fetter on the legislative power of the Parliament which would adversely impact on the sovereignty of the People.

In *Attorney-General and others vs Sumathipala* (2006) 2 SLR 126 at 143 this Court held as follows:

> *" ... A Judge cannot under a thin guise of interpretation usurp the function of the Legislature to achieve a result that the Judge thinks is desirable in the interests of justice. Therefore, the role of the Judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any Court and the function of every Judge to do justice within the stipulated parameters. Referring to the function of a Judge, Justice Dr. Amerasinghe was of the view that (Judicial Conduct, Ethics and Responsibilities pg. 284),The function of a Judge is to give effect to the expressed intention of Parliament. If legislation needs amendment because it results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years ..."*

Considering the reasons set out above, this Court is not inclined to follow the determination in *Divineguma Bill* (supra) on this issue. Therefore, in the aforementioned circumstances non-reference of the Bill to Provincial Councils does not tantamount to a non-compliance with the procedural requirement stipulated in Article 154G(3) of the Constitution.

It is therefore not necessary for Court to decide the question, whether the Bill relates to any matter set out in the Provincial Council List.

The Court will now proceed to consider the objections raised by the Petitioners in relation to clauses of the Bill.

Several Petitioners submitted that the Commission to be established is vested with wide powers including executive and legislative powers

sans any executive or Parliamentary control in areas such as public finance, granting of exemptions, licenses, authorizations and the making of subordinate legislation. It was also submitted that the Bill allows for the appointment of non-citizens as members of the Commission. It was further contended that the Colombo Port City is not subject to laws and regulations of the Municipal Council and Urban Development Authority. Further, no representatives would be elected from the Zone and thereby democracy is denied to the people in the Colombo Port City. It was further submitted that the compulsory requirement to refer disputes to arbitration ousts the jurisdiction of Courts.

In the context of the above submissions, in order to consider the constitutionality of the Bill, it is necessary to examine the clauses of the Bill individually as well as cumulatively.

Clause 7 of the Bill refers to the composition of the Commission and the appointment of its members. Members of the Commission are to be appointed by the President. Clause 7(2) provides for the criteria of such appointment and states that "in appointing the members of the Commission, consideration shall be afforded to ensure that the composition of the Commission is representative, in terms of knowledge, expertise and experience and national or international recognition". Furthermore, Clause 7(1) mandates that "In making such appointments consideration shall be afforded to ensure that such members possess relevant knowledge, expertise and experience and national or international recognition in the fields of Investment, Finance, Law, Information Technology, Engineering, Business or Accountancy".

Petitioners drew the attention of Court to the above clause and submitted that it paves the way for the President to appoint non-Sri Lankans to the Commission. It is their contention that appointment of non-Sri Lankans as members of the Commission is detrimental to national economy and would adversely impact on national security. On this basis, they contended that Clause 7 is inconsistent with Articles 2, 3 and 4 of the Constitution. In the course of the submissions reference was made to the determination of Court in *Sri Lanka Broadcasting Authority Bill* S.C.(S.D.) Nos. 1/1997 to 15/1997 where Court observed "these things may not happen, but they might happen because they are permitted".

The learned Additional Solicitor General submitted, that Clause 7 provides a clear criterion for the selection of members of the Commission and therefore, the President in making appointments is required to exercise his discretion within the parameters set out therein. Furthermore, Clause 13(1) of the Bill sufficiently provides for avoidance of any conflict of interest.

Whilst submitting that such appointments could be subjected to judicial review, the learned Additional Solicitor General contended that the Petitioners submissions are based on speculation and the constitutionality of any provision should not be decided on speculation. In this context the learned Additional Solicitor General referred to the determination of Court in the *Third Amendment to the Constitution Bill* S.C.(S.D.) Nos. 2/1982 to 5/1982, where this Court observed *"a clear distinction must be borne in mind between the law and the administration of the law. A law cannot be struck down as discriminatory because of the fear that it may be administered in a discriminatory manner. Mere possibility of abuse of power is not sufficient ground to hold that a law offends the fundamental right of equality.* "

Court considered all submissions made in relation to Clause 7 of the Bill. We are of the view that Clause 7 sufficiently sets out the criteria for the selection of members to the Commission. Therefore, it does not lead to arbitrary exercise of discretion. Any appointment, that is not in accordance with the law is open for judicial review in appropriate legal proceedings. Hence, Court is of the view that Clause 7 is not inconsistent with any provision of the Constitution.

Court also gave its mind to several clauses of the Bill including Clauses 3(5), 3(6), 3(7), 6(l)(a), 6(1)(b), 6(1)(g), 6(1)(h), 6(1)(i), 6(l)(s), 6(l)(t), 28, 30, 31, 33, 55, 58 and the definition of the term "Regulatory Authority" as provided in Clause 74.

The long title *inter alia* recognises "To provide for the identification of a Single Window Investment Facilitator for the promotion of ease of doing business within such Zone" as one of the objectives of this Bill. Clause 30 of the Bill identifies the "Commission" as the Single Window Facilitator responsible for the consideration and determination of an application made for registration, licence, authorisation or other approval as may be necessary to engage in any business in or to invest in the Area of Authority of the Colombo Port City.

Clause 31 of the Bill makes provision relating to the issue or grant of the registration, licence or authorisation or other approval so applied. It is important to note, that the Commission when granting such licence, authorisation or approval should seek the concurrence of the respective statutory authorities as provided in Clauses 3(5), 6(1)(b), 55 and 58.

It was contended on behalf of several Petitioners that the relevant clauses in the Bill imposes an obligation on Regulatory Authorities to grant the required concurrence to the Commission as a matter of course and therefore infringe Articles 1, 2, 3, 4(d), 12(1), 27(2)(a) and 27(3) of the Constitution. Furthermore, it was contended that it is unreasonable and arbitrary to remove discretion and any meaningful decision-making

power vested with statutory bodies by relevant laws. It was contended that the process of removal of the discretion of statutory bodies is arbitrary, capricious and unreasonable and is therefore inconsistent with Article 12(1) of the Constitution.

Clauses 3(5) and 3(6) of the Bill reads:

> *"(5) The Commission shall, in the exercise, performance and discharge of its powers, duties and functions, where so required by the respective written laws applicable to any Regulatory Authority, obtain the concurrence of the relevant Regulatory Authority in respect of the subjects vested in or assigned to, such Regulatory Authority and to the extent specifically provided for in this Act:*
>
> *Provided that, the concurrence of the relevant Regulatory Authority sought shall be limited to the implementation, within the Area of Authority of the Colombo Port City, of the respective written laws applicable to such Regulatory Authority.*
>
> *(6) The relevant Regulatory Authority from whom such concurrence is being sought by the Commission, shall as soon as practicable in the circumstances, as a matter of priority, provide such concurrence to the Commission."*

Examination of Clauses 3(6), 30(3), 55(2) and 58(1) of the Bill show that when the Commission seeks the concurrence from a Regulatory Authority such authority should 'render such concurrence to the Commission'. Such a process takes away the discretionary power of the authorities and therefore is inconsistent with Article 12(1) of the Constitution.

Learned Additional Solicitor General during the course of her submissions submitted that the following amendments will be moved at the Committee Stage to Clauses 3(6), 30(3), 55(2) and 58(1):

Clause 3(6)

Page 3, Line 33 - Delete the words "provide such concurrence" and substitute therefor the words "communicate its decision "

Clause 30(3), second proviso

Page 30, Line 15 - Delete the words "render such concurrence" and substitute therefor the words "communicate its decision"

Clause 55(2)

Page 49, Lines 16 and 17 - Delete the words "provide such concurrence" and substitute therefor the words "communicate its decision "

Clause 58(1)

Page 52, Lines 9 and 10 - Delete the words "render such concurrence" and substitute therefor the words "communicate its decision "

Upon an examination of the proposed amendments, Court is of the view that if the above clauses are amended as stated above they would cease to be inconsistent with Article 12(1) of the Constitution.

Several Petitioners further contended that the scheme provided under the Bill grants sweeping powers to the Commission including the statutory powers and functions that are vested on regulatory authorities such as Director General of Customs and Director General of Inland Revenue. Furthermore, it was contended that the discretion vested on such authorities have been compromised to a great extent by the provisions of the Bill.

The attention of Court was drawn by the Petitioners to Clause 74 of the Bill which defines "Regulatory Authority". In terms of this definition "Regulatory Authority" includes "the Monetary Board of the Central Bank of Sri Lanka, the Registrar General of Companies, the Director General of the Central Environmental Authority, the Controller of Immigration and Emigration, the Director General of Customs, and such other regulatory authority or approving authority, and in whom the powers, duties and functions relating to the respective subjects which are dealt with in this Act are vested in or assigned to in terms of any applicable written law to the extent provided in this Act. The relevant Regulatory Authority shall be limited to the implementation of the respective written laws applicable to such authorities, within the Area of Authority of the Colombo Port City".

The learned Additional Solicitor - General in response submitted that the process of regulation entails several phases: a. licensing/granting permission; b. supervision and monitoring; c. enforcement and punishment for violations. It was her submission that the Bill creates a concurrent structure of regulation, where both the Commission and the existing Regulatory Authorities exercise concurrent power.

The learned Additional Solicitor - General further submitted that Schedule II of the Bill seeks to identify the laws under which exemptions or incentives may be granted. Accordingly, it was submitted that the Bill does not suspend the operation of the Inland Revenue Act within the Area of Authority of the Colombo Port City. She drew the attention of Court to Clause 41(6) of the Bill which deems a company registered under Part VII to be a non-resident for the purposes of the Inland Revenue Act, and therefore such companies will be subject to the provisions of Inland Revenue Act, dealing with non-resident company. It was contended that there are no other restrictions to the application of the Inland Revenue Act. Further, it was submitted

that the Customs Ordinance continues to apply, and its inclusion in Schedule II is merely for the purposes of granting incentives under the strict regime specified in Clauses 52 and 53 for Businesses of Strategic Importance and that key authorities such as the Central Bank of Sri Lanka, Central Environmental Authority, Department of Customs, Department of Inland Revenue, the Department of Labour etc., will therefore be able to supervise and monitor the implementation of the respective laws within the Area of Authority to the extent required by the relevant written laws.

Further, learned Additional Solicitor - General contended that such a structure is not repugnant to the Constitution and relied on the determination of Court in *Greater Colombo Economic Commission (Amendment) Bill* S.C.(S.D.) No. 01/1992 where the Greater Colombo Economic Commission was renamed as the Board of Investment. It was contended that Court did not find anything repugnant to the Constitution on the basis that the powers of the existing regulators 'only enable the Board to exercise those powers concurrently'. It was further pointed out that Court observed in the said determination that granting such concurrent power to the Board of Investment would not permit the Board to exercise such powers arbitrarily or against the spirit of the Act.

The learned Additional Solicitor - General further submitted that all the other laws of the country, other than the laws which are excluded by Schedule III of the Bill and any other provision of any law that has been excluded by the Bill, are in force within the Area of Authority of the Colombo Port City. It was further submitted that Clauses 3(5) and 3(7) of the Bill are overarching provisions which retain in full force the power of the Regulatory Authorities in respect of regulatory matters except where the powers of such authorities have been expressly restricted under this Bill.

Upon reading of the Bill, Court is of the view that the regulatory structure set out in the Bill lacks clarity and provides for the exercise of arbitrary power by the Commission and thus, inconsistent with Article 12(1) of the Constitution.

Furthermore, it is important that the relevant Regulatory Authorities are consulted when the President or the assigned Minister makes regulations in terms of Clause 71(1) of the Bill.

The learned Additional Solicitor - General submitted that the following amendments will be made to Clauses 3(5) proviso, 6(1)(b), 30(3) first proviso and 74 of the Bill at the Committee Stage:-

Clause 3(5) proviso

Page 3, Line 27 - Add the words "by the Commission" after the word "implementation"

Clause 6(1)(b)

Page 6, Line 27 - Delete the word "overall"

Page 6, Line 32 - Delete the words "as the Commission considers necessary,"

Clause 30(3) first proviso

Page 30, Line 9 - Add the words "by the Commission" after the word "implementation"

Clause 71(1)

Page 62, Line 7 - Delete the words "as is considered necessary"

Clause 74

Page 70, Lines 11 to 16 - Delete the words commencing from "to the extent" to "Colombo Port City".

In addition to the above mentioned amendments proposed by the learned Additional Solicitor - General, Court is of the view that the following amendments must also be made to overcome inconsistency with Article 12(1) of the Constitution and ensure that the Commission in exercising regulatory powers vested in other Regulatory Authorities within the Area of Authority of the Colombo Port City, should always obtain the concurrence of the respective Regulatory Authorities and the powers of such Regulatory Authorities within the Area of Authority of the Colombo Port City will continue unimpeded.

Clause 3(7)

To be shifted after Clause 73 of the Bill and re-numbered as Clause 74. The new Clause 74 will now read as follows:

> ***"74. Nothing in this Act shall, unless otherwise specifically provided for in this Act, be deemed to restrict in any way the powers, duties and functions vested in such Regulatory Authority by any written law in relation to the Area of Authority of the Colombo Port City. "***

Clauses 74 and 75

Present Clauses 74 and 75 to be re-numbered as Clauses 75 and 76 respectively.

The inconsistency with Article 12(1) of the Constitution described above will cease if Clauses 3(5) proviso, 3(7), 6(1)(b), 30(3) first proviso 71(1) and 74 are amended as described in the manner referred to above.

Several Petitioners further contended that the Clauses of the Bill infringe the legislative power of Parliament. In particular they submitted that Clauses 3(4), 6(1)(u), 68(1)(f) and 68(3)(a) infringe Article 76 of the Constitution read with Articles 3 and 4 since the said Clauses confer power on the Commission to legislate on certain matters contrary to Article 76 read with Articles 3 and 4 of the Constitution.

The Petitioners also drew the attention of Court to Clause 68 of the Bill which provides for the imposition of punishment for the violation of a rule, code, direction or guideline issued by the Commission. It was pointed out that although Clause 72 of the Bill requires rules made under the Bill to be published in the *Gazette*, there is, however, no requirement for its approval by Parliament. Accordingly, it was submitted that the said Clauses are inconsistent with Article 4(a) of the Constitution.

Court observes that Clause 3 of the Bill deals with the establishment of the Commission and Clause 6 stipulates powers, duties and functions of the Commission. Clause 68 of the Bill refers to offences.

Clause 3(4) of the Bill reads:

> *"The Commission shall be responsible for preparing, developing, amending, updating, publishing and enforcing all Community Rules and Development Control Regulations applicable within the Area of Authority of the Colombo Port City"*

Clause 6 of the Bill deals with the powers, duties and functions of the Commission and Clause 6(l)(u) of the Bill reads:

> *"to prepare, develop, amend, update, publish and enforce all Community Rules and Development Control Regulations as may be prescribed for applicability within the Area of Authority of the Colombo Port City"*

Clause 68(1)(f) of the Bill reads:

> *"contravenes or fails to comply with any rule, code, direction or guideline made or issued in terms of this Act,"*

Clause 68(3)(a) of the Bill reads:

> *"Notwithstanding the provisions contained in any other written law, any person who contravenes or fails to comply with any provision of this Act or any regulation, rule, direction, order or requirement issued or imposed thereunder commits an offence under this Act and shall be liable on conviction after summary trial before a Magistrate to a fine of not less than rupees five hundred thousand and not more than rupees one million or to imprisonment for a term of not less than three months and not exceeding one year, or to both such fine and imprisonment"*

The submission that the said Clauses are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution is based on the fact that the Commission is conferred with the power to make rules, codes, directions or guidelines without Parliamentary control and hence such rules, codes, directions or guidelines cannot then be the basis of any criminal sanction.

Upon a careful consideration, Court is inclined to agree with the said submission. It is the view of Court that Clauses 68(l)(f) and 68(3)(a) are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution.

The learned Additional Solicitor - General submitted that the following amendments will be made to Clauses 68(1)(f) and 68(3)(a) of the Bill at the Committee Stage:

Clause 68(1)(f)

Page 60, Lines 1 to 3- Delete in its entirety

Clause 68(3)(a)

Page 60, Line 25 - Delete the words "rule, direction, order or requirement issued or imposed"

Court is of the view that if the above amendments are made the aforementioned inconsistency will cease.
Court observes that in terms of Clause 71(2)(a) of the Bill, it is the President or the assigned Minister who is conferred with the power to make Development Control Regulations which are then placed before Parliament for approval. The role of the Commission in this process is consultative as evinced by Clauses 71(1) and 74. However, Court further observes that contrary to Clause 71(2)(a) of the Bill, in terms of Clauses 3(4) and 6(1)(u) of the Bill, the Commission has been conferred with the power to prepare Development Control Regulations without any Parliamentary control. In these circumstances, Court is of the view that Clauses 3(4) and 6(1)(u) of the Bill are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution.

The learned Additional Solicitor - General submitted that the following amendments will be made to Clauses 3(4) and 6(1)(u) of the Bill at the Committee Stage:

Clause 3(4)

Page 3, Line 14 - Delete the word "for" and substitute therefore the words "to facilitate"

Page 3, Lines 16 and 17 - Delete the words "and Development Control Regulations"

Clause 6(1)(u)

Page 10, Lines 14 to 15 - Insert the words "enforce the" before the words "Development Control Regulations"

The Court is of the view that the inconsistency with Article 76 read with Articles 3 and 4 of the Constitution will cease if the aforementioned amendments are made.

Court further observes that Clause 71(1) of the Bill confers power on the "President or in the event that the subject of the Colombo Port City is assigned to a Minister, such Minister" to make Development Control Regulations. However, in the definition of the term "Development Control Regulations" in Clause 74 of the Bill, reference is only made to the President. Therefore, Court is of the view that the word "President" in the definition clause of "Development Control Regulations" should be amended to read as "President or in the event that the subject of the Colombo Port City is assigned to a Minister, such Minister".

Another submission on behalf of the Petitioners was that the Bill as a whole is inconsistent with Chapter VI of the Constitution dealing with the Directive Principles of State Policy and Fundamental Duties. It was contended that such duties include the realization by all citizens of an adequate standard of living and the rapid development of the whole country, equitable distribution among all citizens of the material resources of the community and social product. It was further submitted that when the Bill seeks to give concessions by excluding 14 revenue laws to the Colombo Port City, the entrepreneurs in the rest of the country will be at a disadvantage and be adversely affected.

In the course of the submissions the attention of Court was drawn to the decision in ***Haputhantirige and Others v. Attorney - General*** **(2007) 1 SLR 101 at 118 where S.N. Silva C.J. held**:

> *"The limitation in Article 29 which states that the provisions of Chapter VI are not justifiable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. Article 27 of Chapter VI lays down that the 'Directive Principles of State Policy' contained therein shall guide "Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society." Hence the restriction added at the end of Article 29 should not detract from the noble aspiration and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert."*

It was further submitted by the Petitioners that Part IX of the Bill is inconsistent with Articles 148 and 152 of the Constitution. It was contended that the tax exemptions or incentives are sought to be given

sans any approval from the Parliament and is in total violation of Articles 148 and 152 of the Constitution. A comparison was made between the Bill and the Strategic Development Projects Act No. 14 of 2008 under which the grant of fiscal exemptions must be placed before Parliament for approval.

It was further submitted that the provisions in the Bill dealing with tax exemptions is an abdication of powers of Parliament and violates Article 76(1) read with Article 148 of the Constitution.

In view of the above submission, Court considered whether the Bill as a whole infringes Articles 3, 4, 12(1), 76 and 148 of the Constitution.

Court observes that one objective of the Directive Principles of State Policy and Fundamental Duties is the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and coordinating such public and private economic activity towards social objectives and the public weal.

As the Preamble to the Bill states, it is an attempt by the Government to give effect to the above objective thorough the establishment of the Colombo Port City to attract new investments. It is universally accepted that one way of attracting foreign investments is to provide fiscal incentives to the investors.

Furthermore, Article 15(7) of the Constitution permits a restriction of the application of Article 12(1) of the Constitution in the interest of meeting the just requirements of the general welfare of the democratic society, through such measures as taxation.

Article 148 of the Constitution reads:

> *"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."*

In *Development Councils Bill* S.C.(S.D.) No. 4/1980 this Court observed:

> ***"A wide and sweeping power to impose taxes, rates and levies at will is an attribute of the Sovereign Legislature*** *and the conferment of such power on any other body constitutes an abdication and alienation of legislative power.* ***In the case of the Bill this is so only because the nature and kind of taxes, rates or levies that may properly be imposed by the Development Council have not been specified in any way.*** *The conferment of an unrestricted power of imposing taxes, rates and levies*

> *effected by section 24, and the vesting of it in another body, is such a fundamental departure from what may be done under our Constitution that it both contravenes Article 76 ... and is inconsistent with Article 3."* [emphasis added]

Part IX of the Bill provides for the determination and grant of exemptions or incentives for the promotion of Businesses of Strategic Importance.

Clause 52(2) of the Bill confers power on the Commission in consultation with the President or in the event that the subject of Colombo Port City is assigned to a Minister, in consultation with such Minister, to identify and designate "Businesses of Strategic Importance", which would ensure the success of the objectives in establishing the Colombo Port City, having regard to the national interest or in the interest of the advancement of the national economy. Upon a business being so identified as a Business of Strategic Importance, exemptions or incentives as provided in Part IX may be granted in so far as it relates to its operations in and from the Area of Authority of the Colombo Port City. In the case of tax related exemptions, such exemptions may be granted, either in full or in part, and from all or any of the enactments set out in Schedule II of the Bill.

This Court has on numerous occasions emphasised that in revenue matters, in making classifications for the purpose of granting concessions or imposing liability, there is a wide discretion. *[Inland Revenue Amendment Bill* S.C. (S.D.) No. 3/1980; *Finance Bill* S.C. (S.D.) No. 28/2004, *Value Added Tax (Amendment) Bill* S.C.(S.D.) No. 29/2004, *Value Added Tax (Amendment) Bill* S.C. (S.D.) No. 2/2005, *Finance (Amendment) Bill* S.C.(S.D.) No. 6/2005, *Inland Revenue (Amendment) Bill* S.C.(S.D.) No. 5/2005, *Default Taxes (Special Provisions) Bill* S.C.(S.D.) No.02/2009]. Such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable or discriminatory.

In terms of Clause 53(1) of the Bill, the Commission only makes recommendations to the President or the Minister in charge of the Colombo Port City to grant exemptions or incentives in terms of Clause 52 who will then seek the approval of the Cabinet of Ministers in consultation with the Minister assigned the subject of Finance.

If the Cabinet of Ministers approves the project, within two weeks of such approval, an Order in terms of Clause 53(3) of the Bill shall be published in the *Gazette* specifying the details mentioned in sub-paragraphs (a) to (d) thereof. After thirty days of its publication, the Order is required to be placed before Parliament for information in terms of Clause 53(4) of the Bill.

Upon consideration of the Clauses referred to above, we are of the view

that the submission that it is the Commission which grants fiscal exemptions or incentives is misconceived. The decision on the grant of exemptions or incentives is of the Cabinet of Ministers based on the recommendation of the Commission.

Court observes that Clause 52(5) of the Bill provides for the criteria of determining Businesses of Strategic Importance.

In *Appropriation Bill* S.C.(S.D.) Nos. 3 & 4/2008, this Court held that legislative power of Parliament includes the "full control over public finance" as stated in Article 148 which is a vital component of the balance of power firmly established by the Constitution in relation to the respective organs of Government. Such "full control" was held to have three vital components *viz:*

(i) control of the sources of finance *i.e.* imposition of taxes, levies, rates and the like and the creation of any debt of the Republic;

(ii) control by way of allocation of public finance to the respective departments and agencies of Government and setting of limits of such expenditure;

(iii) control by way of continuous audit and check as to due diligence in performance in relation to (i) and (ii).

This formulation has been adopted and followed by this Court in *Fiscal Management (Responsibility)(Amendment) Bill* S.C.(S.D.) No. 29/2016 and in *Foreign Exchange Bill* S.C.(S.D.) Nos. 01/2017 to 04/2017.

Clauses 52(3) and 52(5) of the Bill reads:

> *"(3) Upon a business being so identified as a Business of Strategic Importance, exemptions or incentives as provided in this Part may be granted thereto, in so far as it relates to its operations in and from the Area of Authority of the Colombo Port City. In the case of tax related exemptions, such exemptions may be granted, either in full or part, and from all or any of the enactments set out in Schedule II hereto."*
>
> *"(5) Regulations may be made prescribing any further guidelines as may be necessary on the grant of exemptions or incentives, as provided for in this Part of this Act."*

The Bill as it stands now does not provide for any guidelines in the granting of exemptions or incentives. Neither the individual exemptions nor incentives go before Parliament for approval. Clauses 52(5) and 71 (2)(p) as it stands now presupposes that there are guidelines in the Bill for the grant of such exemptions or incentives when there is none. Accordingly, Clause 52(3) read with Clauses 52(5) and 71(2)(p) of the Bill are inconsistent with Articles 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution.

In *Finance Bill* S.C.(S.D.) No. 3/2013, Court considered Clause 19A(1) of the Finance Bill which empowered the Minister to make regulations in respect of all matters which are required to be prescribed and specify the conditions and exemptions in relation to local sales, the procedure to be followed in granting exemptions, and specify the monitoring authority and mechanism for monitoring the grant of concessions. The Court held that the structure put in place by the Bill would not amount to derogation from the control of Public Finance by Parliament under Article 148 of the Constitution.

Thus, the Court determines that the requirements in Article 148 of the Constitution is satisfied when fiscal exemptions are granted in accordance with regulations made specifying the conditions under which exemptions can be granted and the approval of Parliament is obtained for such regulations.

The learned Additional Solicitor - General submitted that the following amendments will be made to Clauses 52(5) and 71(2)(p) of the Bill at the Committee Stage:

Clause 52(5)

Page 44, Lines 29 to 31 - Delete in its entirety and replace with the following:

"Regulations may be made prescribing guidelines on the grant of exemptions or incentives, as provided for in this Part of this Act."

Clause 71(2)(p)

Page 65, Line 1, delete the words "any further"

Furthermore, the Court is of the view that the following amendment should also be made to remove the inconsistency identified above.

Clause 52(3)

Page 44, Line 20, Add the words "in accordance with the Regulations made under this Act ..." after the words "granted thereto."
The Court is of the view that the inconsistency with Articles 3, 4, 76 and 148 of the Constitution will cease if the proposed amendments are made.

Court further observed that Clause 53(2)(b) read with Clause 53(3)(b) of the Bill empowers the Cabinet of Ministers, on the recommendation of the Commission, to exempt enactments (listed in Schedule II of the Bill) being applicable to such Businesses of Strategic Importance. Court determines that this is inconsistent with Article 76 of the Constitution read with Articles 3 and 4 of the Constitution as it amounts to an abdication of the legislative power of Parliament.

The learned Additional Solicitor - General submitted that the following amendment will be made to Clause 53(2)(b) of the Bill at the Committee Stage:

Clause 53(2)(b)

Page 45, Line 20 - Delete the words "the specific enactments from those listed in" and substitute therefor the words "the specific exemptions from those enactments listed in"

Page 45, Line 22 - Delete the words "exempted from being"

The Court determines that Clause 53(3)(b) of the Bill should be also amended as follows:-

Clause 53(3)(b)

Page 46, Line 10 - Delete the words "the specific enactments from those listed in" and substitute therefor the words "the specific exemptions from those enactments listed in"

Page 46, Line 11 - Delete the words "exempted from being"

The Court is of the view that the inconsistency with Articles 3, 4 and 76 of the Constitution will cease if the proposed amendments are made.

The attention of Court was drawn by the Petitioners to Clause 6(1)(n) which empowers the Commission to charge fees and other charges as may be determined by the Commission and Clause 6(1)(p) which confers power on the Commission to identify local assessment rates and other levies and it was submitted by the Petitioners that they infringe Article 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution.

In so far as Clause 6(1)(n) of the Bill is concerned, the said provision empowers the Commission to charge "fees and other charges" for services and facilities provided directly by the Commission or through the Estate Manager within the Area of Authority of the Colombo Port City.

The Court is of the view that Clause 6(1)(n) of the Bill does not provide for collection of taxes or levies and as such does not attract Article 148 of the Constitution. In the course of the submissions, the learned Additional Solicitor - General submitted that the Clause in issue only empowers the Commission to charge fees and or other charges strictly for the services and any other facilities that the Commission would be providing. The learned Additional Solicitor - General further submitted that the said sub-Clause will be amended at the Committee Stage for clarity as follows:-

Clause 6 (1) (n)

Page 9, Line 16 - Insert the word "ancillary" before the word "services"

In so far as Clause 6(1)(p) is concerned, Court observes that the power granted to the Commission is to identify local assessment rates and any other levies at rates as shall be prescribed. Clause 71(2)(b) makes provision for the President or the Minister to make regulations for the purposes of Clause 6(1)(p).

Accordingly, Court determines that Clauses 6(1)(n) and 6(1)(p) are not inconsistent with Article 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution.

The Petitioners further submitted that Clause 40 is inconsistent with Articles 3, 4 and 148 of the Constitution since it requires a citizen to pay a 'levy' in respect of goods purchased at retail facilities "when leaving the Area of Authority of the Colombo Port City" without any control of Parliament.

Court observes that this objection is two-fold. Firstly, it raises the issue of infringement of Article 148 of the Constitution and secondly, it raises the issue of freedom of movement.
Clause 40(2) of the Bill reads:

> *"Any levy as may be required to be paid by a citizen of Sri Lanka or a resident on goods purchased at retail facilities as set out in subsection (1), when leaving the Area of Authority of Colombo Port City, shall be as prescribed."*

In so far as the collection of levies under Clause 40(2) of the Bill, Court observes that it will be as prescribed in terms of Clause 71(2)(1) of the Bill which needs the approval of Parliament and hence there will be no violation of Article 148 of the Constitution.

In so far as the freedom of movement is concerned, Court observes that, the levy must be paid, in terms of Clause 40(2) "when leaving the Area of Authority of the Colombo Port City" and in terms of Clause 71(2)(1) "at the time of leaving the Area of Authority of the Colombo Port City".

It is pertinent to observe that Clauses 30(1) and 33(1) of the Bill require a person to obtain prior approval of the Commission in order to visit the Area of Authority of the Colombo Port City. In this regard Court observes that in terms of Clause 40(1) of the Bill, *inter alia*, a citizen of Sri Lanka is entitled to utilise any retail facilities or services within the Area of Authority of the Colombo Port City at restaurants, cinemas, entertainment facilities, shopping facilities, or parking facilities, upon making related payments, in Sri Lanka Rupees.

Court holds that when Clauses 30(1), 33(1), 40(2) and 71 (2)(1) of the Bill are considered cumulatively, they are inconsistent with Article 14 (l)(h) of the Constitution.

The learned Additional Solicitor - General informed that the following amendments will be made to Clauses 30(1) and 40(2) of the Bill at the Committee Stage:

Clause 30(1)

Page 29, line 24 - Delete the words "or to visit."

Clause 40(2)

Page 35, Line 37 - Delete the words "when leaving" and substitute therefor the words "to be taken out of"

In addition to the amendments proposed by the learned Additional Solicitor- General, Court holds that Clauses 33(1) and 71(2)(1) of the Bill should also be amended as follows:-

Clause 33(1)

Page 31, Lines 32 and 33, Delete the words "or to visit"

Clause 71(2)l

Page 64, Lines 11 and 12, Delete the words "at the time of leaving the Area of Authority of the Colombo Port City"

The inconsistency of Clauses 30(1), 33(1), 40(2) and 71(2)(1) of the Bill with Article 14(1)(h) of the Constitution will cease if all the above amendments are made.

Court observes that Clauses 60(c) and 60(f) makes provision for the Estate Manager to collect taxes imposed by the Commission. It is significant to note that Clause 6 of the Bill which sets out the powers, duties and functions of the Commission does not confer any power on the Commission to impose any form of taxes. However, Clause 6 read with either Clauses 60(c) or Clause 60(f) of the Bill implies a power in the Commission to impose taxes. Court holds that this is inconsistent with Article 148 of the Constitution.

The learned Additional Solicitor - General submitted that an amendment will be made at the Committee Stage to Clause 60(c) of the Bill as follows:-

Clause 60(c)

Page 53, line 14 - delete the word "taxes" and substitute therefore the word "rates"

However, in view of our observations above, Clause 60(f) should also be amended as follows at the Committee Stage:-

Clause 60(f)

Page 54, line 2 - delete the word "taxes" and substitute therefore the word "rates"

The inconsistency of Clauses 60(c) and 60(f) of the Bill with Article 148 of the Constitution will cease if the above mentioned amendments are made.

It was also submitted on behalf of several Petitioners that in terms of Clause 15(1) of the Bill, the accounts of the Commission shall be audited in terms of Article 154 of the Constitution but that it goes further and provides that such auditor may be an international firm of accountants. It was submitted that this clause is inconsistent with Articles 3, 4, 12, 14 and 154 of the Constitution.

Clause 15(1) of the Bill reads:

> "The accounts of the Commission shall be audited annually by a qualified auditor in terms of Article 154 of the Constitution. For the purposes of this section, the qualified auditor so appointed may be an international firm of accountants."

The word "qualified auditor" has been defined in Article 154(8) of the Constitution to mean:

> "(a) an individual who, being a member of the Institute of Chartered Accountants of Sri Lanka, or of any other Institute established by law, possess a certificate to practice as an Accountant issued by the Council of such Institute; or
>
> (b) firm of Accountants each of the resident partners of which, being a member of the Institute of Chartered Accountants of Sri Lanka or of any other Institute established by law, possess a certificate to practice as an Accountant issued by the Council of such Institute."

There is some merit in the submission that Clause 15(1) of the Bill may violate Article 154 of the Constitution if the two sentences therein are read disjunctively. It is the view of this Court that the two sentences in Clause 15(1) of the Bill must be read conjunctively to avoid any inconsistency with Article 154 of the Constitution and hence "an international firm of accountants" referred to in Clause 15(1) will become a "qualified auditor" only if it fulfills the criteria specified in Article 154(8) of the Constitution. For the reasons set out above, Court is of the view that Clause 15(1) of the Bill is not inconsistent with Article 154(8) of the Constitution.

It was also submitted on behalf of several Petitioners that Clauses 35(a) and 35(b) of the Bill provides that all employment income derived by both non-residents and residents (foreigners and locals) working at the Colombo Port City to be free from income taxes. It was contended that there is no rationale whatsoever for providing an unconditional and indefinite exemption from income tax for persons in employment in the Colombo Port City in the context of most of these employees likely being expatriates. Hence, it was submitted that these clauses in particular and the Bill in general are therefore entirely discriminatory in nature and not in the best interest of the national economy and is inconsistent with Articles 12 and 14 of the Constitution.

Furthermore, it was submitted that, since Clause 35 provides that all remuneration to employees shall be paid in the designated foreign currency other than in Sri Lanka Rupees, the Bill attempts to exclude the operation of Monetary Act, Banking Act and many other laws and is inconsistent with Articles 12 and 14 of the Constitution.

The learned Additional Solicitor - General submitted that even under the existing laws, there is no prohibition on Sri Lankans being remunerated in designated foreign currencies. The attention of Court was drawn to *Appropriation Bill* S.C.(S.D.) No. 5/1989 (Special), and it was contended that Court implicitly took cognizance of the fact of Sri Lankan citizens being paid in foreign currency. When the Petitioner in that case argued that Sri Lankans paid in American Dollars would be at an advantage over those paid in Sri Lankan Rupees, due to depreciation of local currency and, as such, violative of Article 12 of the Constitution, Court observed that this violation would be a result of the depreciation of currency and not a consequence of the Bill.

Court observes that the rationale for granting income tax exemptions to employees in the Colombo Port City is a permissible classification. In any event, as correctly submitted by the learned Additional Solicitor General, the decision to grant tax exemptions is a matter of economic and fiscal policy and the State has a wide discretion in this area.

In *Inland Revenue (Amendment) Bill* S.C.(S.D.) No. 3/1980, Court held:

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

Court is of the view that there is no merit in the submission that Clause 35 violates Article 12 or 14 of the Constitution.

The attention of Court was also drawn by several Petitioners to Clauses 65(3), 6(1)(c) to (f) and submitted that the clauses referred to amounts to a delegation of powers of the President in terms of Article 33(f) of the Constitution and are inconsistent with Article 33 read with Article 4 (b) of the Constitution.

It was further submitted that Article 33(f) vests such power in the President to make grants and disposition of land and movable property vested in the Republic. Clause 65(3) of the Bill states that the President may issue a land grant under the Crown Land Ordinance in the name of the Commission in respect of land comprising the Area of the Authority of the Colombo Port City. Thereafter, the Commission is empowered to lease land in terms of Clauses 6(1)(c) and 6(1)(d) of the Bill and lease, or transfer condominium parcels on free hold basis in terms of Clauses 6(1)(e) and 6(1)(f) of the Bill and it was the contention of the learned counsel that this process amounts to delegation of the powers of the President.

Court observes that in terms of Article 33(f) of the Constitution, the President has the power to make such grants and dispositions of lands and immovable property of the Republic as he is by law required or empowered to do. As this Court has already observed, section 2(1)(a) of the State Lands Ordinance confers power on the President to make absolute or provisional grants of State land. Therefore, Clauses 65(3), 6(1)(c) to 6(l)(f) of the Bill does not contravene Article 33(f) of the Constitution and therefore Court is of the view that the said clauses are not inconsistent with Article 4(b) of the Constitution.

Several Petitioners submitted that Clause 37 of the Bill permits an 'authorised person' with the permission of the Commission to '*engage in business in Sri Lanka, with a citizen of Sri Lanka or a resident, who is engaged in business in Sri Lanka, outside the Area of Authority of the Colombo Port City.*' It was further contended on behalf of the Petitioners that the 'authorised persons' who will be enjoying exemptions or incentives granted to them, would have an undue advantage over and above citizens of this country who are engaged in similar businesses outside the Area of Authority when such authorised persons are permitted to engage in business activity outside the Area of Authority of the Colombo Port City which will lead to creation of an "unequal playing field" as far as the conduct of such businesses are concerned. It was also submitted that the situation thus created is a clear violation of Article 12(1) as well as Article 14(1)(g) of the Constitution.

The Court gave consideration to the submissions in relation to Clause 37 of the Bill and is of the view that there is merit in the contention that

Clause 37(1) as it stands now, is inconsistent with Article 12(1) as well as Article 14(l)(g) of the Constitution. The Court further observes that such inconsistency would occur in the event an authorized person is permitted to make use of the exemptions or incentives granted to such authorized person in engaging in business outside the Area of Authority of the Colombo Port City to the detriment of the local business community who would not be enjoying such exemptions or incentives.

If exemptions or incentives given under this Bill is used outside the Area of Authority to the detriment of similar local industries and services, that would infringe Articles 12(1) and 14(1)(g) of the Constitution.

Although this Court does not see any reason to deprive an authorized person engaging in any business outside the Area of Authority of the Colombo Port City, what is obnoxious is the taking advantage of the exemptions or incentives granted to such authorized person in engaging in business outside the Area of Authority of the Colombo Port City to the detriment of similar businesses conducted outside such Area of Authority within the territory of Sri Lanka. This inconsistency will cease if a new sub-clause is added to Clause 37 of the Bill restraining such authorized person making use of any exemptions or incentives granted under this Bill when conducting business outside the Area of Authority of the Colombo Port City to the detriment of similar businesses conducted outside such Area of Authority but within the territory of Sri Lanka.

Part VII of the Bill deals with Offshore Companies to operate within the Area of Authority of the Colombo Port City.

Clause 41 of the Bill provides for the registration of companies as offshore companies for the purposes of the Bill. Clause 42 provides for the issue of license to engage in offshore banking business in and from the Area of Authority of the Colombo Port City whilst Clause 43 makes provision for its cancellation. In terms of Clauses 44 and 45, regulations can be made to give effect to the scope of the Bill and other matters specified therein.

Several Petitioners submitted that none of the regulatory obligations and duties mandated by the Companies Act No. 7 of 2007 such as filing of Returns and the need to comply with the duties cast upon directors is applicable to these offshore companies. It was further submitted that companies that do not require disclosing their shareholders and/or ultimate beneficiaries are often a vehicle for money laundering and financial crimes, the world over.

Further, the attention of Court was drawn to the preamble to the Bill which refers to the Directive Principles of State Policy enshrined in the Constitution and it has overlooked two crucial Directive Principles *viz*.

Articles 27(2)(e) and 27(2)(f) which speaks of equal distribution and dispersal of *'material resources of the community', 'the social product'* and *'the means of production, distribution and exchange'* among *'all the people of Sri Lanka*'. It was submitted that if the true beneficiaries of such offshore entities are not disclosed, and such companies engage in or facilitate illicit activities such as money laundering, bribery and corruption, insider dealings, tax fraud and terrorist financing, the purpose of the Bill is entirely vitiated and is inconsistent with Articles 3, 12 and 14 of the Constitution.

The learned Additional Solicitor General submitted that making special provisions for offshore companies is not something that is alien to the laws of Sri Lanka and drew our attention to Chapter XI of the Companies Act which provides for such registration. It was submitted that as the Bill seeks to create a Special Economic Zone, the application is routed through the Commission, as part of the Single Window Investment Facilitator, created by the Bill and that this is similar to an investment zone established under Board of Investment (BOI) Act where, licensed enterprises within the area of authority of the BOI is deemed to be a location offshore.

It was further submitted by the learned Additional Solicitor - General that the contention that the exclusion of the provisions of the Companies Act, would create a foundation for fraud and money laundering is wholly devoid of merit. She pointed out that excluding companies registered as 'offshore' companies, is not a new concept. The Companies Act No. 7 of 2007 provides for the registration of a company as a 'off-shore company' and upon such registration, in terms of section 262(2) of the said Act, 'A certificate of registration issued to an off-shore company under this Part of this Act, shall exempt the company from complying with any other provision of the Act'.

It was pointed out by the learned Additional Solicitor - General that in view of the provisions of Clauses 3(5) and 3(7) of the Bill, the power of the Registrar of Companies to supervise such company, in the manner it would a offshore company registered under Part XI of the Companies Act remains unaltered. Moreover, the learned Additional Solicitor - General drew the attention of Court to the fact that Schedule III of the Bill lists out the laws that are sought to be exempted from the Area of Authority of the Colombo Port City.

Court observes that laws which seek to prevent money laundering and terrorist financing such as The Convention on the Suppression of Terrorist Financing Act No. 25 of 2005, Prevention of Money Laundering Act No. 5 of 2006 and the Financial Transactions Reporting Act No. 6 of 2006 apply within the Area of Authority of the Colombo Port City. It is to be noted that none of these Acts are included in Schedule II or III of the Bill.

The Court considered the Clauses of Part VII of the Bill and is of the view that there is no merit in the submission that the purpose of the Bill is either entirely vitiated or is inconsistent with Articles 3, 12 and 14 of the Constitution.

The Petitioners also submitted that Part VIII of the Bill which provides for the operation of offshore banks within the Colombo Port City excludes the application of the provisions of Part IV of the Banking Act for such entities. They further submitted that the provisions of the Banking Act and the Companies Act have no application to such entities which is discriminatory between offshore banks operating within Sri Lanka and offshore banks (companies licensed in other countries) operating in the Colombo Port City. As a result it was submitted that Part VIII of the Bill in general and Clauses 42, 43 and 44 in particular are inconsistent with Articles 3, 4 and 12 of the Constitution.

Clause 42 of the Bill provides for the issuance of a license to engage in offshore banking business whilst Clause 43 provides for the cancellation of such a license. Clause 44 confers on the President or the assigned Minister the power to make regulations and Clause 45 explains the matters on which such regulations may be made. The nature of business that may be authorized to be carried on by those engaged in offshore banking business is identified in Clause 46.

Having examined the above clauses carefully, the Court is of the view that the clauses in Part VIII of the Bill are not inconsistent with Articles 3,4 and 12 of the Constitution.

Part XIII of the Bill deals with 'International Commercial Dispute Resolution Centre'. Clause 62(2) of the Bill requires that any dispute that may arise, within the Area of Authority of the Colombo Port City, between (a) the Commission and an authorized person or an employee of an authorized person where relevant; and (b) the Commission and a resident or an occupier, provided that there exists in relation thereto, an agreement or other legally binding document as between the Commission and such resident or occupier, shall be resolved by way of arbitration conducted by the International Commercial Disputes Resolution Centre. Clause 62(3) requires every authorized person to ensure that all agreements entered into by such authorized person in terms of Clause 32 of the Bill, shall contain a provision requiring a mandatory reference of any dispute that may arise within the Area of Authority of the Colombo Port City under such agreement, to arbitration, in terms of this Clause.

On behalf of the Petitioners it was submitted that arbitration is consensual and cannot be the subject matter of mandatory reference or of compulsory submission, ousting access to judicial institutions of the

country. It was further submitted that a person who would rather have his dispute resolved by the ordinary courts of Sri Lanka is denied the right to seek redress before the courts of law and is forced to arbitrate and that this is inconsistent with Articles 3, 4, 12 and 14 of the Constitution. It was also submitted that these provisions amount to a suspension 'to such extent' of Chapter XVI of the Constitution.

The learned Additional Solicitor - General submitted that these Clauses only require the Commission and an authorized person (the parties to a commercial agreement) to include a provision in the Agreement, that they agree to the resolution of any dispute under the Agreement by arbitration under Part XIII of the Bill and that it is not an ''ouster clause" which precludes the courts of Sri Lanka from exercising judicial power according to law.

Court observes that arbitration is recognised by the law of Sri Lanka as a method of dispute resolution. The Arbitration Act No. 11 of 1995 is not an enactment excluded from application within the Area of Authority of the Colombo Port City in terms of Schedule III of the Bill. Thus, it will be applicable to all arbitrations commenced under the agreement between the Commission and an authorised person in terms of the Bill.

We further observe that an authorised person or one of his employees or a resident or occupier of the Colombo Port City is put on notice that arbitration is mandatory in given circumstances. When they make the choice of assuming such status as an authorised person or one of his employees or a resident or occupier, it is done through a choice they make and in that sense party autonomy is preserved. In any event, we observe that several provisions of the Arbitration Act, No. 11 of 1995 provides for the intervention of court in given circumstances. Accordingly, Court holds that Part XIII of the Bill is not inconsistent with Articles 3, 4, 12 and 14 of the Constitution.

The learned Additional Solicitor - General, however, submitted that for the purposes of clarity, the following amendments will be made:

Clause 32

Page 31, line 21- Insert the words "concerning or" before the word "arising"

Clause 62(5)

Page 56, Line 10 - Insert the words "or setting aside" after the word "enforcement"

Clause 63(1) of the Bill requires courts to give priority to any legal proceedings instituted on civil and commercial matters where the cause

of action has arisen within the Area of Authority of the Colombo Port City. The Petitioners submitted that granting of such priority at the expense of other litigation is a clear violation of Articles 3, 4 and 12 of the Constitution.

Court is of the view that there is no merit in this contention. One of the main purposes of the Bill is to establish a Special Economic Zone within which there is ease of doing business that will attract new investments primarily to facilitate the diversification of the service economy and to promote the inflow of foreign exchange into such Zone. In order to achieve these objectives, a conducive environment must be created for new investments. One critical concern to any investor is to ensure that disputes are resolved expeditiously. It is a permissible classification and there is no inconsistency with Articles 3, 4 and 12 of the Constitution.

Several Petitioners drew the attention of Court to Clause 63(2) of the Bill which states that "*the inability of a particular attorney-at-law to appear before the Court on a particular date for personal reasons (including engagement to appear on that date in any other court or tribunal) shall not be a ground for postponement of commencement or continuation of the trial or be regarded as an exceptional ground warranting such postponements."*

Court after careful consideration is of the view that this clause is not inconsistent with any provision of the Constitution. However, we reiterate the observation of Court in the *Judicature (Amendment) Bill* S.C.(S.D.) Nos.7-13/2018 that clauses of this nature should have "*sufficient laxity to allow the Judge to use his discretion when deciding what amounts to 'exceptional circumstances".*

The learned Additional Solicitor - General submitted that for the purposes of clarity, Clause 63 of the Bill will be amended as follows at the Committee Stage:

Clause 63

Page 56, lines 21 to 38 - Delete in its entirety and replace with the following:

> *"***In order to foster international investor confidence in the ease of doing business and in the enforcement of contracts, in the national interest or in the interest of the advancement of the national economy, priority shall be given by courts in relation to any legal proceedings instituted in civil or commercial matters, where the cause of action has arisen within, or in relation to any business carried on in or from, the Area of Authority of the Colombo Port City, to hear such cases expeditiously on a day-to-day basis, unless in the opinion of**

court, exceptional circumstances warrant postponement of commencement or continuation of trial, for reasons which shall be recorded by court."

Clause 73 of the Bill excludes the operation of several laws listed in Schedule III within the Area of Authority of Port City. The basis for such exclusion as set out in Clause 73 is "the subjects dealt with in such enactments have been, *mutatis mutandis,* set out in this Act, or alternate legal arrangements have been specifically set out in this Act or such enactments are not relevant and are not required to be applicable within the Area of Authority of the Colombo Port City".

Petitioners contend that Clause 73 read with Schedule III of the Bill is inconsistent with Articles 2, 3, 4 and 12(1) of the Constitution.

The Area of Authority of the Colombo Port City is devoid of a 'community' at present and it is envisaged that the provisions of the Bill would become applicable to the 'community' in such area once the development work is completed. Upon an analysis of the clauses of the Bill, it is apparent that alternate legal arrangements are specifically provided for in the Bill that largely covers the subjects dealt with in the enactments that are excluded from the operation of the Area of Authority of the Colombo Port City in terms of Schedule III of the Bill.

Constitutionality of a similar provision was examined by the Constitutional Court in its decision relating to the *Greater Colombo Economic Commission Bill* (Decisions of the Constitutional Court of Sri Lanka, Vol. 6, page 5) and it was observed, *"This clause gives the power to the Commission to make any such law applicable to an enterprise. This power as the four laws have not been made applicable to the area is clearly legislative in nature. Secondly, it is within the Power of the Commission to make a law applicable to one enterprise and not to the others.*" The Court therefore determined that the said clause contravenes Sections 5, 45 and 18(1)(a) of the Constitution (1972). The Constitutional Court recognized that the power to exclude the operation of certain laws 'in the area' as a legislative power. However, the inconsistency with the Constitution arose due to the vesting of such power with the Greater Colombo Economic Commission.

As opposed to the powers that were sought to be vested in the Greater Colombo Economic Commission, Clause 73 of the Bill does not confer any such legislative power on the Commission to make any of the laws in Schedule III applicable to any of the authorized persons. No power is vested with the Commission to amend Schedule III either. The exclusion of the specified laws as envisaged takes place through the exercise of its legislative power by Parliament.

Court is of the view that Clause 73 of the Bill read with Schedule III is within the legislative power of Parliament as set out in Article 75 of the

Constitution and is not inconsistent with any of the Articles in the Constitution.

In response to submissions made by several Counsel on behalf of the petitioners relating to rest of the clauses of the Bill, the learned Additional Solicitor - General submitted that amendments will be made to the following Clauses of the Bill at the Committee Stage:

Clause 6(1)(n)
Page 9, Line 16 - Insert the word "ancillary" before the word "services"

Clause 7(1)

Page 13, Line 15 - Insert the words "while ensuring that the majority are Sri Lankans" after the word "President"

Clause 9(4)
Page 15, Line 4 - Delete the words "such Minister"

Clause 32
Page 31, Line 21- Insert the words "concerning or" before the word "arising"

Clause 45
Page 41, Line 4 - Insert the words "offshore banking business, reserve and" before the words "capital requirements"

Clause 46(9)
Page 41, Lines 34 and 35 - Delete in its entirety

Clause 62(5)
Page 56, Line 10 - Insert the words "or setting aside " after the word "enforcement"

Clause 63
Page 56, Lines 21 to 38 - to be deleted and replaced with the following:

> *"In order to foster international investor confidence in the ease of doing business and in the enforcement of contracts, in the national interest or in the interest of the advancement of the national economy, priority shall be given by courts in relation to any legal proceedings instituted in civil or commercial matters, where the cause of action has arisen within, or in relation to any business carried on in or from, the Area of Authority of the Colombo Port City, to hear such cases*

expeditiously on a day-to-day basis, unless in the opinion of court, exceptional circumstances warrant postponement of commencement or continuation of trial, for reasons which shall be recorded by court."

Clause 72

Page 66, Lines 4 and 5 - To be deleted and replaced with the following:

"All rules made under this Act shall be published in the Gazette within three months of the formulation thereof.

Clause 74

Page 71, Line 2 - Delete the word ' judicial " and substitute therefor the word " juristic "

Schedule 2, Item 6

Page 73 - Delete reference to the "Debit Tax Act, No 16 of 2002"

General Amendment

The reference to "in the national interest and the interest of the advancement of the national economy ", wherever it occurs in the Bill, be amended to read as "in the national interest or in the advancement of the national economy".

The Determination of the Court:-

The determination of the Court as to the constitutionality of the Bill titled "Colombo Port City Economic Commission" is as follows:

(i) The provisions of Clauses 3(6), 30(3) second proviso, 55(2) and 58(1) of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 3(6)

Page 3, Line 33 - Delete the words "provide such concurrence " and substitute therefor the words "communicate its decision "

Clause 30(3), second proviso

Page 30, Line 15 - Delete the words "render such concurrence" and substitute therefor the words "communicate its decision "

Clause 55(2)

Page 49, Lines 16 and 17 - Delete the words "provide such concurrence" and substitute therefor the words "communicate its decision "

Clause 58(1)

Page 52, Lines 9 and 10 - Delete the words "render such concurrence" and substitute therefor the words "communicate its decision "

(ii) The provisions of Clauses 3(5) proviso, 3(7), 6(1)(b), 30(3) first proviso, 71(1) and 74 [interpretation "Regulatory Authority"] of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 3(5) proviso

Page 3, Line 27 - Add the words "by the Commission" after the word "implementation"

Clause 6(1)(b)

Page 6, Line 27 - Delete the word "overall"

Page 6, Line 32 - Delete the words "as the Commission considers necessary"

Clause 30(3) first proviso

Page 30, Line 9 - Add the words "by the Commission" after the word "implementation"

Clause 71(1)

Page 62, Line 7 - Delete the words "as is considered necessary"

Clause 74

Page 70, Lines 11 to 16 - Delete the words commencing from "to the extent" to "Colombo Port City"

Clause 3(7)

To be shifted after Clause 73 of the Bill and re-numbered as Clause 74. The new Clause 74 will now read as follows:

> *"74. Nothing in this Act shall, unless otherwise specifically provided for in this Act, be deemed to restrict in any way the powers, duties and functions vested in such Regulatory Authority by any written law in relation to the Area of Authority of the Colombo Port City."*

Clauses 74 and 75
Present Clauses 74 and 75 be re-numbered as Clauses 75 and 76 respectively

(iii) The provisions of Clauses 3(4), 6(1)(u), 68(1)(f) and 68(3)(a) are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 3(4)
Page 3, Line 14 - Delete the word "for" and substitute therefor the words "to facilitate"

Page 3, Lines 16 and 17 - Delete the words "and Development Control Regulations"

Clause 6(1)(u)
Page 10, Lines 14 to 15 - Insert the words "enforce the" before the words "Development Control Regulations"

Clause 68 (1)(f)
Page 60, Lines 1 to 3 - Delete in its entirety

Clause 68(3)(a)
Page 60, Line 25 - Delete the words "rule, direction, order or requirement issued or imposed"

(iv) The provisions of Clause 52(3) read with Clauses 52(5) and 71 (2)(p) of the Bill are inconsistent with Article 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 52(3)
Page 44, Line 20 - Add the words "in accordance with the Regulations made under this Act ..." after the words "granted thereto"

Clause 52(5)

Page 44, Lines 29 to 31 - Delete in its entirety and replace with the following:

> *"(5) Regulations may be made prescribing guidelines on the grant of exemptions or incentives, as provided for in this Part of this Act."*

Clause 71(2)(P)

Page 65, Line 1 - delete the words "any further"

(v) The provisions of Clauses 30(1), 33(1), 40(2) and 71(2)(1) of the Bill are inconsistent with Article 14(l)(h) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 30(1)

Page 29, Line 24 - Delete the words "or to visit"

Clause 33(1)

Page 31, Lines 32 and33 - Delete the words "or to visit"

Clause 40(2)

Page 35, Line 37 - Delete the words "when leaving" and substitute therefor the words "to be taken out of"

Clause 71(2)(l)

Page 64, Lines 11 and 12 - Delete the words "at the time of leaving the Area of Authority of the Colombo Port City"

(vi) The provisions of Clause 53(2)(b) read with Clause 53(3)(b) of the Bill is inconsistent with Article 76 of the Constitution read with Articles 3 and 4 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 53(2)(b)

Page 45, Line 20 - Delete the words "the specific enactments from those listed in" and substitute therefor the words "the specific exemptions from those enactments listed in "

Page 45, Line 22 - Delete the words "exempted from being"

Clause 53(3)(b)

Page 46, Line 10 - Delete the words "the specific enactments from those listed in" and substitute therefor the words "the specific exemptions from those enactments listed in"

Page 46, Line 11 - Delete the words ''exempted from being"

(vii) The provisions of Clauses 60(c) and Clause 60(f) of the Bill is inconsistent with Article 148 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 60(c)

Page 53, line 14 - delete the word "taxes" and substitute therefor the word "rates"

Clause 60(f)

Page 54, line 2 - delete the word "taxes " and substitute therefor the word "rates"

(viii) The provisions of Clause 37 of the Bill is inconsistent with Article 12(1) and 14(l)(g) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistency will cease if a new sub-clause is added to Clause 37 of the Bill restraining such authorised person making use of any exemptions or incentives granted under this Bill when conducting business outside the Area of Authority of the Colombo Port City to the detriment of similar businesses conducted outside such Area of Authority but within the territory of Sri Lanka.

We have examined the rest of the clauses of the Bill and determine that they are not inconsistent with the Constitution.

We determine that upon the amendments suggested by this Court, referred to in paragraphs (i)- (viii) under "the determination of Court" being effected, the Bill and its provisions will cease to be inconsistent with the Constitution.

We place on record our deep appreciation of the assistance given by all learned Counsel for the Petitioners and Intervenient Petitioners and the learned Additional - Solicitor General.

	Jayantha Jayasuriya, PC. **Chief Justice** **Buwaneka Aluwihare, PC.** **Judge of the Supreme Court** **Priyantha Jayawardena, PC.** **Judge of the Supreme Court** **Murdu N. B. Fernando, PC.** **Judge of the Supreme Court** **Janak De Silva,** **Judge of the Supreme Court**
First Reading:	08.04.2021 (Hansard Vol.282; No.10; Col. 1408)
Bill No. :	45
Sponsor/Relevant Minister:	Hon. Prime Minister and Minister of Finance, Minister of Buddhasasana, Religious & Cultural Affairs and Minister of Urban Development & Housing
Decision of the Supreme Court Announced in Parliament:	18.05.2021 (Hansard Vol.283; No. 03; Col. 307-310)
Second Reading:	19.05.2021 (Hansard Vol.283; No.04; Col. 610-725) 20.05.2021 (Hansard Vol. 283; No. 05; Col. 731-906)
Committee of the whole Parliament and Third Reading:	20.05.2021 (Hansard Vol. 283; No. 05; Col. 907-912)
Hon. Speaker's Certificate:	27.05.2021
Title :	Colombo Port City Economic Commission Act, No. 11 of 2021

S.C (SD) No. 24/2021

"CORONAVIRUS DISEASE 2019 (COVID-19) (TEMPORARY PROVISIONS)" BILL

BEFORE :
Murdu N. B. Fernando PC - Judge of the Supreme Court
Yasantha Kodagoda PC - Judge of the Supreme Court
A. H. M. D. Nawaz - Judge of the Supreme Court

S.C. (SD) No. 24/2021

Petitioner : Aruna Laksiri Unawatuna

Counsel : Petitioner appeared in person

Respondent : Hon. Attorney-General

Counsel : Nerin Pulle, Senior Deputy Solicitor General with Dr. Avanti Perera, Senior State Counsel

The Court assembled for the hearing on 17.06.2021 and 18.06.2021.

A Bill tilled "CORONA VIRUS DISEASE 2019 (COVID-19) (TEMPORARY PROVISIONS)" was published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka on 13th May, 2021 and placed on the Order Paper of Parliament on 08th June, 2021.

The jurisdiction of this Court to determine the constitutionality of the aforesaid Bill was invoked in terms of Article 121 of the Constitution by a Petition presented to this Court by the Petitioner. Upon receipt of the Petition, the Attorney-General was noticed as required by Article 134(1) of the Constitution and the Court heard the Petitioner and the Attorney-General.

The Petitioner in the Petition filed, challenged that Clauses 3, 4 and 11 of the CORONAVIRUS DISEASE 2019 (COVID-19) Bill ("the Bill"), are inconsistent with the provisions of Article 3, 4(d), 12(1) and 106 of the Constitution and for that reason the Bill cannot become law unless the provisions laid down in Article 83 of the Constitution is adhered to. In the written submissions tendered to this Court the Petitioner also challenged that Clauses 2, 3, 4. 6, 7, 10, 11 and 12 of the Bill are inconsistent with the provisions of Articles 1, 2, 3, 4(c), 5, 9, 12(1), 23, 24, 76, 78, 80, 157 and 170 and submitted that the provisions laid down in Article 84(2) of the Constitution should also be followed.

The contention of the Respondent was that the provisions of the Bill are not inconsistent with the Constitution and that this was a timely piece of legislation brought to safeguard the interests of persons affected by

Corona Virus Disease 2019 ("COVID-19") which gripped the mankind in an unprecedented manner and disrupted the daily lives of people throughout the globe and was declared as a pandemic by the World Health Organization, on 11th March 2020.

In the said backdrop, we now proceed to examine the provisions of this Bill for its constitutionality.

The Long Title of the Bill reads as follows:-

> An act to make temporary provisions in relation to situations where persons were unable to perform certain actions required by law to be performed within the prescribed time periods due to Covid-19 circumstances; to assign alternative courts where a court cannot function due to Covid-19 circumstances; to conduct court proceedings using remote communication technology to facilitate the control of Coronavirus Disease 2019 (Covid-19); to grant relief in relation to parties to certain contracts who were unable to perform contractual obligations due to Covid-19 circumstances and for matters connected therewith or incidental thereto.

The Bill consists of the following Parts and a Schedule.

Part I - Relief for inability to comply with Prescribed Time (Clause 2);

Part II - Designation of Alternative Courts (Clause 3);

Part III - Conducting Court proceedings using Remote Communication Technology (Clause 4);

Part IV - Temporary relief in respect of Contracts (Clauses 5 to 8); and

Part V - General Provisions (Clauses 9 to 12).

Clause 1

Clause 1(1) of the Bill, provides that it shall be in operation for a period of two years commencing from 1st March, 2020. Clause 1(2) of the Bill makes provision for effecting extensions to the duration of the Bill.

Clause 2

Clause 2(1) of the Bill makes provision for a court, tribunal or any other authority established by or under any law, to allow, admit or entertain an action, application, appeal, proceeding or act, **notwithstanding the lapse of the time period prescribed by law** for such purpose, if the court, tribunal or any other authority is satisfied, that a person was prevented from instituting or filing any action, application, appeal or other legal proceeding, within the prescribed

period or to perform any act within a prescribed period, **due to a "Covid-19 circumstance"** and to exclude in calculating the said prescribed time period, when such person was subjected to a "Covid-19 circumstance".

Whilst the Petitioner, did not challenge the basic concept and the contents of the aforesaid provisions in Clause 2, his ground of challenge was pivoted and mounted upon the definition of the term "Covid-19 circumstance".

This term is defined in Clause 12, the interpretation section, as follows:-

Covid-19 circumstance includes -

(a) Covid-19;

(b) the operation of or compliance with any law of Sri Lanka or another country, or territory, or an order or direction of the Government or any statutory body, or of the Government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (Covid-19); or

(c) any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a) or (b).

The term "Covid-19" referred to above [in item (a) in Clause 12 - the interpretation section] means "*the Coronavirus Disease 2019 (Covid-19) declared as a quarantinable disease by notification published in the Gazette Extraordinary No. 2167/18 of March 20, 2020 under the Quarantine and Prevention of Diseases Ordinance (Chapter 222).*

The Petitioner did not raise any objection to Items (a) and (c) of the definition in "Covid-19 circumstance" in the above sub-clause, but strenuously contended that the definition given Item (b) in "Covid-19 circumstance", would bring in a foreign law and / or a law applicable in another country or territory and/ or an order or direction of a foreign agency to be applicable in Sri Lanka. Therefore, the Petitioner contended, that such definition would be to the detriment of the People and thus erode the sovereignty which is in the People and therefore violates Article 4(c) read together with Article 3 of the Constitution. Hence, the Petitioners principal contention was that the term "Covid-19 circumstance" which is referred to in Clauses 2, 3, 4, 6, 7, 10 and 12 of the Bill, makes the Bill in its entirety, inconsistent with Articles 3 and 4 (c) of the Constitution and the numerous other Articles relied upon by the Petitioner and more fully referred to earlier in this determination.

In response to same, the submission of the Senior Deputy Solicitor - General was that this Bill is a salutary piece of legislation which accords with the constitutional mandate cast upon all organs of Government i.e., the Executive, Legislature and Judiciary as set out in Article 4(d) of the Constitution. The learned Counsel further contended that the Bill is a widely accepted necessity in the current context and is fashioned to suit the new normal. He vehemently relied on the dictum of this Court in **S.C. (SD) 08 and 09/ 2005 - The Tsunami (Special Provisions) Bill,** where it was determined that *affirmative action by the State is the need of the hour.*

The learned Counsel went on to submit that therefore, the provisions of the Bill must be broad enough to capture not only the present context but also the uncertainties which the ever evolving Covid-19 may bring in the future and that the presence of Item (b) in the definition of the term "Covid-19 circumstance" in Clause 12 [the interpretation section] would give some guidance to the type of circumstances envisaged, in other countries, in order to co-relate to the law, order or directions issued by agencies and authorities in those countries and territories, in the context of 'Covid-19' alone, and that the emphasis should be on the practical reality of Covid-19 only and not on the legality, legitimacy, binding effect, desirability, territorial or extra-territorial nature or threat of an infiltration of foreign law into Sri Lanka. In the absence of Item (b), the learned Counsel submitted, the word "circumstance" will have no boundaries and remain undefined, as a vague and broad term which would in turn be inconsistent with Article 12(1) of the Constitution, since equal protection of the law cannot be guaranteed in a context of uncertainty.

We have considered the submissions of both parties pertaining to the definition of "Covid-19 circumstance", especially in the light of the provisions of Clause 3, which provides for the transfer of cases to an alternative court and also with regard to Clauses 2, 4, 6 and 7 of the Bill and we see no justifiable ground or reason whatsoever, to include a term '*operation of or compliance with a law of another country or a territory or an order or direction of a Government or any statutory body, public authority of another country or territory, whether it is a law, order or direction made by reason of or in connection with Covid-19',* as referred to in Item (b) of the definition of "Covid-19 circumstance", in Clause 12 of the Bill.

Article 1 of the Constitution, recognise that Sri Lanka is a Free, Sovereign, Independent and Democratic Socialist Republic. Thus, unequivocally this country is a Sovereign State. Although the courts of this country have been guided by the persuasive value of judgements of foreign jurisdictions, that cannot and should not mean, that in roads could be made to include 'operation or compliance of foreign law' in to the definition of a term in a Bill, whether it be necessitated in view of

the present pandemic situation or otherwise.

Similarly, such a definition cannot be made "speculating" the unforeseen future and considering the uncertainties of the ever-evolving Covid-19 or its variants and mutations. This Court in **S.C. (SD) No. 11/1997** to **15/1997- Sri Lanka Broadcasting Authority Bill** observed, *"these things may not happen*, *but they might happen, because they are permitted.* "

In any event, the Bill before us for determination provides "Temporary Provisions" and the time duration of the Bill is for a period of two years unless extended. Moreover, it is observed that Item (c) of the sub-clause in the definition of the term "Covid-19 circumstance" comprehensively provides for *"any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a) and (b).* "

Hence, we are of the view, that Item (b) in the definition of "Covid-19 circumstance", in Clause 12 of the Bill, which provides *inter-alia for operation of or compliance with any law of another country or territory or of the Government or other public authority of another country or territory,* notwithstanding it is made by reason or in connection with Covid-19, is inconsistent with the provisions of Article 4(c) read together with Article 3 of the Constitution. Thus, the said sub-clause could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum, by virtue of the provisions of Article 83 of the Constitution.

Similarly, Clauses 2, 3, 4, 6, 7 and 10 of the Bill read together with the impugned definition in Clause 12 of the Bill too, are inconsistent with the provisions of Article 4(c) read together with Article 3 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum, by virtue of the provisions of Article 83 of the Constitution.

However, if Item (b) in the definition of the term "Covid-19 circumstance" in Clause 12 is deleted and Item (c) therein, is suitably amended, we are of the view that the said inconsistency with the Constitution would cease and this Bill may be passed with a simple majority in Parliament.

Notwithstanding the above discussed pivotal issue, this Bill was challenged, in relation to several other Clauses as well.

The next objection raised by the Petitioner was with regard to Clause 2 (2)(b) of the Bill. The contention of the Petitioner was that through this process foreign law will be introduced into Sri Lanka and therefore the

said Clause is inconsistent with Article 4(c) of the Constitution.

However, we observe that the aforesaid sub-clause is an integral part of Clause 2(2) of the Bill. It specifically ensures that the relief granted with regard to exclusion of the time limits under Clause 2(1) shall not apply in relation to any application or appeal for which the Supreme Court Rules and the Court of Appeal Rules [more fully referred to in Clause 2(1)(i) to (iv) of the Bill] have already been formulated [by virtue of Article 136 of the Constitution] and relief granted. The said Supreme Court and Court of Appeal Rules refer to the time periods, 16.03.2020 to 18.05.2020 and 24.10.2020 to 31.01.2021 only.

Clause 2(2)(b) of the Bill, on the other hand makes provision for further exclusion of time periods by way of Supreme Court or Court of Appeal Rules to be formulated, under Article 136 of the Constitution but within the period of the operation of the Act, as relief to a party affected in respect of any "Covid-19 circumstance". This provision in our view, only ensures further grant of relief to a party affected, by way of exclusion of time, in addition to the periods referred in the Supreme Court and Court of Appeal Rules already promulgated and more fully referred to in Clause 2(1) of the Bill.

In the said circumstances, we see no merit in the argument of the Petitioner pertaining to Clause 2(2)(b) of the Bill and we are of the view that Clause 2(2)(b) of the Bill is not inconsistent with the provisions of the Constitution.

Clause 3

Clause 3(1) of the Bill provides, that in the event of a disruption of the ordinary function of any court of first instance, due to any "Covid-19 circumstance", **for the Judicial Service Commission to designate,** the nearest court of concurrent jurisdiction as the alternative court in place of such court, where the ordinary function is disrupted. We observe that it is a discretionary provision.

The Clause goes onto provide, upon such designation, such alternative court shall consider and hear any action, prosecution, proceeding or matter filed or considered by such court or any new matter that has been filed in the alternative court.

The proviso to Clause 3(1) further provides for circumstances, in which a transfer should not be made, i.e., when a matter is reserved for judgement, order *et al* or when hearing has been concluded.

Clause 3(2) empowers, upon the resumption of ordinary function of such original court for the presiding judge of the alternative court to re-transfer an action, prosecution, proceeding or matter filed or considered by the alternative court more fully referred to in Clause 3(1), back to the original court, subject to the limitations referred to in the proviso to Clause 3(2).

The contention of the Petitioner is that this Clause is inconsistent with Article 3, 4(c) and 12(1) of the Constitution, in so far as the mechanism of transfer is ambiguous and unclear, that there are no guidelines pertaining to transfer of a case and that it is in conflict with the powers of the Court of Appeal which is empowered to transfer a case upon an application being made by a party.

The learned Senior Deputy Solicitor General, in response to the Petitioners submissions contended, that the provisions laid down in the Clause itself, for the transfer and re-transfer of cases is rooted in the law itself, as disruption due to any "Covid-19 circumstance" and thus, the mechanism was clear, precise and unambiguous.

The learned Counsel also contended with regard to the failure to lay down guidelines, that the Judicial Service Commission, at its discretion and wisdom may take cognizance of ''Covid-19 circumstance" which disrupted the function of the original court.

It was also contended that the power of the Judicial Service Commission to designate court, is not a judicial power but an administrative power and hence there is no erosion of Judicial power and that the sovereignty of the people will not be affected.

Upon questioned by Court, with regard to the forum jurisdiction, the Senior Deputy Solicitor General contended that when the Judicial Service Commission designates an alternative court, as expressly laid down in Clause 3(1) itself, the forum jurisdiction is conferred on the said court. It was also contended that thereafter, implicitly physical transfer of all cases should take place and the scheme of the provision is that, it ought to be by the Judicial Service Commission itself, although it is not expressly provided for in Clause 3(1) of the Bill. It was also submitted that this transfer is subject however, to the provisions of Sections 46 and 47 of the Judicature Act No. 2 of 1978 as referred to at the commencement of the Clause itself, as well as the limitation referred to in the proviso to Clause 3(1) therein.

Notwithstanding the said submission, the learned Senior Deputy Solicitor General, tendered to Court certain amendments that will be moved to the Bill, at the Committee Stage in Parliament.

We note that the principal amendment to be moved at the Committee Stage, is to the afore discussed Clause 3(1) of the Bill. It contemplates, '*by operation of law*, *for the geographically nearest court of concurrent jurisdiction*' to be the assigned court to take over the functions of the original court. Hence, the requirement for the Judicial Service Commission to designate a court will not arise.

In the absence of a decision making authority and specific guidelines with regard to the mechanism of transfer of cases as well as the

functionality and duties of the assigned court, the proposed amendment in our view, would give rise to certain other practical difficulties and issues.

However, prior to examining the said amendment to be moved at Committee Stage in Parliament, we wish to look at Clause 3(1) of the Bill in its original form and its constitutionality.

Judicial Service Commission established by virtue of the provisions of Chapter XV A of the Constitution, is an independent entity, vested with powers as laid down in Article 111H of the Constitution. Clause 3(1) of the Bill makes provision for the Judicial Service Commission to designate an alternative court in the event the ordinary function of a court of first instance is disrupted due to a "Covid -19 circumstance".

We are of the view that the discretionary power bestowed upon the Judicial Service Commission, to make a considered and independent decision, irrespective of any specific guidelines referred to in Clause 3 (1), does not impinge the constitutionality of such Clause. Moreover, we are of the view that it is implicit, that the mode and manner of transfer of cases, should only take place with the cognizance of the Judicial Service Commission and consequent to the designation of the alternative court by the Judicial Service Commission. Hence, the provisions of Clause 3 of the Bill, in our opinion, is not inconsistent with the Constitution.

However, to avoid any doubt and to bring in more clarity with regard to the mechanism of transfer of cases and other ancillary matters, provision may be made by including a suitable sentence to such effect in the said Clause 3(1).

Having examined Clause 3 of the Bill in its original form, the Court would now consider the proposed amendment that is to be brought into the said Clause at the Committee Stage.

By the suggested amendment, the assignment of the alternative court will be by operation of law. Thus, the provision of designation of such court by the Judicial Service Commission will be dispensed with. Hence, there will be no independent authority to assess the "Covid-J9 circumstance" and to take necessary steps to transfer cases from the 'original court' to the 'assigned court'. For example, if the ordinary function of the geographically nearest court of concurrent jurisdiction in the province is also disrupted due to "Covid-19 circumstance" what will be the alternative court? Where can an action be filed?

Similarly, during a pandemic, it may not be prudent or advisable to automatically transfer all cases to an alternative court. A prioritization of cases will have to be made.

Thus, we are of the view, that there should be an independent authority bestowed with necessary powers to assess and take decisions pertaining to transfer of a case to an alternative court and the transfer cannot take place by operation of law alone.

Hence, we are of the opinion that the amendment sought to be moved will give rise to numerous other issues, legal and otherwise and will not assist in achieving the object of the Bill to provide relief and redress to persons affected by Covid-19.

In the said circumstances, we see no basis or reason in going forward with the proposed amendment and dispense with the powers and duties bestowed upon the Judicial Service Commission to designate and monitor, discharge and perform its functions empowered to the Judicial Service Commission by virtue of the Constitution itself.

Thus, we are of the view, that the proposed amendment to be moved to Clause 3(1) of the Bill at the Committee Stage in Parliament, should be dispensed with.

Clause 4

Clause 4 provides for conducting of court proceedings using remote communication technology and for the Minister to make regulations pertaining to same with the concurrence of the Chief Justice.

The Petitioner challenged the provisions of the said Clause upon the basis that this Clause read together with Clause 11, the regulation making power of the Minister, vests excessive power on the Minister, pertaining to administration of this Bill.

Article 136(1) of the Constitution, empower the Chief Justice and three other judges of the Supreme Court appointed by the Chief Justice, to make Rules regulating the practice and procedure of court and in sub-clause (l) makes provision for Rules to be made for "all matters of practice and procedure [..] not specifically provided for or under any law". We note, that already Rules have been promulgated pertaining to *electronic filling and urgent digital hearings in the Supreme Court and the Court of Appeal.* Thus, we observe that in the said circumstances, the need to empower the Minister to make regulations as laid down in Clause 4 of the Bill, pertaining to remote communication technology, exclusively to courts of first instance will not arise. Hence, we are of the view that the provisions in Clause 4 are inconsistent with Article 136 read together with Article 4(c) of the Constitution.

However, the learned Senior Deputy Solicitor General, appraised this Court about the Committee Stage amendment that is to be moved to this Clause and contended that the Minister will no longer have a role to play under Clause 4. The suggested amendment would incorporate the

aforementioned Supreme Court and Court of Appeal Rules, into Clause 4 of the Bill and other Rules as may be made under Article 136 within the period of operation of this Bill and the said Rules will apply *mutatis mutandis,* in relation to any action, application, appeal or proceeding conducted before a court of first instance, to the extent possible.

Hence, we are of the view, that if the proposed amendment is incorporated to Clause 4 of the Bill at the Committee Stage, then the inconsistency of Clause 4 of the Bill, with Article 136 read together with Article 4(c) of the Constitution would cease.

In passing, we may add that for elegance in language and in order to maintain consistency, it is desirable that the terminology referred to in the written law pertaining to similar provisions, maybe incorporated into this Clause as well.

Clauses 5, 6, 7 & 8

Clauses 5, 6, 7 and 8 consist of Part IV of the Bill, wherein relief in respect of 'exclusion of time' is granted by a court, tribunal or any other authority, to a party of a contract, who is subject to "Covid-19 circumstance" and is unable to perform any rights or obligations under the said contract.

However, we observe, that this relief is not granted to each and every party to a contract, but to a specific set of persons. In order to make an application for such relief, the principal criteria is that the 'contract' should be a 'scheduled contract'.

According to Clause 5, a 'scheduled contract' means any contract specified in the schedule to the Bill or any other contract as may be prescribed, from time to time.

Upon perusal of the Schedule to the Bill, it is observed that the 14 contracts specified and more fully defined therein, are all commercial contracts.

Hence, the question posed by this Court to the Respondent was the rationale of the classification of such contracts and whether the provisions of the said Clause would impinge Article 12(1) of the Constitution.

The contention of the learned Senior Deputy Solicitor General was that the implicit categorization of commercial contracts in itself is justified as a reasonable classification with a rational and intelligible criteria. He further contended that the said criteria was arrived at having taken into consideration the representations of stakeholders and being satisfied, that it is the parties to a commercial contract on whom the immediate

and urgent focus of relief should be made and the schedule of contracts is not exhaustive and can be further expanded.

The learned Counsel went on to submit that it is a matter of policy and not constitutionality and when it comes to matters of 'an economic nature', judicial intervention is slow and hesitant and drew our attention to a number of Supreme Court Special Determinations in respect of fiscal legislation, which he contended was somewhat relevant, to the matter in issue and thus, submitted that the classification is justifiable and reasonable.

However, we observe that this Bill makes provision to **grant relief to persons affected by "Covid-19 circumstance".** We also note, unlike Part 1 of the Bill which provides relief for exclusion of time periods for *any person* affected by "Covid-19 circumstance", Part IV of the Bill provides relief only for a *certain category of persons,* namely parties to a commercial contract and thus leaves out all the other contracting parties. The examination of the list of contracts in the Schedule of the Bill, emphasizes the said fact in greater extent. For example Items (a) and (b) of the Schedule, provides that a contract for the grant of a loan by a licensed bank or a finance company to an enterprise, where such facility is secured against any commercial or industrial immovable property or plant or machinery, such contract falls within a 'scheduled contract', *whereas* when a loan by the same licensed bank or a finance company is granted to an individual, and such facility is secured against immovable property, been a land or residential property, such contract will not fall within the categorization of scheduled contracts.

The selection of contracts to be classified as scheduled contracts maybe a matter of policy but it has to be based on rational and intelligible criteria. The relief that is granted to the contracting parties to a scheduled contract, by virtue of Clause 6(2) of the Bill, (where no specific procedure is laid down) is only an order of court, that the period which a contracting party was subjected to "Covid-19 circumstance", prevented such party from performing an obligation or exercising a right. In our view this criterion cannot be limited to commercial contracts only and should equally apply to all contracts and any contracting party affected by a "Covid-19 circumstance" should be able to obtain relief under this provision. The submission that the list can be expanded, in our view, will not take away the arbitrariness of granting relief only to certain identified contracting parties.

It is also noted, that according to the provisions of Clause 7(1), obtaining such an order of court by virtue of Clause 6(2), would not prevent the right of the other contracting party, to institute 'an action' prescribed in detail in Clause 7(2), and the contracting party who obtained an order under Clause 6(2) could only use the order obtained, as a defense available to such party.

In our view, the categorization of the scheduled contracts and the privileges granted to only the contracting parties of the scheduled contracts to obtain relief as discussed above, does not fall within the ambit of the term 'economic in nature', where judicial intervention should be slow and hesitant, as contended by the learned Counsel. Moreover, it does not fall within the regime of fiscal legislation as well and in our view, the determinations of this Court pertaining to fiscal legislation has no applicability in the present context. Clause 6(2) is purely an exercise of excluding time, subject however to the time limitation referred to in Clause 9 of the Bill.

Thus, we are unable to agree with the submissions made by the learned Senior Deputy Solicitor General, that the categorization of certain contracts as scheduled contracts under Clause 6(2), and leaving out certain other contracts, especially in the context of obtaining relief by way of an exclusion of a time period, when a contracting party was subjected to "Covid-19 circumstance" and unable to perform any obligation or exercise any right, under such contract due to Covid-19 circumstance, is justified and reasonable and is based on rational and intelligible criteria.

The object of this Temporary Provisions Bill is to provide relief to all persons affected by "Covid-19 circumstance." In the said circumstances, we see no basis or reason to grant relief only to a certain segment of contracting parties.

Hence, we are of view that the provisions of Clauses 5, 6 and 7 of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84 (2) of the Constitution.

Clauses 9, 10, 11 and 12

The aforesaid Clauses consist of Part V. which lays down the general provisions of the Bill. Subject to the observations of this Court pertaining to the term "Covid-19 circumstance", these Clauses are not inconsistent with the Constitution.

The Determination of the Court

For the reasons adumbrated above, in terms of Article 123(1) of the Constitution we determine as follows :-

(i) Clauses 2, 3, 4, 6, 7 and 10 of the Bill, read together with the definition of "Covid-19 circumstance" in Clause 12 of the Bill are inconsistent with Articles 3 and 4(c) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

However, if the definition of "Covid-19 circumstances" in Clause 12 is amended as opined by this Court, the said inconsistency would cease and this Bill may be passed with a Simple Majority in Parliament.

(ii) Clause 4 of the Bill is inconsistent with Article 136 read together with Article 4(c) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution.

However, if the said Clause is amended in terms of the proposed amendment tendered to this Court, the said inconsistency would cease and the Bill may be passed with a Simple Majority in Parliament.

(iii) Clauses 5, 6 and 7 of the Bill are inconsistent with Article 12(l) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution.

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. However, with regard to Clause 3(1) of the Bill, as opined by this Court provision may be made.

We place on record our appreciation of the assistance given by the Petitioner and the learned Senior Deputy Solicitor General who appeared on behalf of the Hon. Attorney-General.

Murdu N. B. Fernando, PC
Judge of the Supreme Court

Yasantha Kodagoda, PC
Judge of the Supreme Court

A.H.M.D. Nawaz J.,

I have read in draft the conclusions and reasoning of my sister judge Murdu N. Fernando PC. J, and brother judge Yasantha Kodagoda PC. J, on the Bill titled Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) and in a summary their determinations are as follows:-

(i) Clauses 2, 3, 4, 6, 7, 8, 9 and 10 read together with the definition of "Covid-19 . circumstance" in Clause 12 of the Bill are inconsistent with Article 3 and 4(c) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

However, if the definition of' 'Covid-19 circumstance" in Clause 12 could be amended as opined by this Court, the said inconsistency would cease and this Bill may be passed with a Special Majority in Parliament.

(ii) Clause 4 of the Bill is inconsistent with Article 136 read together with Article 4(c) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution.

However, if the said Clause is amended in terms of the proposed amendment tendered, to this Court, the said inconsistency would cease and the Bill may be passed with a Simple Majority in Parliament.

(iii) Clauses 5, 6, 7 and 8 of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the Special Majority provided for in Article 84(2) of the Constitution.

At the outset I would like to state that as determined by Her Ladyship and His Lordship, Clause 4 of the Bill will cease to be inconsistent when the Committee Stage Amendments thereto are moved and enacted with a simple majority.

While I thus agree with the conclusion reached by Her Ladyship Murdu N. Fernando PC. J, and His Lordship Yasantha Kodagoda PC. J, on Clause 4 of the Bill, 1 am afraid that I would dissent from their conclusion that Clauses 2, 3, 4, 5, 6, 8, 9 and 10 read together with the definition of "Covid-19 circumstance" in Clause 12 of the Bill are inconsistent with Article 3 and 4(c) of the Constitution and thus they could only be passed with the Special Majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

Her Ladyship and His Lordship have opined that if the definition of "Covid-19 circumstances" in Clause 12 is amended, the said inconsistency would cease and the Bill may be passed with a Simple Majority in Parliament.

Thus in the determination of the majority it is the pervasive presence of the phrase "Covid-19 circumstance" as defined, in the aforesaid Clauses of the Bill, that constitutes the causal factor of the inconsistency and therefore I would assay the definitional clause to demonstrate that in my determination the said definition of "Covid-19 circumstance'' in no way eventuates in any such inconsistency with the Constitution. If 1 could demonstrate that the definition of "Covid-19 circumstance" in Clause 12 does not infringe the Constitution or any of its Articles, then the corollary follows that none of the Clauses wherein the phrase

"Covid-19 circumstance" occurs namely Clauses 2, 3, 4, 5, 6, 7, 8, 9 and 10 would be tainted with inconsistency with the Constitution.

Though I do not determine Clauses 2, 3, 4, 5, 6, 7, 8, 9 and 10 to be inconsistent with the Constitution, I do subscribe to the view that the definition of Covid-19 circumstance in Clause 12, if at all, could be amended only on account of its tautology, which I will later advert to in this determination. Notwithstanding the view I hold as to the amendment of definition of Covid-19 circumstance in the end because of its inherent tautology, upon an analysis of the definition of "Covid-19 circumstance" in Clause 12, I determine that even in its current format as the definition stands in the Bill, it does not fall foul of the supreme law of the country.

I would set down my reasons as to why I determine the definition to be consonant with the Constitution. Before doing so, let me observe that the proposed legislation titled "Coronavirus Disease 2019 (Covid-19) (Temporary Provisions)" Bill would appear to be pre-emptive in that it is not intended to result in any extinction of liability or rights due to the raging pandemic but rather it authorizes the dispute resolution mechanism in this country to adapt the procedural form or timeframes to the unforeseen circumstances that have infiltrated into every aspect of litigation. The common law concepts of force majeure and hardship consists in the elimination of obstacles in the resolution of disputes caused by uncontrollable and unforeseen circumstances and it would appear that the Clauses under consideration namely 2, 3, 4, 5, 6, 8, 9 and 10 intend to enact legislative responses to Covid-19 induced crises in litigation. The majority determination deals with the exact scope and ambit of the aforesaid Clauses but I would only briefly advert to their legal effects when necessary and now I proceed to answer the question as to why I determine the Clauses to be consonant with the Constitution.

Clause 2

The impugned definition of Covid-19 circumstance

The definition of Covid-19 as it stands now in the draft Bill reads as follows:-

"Covid-19 circumstance" includes

(a) Covid-19;

(b) the operation of or compliance with law of Sri Lanka or another country or another country or territory or an order of direction of the Government or any statutory body, or of the Government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19); or

(c) any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a) or (b),

The gravamen of the Petitioner's complaint was that the operation of or compliance with any law of another country or territory would intrude on the sovereignty of the People as adumbrated in Article 3 read with Article 4 of the Constitution. It is not as if the decision-making process of the Sri Lankan judiciary or tribunal is intruded upon or affected by an extraterritorial law or order but on the contrary the import of the definition (b) only means that the Sri Lankan courts which have to take into account a Covid-19 circumstance for the purpose of granting reliefs to litigants under the Act if enacted, will also take cognizance of a factual consequence brought about by a Covid related law or order of an overseas country. In my view there is nothing unconstitutional in such a provision.

Craies On Legislation - a Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation edited by Daniel Greenberg, Counsel for domestic legislation, House of Commons (2020) has this interesting passage which makes it patently clear that what is sought to be achieved in this Bill does not trespass on the legislative province of the Sri Lankan Parliament nor is it an intrusion on the decision-making power of the judiciary in this country.

In paragraph 3.5.1 of the 12th Edition of that well-known tome on statutory interpretation it is unambiguously stated as follows:-

> *"As a general rule the person on whom a power to legislate is conferred cannot use that power to confer a further power to legislate. "*

If the Constitution recognizes Parliament as its legislative repository in Articles 4(a) and 75 of the Constitution, such a delegate vested with the legislative power of the people cannot alienate that power and what Craies on Legislation states as a prohibition against further delegation (sub-delegation) in para 3.5.1 of the 12th Edition of *Craies,* is well encapsulated in Article 76(1) of the Constitution.

> *"Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power."*

Of course this Article operates subject to the power of Parliament to sub-delegate the plenitude of its legislative power only to its authorized agents such as the President who is authorized to make emergency regulations and a person or body who is empowered to make subordinate legislation for prescribed purposes.

Nowhere does the proposed legislation attempt a sub-delegation of its legislative power outside the pale and remit of Article 76 of the

Constitution. Nowhere does the proposed legislation abdicate its law making power to an external institution such as a foreign legislature. Such an intendment is further from the true import of the Bill before us. No legislative power is sub-delegated or further delegated to an outside instrumentality in contravention of Article 76 of the Constitution.

Let me juxtapose the impugned limb (b) of the definition "Covid-19 circumstance" in Clause 12 -the Interpretation Clause.

> *(b) The operation of or compliance with any law of Sri Lanka or another country or territory, or an order or direction of the Government or any statutory body, or the Government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19)*

When the definition of Covid-19 circumstance includes in its limb (b) "the operation of or compliance with ***any law of another country or territory*****, or** ***an order or direction of the Government or other public authority of another country or territory*****,** being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19)," it will become inconsistent with the Constitution and more particularly with Articles 4 (a) and 76 of the Constitution, only if that other country or territory has enacted their legislation for the sake of Sri Lanka. The truth is to the contrary. The Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Bill does not aim at such an impermissible sub-delegation. Rather it only allows a Court in Sri Lanka to take cognizance of the consequence of the Covid related legislation of the other country or territory in order to grant time extensions and relief to a litigant possibly impacted by the Covid related legislation. The adjectival clause "*being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19)* " in Clause (b) of the definition makes it clear that it is only a Coronavirus related legislation or order of another country whose impact is brought to the notice of our judiciary so that it will deem it as a Covid-19 circumstance to grant relief to a party affected by such circumstances. Take for instance the case of a Sri Lankan undergoing travelling restrictions to come back to Sri Lanka on account of a foreign law or direction that has barred his journey back home. In the meanwhile the time limit for his contemplated suit to vindicate his rights in Sri Lanka under a cause of action may be running out by his prolonged stay overseas but the Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Bill gives him a breathing space in that Clause 2(1) of the Bill enables him to obtain an extension of time beyond the statutory time limit provided he establishes to the satisfaction of the relevant Court that he was prevented from complying with the statutory time limit because of a Covid-19 circumstance that would include a law or order passed in relation to the pandemic in the

country where he became sequestered. The law or order passed in the foreign country causally led to a Covid-19 circumstance and that circumstance is invoked by the litigant for purposes of obtaining an exemption or extension of time that this proactive legislative seeks to achieve.

In no way does such a judicial cognizance of the passage of foreign law or order that made it impossible for him to comply with statutory time limits impinge on the sovereignty of the People. The competent court where relief is sought under Clauses 6, 7 and 9 takes into consideration the foreign law or order only as a Covid-19 circumstance that made it impossible for a litigant to comply with time limits or perform his contractual obligations.

It is a question of fact whether the foreign law or order prevented or disrupted a litigant in his quest to vindicate his legal rights or perform his obligations. It is not an illegal usurpation of the legislative power of the People that is engaged here.

The question before Court would be whether it is satisfied that the foreign law or order made by reason of or in connection with Coronavirus Disease 2019 or compliance thereof operated so as to prevent or disrupt a person to comply with limitation periods or to perform obligations imposed or secure rights conferred by certain contracts known as Scheduled Contracts. There are component elements that are stipulated for this excusatory plea of Covid-19 circumstance to succeed. There must be a foreign law or order occasioned by Coronavirus Disease, which eventually leads to an impossibility for a person to comply with limitation periods or contractual obligations. The Bill enables this circumstance to be pleaded as a defense to seek time extensions and relief from performance of contractual obligations.

The collocation of the words in Clause (b) of the definition of "Covid-19 circumstance" namely "*operation of ..... any law of ... another country or territory, or an order or direction of or the Government or other public authority of another country or territory ...*" only connotes an extraterritorial and external phenomenon because its consequence transcends boundaries. Its reliance by a person as causative of his impossibility to perform or comply with a time limit does not result in the use by a Sri Lankan Court of that law or order to adjudicate on the merits of a dispute. Thus there is no intrusion on judicial power as adumbrated by Article 4(c) of the Constitution.

Accordingly I am irresistibly driven to the determination that the retention in the impugned clause of the words "*any law of... or another country or territory, or an order or direction of ... or the Government or other public authority of another country or territory ...*" does not

infringe any provisions of the Constitution, least of all on sovereignty which all organs of Government would indisputably recognize as inalienably inherent in the People of our country.

There is another argument that is germane to the issue. When an authority of a foreign country issues a Covid-related direction which impacts on a person's ability to timeously initiate legal proceedings in Sri Lanka, certainly the exercise of discretion in the foreign jurisdiction is having a consequence of fact. By no stretch of imagination can it be argued that it amounts to intentional delegation of legislative power. A reference to a foreign law or order that emanated due to Covid is not equivalent to delegation. What is offensive of the Constitution is an unlawful abdication or alienation of legislative power and in my view the definition does not result in such an alienation. A mere reliance on a foreign law or order is not an intrusion on sovereignty of the country. *Craies* on Legislation articulates the true test of delegation at page 172 of its 12th Edition. Daniel Greenberg -the learned Editor makes the assertion that if a particular enactment or order is made wholly without reference to the referential use that would be made of it, that enactment would not amount to a delegated legislation.

In this instance the particular foreign law or direction of a foreign body is not made with the knowledge that a referential use of it would be made in Sri Lanka. For instance the law is not made in England expressly with reference to it becoming directly applicable in Sri Lanka. In the case of delegated legislation in its true sense, the delegate enacts it with the knowledge that it will have direct application in Sri Lanka. In this instance no such direct application of a foreign law is intended but a mere reliance thereof to secure an exemption for instance from a time limit and it does not intrude prejudicially on the legislative power or judicial power of the People. Our domestic legislation is rife with such examples.

The one-month time limit stipulated in Article 126(2) of the Constitution is deferred by Section 13 of the Human Rights Commission Act, No. 21 of 1996 which provides that the period of time where an inquiry is pending before the Human Rights Commission shall not be taken into account in computing the one month time limit prescribed in Article 126(2) of the Constitution. Thus a mere impact on the Fundamental Rights jurisdiction of the Supreme Court alone does not impinge on the sovereignty of the People-see Priyantha Jayawardena, PC. J., in the Special Determination on **"Twentieth Amendment to the Constitution" S.C. (SD) No. 01-36/2020.** Since a Covid circumstance transcends passport control, it is immaterial that its impact arises from an impossibility arising from Sri Lanka or overseas. In my view the scheme of the Bill is premised on the doctrine of *lex non cogit ad impossibilia.*

Broom's Legal Maxims (11th Edition, p. 177) indicate that however mandatory a provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance particularly where it is a question of time factor. It is but fair that relief is molded, varied or re-shaped in the light of updated facts. The proposed bill in my view puts the doctrine on a legislative footing.

In the circumstances I determine that the presence of the sub-clause (b) in the definition of the phrase "Covid-19 circumstance" does not infringe any of the provisions of the Constitution and the appearance of the phrase "Covid-19 circumstance" in Clauses 2, 3, 4, 5, 6, 7, 8, 9 and 10 does not render those clauses inconsistent with the Constitution. As such it is my determination that these clauses can be enacted with a simple majority in Parliament.

An Amendment of the Definition of Covid-19 Circumstance

1 have already opined that despite my holding that the definition of Covid-19 circumstance as it stands in the Bill is not inconsistent with the Constitution, it will not be repugnant if it is sought to amend the definition.

The Bill in its current form defines the phrase in Clause 12 as follows:

"Covid-19 circumstance" includes

(a) Covid-19;

(b) the operation of or compliance with law of Sri Lanka or another country or another country or territory or an order of direction of the Government or any statutory body, or of the Government or other public authority of another country or territory, being a any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID- 19); or

(c) any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a) or (b).

Though the formulation is consonant with the Constitution, a close scrutiny will show that sub-clauses (b) is in effect an example of sub-clause (c). It is for this reason I observed that Clause (b) is tautologous as sub-clause (c) would adequately cover sub-clause (b). In such circumstances even if sub-clause (b) is deleted and a new definition is reformulated as below, the Bill will have the salutary effect it seeks to achieve. In my view the amendment would only be a distinction without a difference.

The new formulation

The definition could be suitably amended in the following way to avoid tautology.

"Covid-19 circumstance" includes

(a) Covid-19; or

(c) any other circumstances arising out of or consequential to the circumstances referred to in paragraph (a).

Clause 5, 6, 7 and 8 of the Bill

I next turn to Clauses 5, 6, 7 and 8 which are found in Part IV of the Bill. It is under the aegis of these clauses that parties to a "Scheduled contract" are granted relief in respect of their inability to perform their contractual obligations or in the enforcement of contractual rights emanating from the said Scheduled contracts they are empowered to institute actions.

Clause 5 of the Bill reads as follows :-

> *For the purpose of this Part, a "Scheduled contract" means any contract specified in the First Schedule to this Act or any other contract as may be prescribed, from time to time.*

In terms of this Clause, a Scheduled contract would be any contract specified in the First Schedule to the Act or any other contract as may be prescribed from time to time. A close scrutiny of the Scheduled contracts in the First Schedule would indicate that the Scheduled contracts in the First Schedule do not evince a comprehensive and closed list. The use of the word "include" in the First Schedule shows the intention of the legislature to enlarge the scope of Scheduled Contracts. The enlargement can take place either by subordinate or delegated legislation made by the Minister from time to time or from an argument that a particular contract on which relief is sought is indeed included within the rubric of Scheduled contracts.

I would for purposes of clarity set out the Scheduled contracts that have been specified in the First Schedule:

Scheduled contracts include-

(a) a contract for the grant of a loan facility by a bank licensed under the Banking Act, No. 30 of 1988 or a finance company licensed under the Finance Business Act, No. 42 of 2011 to an enterprise, where such facility is secured, wholly or partially, against any commercial or industrial immovable property located in Sri Lanka;

(b) a contract for the grant of a loan facility by a bank licensed under the Banking Act, No. 30 of 1988 or a finance company licensed under the Finance Business Act, No. 42 of 2011 to an enterprise-

(i) where such facility is secured, wholly or partially, against any plant, machinery or fixed asset located in Sri Lanka; and

(ii) where such plant, machinery or fixed asset, as the case may be, is used for manufacturing, production or other business purposes;

(c) a performance bond or equivalent that is granted pursuant to a construction contract or supply contract;

(d) a hire-purchase agreement within the meaning of the Consumer Credit Act, No. 29 of 1982, where the good hired or conditionally sold under the agreement is —

(i) any plant, machinery or fixed asset located in Sri Lanka, where such plant, machinery or fixed asset is used for manufacturing, production or other business purposes; or

(ii) a commercial vehicle;

(e) a lease of-

(i) any plant, machinery or fixed asset located in Sri Lanka, where such plant, machinery or fixed asset is used for manufacturing, production or other business purposes; or

(ii) a commercial vehicle;

(f) a finance lease within the meaning of the Finance Leasing Act, No. 56 of 2000, where the equipment provided under the finance lease is -

(i) any plant, machinery or fixed asset located in Sri Lanka, where such plant, machinery or fixed asset is used for manufacturing, production or other business purposes; or

(ii) a commercial vehicle;

(g) an event contract;

(h) a tourism - related contract;

(i) a construction contract or supply contract;

(j) a lease of non-residential immovable property;

(k) an option given by a housing developer to an intending purchaser for the purchase of one or more units of housing accommodation;

(l) an agreement between a housing developer and a purchaser for the sale and purchase of one or more units of housing accommodation;

(m) an option given by a commercial property developer to an intending purchaser for the purchase of one or more units of commercial property;

(n) an agreement between a commercial property developer and a purchaser for the sale and purchase of one or more units of commercial property.

It is parties to the above contracts who secure rights under Clauses 6, 7 and 8. In terms of **Clause 6 of the Bill,** a party who is unable to perform an obligation imposed on him by the contract but who is subject to a Covid-19 circumstance can make an application to court or tribunal to seek a deferral of his contractual obligation. If a Covid-19 circumstance has prevented a party from performing his obligations or exercising his right under the contract, the period of such circumstance would be excluded from the period within which such party would otherwise be required to perform the obligation or exercise the right.

According to **Clause 7 of the Bill** any party who could vindicate a right against any other party under the contract who is otherwise subjected to a Covid-19 circumstance can institute proceedings against the other party. In such a situation the proviso to Clause 7(1) enables the other party to plead his inability due to Covid-19 circumstance as a defence. The actions that a party could institute arising from the Scheduled contracts are said to include the type of actions set out in Clause 7(2).

Clause 8 of the Bill clarifies the position that the relief that is granted under Part IV of the Bill is only a deferral of the contractual obligations or rights and they would in no way constitute an extinction of the contractual obligations or rights.

The quintessential issue that came up in the course of the argument was whether the Scheduled contracts expressly listed under the First Schedule would constitute the creation and classification of commercial contracts as a class and whether in such circumstances the categorization can be justified with rational and intelligible criteria.

If one takes a closer look at the Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Bill under consideration, there is indeed an underlying deferral of contractual obligations or rights that arise from commercial contracts. Take for instance the following contracts given in the First Schedule:

a) a contract of loan given by a bank or a finance company to an enterprise which has secured that loan against a commercial or industrial immovable property;

b) a secured loan given by a bank or a finance company where plant machinery or a fixed asset etc have been given as a security;

c) a performance bond given in the case of a construction contract or supply contract.

The list is undoubtedly not exhaustive but one could perceive the underlying policy of the legislature to treat these industries and persons as having been disrupted by the Covid-19 circumstance, which has in turn debilitated their ability to service the loans granted by lending institutions.

In the case of a performance bond issued at the instance of a builder, a call on the performance bond is a right inherent in the beneficiary of the performance bond namely the employer who has entered into a building contract with the builder. The issuer of the performance bond may be a bank or an insurance company who has a contractual liability to pay on the call once a breach of contract is brought to its notice. Here the builder is empowered under Clause 6 to seek relief. Clause 7 will enable the beneficiary to exercise his right to call on the performance bond. The proviso to Clause 7(1) provides that a COVID-19 event will be a defence to any breach of contract claim if it is the reason for the inability to do something in pursuance of the contract.

It is in public domain that construction contracts have been hit hard by the Covid-19 pandemic. The raging pandemic has had the side effect of disrupting supply chains and limiting working hours along with myriad other issues great and small that have left contractors staring at completion dates they have little hope of meeting. In order to get protection under the Act the burden of proof is on the builder to prove his inability to perform the obligations which must be, to a material extent, caused by a COVID-19 circumstance. As it stands, a COVID-19 circumstance is defined broadly as:

a) Covid-19;

b) the operation of or compliance with any law of Sri Lanka or another country or territory, or an order or direction of the Government or any statutory body, or of the government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with Coronavirus Disease 2019 (COVID-19);

If a party to a contract encounters issues due to the laws of other countries, sub-clause (b) would be very useful in circumstances where a party is delayed by suppliers or where personnel are unable to travel due to COVID-19 measures. In any event I have dealt with this issue before and the citation of sub-clause (b) in this context is only to mirror its relevance to the issue of the builder.

I have sought in the above discussion to pinpoint the legislative policy which seems to pervade the ameliorating clauses that provide relief to these contractual parties.

The issue that came up before court was whether the legislature could group together these contracts without offending Article 12 of the Constitution. Article 12(1) of the Constitution specifically spells out that all persons are equal before the law and are entitled to the equal protection of the law. It is realistic to pose the question as to why small time borrowers and individual house owners who have secured their loans by mortgaging their housing have been excluded but it is axiomatic that their non-selection is not per se discriminatory and arbitrary provided that the legislation is so pervasive as to promote a legitimate aim and policy.

A consequence of this classification certainly triggers the argument that other borrowers and contracting parties are not entitled to the same rights. But it is a given that it is legitimate and rational for a legislature to enact a law specifying a threshold. As could be seen, undoubtedly commercial enterprises which have entered into Scheduled contracts have suffered financially that the legislature has felt it legitimate to give them a shot in the arm by giving them deferrals and postponement of the enforcement of their contractual obligations. Some of these enterprises employ a whole host of work force that retrenchment due to the Covid-19 pandemic has been abundant and these enterprises have not been able to finance their loans though they have contributed to the national economy.

It is no secret that the Covid-19 pandemic and its impact on economic activity have resulted in many businesses being unable to fulfill their contractual obligations. As a result such businesses and enterprises are exposed to the consequences of failing to comply - such as claims for damages, forfeiture of deposits, termination of leases, insolvent proceedings etc. In the circumstances if the legislature goaded by a legitimate policy to protect and give relief to this category attempts a classification, this could hardly be condemned as discriminatory. If the legislature had felt that they would afford this relief to this category because the blows on their coffers arc harder and they should be resuscitated to promote economic activity, the legislature is guided by a legitimate aim and such a classification would not offend Article 12 of the Constitution.

This differentiation is not arbitrary or unreasonable, and is referable to a legitimate object, namely, to facilitate the recovery of these institutions who, in the legislative eye, play a significant role in the provision of cash flow for the promotion of the economy. The consequential discrimination from the point of view of the small time borrowers and weaker parties to a contract is almost inevitable. Whenever there is a classification permitted by Article 12, there will be consequential differences.

I find that there is rationale in the classification sought to be attained by

the Bill and though it is axiomatic that Article 12(1) of the Constitution postulates that equals must be treated equally and unequals cannot be treated equally, it is ingrained in Article 12(1) of the Constitution that the state is allowed to classify persons or things for legitimate purposes- ***Perera vs. Building Materials Corporation*** **(2007)** ***BLR 59*** and ***Dayawathie and Others vs. Dr. M. Fernando and Others*** **(1988) 1 Sri LR 371.**

In the circumstances the classification made in clause 5, 6, 7 and 8 read with the First Schedule of the Bill is based on intelligible differentia and it bears a reasonable and a rational relation to the objects sought to be attained by the Bill.

In **S.C.(SD) No. 27/2004 re. "Inland Revenue (Amendment) Bill",** the Supreme Court categorically determined as follows:

> ***"The substantive provisions of the Act grant concessions from income tax or impose and clarify liabilities.*** *The former Constitutional Court and this Court have in several determinations stated that in taxation matters the legislature has the greatest freedom of classification and concessions granted or liability imposed have not been held to be inconsistent with Article 12(1) which provides for the equal protection of the law."*

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

> *"In taxation matters, even more than in other fields, it is well established that the legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally that it cannot be justified on the basis of any valid classification."*

A slew of Special Determinations of this court in respect of fiscal legislation has emphasized this dictum that the policy of the legislature if it is referable to a legitimate objective is best left to the legislature and there has been judicial reticence and non-interference with such policy.

I take the view that the co-equal status of legislative, judicial and

executive branches of Government has entailed a significant degree of judicial restraint concerning matters that properly fall within the purview of other branches of Government. Courts tend to shy away from reviewing the merits of matters involving intricate balancing of competing policy considerations that "judges are ill equipped to trespass into these domains and adjudicate thereon"

It is worth adverting to the observations made in **the *Colombo Port City Commission Bill* S.C. (SD) Nos. 4, 5, & 7-23/2021)**

> *"This Court has on numerous occasions emphasized that in revenue matters, in making classifications for the purpose of granting concessions or imposing liability, there is a wide discretion. [Inland Revenue Amendment Bill S.C.(SD) No. 3/1980; finance Bill S.C. (SD) No. 28/2004, Value Added Tax (Amendment) Bill S.C.(SD) No.29/2004, Value Added Tax (Amendment) Bill S.C.(SD) No.2/2005, Finance (Amendment) Bill S.C. (SD) No. 6/2005, Inland Revenue (Amendment) Bill S.C.(SD) No. 5/2005, Default Taxes (Special Provisions) Bill S.C. (SD) No. 02/2009]. Such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable or discriminatory'"*

No tinge or taint of arbitrariness or unreasonableness could taint the policy objective behind Part IV in categorizing Scheduled contracts as Clause 5 empowers the Minister to prescribe any other contracts from time to time. In other words the Minister has been empowered by Clause 5 of the proposed Bill and Clause 11(1) of the Bill empowers the Minister to make regulations in respect of all matters which arc required by this Act to be prescribed. In other words a discretionary power has been conferred on the Minister by this proposed legislation enabling him to add additional types of contracts if needed. It automatically follows that any inaction or even action on the part of the Minister in regard to his power of expanding the list of additional contracts can always be challenged under Article 126 of the Constitution. This takes away any allegation of arbitrariness or discrimination that could be leveled against this legislation as the list of Scheduled contracts is not fixed or static. Given the fluid nature of the Covid-19 situation, it should not be assumed that it is the end of the road for small time borrowers and house owners who have hypothecated their accommodation. There could be subsequent additions in the event individuals and specific industries come under further financial pressure.

Therefore the non-selection of any other borrower and a party to a contract is not anathema to Article 12 of the Constitution. Though the legislature may not have decided now not to give them relief, it has appointed a delegate to ameliorate their hardships in the future.

The question of priority that has been given to a specific category appears to be galvanized by social engineering and economic consideration and I take the view that owing to the polycentric nature of decision-making on Covid-19 measures and the concomitant legislative response in the form of this legislation, the views of the legislature and executive will carry much weight before this court. In such circumstances I determine that Clauses 5, 6, 7 and 8 of the Bill are consistent with Article 12(1) of the Constitution and could be validly passed with a simple majority.

For the aforesaid reasons the pith and substance of my determination in terms of Article 123(1) of the Constitution would be as follows :-

(i) Clauses 2, 3, 4, 6, 7, 8, 9 and 10 read together with the definition of "Covid-19 circumstance" in clause 12 of the Bill are consistent with Article 3 and 4(c) of the Constitution and could be validly passed with a simple majority.

The Definition of "Covid-19 circumstance" could however be amended owing to the fact that sub-clause (b) is an example of sub-clause (c).

(ii) Clause 4 of the Bill is inconsistent with Article 136 read together with Article 4(c) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However if the said Clause is amended in terms of the proposed amendment tendered to this court, the said inconsistency would cease and the Bill may be passed with a simple majority in Parliament.

(iii) Clauses 5, 6, 7 and 8 of the Bill are consistent with Article 12 (1) of the Constitution and could be validly passed with a simple majority in Parliament.

I also 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.

I wish to place on record my appreciation of the assistance given by the learned Counsel for the Petitioner and the learned Senior Deputy Solicitor-General.

A.H.M.D. Nawaz
Judge of the Supreme Court

First Reading:	08.06.2021 (Hansard Vol.283; No. 06; Col. 942)
Bill No. :	51
Sponsor/Relevant Minister:	Minister of Justice
Decision of the Supreme Court Announced in Parliament:	06.07.2021 (Hansard Vol.283; No. 09; Col. 1387-1388)
Second Reading:	17.08.2021 (Hansard Vol.284; No.05; Col. 713-810)
Committee of the whole Parliament and Third Reading:	17.08.2021 (Hansard Vol. 284; No.05; Col. 818-819)
Hon. Speaker 's Certificate:	23.08.2021
Title :	Coronavirus Disease 2019 (Covid-19) (Temporary Provisions) Act, No. 17 of 2021

S.C. (SD) No. 25/ 2021 to 32/2021
"FINANCE" BILL

BEFORE:

Priyantha Jayawardena, PC - Judge of the Supreme Court
K. Kumuduni Wickremasinghe - Judge of the Supreme Court
A. L. Shiran Gooneratne - Judge of the Supreme Court

S.C.(SD) No. 25/2021

Petitioner:	Sunil Handunneththi
Counsel:	Shantha Jayawardena with Niranjan Arulpragasam and Thilini Vidanagamage

S.C.(SD) No. 26/2021

Petitioner:	Eran Wickramaratne
Counsel:	Suren Fernando with Khyathi Wikramanayake and Sanjith Dias

S.C.(SD) No. 27/2021

Petitioner:	Ekeshwara Kottegoda Vithana
Counsel:	Darshana Weraduwage with Dhanushi Kalupahana

S.C.(SD) No. 28/2021

Petitioner:	1.Centre for Policy Alternatives (Guarantee) Limited 2. Dr. Paikiasothy Saravanamuttu
Counsel:	M. A. Sumanthiran, PC with Viran Corea, Bhavani Fonseka, S. Fernando, Luwie Ganeshkaran, Kyati Wickramanayake, Sanjith Dias and Divya Mascarange

S.C.(SD) No. 29/2021

Petitioner:	Rathnayake Mudiyanselage Ranjith Madduma Bandara
Counsel:	Farman Cassim PC with B. Siriwardena, Mithun lmbulamure and Vinura Kularatne

S.C.(SD) No. 30/2021

Petitioner:	Weligodage Saman Rathnapriya Silva
Counsel:	Eraj de Silva with Daminda Wijerathne and J. Sundharamoorthy

S.C.(SD) No. 31/2021

Petitioner:	Ashok Abeysinghe
Counsel:	A. S. M. Pcrera PC with Anjela Josef

S.C.(SD) No. 32/2021

Petitioner:	Nagananda Kodituwakku
Counsel:	Appeared in person
Respondent:	1. Hon. Attorney-General 2. Secretary-General of Parliament
Counsel:	N. Wigneshwaran, Deputy Solicitor-General with Ishara Madurasinghe, State Counsel and Shiloma David, State Counsel

Court assembled for hearings at 10.00 a.m. on the 27th, 28th and 29th of July, 2021. With consent of the parties, all the Petitions were taken up for hearing together on the 28th of July, 2021.

A Bill titled 'Finance' was published in the Government *Gazette* of the Democratic Socialist Republic of Sri Lanka on the 12th of July, 2021. and was placed on the Order Paper of Parliament on the 20th of July, 2021.

The aforementioned Petitioners have invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution to determine whether the Bill or any of the Clauses therein are inconsistent with the Constitution.

The Attorney-General was given notice in terms of Article 134(1) of the Constitution. The learned Deputy Solicitor-General who appeared for the Attorney-General and Secretary-General of Parliament, learned Counsel for the Petitioners, and the Petitioner who appeared in person, assisted Court in considering the constitutionality of the Bill and the Clauses therein.

The Bill seeks to introduce a tax amnesty in order to give effect to the proposals contained in the Budget Speech which was presented to Parliament by the former Minister of Finance on the I7th of November, 2021, and approved by Parliament.

The Long Title of the Bill states -

> "An Act to enable persons to voluntarily disclose undisclosed taxable supplies, income and assets required to be disclosed under certain laws; to provide for the imposition of a tax on the

taxable supplies, income and assets so disclosed; to indemnify the persons who voluntarily disclose any such taxable supply, income or asset against liability from investigation, prosecution and penalties under specified laws; to grant certain concessions to persons who had already disclosed taxable supplies, income and assets under specified laws; and for matters connected therewith and incidental thereto."

Part 1 of the Bill - Imposing the Tax on Voluntary Disclosure

Part I of the Bill provides a tax amnesty to individuals and companies who voluntarily disclose taxable supply, income or asset which they were required to disclose, but had failed to disclose under the provisions of specified revenue laws. Clause 2(2) of the Bill however, excludes those under investigation, pending legal proceedings, or convicted under the provisions of specified laws, from benefitting under the scheme set out in the Bill.

Accordingly, any person who wishes to benefit from the tax amnesty scheme set out in the Bill, is first required to invest an amount equivalent to the undisclosed taxable supply, income or asset either in shares issued by a resident company, treasury bills or bonds issued by the Central Bank, any quoted debt securities issued by a resident company in Sri Lanka, or in any movable or immovable property. If such person is unable to invest immediately, the said amount may be deposited in a bank account. Clause 3(3) of the Bill further states that those who have invested or deposited such an amount prior to the commencement of the Act, are exempted from fulfilling the said requirement.

In addition to the above, Clause 4(2) of the Bill requires such persons to pay a tax on voluntary disclosure. The said tax is charged at a rate of *one percent* of the amount of taxable supplies, income or assets disclosed in the declaration form submitted to the Commissioner-General under Clause 5(1) of the Bill.

However, if such declaration is not in compliance with the provisions of the Bill, the Commissioner-General of Inland Revenue may reject the same and should notify the declarant in writing, the reasons for the rejection.

Part II of the Bill - Provisions to Write off Tax Arrears under certain laws

Part II of the Bill provides for a taxpayer who is liable to pay tax arrears or penalty or interest stipulated under the provisions of the Bill within the stipulated time frame to be written-off by the Commissioner-General.

Further, Clause 12 of the Bill writes off tax arrears of any individual whose assessable income, as calculated in terms of the said Clause, does not exceed Rs. 3 million. However, the said write offs are subject to the limitations set out in Clauses 14 and 15 of the Bill.

Moreover, such concessions on tax would not be granted to persons with tax arrears payable under the Value Added Tax Act, No. 14 of 2002 and would only be applicable to any individual whose assessable income in terms of the Inland Revenue Act, No. 24 of 2017 prior to the 31st of March, 2020, is less than three million rupees. Further, such concessions on tax would not be granted to individuals falling within the categories set out under the proviso to Clause 12 of the Bill.

At the commencement of the hearing, learned Deputy Solicitor-General who appeared for the Attorney-General and Secretary-General of Parliament, submitted that the Ministry of Finance had agreed to amend some of the Clauses in the Bill at the Committee Stage and outlined the proposed amendments. Further, he moved for time till the 29th of July, 2021, to hand over the proposed amendments to court after the Legal Draftsman had prepared the same. Accordingly, the following Committee Stage amendments were handed over to Court with copies to the Counsel for the Petitioners on the 29th of July, 2021;

1. **Clause 4(1)** will be amended as follows:-

   A person to whom this Part applies shall be liable to pay a tax to be called the "Tax on Voluntary Disclosure" to the Commissioner -General prior to making the declaration under section 5 subject to the provisions of subsection (2).

2. **Clause 5(1)** will be amended as follows:-

   Any person to whom this Part applies who has invested or deposited any undisclosed taxable supply, income or asset as specified in Section 3 and has paid the Tax on Voluntary Disclosure as specified in Section 4, shall on or prior to December 31, 2021, submit to the Commissioner-General a declaration (hereinafter in this Part referred to as the "declarant") in relation to any undisclosed taxable supply, income or asset, substantially in the relevant Form specified in Part I or Part II of Schedule V hereto, along with the documents to prove the ownership, date of acquisition and cost or market value of the asset subject to the guidelines issued by the Commissioner-General under subsection (2).

3. **Clause 5(2)** will be substituted with the following:-

   For the effective implementation of the provisions of this Act, the Commissioner-General may issue necessary guidelines specifying the manner of payment and filing the declaration within one week of the date of coming into operation of this Act.

4. **Clause 5(3)** will be substituted with the following:-

(a) Upon receipt of a declaration made under subsection (1), the Commissioner-General shall verify whether such declaration is in accordance with this Act.

(b) Where the declaration is in accordance with this Act the Commissioner-General shall accept the declaration in writing and inform of such acceptance to the declarant within thirty days of the date of receipt of the declaration.

(c) If the declaration is not in accordance with the provisions of this Act, the Commissioner-General shall reject the declaration and inform the declarant in writing the reasons for his rejection within thirty days of the date of receipt of such declaration.

(d) If the Commissioner-General fails to inform the declarant as specified in paragraph (b) and (c) within thirty days the declaration shall be deemed to have been accepted.

5. **Clause 5(4)** will be substituted with the following: —

Any declarant whose declaration is rejected in terms of subsection (3), shall be entitled to submit a fresh declaration remedying any defects specified in the Commissioner-General's decision under subsection (3) within thirty days of the receipt of the Commissioner-General's decision.

6. **Clause 5(5)** will be amended as follows:—

Any declarant who ~~intentionally~~ provides false or incorrect information in the declaration made under subsection (1) shall not be entitled to the immunity granted under section 6, notwithstanding the acknowledgement of such declaration by the Commissioner-General under subsection (3).

7. **Clause 6 (1)** will be amended as follows:-

(a) Under the provisions of ~~the respective~~ <u>any</u> law specified in Schedule I hereto, <u>other than the Value Added Tax Act, No. 14 of 2002</u> ~~and~~ in relation to any <u>year of assessment</u> ending on or prior to March 31, 2020 in relation to the ~~taxable supply~~ income or asset disclosed in the declaration made under subsection (1) of section 5.

(b) Under the provisions of the Value Added Tax Act, No. 14 of 2002 in relation to any year of any period ending on or prior to March 31, 2020 ~~and~~ in relation to the amount of taxable supplies disclosed in the declaration made under subsection (1) of section 5, unless such tax has been collected by such declarant.

8. **Clause 7(1)** will be amended as follows:-

The Commissioner-General or any officer of the Department of Inland Revenue, shall preserve and aid in preserving ~~absolute~~ official secrecy in respect of the identity of a declarant and any matter or thing contained in a declaration made under subsection (1) of section 5 of this Act.

9. **Clause 12(b)** will be amended as follows:-

Where the assessable income of the relevant individual exceeds rupees three million in aggregate with the income from final withholding payments, gains and profits exempted from income tax in terms of the provisions of the Inland Revenue Act, No. 24 of 2017.

10. **Clause 13(1)** will be amended as follows:-

The Commissioner-General shall write off any penalty or interest calculated in terms of the provisions of any law specified in Schedule I or IV hereto, in relation to a taxpayer, in respect of which the payment due date was December 31, 2020 or a date prior to that date, if the taxpayer ~~settles~~ pays the full amount of the tax outstanding, under the provisions of the said laws, on or prior to March 31, 2022.

11. **Clause 14** will be amended as follows:-

Where there is any dispute in relation to any tax arrears referred to in section 11 or 12, in respect of which a decision is pending ~~decision~~ before or has been made by the Tax Appeals Commission or any court of law, ~~prior to February 22, 2021~~, before the commencement of this Act, under the provisions of any respective law specified in Schedule 1 or Schedule III hereto, or an assessment made in relation to a taxpayer, shall not be written off under the provisions of section 11 and 12, as the case may be.

12. **Clause 17** will be deleted in its entirety.

13. **Clause 20** will be amended to include the following:-

"Final withholding payments" shall have the same meaning assigned to such payment as provided in section 88 of the Inland Revenue Act, No. 24 of 2017;"

Further, the definition of 'return' which was in the same Clause will be amended as follows:-

"return" means a return of income or Value Added Tax return that a person is required to file with the Department of Inland Revenue in terms of the respective laws specified in Schedule I, including any certificate, declaration or any other attachment required to be furnished with the return;

Further, learned Deputy Solicitor-General informed that the typographical error in Clause 2(2)(a) in the Sinhala text would be corrected to give the same meaning in the English Text.

Thereafter, the Petitioners commenced their submissions.

Legislative Competence

Learned Counsel for the Petitioners submitted that the Bill provides for a waiver of tax arrears. Thus, it would legalize the acts of persons who defaulted tax, either in full or in part.

Further, it was submitted that the Bill grants tax evaders a full immunity from investigation and prosecution under specified revenue laws, if they voluntarily disclose their undisclosed taxable supply, income or assets. Hence, the Bill would discourage lax compliance.

Moreover, it was submitted that the Bill would facilitate persons who have acquired wealth through illegal and anti-social activities, to bring their wealth into the country's financial system and therefore, use such money as if they were earned through legitimate means.

Thus, it was submitted that the cumulative effect of the Bill is to enact legislation to grant an amnesty to tax defaulters, and is thereby discriminatory against taxpayers who have already paid the stipulated taxes on time. Therefore, the enactment of the Bill into law to grant a tax amnesty is arbitrary, irrational, grossly unreasonable, and contrary to the rule of law. Thus, the cumulative effect of the Bill is inconsistent with Article 12(1) of the Constitution and, therefore, cannot be enacted into law by Parliament.

The Counsel for the Petitioners cited **S.C. Reference No. 1/2004** which considered ***Inland Revenue (Special Provisions) Act, No. 10 of 2003*** *as amended by Act*, *No. 31 of 2003* consequent to invoking constitutional jurisdiction by the then President, in terms of Article 129(1) of the Constitution, five judges of this Court observed;

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

However, we observed in ***Inland Revenue (Regulation of Amnesty) Bill*****, S.C. (S.D.) No. 26/2004,** three judges of this Court (including two of the judges who considered the aforementioned reference) observed that subject to certain amendments, the Bill can be passed in

Parliament. Hence, the above reference has no applicability to the instant Bill. In any event, in the determination of the **Tax Amnesty Bill SC No. 2 of 1978,** five judges of this Court have held that Article 15(7) of the Constitution permits to enact legislation to grant amnesties.

Without prejudice to the above, learned Counsel for the Petitioners further submitted that the exemptions recognized in law in enacting fiscal legislation have no application to the enactment of legislation on tax amnesties by Parliament.

Responding to the above submission, the learned Deputy Solicitor-General submitted that Sri Lanka has introduced amnesty schemes eleven (11) times since their first introduction in 1964.

Moreover, it was submitted that granting tax amnesties is a common phenomenon in the world. Countries such as Argentina (2021). Dominican Republic (2020) (2021), Colombia (2020), El Salvador (2020), Guatemala (2020), Panama (2020), the United Kingdom (2007) (2011) (2020), Honduras (2018) (2019) (2020), Malaysia (2019), Philippines (2019), Pakistan (2018), Indonesia (1964) (1984) (2008) (2016) (2017), India (2016), Australia (2014), Spain (2012), Greece (2010), Portugal (2005) (2010), Russia (2007), Belgium (2004), Germany (2004), South Africa (2003), Italy (2001) etc., have introduced various types of tax amnesties from time to time to raise additional revenue and to get tax defaulters into the tax regime. Further, Los Angeles City (2009), and the State of Louisiana (2009) too have enacted similar legislation.

He further submitted that, the Bill has been drafted to meet specific and pressing needs of the people and the Republic whilst honouring the obligations of the Slate under Articles 148, 155 and 157 of the Constitution. Moreover, the Bill does not prevent investigations and/or prosecution in respect of wealth acquired by illegal or anti-social activities. Thus, the Bill is not directed at converting unlawfully earned funds into legal funds or for any other similar purpose.

Accordingly, he submitted that the present Bill falls within the exclusions set out in Article 15(7) of the Constitution and thereby it does not violate any of the Articles in the Constitution.

In this context, he cited the determination in the ***Finance Bill,*** **S.C. (S.D.) No. 28/2004** where it was observed;

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

> *" ... subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of* ***meeting the just requirements of the general welfare of a democratic society.***
>
> *The main purpose of the Bill, as pointed out earlier is to implement the Budget proposals for 2004, and it is undoubtedly for the purpose of general welfare of a democratic society. To that extent the Clause would come within the exception granted in terms of Article 15(7) of the Constitution."* [Emphasis added]

The aforementioned submissions of the parties with regard to the legislative competence of the Parliament to enact legislation to grant tax amnesties are considered first.

Article 15(7) of the Constitution confers power on the legislature to enact legislation to restrict the exercise and operation of all the fundamental rights declared and recognized by Articles 12. 13(1), 13(2) and 14 for the purpose of *inter-alia* - 'meeting the just requirements of the general welfare of a democratic society'. Time and again this Court has observed that enacting such legislation is not inconsistent with the Constitution.

In the determination of the ***Tax Amnesty Bill*** *(supra),* five judges of the, Supreme Court recognized the legislative competence to enact legislation to grant tax amnesties to persons who have defaulted in the payment of tax. In the said determination, the Supreme Court observed:

> *"The main provisions of the Act deals with persons who are commonly referred to as "tax evaders". The provisions of the Act seek to grant such evaders an amnesty in regard to non-payment of taxes in respect of any profit and income arising or accruing on or before 31st March, 1977.*
>
> *The provisions of this Bill do not apply to any person in relation to whom investigations have been commenced by the Commissioner-General or by any other officer of the Department of Inland Revenue for any alleged or suspected evasion of any tax payable under the provisions of the law for the time being relating to the imposition of income tax in respect of any profit and income arising or accruing on or before 31st March, 1977.*
>
> *The provisions of this Bill will not benefit those tax evaders who have already been dealt with under the law or who have*

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

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

Further, in the ***Tax Amnesty Bill*** **S.C. (S.D.) No. 3/89**, the court observed;

"In regard to the class of persons liable to pay income tax and surcharge on income tax for the years of assessment ending on or before 31.3.88, the Bill seeks to make special provision for certain persons who have failed to comply with their statutory obligations, including a different (and probably lower) rate of tax and relief from the penalties and prosecutions for default. Prima facie. the Bill appears to discriminate in favour of tax evaders and against the honest tax-payer, and we have to consider whether the Bill is inconsistent with Article 12(1) for that reason.

....it confers certain advantages on the tax evader, in respect of past years, based on a rational and intelligible basis of differentiation: and with the objective of bringing a distinct category of persons, namely those resorting to tax evasion, into the fiscal net, in the future. There is no inconsistency with Article 12(1). "

Moreover, in **The Specified Certificates of Deposit (Tax and Other Concessions) Bill S.C. (S.D.) No. 18/90,** the court observed;

"The Bill is similar in many respects to the Tax Amnesty Act, No.5 of 1989, which was considered by this Court in ***Special Determination No. 3 of 1989 (P/Parl/2)*** *on 6th April 1989 (Hansard of 8.4.1989, column 1154). It is not violative of article 12 to confer certain advantages and immunities on tax evaders, upon making disclosure and making substantial payment in respect of previously undisclosed profits and income, although this might be more favoured treatment than that meted out to honest taxpayers under the normal tax laws. Such difference in treatment is based on a rational and intelligible basis of differentiation, reasonably related to the*

> *legislative objective of bringing a distinct category of persons (tax evaders) into the fiscal net in the future. Legislation of this kind is not intended for the sole purpose of benefiting tax evaders, but is enacted in recognition of the reality that there is tax evasion, which is both extensive and difficult to check or detect; it seeks to recover some revenue in respect of past evasion; and finally, to secure full compliance in the future."*

In ***Inland Revenue (Regulation of Amnesty) Bill.*** **S.C. (S.D.) No. 26/2004** it was observed;

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

Responding to the submissions made by the learned Deputy Solicitor-General with regard to the legislative competency to enact legislation to grant tax amnesties, Counsel for some of the Petitioners submitted that the determinations of this Court on enacting fiscal legislation have no application to the instant Bill as it provides to grant a tax amnesty. We are unable to agree with the above submissions of the Counsel for the Petitioners, as enactment of legislation to grant tax amnesties is a part of the government policy on fiscal matters.

In the circumstances, the learned Deputy Solicitor-General submitted that Parliament has the legislative competence to enact legislation granting tax amnesties. In this regard, it is pertinent to note that tax amnesties are introduced by governments to encourage individuals and businesses who have failed to declare taxable income or assets to disclose their wealth by offering certain benefits to such persons.

He further submitted that in the aforementioned circumstances neither the Bill nor any of the Clauses in the Bill are arbitrary, irrational or violative of any of the Articles in the Constitution.

We have considered the objection raised by some of the Counsel for the Petitioners with regard to the legislative competence to enact legislation to grant tax amnesties and are of the view that there is no constitutional ouster to enact legislation to grant tax amnesties by Parliament.

However, Article 15(7) or any of the Articles in the Constitution does not oust the jurisdiction of the Court to consider the constitutionality of a Bill, even if on the face of the Bill it appears that the Bill comes within one of the exclusions enshrined in Article 15(7) of the Constitution.

Hence, this Court is required to consider the Clauses of the Bill in terms of Article 121 read with Article 123 of the Constitution.

We are also of the view that, the Clauses of the Bill fall within the aforementioned exclusion set out in Article 15(7) and thus, the Bill is not inconsistent with Article 12(1) of the Constitution.

Proportionality

Counsel for the Petitioners submitted that the Bill *inter alia* provides for the granting of full immunity from liability to pay arrears of taxes, penalties and interests or from investigations and prosecutions. Further, such an amnesty is available to any person who has not disclosed a taxable supply, income or asset which were required to be disclosed under the provisions of any law. It was also submitted that, granting of the tax amnesty is conditional upon the making of an investment or deposit as set out in Clause 3 of the Bill.

It was further submitted that the sum to be collected under the 'Tax on Voluntary Disclosure scheme is at a nominal rate of *one percent* of the total value of the disclosed wealth which is far lower than the tax liability of the persons who have already paid taxes in terms of the applicable law. In this regard it was pointed out that;

i. Under the Inland Revenue Act 2017, the tax rates originally varied from 4-24%, and subsequent to the amendment by Act No. 10 of 2021, the rates were between 6-18%.

ii. Under the Inland Revenue Act 2006, the tax rates varied from 5-35% for individuals.

iii. Under the Value Added Tax Act, post November 2016 up to January 2020, the tax rate was 15%, and post January 2020 - 8%.

Moreover, counsel for the petitioners cited the determination in ***The Specified Certificate of Deposit (Tax and other Concessions) Bill*** *(supra)* where the court observed that the seven percent of taxable income is far too low and is arbitrary.

Accordingly, it was submitted that the benefits offered to tax defaulters are disproportionate to the taxes imposed on the taxpayers who pay their taxes on time.

Responding to the aforementioned submissions, the learned Deputy Solicitor-General submitted that due to the outbreak of COVID-19 in Sri Lanka, the government revenue has dropped drastically. However, the government expenditure remains the same and thus, the government revenue is not sufficient to cover recurrent expenditure of the country. Hence, the introduction of the new Finance Bill would help to ease the fiscal deficit, as a temporary measure at this critical time.

He further submitted that there are compelling reasons for enacting the Bill into law, such as encouraging tax evaders to disclose their wealth, raise funds that are required for the government coffers, to spur economic activity and to clear accumulated outstanding taxes which are unable to recover by the State.

Moreover, this Bill has addressed the losses suffered by certain businesses as a result of the economic impact of COVID-19 and also sets out a scheme to usher in tax evaders into the national tax administration.

It was further submitted that Sri Lanka's tax compliance rate is very low, mainly due to the weak lax administration, enforcement system, complexities in enforcement of fiscal legislation and higher tax rates. As the Bill covers both existing 'tax filers' as well as 'non tax filers', the compliance rate is expected to increase up to sixty percent.

Learned Deputy Solicitor-General further submitted that the purpose of the Bill is to give effect to certain Budget Proposals. Moreover, previous legislation required tax defaulters to pay a percentage of the taxable income. In comparison, the Bill requires tax defaulters to pay *one percent* of the total amount of the money or the income disclosed and *one percent* on the market value of the movable and immovable property on date of the declaration. Therefore, it is not possible to compare the present tax amnesty scheme with the previous scheme that offered tax amnesty.

Thereafter, he drew a distinction between the previous legislation and the present Bill. He heavily relied on the fact that the Bill intends to widen the number of taxpayers for the future and thereby it facilitates to increase the number of taxpayers. Further, it was submitted that the object of widening the tax net is a unique feature of the Bill and thereby reduces the burden on taxpayers in the long run.

Further, it was submitted that the Bill is a part of the government's efforts to implement a structured taxing system by clearing all tax arrears on or before 31st of December, 2021, and to expand the tax administration by offering incentives to persons who have failed to enter the tax regime and thereafter, getting them to comply with the tax legislation.

The issue that needs consideration by Court is whether the benefits offered to tax defaulters in exchange of full disclosure of their income and assets are proportionate to the taxes imposed on the general public by the government, and whether such a scheme violates Article 12(1) of the Constitution.

In order to incentivize voluntary disclosure, tax amnesties offer either; financial or legal amnesty or a combination of both. Accordingly, if an individual or a company discloses their undisclosed income or assets,

the government will grant immunity from liability to pay in full or in part of the amount of the unpaid taxes, and also may exempt them from penalties or the payment of interest as a result of defaulting payment of taxes. Further, the government may grant immunity to such individuals and companies from investigation and prosecution for tax evasion under the revenue laws.

Moreover, the primary reason for granting a tax amnesty is to raise funds for the government coffers on a short-term basis and, thereby, to increase revenue. Further, introducing a 'tax on voluntary disclosure' scheme would reduce the government's budget deficit of a given fiscal year with minimal State intervention. Furthermore, encouraging tax evaders to disclose their undisclosed income and assets would assist in getting such persons to the national tax system, and thereby increase tax collection and compliance in future fiscal years. Hence, such persons will have to pay the stipulated taxes along with the rest of the taxpayers in the future.

In the majority decision of ***Parliamentary Pensions Bill,*** **Decisions of the Constitutional Court of Sri Lanka volume 4 (1976) page 36,** it considered Article 18(1) of the 1972 Constitution of Sri Lanka (which is identical to Article 12(1) of the present Constitution) and observed;

> *"Classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which a classification is made. If a law is made applicable to a class of persons or things and the classification is based upon a differentia having a rational relation to the objects sought to be achieved, there can be no objection to its constitutional validity that its application is bound to affect one person or thing, or a particular class of persons.*
>
> *Classification, therefore, must be based -*
>
> *(i) on a rational basis, and*
> *(ii) on intelligible differentia; and*
> *(iii) the differentia must bear a rational relation to the objects sought to be achieved by it; and*
> *(iv) arbitrary selection cannot be justified by calling it a classification."*

In the dissenting determination it was observed;

> *"...Permissible classification must satisfy two conditions, namely, (1) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (2) the differentia must have a rational relation to the object sought to be achieved by the Bill in question."*

We observe that unlike in previous legislation relating to granting of tax amnesties, the present Bill contains stringent provisions to comply with all the laws that are in operation. Particularly, the Bill excludes the persons who have earned money illegally. Further, the Bill provides to secure international commitments which are arising from the conventions that Sri Lanka has ratified. Hence, in view of the stringent safeguards embodied in the Bill, it is necessary to provide substantial incentives to attract the persons who evade payment of tax, either in full or in part.

Further, though the previous tax regimes charged a percentage of the taxable income, the Bill contains provisions to charge *one percent* of the total income declared or the market value of the movable or immovable property at the time of the declaration by the persons who were evasive of paying their taxes as required by law. In this regard, imposing a higher rate of tax would deter such persons from participating in the scheme offered by the Bill and comply with the fiscal legislation in the future.

Moreover, the Bill contains short-term and long-term fiscal policies of the Government. As a short-term benefit, the Bill contains provisions to collect money for the government coffers on or before the 31st of December, 2021. As a long-term benefit, it has provisions to get tax evaders to join the tax regime in the country and to pay the prescribed taxes along with the other payments in the future.

The principle applicable to the enactment of fiscal legislation were considered by court in the following determinations;

In ***Inland Revenue (Amendment) Bill*** **S.C. (S.D) No. 01-03/2021** the court observed;

> *"It is an established principle that, in fiscal legislation, the Legislature has the greatest freedom of classification in imposing liability and granting concessions, and such classification in imposing liability or granting concessions have not been held to be inconsistent with Article 12(1) of the Constitution."*

Further, in ***Value Added Tax (Amendment) Bill*** **S.C. (S.D) No. 02/2005,** this court observed;

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

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

Furthermore, the former Constitutional Court in relation to the ***Finance (Amendment) Bill of 1978,*** (Decisions of the Constitutional Court of Sri Lanka (Volume VI) 1978) observed;

"... In taxation matters even more than in other fields it is well established that the legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally that it cannot be justified on the basis of any valid classification. "

Moreover, in the ***Inland Revenue (Amendment) Bill*** **S.C. (SD) No. 03/1980,** the court observed;

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

Further, in ***P.M. Ashwathanarayana Setty vs State of Karnataka*** **(1989 Supp (1) SCC 696),** the Supreme Court of India observed:

"Though other legislative measures dealing with economic regulations are not outside article 14, it is well recognised that the State enjoys the widest latitude where measures of economic regulations are concerned. These measures for fiscal and economic regulations involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways."

It is pertinent to note that, tax amnesties that are offered by governments vary in nature depending on the government's fiscal policy. Complete tax amnesties grant full immunity from liability to pay outstanding taxes, penalties or interest incurred as a result of defaulting tax. In addition, it offers granting immunity from investigation or prosecution for tax evasion under the specified revenue laws. Semi-complete tax amnesties require the tax defaulter to pay a 'tax on voluntary disclosure' at an average rate determined by government's fiscal policy in view of writing off past tax liabilities. Restrictive tax amnesties require the tax defaulter to pay the full amount of the outstanding tax. but grants him immunity from liability to pay any penalty or interest arose as a result of tax default. It also grants immunity from investigation or prosecution for the tax evasion under revenue laws.

Further, it is a part of the government's fiscal policy to decide the type and the amount of taxes that will be implemented taking into consideration the amount of revenue that will be collected for a particular fiscal year.

The Petitioner who appeared in person, submitted *inter-alia* that recently international rating agencies downgraded the sovereign rating of Sri Lanka and as such, the government is finding it difficult to raise funds in the international money market.

The Bill titled ***'The Specified Certificates of Deposit (Tax and other Concessions)'*** *(supra)* provided a tax amnesty for the persons who defaulted the payment of tax either in full or in part.

However, in the said determination the Court observed that the benefits and immunities granted to tax evaders by the said Bill are quite disproportionate to the concessional taxes required to be paid by the defaulters in tax.

We have considered the aforementioned Bill and the instant Bill and are of the view that the different percentages of taxes are recovered from tax defaulters cannot be compared on the face of the Clauses in the said Bills. Hence, it is necessary to consider the cumulative effect of the benefits offered to tax defaulters in view of their voluntary disclosure of undisclosed income, assets and the benefits that are expected for the Stale by the Bill.

As slated above, one of the main objects of the Bill is to bring tax defaulters into the fiscal net. More importantly, the present situation in the country that was stated above and the need to increase the revenue for the government coffers to grant redress to the ordinary people are necessary considerations of the fiscal policy of the government that are required to be taken into consideration by court in making the determination.

In the circumstances, for the reasons stated above, the determination in the Bill titled *'**The Specified Certificates of Deposit (Tax and other Concessions)'*** has no application to the instant Bill.

In the circumstances, we are of the view that there is a rationale behind the objects sought to be achieved by the Bill. Further, the rationale in providing certain benefits to tax defaulters to raise funds for the government coffers at a time where the country is facing severe economic and financial hardships is justified.

Further, the classification in the instant Bill is between taxpayers and non-taxpayers or taxpayers who have paid a tax less than what is prescribed by law. We are of the view that the Bill falls within the exclusion set out in Article 15(7) of the Constitution.

Thus, taking into consideration all the facts and circumstances urged in the submissions made by the Deputy Solicitor-General, we are of the view that the benefits granted to tax defaulters in exchange of voluntary disclosure of their total wealth and paying the *one percent* tax on the total income or the market value of the movable or immovable property is proportionate. Hence, the benefits that are offered to tax defaulters are not violative of Article 12(1) of the Constitution.

Applicability of the Doctrine of 'the Constitution as a Living Organ/ Document'

When considering the constitutionality of legislation that are being brought in at a time where a country is facing severe economic crisis, financial hardships and calamities or to meet the requirements of an evolving society etc, the Court should not confine itself to traditional interpretations that are used to interpret the Constitution.

It is pertinent to note that, the concept of equality set out in Article 7 of the Universal Declaration of Human Rights was enshrined in Article 18 (1) of the 1972 Constitution and it was once again enshrined as Article 12(1) of the 1978 Constitution. However, during the recent past the needs and circumstances of the people and the country as a whole have adversely affected due to COVID- 19.

It is a fact that presently the country is facing severe economic and financial hardships which warrants immediate remedial action to grant redress to the people of this country. In such circumstances, the court should not apply the traditional principals of interpretation of the Constitution and give a restrictive interpretation to Articles enshrined in the Constitution. The facts brought to the notice of the court by the learned Deputy Solicitor-General and the Petitioner who appeared in person warrants the court to interpret the Constitution taking into consideration the harsh realities that the country is undergoing at present.

The outbreak of COVID-19 in Sri Lanka is an unprecedented event in our country. Thus, it is vital that the Constitution be interpreted as a 'living document' to meet the aforementioned situation in our country and thereby allowing the adoption of a more liberal interpretation of the Constitution when considering the present Bill.

At the core of living constitutionalism is the idea that while constitutional guarantees remain static, the application is dynamic. Living constitutionalism prevents the interpretation of the Constitution from being anchored to the specific interpretation at all times and it offers the flexibility that is required to face unprecedented events or to meet the requirements of an evolving society. As such, it would be pragmatic to apply such an approach to interpret the constitutional issues that have arisen at present.

The flexibility offered by living constitutionalism is tied to the idea that the Constitution is not a law but an amalgamation of concepts that are fundamental to the governance of society. Hence, the Constitution should be interpreted to meet unexpected situations or to meet the requirements of an evolving society while maintaining these fundamental concepts.

When taking into consideration the aforementioned circumstances we are of the view that the benefits offered to tax defaulters by the government are proportionate in view of the aforementioned stringent conditions that are imposed on them. Thus, the enactment of legislation to grant a tax amnesty and the benefits offered to tax defaulters in exchange of voluntary disclosure and payment of the aforementioned sum to be collected do not violate Article 12(1) of the Constitution.

Secrecy Clause

Learned Counsel for the Petitioners submitted that Clause 7(1) of the Bill seeks to provide absolute secrecy in respect of the identity of a declarant and 'any matter or thing' contained in a declaration made under Clause 5(1) of the Bill. Further, Clause 7(2) of the Bill provides for punishment for breach of secrecy.

It was further submitted that giving a defaulter the same level of secrecy is arbitrary, irrational and discriminatory against the rights of the honest citizens of this country who comply with the revenue laws and pay their taxes on time, and thereby the said Clause violates Article 12(1) of the Constitution.

Furthermore, it was submitted that the level of secrecy sought to be granted by Clause 7 of the Bill will undermine the power of Parliament to have full control over public finance and thus, violates Articles 148 and 4(d) read with Article 3 of the Constitution.

Moreover, it was submitted that the wording in Clauses 7(1) and 7(2) of the Bill requires the said two sub-Clauses to be read independently of each other. Further, it was submitted whilst sub-Clause (1) provides absolute secrecy, sub-Clausc (2) refers to 'official' secrecy and the punishment for breach of secrecy. Hence, Clause 7 of the Bill is ambiguous. Further, the word 'absolute' in Clause 7(1) of the Bill violates the Right to Information guaranteed under Article 14A of the Constitution.

Learned Deputy Solicitor-General submitted that Clause 7 of the Bill states that the provisions of the Inland Revenue Act, No. 24 of 2017 in respect of 'official secrecy' and penalties for the breach of secrecy shall apply *mutatis mutandis* to a declaration made under this Bill. Hence, the secrecy provisions under section 100 of the said Inland Revenue Act will apply with equal force to declarants under the Bill. Accordingly, the declarants under the Bill will be entitled to the same degree of confidentiality that is applicable to an ordinary taxpayer.

He further submitted that Article 14A permits to impose restrictions by law in respect of the instances set out in Article 14A(2), which includes "preventing the disclosure of information communicated in confidence Moreover, the information furnished to the Department of Inland Revenue under the Bill falls within the said exception as the information provided under the Bill would be 'information communicated in confidence'. In addition to the above, he submitted that the said same 'secrecy' is offered to any taxpayer.

Learned Deputy Solicitor-General further submitted that the said Clause in the Bill is almost a reproduction of section 5 of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004**,** which was approved by this court after anxious scrutiny. Hence, the question of considering the constitutionality of the said Clause will not arise. In this regard he cited the relevant determination the ***Inland Revenue (Regulation of Amnesty) Bill,* S.C. (S.D.) No. 26/2004.**

Responding to the above submission of the learned Deputy Solicitor-General, Counsel for the Petitioners submitted that the existence of a law which contains a provision that is inconsistent with the Constitution is not a justification to enact similar legislation.

In this regard, Counsel for the Petitioners cited ***In Re: Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations (Amendment)* Bill S.C. (S.D.) No. 5/1979** where the court observed;

> *"The Bill seeks to extend the period of operation of Law No. 16 of 1978 for the period of another year. It was therefore necessary for us to consider the provisions of the original Law, in as much as* ***if the provisions of the original law is inconsistent with the Constitution, this Bill too would be inconsistent with the Constitution."*** [Emphasis added]

Further, **in *Re: New Wine Harvest Ministries (Incorporation) Bill* S.C. (S.D.) No. 2/2003** the court observed;

> *"... In exercising jurisdiction under Article 123 of the Constitution* ***we cannot examine the validity of past legislation Nor, can we take their content as a standard of consistency with the provisions of the Constitution.*** *Our task is to examine the provisions of the bill challenged by the Petitioner and to determine whether they are inconsistent or not with the provisions of the Constitution."* [Emphasis added]

Moreover, it was submitted by Counsel for the Petitioners that Article 14A did not exist when the aforementioned determination cited by the learned Deputy Solicitor-General was made by this Court Thus, it is necessary to consider the provisions of the Bill afresh in determining its constitutionality.

We are inclined to agree with the submissions made by Counsel for the Petitioners in respect of the issue that the Clauses in the instant Bill are required to be considered by this Court in terms of Article 121(1) read with Article 123 of the Constitution.

In this regard, this court observed the following in ***Inland Revenue (Amendment) Bill*** **S.C. (S.D.) No. 01-03/2021;**

> *"... In terms of Article 80(3) of the Constitution, once a Bill becomes law, the validity of an Act or a provision of the Act, cannot be inquired into, pronounced upon or called into question by a court or tribunal.*
>
> *However, the said sub-Article 80(3) of the Constitution does not act as a bar in examining the constitutionality of a section in an Act already passed by Parliament when such a section is proposed to be amended, as such an amendment could change the entire complexion and effect of the existing section in an Act. Nevertheless, such an approach does not extend to amendments relating to typographical or grammatical errors."*

Thus, it is necessary to consider Clause 7 of the Bill with a view to make a determination in respect of the constitutionality of the said Clause.

Article 14A of the Constitution states;

> *"14A(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 statue 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-paragraphs (a) (b) or (c) of this paragraph.

(2). No restrictions 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.

(3). In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens."

We have examined the provisions of the Bill, particularly, Clause 7 of the Bill, and are of the view that the disclosure of information by a declarant under the Bill is carried out in confidence and therefore, the legislature is entitled to enact laws to prevent such information being shared with others. Thus, enacting Clause 7 is not inconsistent with the Constitution.

However, we agree with the submissions made by Counsel for the Petitioners, that sub– clauses 7(1) and 7(2) give two different and distinct meanings. The rules of interpretation are required to give a meaning to each and every word in a Statute and it is presumed that the legislature does not waste words in enacting legislation.

Further, where a word is used more than once in an Act, principles of interpretation require such a word to be given the same meaning wherever it appears in the Act, unless there are compelling reasons to give different interpretations to the same word. Similarly, when different words are used in an Act, such words are required to be given different and distinct meanings.

Thus, we are of the view that the words ‘absolute’ and ‘official’ gives two different meanings which leads to ambiguity and thereby, may lead to arbitrary enforcement of the said Clause. Hence, Clause 7 as presently constituted, violates Article 12(1) of the Constitution.

However, learned Deputy Solicitor-General submitted that the word 'absolute' in Clause 7(1) of the Bill will be substituted with the word 'official' to harmonise the said Clause with clause 7(2) of the Bill at the Committee stage. Hence, the said sub-Clause will read as follows:-

> *"of the identity of a declarant and any matter or thing contained in a declaration made under subsection (1) of section 5 of this Act."*

Therefore, we are of the view that if the said amendment is effected at the Committee Stage, the aforementioned inconsistency with Article 12(1) of the Constitution will cease.

Further, as stated above, learned Deputy Solicitor-General informed Court and the Counsel for the Petitioners that Clause 17 of the Bill would be deleted at the Committee Stage. Hence, determining the constitutionality of the said Clause does not arise. A similar view was expressed in the determination of ***'Equal Opportunity Act' S.C.*** **(SD) No. 14/1999.**

We have examined all the provisions of the Bill and determined upon the suggested amendments being effected, neither the Bill nor any of the Clauses in the Bill are inconsistent with the Constitution. In the circumstances, the Bill can be passed by a Simple Majority in Parliament.

We wish to place on record our deep appreciation of the assistance given by the learned Deputy Solicitor-General, Counsel for the Petitioners and the Petitioner who appeared in person in the consideration of the Bill

Priyantha Jayawardena, PC
Judge of the Supreme Court

K. Kumudini Wickremasinghe
Judge of the Supreme Court

A.L. Shiran Gooneratne
Judge of the Supreme Court

First Reading:	20.07.2021 (Hansard Vol.283; No. 14; Col. 2167)
Bill No. :	58
Sponsor/Relevant Minister:	Minister of Finance
Decision of the Supreme Court Announced in Parliament:	17.08.2021 (Hansard Vol.284; No.05; Col.630)
Second Reading:	07.09.2021 (Hansard Vol.285; No.02; Col. 264-277)
Committee of the whole Parliament and Third Reading:	07.09.2021 (Hansard Vol. 285; No. 02; Col. 277)
Hon. Speaker's Certificate:	15.09.2021
Title:	Finance Act, No. 18 of 2021

S.C. (SD) No. 33/2021

"HUMAN RIGHTS ORGANIZATION (INCORPORATION)" BILL

BEFORE :
Jayantha Jayasuriya, PC - Chief Justice
Mahinda Samayawardhena- Judge of the Supreme Court
Arjuna Obeyesekere - Judge of the Supreme Court

S.C. (SD) No. 33/2021

Petitioners: 1. Kulathunga Mudiyanselage Wasantha Bandara
2. W. D. Raja Dharmasirie Goonerathne
3. Ballantudawa Achchige Nuwan Chamara Indunil

Counsel: Chamara Nanayakkarawasam with Dinesh De Silva and Dimuthu Fernando

Respondent: Hon. Attorney-General

Counsel: Kanishka De Silva Balapatabendi, Senior State Counsel with Indumini Randeny, State Counsel

The Court assembled for the hearing at 10.00 a.m. on 12th August 2021.

A Bill in its long title referred to as "An Act to incorporate the Human Rights Organization" has been presented to Parliament as a Private Members Bill. The short title of the Bill reads as "Human Rights Organization (Incorporation) Act".

The Bill was published in the *Government Gazette* dated 20th July 2021 and was placed on the Order Paper of the Parliament on 03rd August 2021.

The Petitioners invoked the jurisdiction of this Court in terms of Article 121 of the Constitution on 09th August 2021 and moved this Court to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution. Upon receipt of the petition, the Attorney-General was noticed in terms of Article 134(1) of the Constitution.

Initially this matter was listed for hearing on 11th August 2021 and was rescheduled for 12th August 2021. Court heard submissions of learned Counsel for the Petitioners and the learned Senior State Counsel on behalf of the Attorney-General.

The learned Counsel for the Petitioners presented two principal arguments before this Court.

The first was that the Bill has not been presented before Parliament in accordance with the provisions of the Standing Orders of Parliament in that the opinion of the Attorney-General has not been obtained and the Bill is therefore in violation of the provisions of Article 78(2) of the Constitution which specifies *inter alia* that the passing of a Bill by Parliament shall be in accordance with the Constitution and the Standing Orders of Parliament.

The learned Counsel for the Petitioners submitted that the Supreme Court in exercising its jurisdiction under Article 120 of the Constitution has the jurisdiction to examine as to whether the Bill under consideration has been placed on the Order Paper of Parliament in accordance with the Standing Orders of Parliament. This submission was on the basis that this Court in the ***"Divineguma Bill"*** S.C. (SD) No. 04-14/2012 had held "*that the Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon, the Constitutionality of a Bill and its procedural compliance*, *before such Bill is placed on the Order Paper of Parliament"*

The learned Counsel for the Petitioners accordingly submitted that the Supreme Court has the jurisdiction to inquire into whether there is due compliance with the provisions of Standing Orders 52(3) and 52(4) of the Parliament and that any failure to comply with such Standing Orders should result in Court determining that the Bill is inconsistent with Article 78 of the Constitution.

The learned Senior State Counsel however did not concur with the above submission of the learned Counsel for the Petitioners and submitted that the jurisdiction conferred on this Court does not extend to considering compliance with Parliamentary procedure. The learned Senior State Counsel, while referring to the determination of this Court in the ***"Twenty First Amendment to the Constitution Bill"*** [(2013) Decisions of the Supreme Court on Parliamentary Bills, Vol. XI 90 at 94] where it was held that "*the placement of the Bill on the Order Paper is part of the proceedings of Parliament that took place on 18th June 2013 and this Court is denuded of jurisdiction to impeach proceedings in Parliament"'* submitted that placing of a Bill on the Order Paper of Parliament is a step in the legislative process that is purely within the purview of Parliament as it is part of the proceedings of Parliament and therefore this Court is devoid of jurisdiction to make any determination on the same. Hence it was submitted that Article 78 of the Constitution should be interpreted accordingly.

The learned Counsel for the Petitioners had however submitted in the written submissions tendered to this Court on behalf of the Petitioners that he is not pursuing with this argument. Hence, the necessity for this Court to make a determination in this regard docs not arise.

The second principal argument of the learned Counsel for the Petitioners was that the Bill, in its present form and in particular the provisions of Clause 7 alienates the executive power of the People, and thereby infringes upon the Sovereignty of the People. He therefore submitted that the provisions of the Bill are in violation of Articles 3 and 4 of the Constitution.

We will now proceed to examine the clauses of the Bill individually as well as cumulatively to determine the constitutionality of the Bill.

There are fifteen Clauses in the Bill. They are as follows:-

Clause 1	-	Short Title
Clause 2	-	Incorporation of the Human Rights Organization
Clause 3	-	General objects of the Corporation
Clause 4	-	Management of the Corporation
Clause 5	-	General Powers of the Corporation
Clause 6	-	Rules of the Corporation
Clause 7	-	Right to engage in dialog [ue] with concern [ed] parties with a view to solve dispute [s]
Clause 8	-	Fund of the Corporation
Clause 9	-	Corporation may hold property movable and immovable
Clause 10	-	Limitation of liability of members
Clause 11	-	Property remaining on dissolution
Clause 12	-	Accounts and Audit of the Corporation
Clause 13	-	Seal of the Corporation
Clause 14	-	Saving of the rights of the Republic and others
Clause 15	-	Sinhala text to prevail in case of an inconsistency

The General objects of the Corporation as set out in Clause 3 reads as follows :

> *"The general objects for which the Corporation is constituted are hereby declared to be:—*
>
> *(a) to protect and make known human rights, humanities and fundamental rights;*
>
> *(b) to promote and encourage humanities, sports and social services;*
>
> *(c) to facilitate in providing various relief facilities to those affected by the natural disasters and manmade disasters;*
>
> *(d) to conduct seminars, dialog [ue] and various*

programmes of religious, social and cultural importance locally and internationally;

(e) to organise leadership programmes;

(f) to lead a committee of patrons comprising of religious leaders representing all communities;

(g) to establish and conduct libraries, to assist in printing and publishing of books, magazines, souvenirs, journals, cassettes, compact Disks and software and to provide other services necessary to the attainment of the objectives of the Corporation;

(h) to do acts in collaboration with institutions or organizations local or foreign, having similar objects to those of the Corporation; and

(i) to do all such other acts and things as are necessary for and incidental or conducive to the attainment of the above objects."

Clause 7

The learned Counsel for the Petitioners, in support of his submission that the Bill, in its present form, alienates the executive power of the People, and thereby infringes upon the Sovereignty of the People and violates the provisions of Articles 3 and 4 of the Constitution, drew the attention of this Court to the provisions of Clause 7 of the Bill, which reads as follows:

"The Executive Chairman and the Chairman, Co-ordinator or appointed Member shall have the authority in the Government and Non Government institute to—

(a) engage in negotiation with the concerned parties in order to solve their dispute whatsoever, with good intention of solving such disputes in the Government organisations for the benefit of the people;

(b) engage in dialog [ue] with concern [ed] authorities in any Police Station within any administrative District in Sri Lanka, for the welfare of the people, in order to solve the dispute where an injustice has taken place; and

(c) act with the corporation of Honourable Members and Minister of Parliament of the Democratic Socialist Republic of Sri Lanka, the Provincial Council Members, the Pradeshiya Sabha Members and the Government and Hon Government Organization upon any complain[t], or request made [to] any members in the society for their benefit in a manner stated in paragraph (a) above."

It was submitted further by the learned Counsel for the Petitioners that the provisions of Clause 7, while alienating the executive power of the people to a private organization, seeks to repose powers on certain officers of the Corporation without stipulating any guidelines or a mechanism to supervise and/or control the exercise of such powers. It was submitted that granting of such broad and vague powers without any guidelines or controls would lead to an arbitrary exercise of power and thereby would be in violation of Article 12(1) of the Constitution.

The learned Senior State Counsel, while fully concurring with the abovementioned submissions of the learned Counsel for the Petitioners, submitted further that the provisions of the Bill seek to alienate and interfere with not only the executive power of the People but both the legislative power and the judicial power, too. Therefore, it was submitted that the Bill is required not only to be passed by the special majority required under the provisions of paragraph (2) of Article 84 but also requires to be approved by the People at a Referendum as provided for by the provisions of Article 83 of the Constitution.

Article 3 of the Constitution provides ***inter alia*** that in the Republic, Sovereignty is in the People and is inalienable. In terms of Article 4, the Sovereignty of the People shall be exercised and enjoyed in the manner stipulated therein, and includes the following:

(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 recognised, 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.

Referring to Articles 3 and 4, the Supreme Court in ***"Nineteenth Amendment to the Constitution Bill"*** S.C. (SD) Nos. 11, 13, 15-21, 25 -28, 30-35, 37-40/2002 stated as follows:

> "*The powers of Government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4 (a), (b) and (c) which specifies that each organ of Government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted*

that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and Judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the people" shall be exercised by Parliament; the executive power "of the People" shall be exercised by President and the judicial power "of the People" shall be exercised by Parliament through Court. 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 arc sovereign, and is exercised 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 Public Service forms part of the executive branch of the Government and public officers in discharging their duties exercise the executive powers of the People. They exercise such powers subject to judicial supervision as well as subject to the scheme of supervision provided under the Constitution and written law. The statutory rights sought to be reposed on "The Executive Chairman, Co-ordinator or appointed Member" by Clause 7 include the power to engage in negotiations with *'concerned parties'* in the *'Government organisations'* anti engage in dialogue in order to solve a dispute where an injustice has taken place.

This Clause raises several concerns. First, the statutory power of "negotiation" is vague and ambiguous, and as such would be violative of Article 12(1) of the Constitution.

Second, it would appear, in any event that the statutory power to negotiate with a public officer exceeds an opportunity to make representations to a public officer. It would appear then that the power of negotiation would exceed even the right given to Attorneys-at-Law

to make representations on behalf of their clients. It should be noted that the special privilege granted to Attorneys-at-Law to make such representations is based upon the premise that they have been given leave to do so by the Supreme Court, belong to a responsible professional association, and that they are subject to oversight by the Supreme Court. Conferring power on an institution that has neither expertise nor safeguards would not only be arbitrary but also dangerous, and violative of Article 12(1) of the Constitution.

Thirdly, even Attorneys-at-Law do not have the right to make representations on behalf of their clients in all fora. The conferring of an unbridled power to negotiate as contemplated by the Bill, raises the question of interference with the discharge of a public officer's functions. Such interference by a person who is not subject to any control or whose conduct is not subject to any review and the power to enter into negotiation, which can influence the decision of the public officer, in an environment where the public officer is obliged to enter into such negotiation, infringes on and interferes with the exercise of the Executive power of the People by the public officer. This infringement and interference with the exercise of the Executive power of the People would therefore violate Article 3 read with Article 4(b) of the Constitution.

Furthermore, it is pertinent to note that while Clause 7 makes reference to '*Government and Non Government institute*', Clause 7(a) proceeds to refer to '*Government organisations'*. These terms have not been defined and are vague and ambiguous, and as such would again fall foul of Article 12(1) of the Constitution.

Clause 7(a) also enables negotiation with '*concerned parties'* in '*Government organisations'*. In terms of Article 3 of the Constitution read with Article 4 of the Constitution, the powers of government include the legislative power of the People, the executive power of the People and the judicial power of the People. The Supreme Court in ***Nineteenth Amendment to the Constitution Bill'*** [Supra], recognised the legislature, executive and judiciary as the three organs of government. Therefore, Clause 7 of the Bill infringes on legislative as well as the judicial power of the people.

The power vested by Clause 7(b) empowers the named officers of the Corporation to make a determination that an '*injustice*' has taken place to a party and to engage in a dialogue with authorities in a Police Station in order to solve a dispute. Clause 7(b) thereby empowers such officers of the Corporation to pre-judge the nature of a dispute by enabling them to determine that *'an injustice has taken place*' What is 'injustice' to the officers of the Corporation may not be "injustice" to others. This Clause is also not clear whether 'injustice' is referrable to police injustice or injustice committed by one disputant party against the other party. A determination on injustice can be made only through

a judicial process and therefore infringes on the judicial power of Lite People. Furthermore, the power to *'engage in a dialogue*' is vague and exceeds the limits on making a representation. Hence granting such a right leads to arbitrariness and therefore is violative of Article 12(1) of the Constitution.

We are therefore of the view that the effect of Clause 7, taken as a whole, is violative of the provisions of Articles 3, 4 and 12(1) of the Constitution.

Clause 4 and Clause 6

Clause 4 of the Bill stipulates that, *"The management, control and administration of the Corporation shall, subject to the provision of this Act* ***and the rules in force for the time being*** *of the Corporation, vest in a Board of Directors.."* (emphasis added) Furthermore, Clause 6 (4) of the Bill provides that *"The rules of the organization in force on the day preceding to date of commencement of this Act ... be deemed to be rules of the Corporation made under this section"*. Clause 9 of the Bill contain similar provisions that seek to confer force of law to a set of existing rules, which do not form part of the Bill and therefore is not before the Parliament.

It is also pertinent to note that in terms of Clause 6(2), the amending, altering, adding or rescinding the existing rules may be made from time to time at any general meeting of the Corporation, without any requirement to place such rules before Parliament. If the Parliament enacts this Bill, it will be granting recognition to a set of existing rules the content of which is unknown as well as to any such future amendments. This Court, in ***"New Wine Harvest Ministries (Incorporation) Bill"*** S.C. (S.D.) No. 2/2003 determined that Parliament cannot give the force of law to any rules that have not been placed before it and that to do so would amount to an abdication of the legislative power of the People and be violative of Article 76(1) of the Constitution. We are therefore of the view that Clause 6 is inconsistent with Article 76(1) of the Constitution.

Clause 14

Clause 14 reads as follows:-

> *"Nothing in this Act contained shall prejudice or affect the rights of the Republic or of any body politic or corporate or of any other person, except such as are mentioned in this Act and those claiming by, from or under them."*

The Supreme Court in "***Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill"*** S.C. [SD] No. 2/2001 examined the identical provision under consideration and determined that such provision,

"would lead to the inference being drawn that the right of the Republic and other corporations and persons are superseded by the provisions of the Act". However, it was further observed that if the said clause is amended to read *"Nothing in this Act contained shall prejudice or affect the rights of the Republic or of any body politic or corporation"* the inconsistency would cease.

The Bill under consideration seeks to incorporate an existing organization and give it legal persona. It further seeks to clothe the organization with statutory powers without any provision to supervise and monitor the exercise of such powers. It is different from the incorporation of a Public Corporation for instance which will be granted specific statutory powers with the required checks and balances. This Bill, as such requires careful scrutiny, as the Bill, if passed in its present form, would confer upon the incorporated body untrammeled and unrestricted power. The absence of any mechanism to regulate the activities of the incorporated body would lead to arbitrariness in the performance of their functions.

It is observed that the body sought to be incorporated has been termed "The Human Rights Organization", and it is pertinent to note that there is a Human Rights Commission already in place whose members are appointed by the President with the observations of the Parliamentary Council. In setting out the general objects of the Corporation, Clause 3 (a) states *"to protect and make known human rights, humanities and fundamental rights"* We are of the view that this Bill needs to be considered as a whole in the context of Clauses 3, 4, 6 and 7 which deals with "General objects of the Corporation", "Management of the Corporation", "Rules of the Corporation" and "Rights to engage in dialog[ue] with concern[ed] parties with a view to solve the dispute". In view of our findings on Clauses 4, 6 and 7 enumerated hereinbefore, we do not think it is necessary for the present purposes to consider each and every Clause in determining the constitutionality of the Bill.

As we have already held that Clause 6 of the Bill is inconsistent with Article 76(1) of the Constitution and Clause 7 of the Bill is inconsistent with Articles 3, 4 and 12(1) of the Constitution, we make determination in terms of Article 123(2) of the Constitution that the Bill is required to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

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

Jayantha Jayasuriya, P.C.
Chief Justice

Mahinda Samayawardhena
Judge of the Supreme Court

Arjuna Obeyesekere
Judge of the Supreme Court

First Reading	**:**	03.08.2021 (Hansard Vol. 284; No. 01; Col. 53)
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