DECISIONS
OF
THE SUPREME COURT
ON
PARLIAMENTARY BILLS

2016 - 2017

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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 YEARS 2016 AND 2017

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OF
THE SUPREME COURT
ON
PARLIAMENTARY BILLS
2016

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S.C. (SD) No. 01/2016, S.C. (SD) No. 02/2016 and S.C. (SD) No. 07/2016

"THERAVADI BHIKKU KATHIKAWATH (REGISTRATION) BILL"

BEFORE :

Priyasath Dep PC	-	Judge of the Supreme Court
Eva Wanasundera PC	-	Judge of the Supreme Court
Sisira J. de Abrew	-	Judge of the Supreme Court

S.C. (SD) No. 01/2016

Petitioner : Biyagama Suseela Thero

Counsel : Manohara de Silva PC with Udaya Gammanpila,
W. D.Weerarathne, Anusha Perusinghe and Rajitha Hettiarathchi.

S.C. (SD) No. 02/2016

Petitioner : Nuwan Ballantudawa

Counsel : Kaniska Witharana with Tissa Yapa

S.C. (SD) No. 07/2016

Petitioner : N. Dharshana Weraduwage

Counsel : Dharshana Weraduwage

Respondent : Hon. Attorney General

The Court assembled for the hearing at 10.00 a.m. on 26.01.2016, 2.00 p.m. on 27.01.2016 and 10.00 a.m. on 29.01.2016.

A Bill titled " Theravadi Bhikku Kathikawath (Registration) Act No..... of 2015 was gazetted on 14th December 2015 and was placed on the order paper of Parliament on 12th January 2016.

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

The Long Title of the Bill read as 'An Act to provide for the formulation and registration of Kathikawath in relation to Nikaya or Chapters of Theravadi Bhikkus in Sri Lanka; to provide for every Bhikku to act in compliance with the provisions of the registered Kathikawath of the Nikaya or Chapters which relates to such Bhikku; to impose punishment on Bhikkus who act in violation of the provisions of any Registered Kathikawath, and for matters connected therewith or incidental thereto'.

The Petitioners alleged that several clauses of this Bill are inconsistent with Articles 9, 10, 12 (1), 12 (2) and 14 (1) (e) of the Constitution. The relevant Articles are reproduced below:

09. The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana while assuring to all religions the rights granted by Articles 10 and 14 (1) (e).

10. Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

12. (1) All persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.

14. (1) (e) Every citizen is entitled to -

The freedom, either by himself or in association with other, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

Clause 1

It refers to the short title of the Act.

Clause 2 (1)

This Clause states that the Karaka Sanga Sabha of each Theravadi Bhikku Nikaya or Chapter may for the purpose of the Act formulate and adopt a Kathikawath pertaining to the Nikaya or Chapter. There is no inconsistency in this sub clause.

The Petitioners alleged that Clauses 2 (2), 2 (3) and 2 (4) are violative of Articles 9, 10, 12 (1), 12 (2) and 14 (1) (e) of the Constitution. Therefore these sub sections are reproduced for the purpose of convenience.

Clause 2 (2) Every Kathikawath referred to in subsection (1) shall inter alia, have provisions pertaining to:-

(a) the composition and functions of the Karaka Sangha Sabha of the relevant Nikaya or Chapter;

(b) a code of conduct and discipline to be strictly followed by a bhikku in conducting himself;

(c) the manner of conducting inquiries in case of violations by any bhikku of the code of conduct and discipline referred to in paragraph (b); and

(d) punishment for such violations.

Clause 2 (3)

This refers to the provisions that may contain in the code of conduct and discipline pertaining to a bhikku referred to clause 2 (2) (b):–

(a) engaging in or carrying out occult practices or similar activities and giving publicity to such activities;

(b) involving in trade or business activities;

(c) obtaining driving licences and driving vehicles;

(d) engaging in any employment in the public or private sector other than in the fields of education, social services or religious affairs; and

(e) engaging in activities unsuitable for bhikku in a manner contrary to bhikku vinaya in public places.

Clause 2 (4)

This refers to the form of punishments that could be included in the Kathikawatha under Clause 2 (2) (d):– The punishment refers to this subsection are:

(a) temporary expulsion from the residing temple;

(b) permanent expulsion from the residing temple;

(c) temporary removal from the office of Viharadhipathy;

(d) permanent removal from the office of Viharadhipathy;

(e) expulsion from the studentship;

(f) expulsion from the relevant Nikaya or Chapter; and

(g) cancellation of the bhikku registration.

According to Clause 2 (1) it is not mandatory for Nikaya or chapter to formulate and adopt a Kathikawatha. It is up to the Karaka Sangha Sabha to decide whether or not it should formulate or adopt a Kathikawatha.

It is a right of any governing body of any religious organizations or for that matter any association or club to decide on matters pertaining to conduct and discipline of its members. The State should not interfere with the internal affairs of religious bodies unless there is a violation of laws especially penal laws. The interference by State by enacting laws requiring Kathikawatha to include provisions which is mandatory is inconsistent with the duty cast upon the State to protect and foster Buddha Sasana. Therefore requiring the Kathikawatha to include provisions is violative of fundamental rights guaranteed under Article 9 of the Constitution. Further it affects the freedom of religion guaranteed under Article 10 of the Constitution.

We hold that Clauses 2 (2), 2 (3) and 2 (4) are violative of Articles 9 and 10 of the Constitution. In the course of the hearing, the Learned Deputy Solicitor General submitted that the State is willing to delete subsections 3 and 4 of Clause 2. If these subsections are deleted as per the undertaking the question of constitutionality will not arise in respect of those subsections.

However the Learned Deputy Solicitor General submits that the Clause 2 (2) should remain. In his written submissions he submitted that the Clause 2 (2) was introduced to identify and specify the scope within which a body that is created for the implementation of the objectives of such legislation is required to function. He further submitted that the scope and parameters specified are not limited to said areas and the Karaka Sangha Sabha is at liberty to include such other provisions which they consider as necessary in the Kathikawatha.

The Clause 2 (2) which is cited above inter alia refer to the provisions which should be included in the Kathikawatha. These provisions refer to the composition and functions of the Karaka Sangha Sabha, a code of conduct and discipline to be strictly followed by a bhikku, the manner of conducting inquiries in case of violations and punishment for such violations. The Petitioner who appeared in person in SC SD 07/2016 stated that there is no need to have a code of conduct and discipline as the Vinaya Pitakaya provides for it.

The Petitioners strongly objected to use of word punishment referred to in 2 (2). The punishments referred to in this subsection are the punishments given for the commission of offences referred to in the Kathikawatha. Clause 2 (4) refers to the forms of punishments that could be included in the Kathikawatha such as expulsion from the residing temple, removal from the office of Viharadhipathy etc. The punishment contemplated in this section is not imprisonment or fine as in Clause 11 (2).

We are of the view that the mandatory nature of this subsection violates Articles 9 and 10 as it compels the Karaka Sangha Sabha to include matters referred to in Clause 2 (2) in the Kathikawatha. If it was made directory by including the word 'may' instead of 'shall' this inconsistency would cease.

Clause 3

According to this clause the Registrar Thero of the relevant Nikaya or the Chapter shall submit the Kathikawath formulated and adopted under Clause 2 (1) to the Commissioner General for registration along with a duly completed application and a statement signed by the Most Venerable Mahanayake Thero of such Nikaya or Chapter to the effect that the Kathikawath was duly adopted by the Karaka Sangha Sabhawa.

It was submitted by the Petitioners that according to Clause 2 (1) of the Bill, it is not mandatory for a Nikaya or Chapter to formulate and adopt a Kathikawath. It is up to the Karaka Sangha Sabha to decide whether it should formulate or adopt a Kathikawath or not. It was submitted by the Petitioners that in such a situation compelling the Registrar Thero of a Nikaya or Chapter to submit a Kathikawath for registration is inconsistent with Articles 9 and 10 of the Constitution.

One of the main objects of the Bill is the formulation and registration of Kathikawath. Therefore requiring the Registrar Thero to submit the Kathikawath which is adopted by the Karaka Sangha Sabha for registration is not inconsistent with the constitution.

However the Learned Deputy Solicitor General agreed to replace the word 'shall' with the word 'may' to make submission of Kathikawath directory.

Clause 4 (1)

The Commissioner General is required to submit the Kathikawatha applied to be registered to be referred to a Panel of Experts appointed under this section to examine whether such Kathikawatha –

(a) contravenes the provisions of any writen law; and

(b) is in compliance with Buddhist Dhamma Vinaya and customs.

Under 4 (1) (3) the Panel of Experts shall issue a certificate stating that Kathikawatha complies with the above requirements. Upon the receipt of that certificate Commissioner General shall register the Kathikawatha. (Clause 6 (1))

Clause 5

This requires the Minister in consultation with the most Venerable Mahanayake Theros of three Nikayas to appoint five member Panel of Experts which shall consist of:–

(a) Three Buddhist bhikkus; and

(b) Two Attorneys-at-Law conversant with the disciplinary rules pertaining to Buddhist bhikkus.

The petitioners submit that these two clauses are inconsistent with Article 9 of the Constitution. It is the Panel of Experts that finally decides whether the Kathikawatha complies with Buddhist Dhamma Vinaya and customs.

It should be observed that the Kathikawatha will be formulated by Karaka Sanga Sabha which is a supreme body of the Nikaya or Chapter consist of Sanga well versed in Dhamma and Vinaya. A statement signed by the most Venerable Mahanayake of the relevant Nikaya or Chapter to the effect that the Kathikawatha was duly adopted is required for registration. In such a situation it will be superfluous for a Panel of Experts to examine a kathikawatha and issue a certificate stating that it is in compliance with the Buddhist Dhamma Vinaya and customs and it amounts to an unwarranted intrusion in to the affairs of Sanga in relation to Dhamma Vinaya. Therefore Clauses 4 and 5 are inconsistent with Article 9 of the Constitution. In order to avoid the inconsistency as agreed by the Learned Deputy Solicitor General Clauses 4 and 5 to be deleted. If as per undertaking Clauses 4 and 5 are deleted the inconsistency would cease.

Clause 11

11. (1) The Bhikku alleged to have violated the provisions of a registered Kathikawath shall act in accordance with the decision of the Karaka Sangha Sabha.

(2) A bhikku who fails or refuses to comply with such decision shall be guilty of an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not less than rupees fifty thousand or to imprisonment for a term not exceeding six months or both such fine and punishment.

Clause 11 (1) a Bhikku is required to comply with the decision of the Karaka Sangha Sabha.

Clause 11 (2) refers to the punishment that could be imposed on a Bhikku who fails to comply with the decision of the Karaka Sangha Sabha, which is a fine not more than fifty thousand rupees or imprisonment for a term not exceeding six months or both, upon conviction by a Magistrate's Court.

The Learned Deputy Solicitor General submitted that there is no automatic referral in the event of non-compliance and that such decision to invoke the jurisdiction of the relevant Magistrate's Court is at the discretion of the Karaka Sangha Sabha, on the facts and circumstances of each case.

The Learned Deputy Solicitor General further submitted that it is necessary to have a mechanism to address a scenario where a Bhikku fails or refuses to comply with the decision of the Karaka Sangha Sabha and this provision has been introduced to cater to such a scenario , in order to ensure that the decision of the Karaka Sangha Sabha are respected by the Bhikkus and is given due deference and is complied with.

The Learned Deputy Solicitor General submitted that though the Petitioners contended that Clause 11(2) violates Article 12 (1) of the Constitution, a similar provision is stipulated in Section 42 of the Buddhist Temporalities Ordinance 19 of 1931, where an Upasampada Bhikku or a Samanera whose name does not appear to be in the register holds himself out to be an Upasampada Bhikku or a Samanera, such person shall be guilty of an offence and be liable on summary conviction to a fine.

The Petitioners submit that the Clause 11(2) violates Articles 9, 10 and 14 (1) (e) of the Constitution.

The question that arises is whether criminal law chould be used for violating the provisions of a Kathikawatha which deals with matters pertaining to conduct and discipline of Bikkhus. In such a situation imposition of criminal liability is not warranted and it is violative of Articles 10, 12 and 14 (e) of the Constitution. In order to enforce the decision of the Karaka Sanga Sabha it is advisable to refer to a civil court for enforcement. If Clause 11(2) is replaced by a subsection containing a provision to refer the decision of the Karaka Sanga Sabha to a civil court for enforcement the inconsistency would cease.

The Presidential Commission on Buddha Sasana (2002) in its report at page 54 recommended a similar course of action.

Clause 12

This Clause prevents Bhikku against whom an inquiry is pending or who has been found guilty of contravening the provisions of the Kathikawatha of being accepted by another Nikaya or Chapter.

The Learned Deputy Solicitor General submits that this Clause ensures the maintenance of discipline among Bhikkus and seeks to prevent a Bhikku circumventing the provisions stipulated in Clause 11 by joining another Nikaya or Chapter, instead of complying with the decision of the Karaka Sanga Sabha of the relevant Nikaya or the Chapter.

Mr. Manohara de Silva, PC who appeared for the Petitioner in SC SD 01/2016 in his written submissions submitted that 'Clause 12 of the Bill also will result in a Bhikku not being able to leave his Nikaya and join another, even for pure theosophical reasons. If a Bhikku, against whom an inquiry is initiated by his Nikaya or Chapter for violating a provision of its Kathikawatha or a decision made there under, does not wish to comply with a particular decision arrived at by the Karaka Sangha Sabha, opt to leave and join another Nikaya which is prepared to accept him for the reason that in the latter Nikaya no similar provision exists in their Kathikawatha or a decision made to the same effect, such Bhikku will be prevented from doing so and he will be compelled to leave robes as a result. He further submitted that this Clause will in no way protect and foster the Sasana as required by Article 9 of the Constitution, on the contrary it will disintegrate the Sasana. This Clause will also violate Article 10 and Article 14(1) (e), namely the freedom of thought and the freedom of religion.

Under Article 10 of the Constitution 'Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice'. This includes a right to change one's religion or to join a different Nikaya or Order. It was submitted that similar provisions are not applicable to non Theravadi bhikkus or to the clergy of other rligions. Therefore this clause violates Article 12 also.

Therefore Clause 12 violates Article 9, 10 and also Articles 12 (1), 12 (2) and 14 (1) (e) of the Constitution.

Clause 13

Sub-Clause (1) of Clause 13 provides for the making of regulations by the Minister in consultation with the Venerable Mahanayake Theros for the purpose of implementing the principles and provisions of the said Bill.

The power to make regulations is limited for the purpose of implementing the principles and provisions of the said Bill and also after consulting the Most Venerable Mahanayake Theros. The Minister's power is limited and restricted to matters stated in the clause. However it was submitted by the Petitioners that the Minister could unduly interfere with the affairs of Sasanaya which violates Article 9 of the Constitution.

The Learned DSG submitted that Clause 13 (1) will be amended by replacing the words 'in consultation with' the words 'on the advice of' Venerable Mahanayake Theros.

Conclusion:

We determine that:

Clauses 2 (2), 2 (3) and 2(4) are inconsistent with Articles 9, 10, 14 (1) (e) of the Constitution and could only be passed with a special majority prescribed in Article 83 of the Constitution and approved by the people at a Referendum.

If Clauses 2 (3) and 2 (4) are deleted as per the undertaking given by the Learned Deputy Solicitor General the question of inconsistency will not arise in respect of those subsections.

If 2 (2) is amended to the effect that inclusion of provisions in the Kathikawatha is directory as opposed to mandatory by replacing the word 'shall' with the word 'may' it will cease to be inconsistent.

Clauses 4 and 5 are inconsistent with Article 9 of the Constitution and could only be passed with a special majority prescribed in Article 83 of the Constitution and approved by the people at a Referendum.

As per the undertaking given by the Learned Deputy Solicitor General to delete these Clauses if deleted it will cease to be inconsistent.

Clause 11 (2) is inconsistent with Articles 9, 10 and 14 (1) (e) of the Constitution and could only be passed with a special majority prescribed in Article 83 of the Constitution and approved by the people at a Referendum.

If Clause 11 (2) is replaced by a subsection containing a provision to refer the decision of the Karaka Sanga Sabha to a civil court for enforcement it will cease to be inconsistent.

Clause 12 is inconsistent with Articles 9, 10, 12 and 14 (1) (e) of the Constitution and could only be passed with a special majority prescribed in Articles 83 of the Constitution and approved by the people at a Referendum.

Clause 13 (1) is inconsistent with Articles 9 of the Constitution and could only be passed with a special majority prescribed in Article 83 of the Constitution and approved by the people at a Referendum.

If Clause 13 (1) is amended by replacing the words 'in consultation with' with the words 'on the advice of ' Venerable Mahanayake Theros, it will cease to be inconsistent.

Subject to foregoing the other provisions of the Bill are not inconsistent with the Constitution.

We wish to place on record our deep appreciation of the assistance given by the Learned Deputy Solicitor General and the other learned Counsel who made submissions in this matter.

Priyasath Dep, PC
Judge of the Supreme Court.

Eva Wanasundera, PC
Judge of the Supreme Court.

Sisira J. de Abrew
Judge of the Supreme Court

First Reading:	12. 01. 2016 (Hansard Vol. 242; No. 02; Col.32)
Bill No:	60
Sponsor/ Relevant Minister:	Minister of Buddhasasana
Decision of the Supreme Court Announced in Parliament:	10. 02. 2016 (Hansard Vol.242; No. 8; Col. 661-676)
Second Reading:	Listed on the Order Paper for Second Reading.

S.C. (SD) No. 03/2016, S.C. (SD) No. 04/2016

"LOCAL AUTHORITIES ELECTIONS (AMENDMENT) BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Sisira J. de. Abrew	-	Judge of the Supreme Court
Anil Gooneratne	-	Judge of the Supreme Court

S.C. (SD) No. 03/2016

Petitioner	:	Nuwan Ballantudawa
Counsel	:	Manohara de Silva PC with Canishka Vitharana

S.C. (SD) No. 04/2016

Petitioner	:	Savithri Gunesekera
Counsel	:	Canishka Vitharana
Respondent	:	Hon. Attorney General
Counsel	:	Mr. Nerin Pulle, Deputy Solicitor General with Dr. Avanti Perera, Senior State Counsel

Court assembled for hearing at 10.30 a.m on 25. 01. 2016.

A Bill bearing the title "Local Authorities Elections (Amendment)" was published in the *Gazette* of the Republic of Sri Lanka on 11th December 2015 and placed on the Order Paper of Parliament on 12th January 2016. Two Petitioners have challenged the constitutionality of this Bill by two seperate petitions presented to this Court under the provisions contained in Article 121 (1) of the Constitution.

The objective of the Bill is to amend the Local Authorities Elections Ordinance (Chapter 252) by introducing provisions to increase women's representation in Municipal Councils, Urban Counsils and Pradeshiya Sabhas by 25%.

Learned Counsel for the Petitioners sought to argue that Clauses 2, 3, 4, 5, 6 and 7 of the Bill are in violation of and are inconsistent with Articles 3, 4, 10, 12 (1), 12 (2) and 14 of the Constitution, in as much as:-

(a) The Sinhala and the English texts of the Bill, especially Clause 2 thereof is inconsistent with each other;

(b) Clauses 2, 3, 4, 5 and 6 are infringing the franchise of the youths and their rights to contest at the Local Authorities Elections as recognized and secured by Section 28 (2) (B) of the Act; and

(c) Clause 4 by importing the application of the precedure stipulated in Article 99A of the Constitution, vests with the Secretaries of the contesting Political Parties, absolute and unfettered right to act arbitrarily and capriciously disregarding the order of priority specified in the lists of women candidates referred to in Clauses 2 and 3.

Learned Deputy Solicitor General submitted the inconsistency, if any between the Sinhala text and the English text would be corrected at the Committee Stage Amendment. However, it is observerd that in terms of Article 18 (3) English is only a link language and Article 18 (1) provides that the Official Language of Sri Lanka shall be Sinhala. Thus, even if the inconsistency remains, the Sinhala version prevails over the English version.

Article 3 of the Constitution vests sovereignty in the people and enlarges the concept of sovereignty by adding to it fundamental rights and the franchise. The said Article reads thus:-

Article 3

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

However, Article 4 (e) in prescribing the manner in which franchise shall be exercised, limited its exercise at the election of the President of the Republic, Members of Parliament and at every Referendum by every citizen who has attained the age of 18 years and being qualified to be an elector has his name entered in the register of electors. The Supreme Court in the case of *Athukorale* Vs. *Attorney-General* (1996) 1 S.L.R. 238 at page 242 noted thus:

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

Learned Deputy Solicitor General drew the attention of Court to S.C.(S.D.) Nos. 2/2010 - 11/2010 ["Local Authorities (Special Provisions) Bill" and "Local Authorities Elections (Amendment) Bill"] where this Court made the following observations:-

"It is clearly evident that the wider, meaning of franchise, which would include voting at local authority elections had not been adopted in Articles 3 and /or 4 of the Constitution. It is to be borne in mind that the basic structure of the Constitution could be amended only by express provisions and admittedly no such provisions had been suggested or introduced to incorporate local government elections in Article 3 and/or 4 of the Constitution."

Thus, the meaning of "franchise" as envisaged by Article 3 read with Article 4 (c) of the Constitution does not extend to elections of local authorities.

Learned Cousel for the Petitioners in both Bills submitted that the intention of the legislature was to rectify the mistakes of the past and it was for that reason that Clause 3 refers to two nomination papers. One nomination paper shall consist of a list of names of candidates for the purpose of election as members of the local authority; the other nomination paper shall consist of a list of names of such number of women candidates ranked in the order of priority. However, reference to Article 99A in Clause 4 with regard to the apportionment of women members to be returned in the order of priority ranking creates a doubt whether the said priority ranking would be followed. The real issue, therefore is whether having regard to the underlying purpose and the policy of the amendment by making reference to the

"order of priority" can the legislature create a doubt in the minds of the voters who have the right to elect their representatives? In case of doubt as to the true scope of the amendment, the provisions sought to be amended may be relied upon as an aid to the understanding of the meaning thereof, and for determining the general object and intention of the legislature in effecting such amendments.

For the avoidance of any doubt, the Commissioner of Elections shall only be permitted to declare women member in accordance with the order of "priority ranking" of the women candidates as contained in the second nomination paper referred to in Section 28 (2A).

The Court therefore holds Clauses 2, 3, 5, 6 and 7 are not inconsistent with the Constitution and may be passed by Parliament by a simple majority of Members present and voting.

Clause 4 in its present form violates Article 12 (1) of the Constitution. However, the inconsistency will cease to operate if the said Clause is amended as follows:-

"In the apportionment, in accordance with the order of priority of ranking, of the Number of women members to be returned from all the wards of such local authority area among the recognized political parties and independent groups, as referred to in Section 28 (2A), *the Comissioner of Elections shall take into consideration the number of valid votes polled by each recognized political party and independent group in all the wards of such local authority area, and the method of apportionment set out in Article 99A of the Constitution of the Democratic Socialist Republic of Sri Lanka shall, mutatis mutandis, apply thereto.*

Provided that the Commissioner of Elections shall not require the Secretary of any recognized political party or group leader of any independent group to make any nomination of persons in addition to the persons already nominated under Section 28 nor shall the Secretary or group leader as the case may be submit any list making any nomination."

We shall place on record our deep appreciation of the assistance given by the learned Counsel for the Petitioners and the Learned Deputy Solicitor General who appeared on behalf of the Attorney-General.

K. Sripavan
Chief Justice.

Sisira J. de Abrew
Judge of the Supreme Court.

Anil Gooneratne
Judge of the Supreme Court.

First Reading:	12. 01. 2016 (Hansard Vol.242; No. 02; Col. 31)
Bill No:	58
Sponsor/ Relevant Minister:	Prime Minister
Decision of the Supreme Court Anncounced in Parliament:	09. 02. 2016 (Hansard Vol. 242; No. 7; Col. 593 - 596)
Second Reading:	09. 02. 2016 (Hansard Vol. 242; No. 7; Col. 647 - 656)
Committe of the whole Parliament and Third Reading:	09. 02. 2016 (Hansard Vol. 242; No. 7; Col. 656 - 659)
Hon. Speaker's Certificate:	17. 02. 2016
Title:	Local Authorities Elections (Amendment) Act, No. 1 of 2016.

S.C. (SD) No. 05/2016, S.C. (SD) No. 06/2016, S.C. (SD) No. 08/2016

"MICROFINANCE BILL"

BEFORE :

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

S.C. (SD) No. 05/2016

Petitioner	:	Renuka Dhusyantha Perera
Counsel	:	Sagara Kariyawasam

S.C. (SD) No. 06/2016

Petitioner	:	Anuruddha Polgampala
Counsel	:	Sagara Kariyawasam

S.C. (SD) No. 08/2016

Petitioner	:	Vimal Geeganage
Counsel	:	Sagara Kariyawasam
Respondent	:	Hon. Attorney General
Counsel	:	Farzana Jameel, Senior Deputy Solicitor General with Suren Gnanaraj, Senior State Counsel.

Court assembled for hearing at 10.00 a.m on 26. 01. 2016.

A Bill titled "Microfinance Bill" was published in the Government *Gazette* and placed on the Order Paper of Parliament on 12/01/2016. The above Petitioners by their petitions (numbered as above) submitted to this Court in terms of Articles 121 of the Constitution of the Republic of Sri Lanka have challenged the constitutionality of the said Bill. Upon receipt of the petitions the Hon. Attorney General was given notice of all three petitions. Counsel representing the three petitioners and Mrs. Jameel, Senior Deputy Solicitor General who represented the Attorney General were heard in considering the constitutionality of the said Bill. The aforesaid petitions were taken up and considered together since the grounds of challenging the constitutionality in respect of the Bill are common.

In the short title the Act is cited as "Microfinance Act". The Petitioners have challenged the Clauses 9 (1), 9 (3) and 11 (b) of the said Bill. The basis of such challenge by all three Petitioners are that the above Clauses are inconsistent with Articte 154 G (3) of the Constitution.

As set out in the preamble of the Bill, the purpose of the Bill is to provide for the licensing, regulation and supervision of companies carrying on microfinance business; the registration of non-governmental organizations accepting limited savings deposits as microfinance non-governmental organizations; for the setting up of standards for the regulation and supervision of microfinance non-governmental organizations and micro credit non - governmental organizations and to provide for matters connected therewith or incidental thereto.

The applicability of this Bill has been enumerated in Clause 2:-

2 (1) The provisions of this Act shall not apply to -

(*a*) a licensed commercial bank or a licensed specialized bank within the meaning of the Banking Act, No 30 of 1988;

(*b*) a finance company within the meaning of Finance Business Act No 42 of 2011;

(*c*) a Co-operative society registered under the Co-operative Societies Law No. 05 of 1972 and a Co-operative Society registered under a Statute of a Provincial Council;

(*d*) a Divineguma community based bank and a Divineguma community based banking society established under the Divineguma Act No.1 of 2013; and

(*e*) an entity formed in terms of the Agrarian Development Act No. 46 of 2000.

(2) The Provisions of this Act, other than part VIII, part IX and part XI shall not apply to a microfinance non-governmental organization and a micro credit non-governmental organization.

The Bill consists of the following parts and a schedule giving the list of businesses that a licensed microfinance company may engage in:-

Parts I to VII of the Bill - Applies exclusively to 'Microfinance Companies'

Part VIII of the Bill - Applies exclusively to 'Microfinance Non - Government Organizations'

Part IX of the Bill - Applies to both Microfinance Companies and Microfinance Non - Governmental Organizations.

Part X of the Bill - Provides for immunity from suit to those officers engaged in giving effect to the provisions of the Act.

Part XI of the Bill - Contains general provisions such as prohibitions, effect of other laws, offences, transitional provisions and interpretations.

The Schedule - sets out a list of permitted businesses which a licensed microfinance company may engaged in under the Act.

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

"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 the 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 the 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."

All three Petitioners complain that Clauses 9 (1), 9 (3) and 11 (b) of the Bill violate that List I of Ninth Schedule to the Constitution. Thus, it attracts Article 154 G (3) of the Constitution. In other words the Bill cannot become Law unless the Bill has been referred by the President, after the publication in the *Gazette* and before it is placed on the Order Paper of Parliament, to every Provincial Council for expression of its views thereon, within such period as may be specified in the reference.

Clauses 9 (1), 9 (3) and 11 (b) of the Bill are reproduced below:

> "9 (1) A licensed microfinance company may carry on such forms of businesses as set out in the Schedule to this Act and any other form of business as may be specified by the Board under subsection (2) subject to such restrictions and conditions may be imposed by or under any written law or specified in the licence issued to such licensed microfinance company".
>
> "9 (3) A licensed microfinance company shall not carry on any from of business that is not set out in the Schedule hereto or specified by the Board under subsection (2)."
>
> "11. Notwithstanding the provisions of any other written law, the Board may issue directions to licensed microfinance companies or to any single licensed microfinance company or to any group or category of microfinance companies (referred to as "company" in this section) as to the manner in which any aspect of the business and corporate affairs of such company are to be conducted, and in particular -
>
> > (b) the terms and conditions under which any loan, credit facility or any type of financial accommodation may be granted by such company, the maximum rates of interest that may be charged on such loans, credit facilities or other types of financial accommodation, and the maximum periods for which any such loan, credit facility or other type of financial accommodation may be granted";

Whilst drawing the attention of Court to items (a), (d) and (k) in the Schedule to the said Bill the petitioners submitted that Clauses 9 (1), 9 (3) and 11 (b) of the Bill are Clauses which permit a licensed microfinance business to engage in any of the businesses enumerated in the Schedule to the Bill. The thrust of the submission of the Counsel for the Petitioners was that the references in the Bill to matters set out in items 5, 9.1, 10, 14, 20 and 35 in List I (Provincial Council List) of the Ninth Schedule would attract the procedure laid down in Article 154 G (3) of the Constitution.

In order to consider whether the Clauses of a Bill fall within the ambit of the said List I (Provincial Council List) it is necessary to consider the functions and the scope of the relevant Clauses of the Bill. It is not possible to consider a Bill by mere comparison of words in the Bill and the said List I. Consideration of a Bill should be based on the purpose, object and aims of it as a whole and not of particular words or phrases used therein. It is therefore necessary to analyse the Clauses in the Bill to ascertain the real purpose and the functions of the Clauses in the Bill.

A careful analysis of the Bill shows that though certain words in the List I (Provincial Council List) of the Ninth Schedule to the Constitution have been used in the said Bill, none of the functions stated in Clauses 9 (1), 9 (3) and 11 (b) of the said Bill fall within the ambit of the said List I (Provincial Council List).

In the determination of Agrarian Services (Amendment Bill) - SC. SD. 2/91 and 4/9 this Court observed that ;

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

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

For the reasons stated above we make a determination in terms of Article 121 of the Constitution that the Bill nd the provisions thereof are not inconsistent with the Constitution.

We wish to place on record our appreciation of the valuable assistance rendered by the Learned Counsel for the Petitioners and the Learned Senior Deputy Solicitor General who appeared on behalf of the Hon. Attorney General.

Chandra Ekanayake
Judge of the Supreme Court.

Buwaneka Aluwihare, PC
Judge of the Supreme Court.

Priyantha Jayawardena, PC
Judge of the Supreme Court.

First Reading:	12.01.2016 (Hansard Vol.242; No.02; Col. 31)
Bill No.:	59
Sponsor / Relevant Minister:	Minister of National Policies and Economic Affairs
Decision of the Supreme Court Announced in Parliament:	10.02.2016 (Hansard Vol.242; No.08; Col. 677 - 688)
Second Reading:	04.05.2016 (Hansard Vol.243; No.11; Col.1487 - 1559)
Committee of the Whole Parliament and Third Reading:	04.05.2016 (Hansard Vol.243; No.11; Col.1559 - 1560)
Hon. Speaker's Certificate:	20.05.2016
Title:	Microfinance Act, No. 6 of 2016.

S.C. (SD) No. 09/2016 to S.C. (SD) No. 18/2016

"BUDDHIST TEMPORALITIES (AMENDMENT) BILL"

Before :	S. Eva Wanasundera, PC	-	Judge of the Supreme Court
	Anil Gooneratne	-	Judge of the Supreme Court
	K. T. Chitrasiri	-	Judge of the Supreme Court

S.C. (SD) No. 09/2016

Petitioner : Udaya Prabath Gammanpila

Counsel : Manohara de Silva

S.C. (SD) No. 10/2016

Petitioner : Sumedha Amarasinghe

Counsel : Lakshman Perera PC with Hemaka Senanayake, Upendra Walgampaya, Thishya Weragoda and Iresh Seneviratne

S.C. (SD) No. 11/2016

Petitioner : Priyantha Prasad Denipitiya

Counsel : Uditha Egalahela PC with Amaranath Fernando instructed by Mayomi Ranawaka

S.C. (SD) No. 12/2016

Petitioner : G. A. M. U. Ematiyagode

Counsel : Manohara de Silva

S.C. (SD) No. 13/2016

Petitioner : Ven. Madugasthalawe Wimalabuddhi Thero

Counsel : Darshana Weerasekara instructed by Chandrani Wijesinghe

S.C. (SD) No. 14/2016

Petitioner : N. Dharshana Weraduwage

Counsel : Darshana Weraduwage

S.C. (SD) No. 15/2016

Petitioner : Sisira Kumara Manikdiwala

Counsel : Saman Liyanage instructed by Thilina Suriyaarachchi

S.C. (SD) No. 16/2016

Petitioners : Ven. Hasalaka Seelarathana
Ven. Thumbulle Vipassi, Ven. Kevulegama Sumanasara

Counsel : Sanjeewa Jayawardena PC with Nanda Goonarathna, Rajeev Amarasuriya, Ashoka Nivunhella and Charitha Rupasinghe

S.C. (SD) No. 17/2016

Petitioner : Ven. Dr. Maduruoye Dhammissara Thero

Counsel : Canishka Vitharana

S.C. (SD) No. 18/2016

Petitioner : Nuwan Ballantudawa

Counsel : Canishka Vitharana

Respondent : Hon. Attorney General

Counsel : Yuresha de Silva, Senior State Counsel.

The Court assembled for the hearing on 09.02.2016 and 11.02.2016.

A Bill titled "Buddhist Temporalities (Amendment) Act, No. .... of 2015 was Gazetted on 4th of December, 2015 and was placed on the Order Paper of Parliament on 29th of January, 2016.

Ten Petitions were presented to this Court, in respect of this Bill, in terms of Article 121 (1) of the Constitution. The ten Petitions by the aforementioned Petitioners were taken up together for hearing. Learned Counsel appearing for the Petitioners and the Learned Senior State Counsel made oral submissions and also filed written submissions in regard to the constitutionality of the Bill. The arguments before Court consisted of several questions with regard to the provisions of the Bill being inconsistent with the Constitution.

The long title of the Bill reads as "An Act to Amend the Buddhist Temporalities Ordinance (Chapter 318)". The date of commencement of the Buddhist Temporalities Ordinance was 1st of November, 1931. It has hitherto been amended by 11 amending Acts, the last one of which was enacted as No.34 of 2013.

There are amendments as well as new sections introduced by this Bill, namely Sections 28 A to 28 K brought about by Clause 23 of the Bill and Section 5 brought about by Clause 4 of the Bill, which if and when enacted will come into operation on a date as the Minister may appoint by Order published in the *Gazette.*

Counsel appearing for most of the Petitioners objected to the interpretation given to the word "Bhikkhu" proposed to be enacted by Clause 2 (2) as it has introduced the words, " in accordance with the Theravada Traditions". Nowhere is it explained or interpreted what "Theravada Traditions" mean. It is an accepted fact that in the world over, there are Theravada Buddhists and Mahayana Buddhists. The Buddhist Temporalities Ordinance has survived for 75 long years without even a mere mention of either Theravada or Mahayana as divisions. It was alleged that the inclusion of "Theravada" infringes Article 9 of the Constitution, which reads:-

Art. 9: Buddhism – The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to *protect and foster* the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14 (1) (e).

It was argued that if this Amendment applies to Theravada Tradition, then, according to the Ordinance, the provisions thereof shall bind only Theravada Bhikkus, Theravadian Temples, Theravadian temple properties, Theravadian temple income etc. and also only Theravadian Bhikkhus will be registered accordingly. The effect of this word 'Theravada' will be that those Bhikkhus, if they do not want to be bound by the provisions of the Buddhist Temporalities Ordinance, will transfer themselves to become Mahayana or any other sector of Bhikkhus. As a result, it may be that the State will then have lesser and lesser number of Bhikkhus and as such the State will neither be protecting the Buddha Sasana nor fostering the Buddha Sasana.

The Constitution speaks of Buddhism and not Theravada Buddhism. Disecting the word Buddhism to include Theravada and Mahayana and only recognizing Theravada Sangha community to be registered and be subjected to comply with the proposed provisions of the Buddhist Temporalities Ordinance as amended by this Bill, would promote derogation of Buddhism and would not be fostering Buddhism.

If it remains as it is already in the Ordinance, there would not be any infringement of any Article of the Constitution, *i.e*. to read as "Bhikkhu means a Bhikkhu whether upasampada or samanera". Ms. Yuresha de Silva, Senior State Counsel, on the second day of hearing of this Bill, agreed to delete the word "Theravada" from all the clauses of the Bill, wherever it appears. With this undertaking, Court does not wish to consider the aforementioned arguments.

The Senior State Counsel agreed and undertook to get Clauses 2 (2), 2 (3) and 2 (4) taken out of the context of the Bill and they will be then taken as deleted. Regarding Clause 2 (4), she submitted that the "Kandyan Provinces" will be interpreted to include the areas specified in Act No. 44 of 1952 in a seperately defined Schedule to the Bill, without any mention of the said Act No. 44 of 1952 and interpreted in a more refined manner to suit the title of this Ordinance.

Regarding Clause 2 (6), she has suggested that in Clause 2 (6), the term "Solosmastane" be replaced with the word, "Polonnaruwa Solosmastane" and the said term to be used, wherever "Solosmastane" appeared in the context of the Bill. As the word 'Solosmastane' is used herein, it may lead to confusion as to the exact meaning of 'Solosmatane' which has been in vogue in the Buddhist literature of Sri Lanka for long years meaning the special sixteen places of worship included in a stanza to worship the said well known places which is used by all the Sri Lankan Buddhists. As such, we suggest that the two words suggested should be written as one word, to read as "Polonnaruwa - Solosmastane". In the Bill, wherever the words Polonnaruwa Solosmastane appears, the text should be corrected to include "Polonnaruwa - Solosmastane" accordingly. Anyway, inclusion of this interpretation does not violate any Article of the Constitution.

She also agreed to vary Clause 2 (7) to read as, "temple" means any vihara, dagaba, dewale, bhikku avasa, and any place of Buddhist worship and includes the Sri Dalada Maligawa of Kandy, the Sripadasthana and the Atamasthana of Anuradhapura and the Polonnaruwa Solosmastane situated within the Administrative District of Polonnnaruwa and any dewale administered in terms of the provisions of subsection (1) of Section 4 of this Ordinance.

She also agreed to keep Clause 2 (8) as varied as follows:
In Cluase 2 (8), by the insertion immediately after this definition of the expression of the "temple" of the following definition:-

"temple land" means:-

(a) any land allocated for the use of any temple under this Ordinance and becomes vested in such temple in terms of a determination made by any court, Sannas, Deeds or by any other means;

(b) any land owned by a Buddhist temple due to the demise of a Bhikkhu.

It was agreed after hearing all the submissions of all the counsel that Clauses 4 and 5 of the Bill would be deleted and Sections 5 and 6 of the Buddhist Temporalities Ordinance as it is, will be retained under the existing headings of "Commissioner General of Buddhist Affairs' Powers" and "Advisory Board".

It was agreed further that 'the person holding the office of the District Secretary or the Administrative District of Kandy' as mentioned in Clause 6 (2) repealing Section 7 (2) and substituting (2) (a) (iii) should be a Buddhist by birth. Similarly, 'the Divisional Secretary in the District in which such dewale is situated, as mentioned in Clause 8 (2) (a) (i), should also be a person who is a Buddhist by birth. The Senior State Counsel agreed to insert provision in the Bill to that effect. Then the Basnayake Nilames of all the Dewales and the Trustees of all the Temples within the Kandyan Provinces will continue to take part in the election of the Diyawadane Nilame, as stipulated in Section 7 (2) (c) and (d) of the Buddhist Temporalities Ordinance.

The State agreed to delete Clase 8 (2) (a) (ii) and a Clause similar to Section 8 (2) (b) to be contained in the Buddhist Temporalities Ordinance to be retained. Furthermore, by Clause 8(2), a provision similar to the second proviso to Clause 11 will be introduced as sub clause (e) referring to the term of office of a Basnayake Nilame. Clause 14 (1)(a) will be amended by deleting reference to the monetary aspect. Clause 15 will be amended by the inclusion of a provision requiring the Commissioner General to act on the advice of the Mahanayake Theros of the two Chapters, prior to conducting an inquiry against the Diyawadana Nilame.

The situation contemplated in Clause 17 to have a new section in order to make temporary appointments for the performance of the duties of the office of the trustee may not arise since the general law of succession has to be applied in such a situation. It is suggested that Clause 17 be done away with as it can create unnecessary conflicts within the Sangha Community and that inclusion of the same will not protect and foster Buddhism.

The State agreed to delete the whole of Clause 19 and also to delete the words “or where such Bhikkhu disrobes, such property shall be deemed to be the property of such temple in which such Bhikkhu resides unless such property has been inherited by such Bhikkhu through succession.” As referred to in Clause 19, the new section 20A will not be there in the Bill. The State has agreed also to delete “where such Bhikkhu disrobes.” from Clause 20.

The State undertook to change Clause 23 in including Sec. 28A (1) to read as follows : “The procedure applicable for the recovery of temple property belonging to any temple or for the assertion of title to any such property from any person other than a Bhikkhu in unauthorized occupation or possession shall be in the manner specified hereunder.”

Clause 23 which introduces the new Sections 28 (A) to 28 (K) are important since these provisions deal with the recovery of temple property from unauthorized possession or occupation. It was agreed that any clause therin will be amended by excluding the application of the said Clauses to a Bhikkhu. In order to ensure consistency, the term “temple property” will be used in relation to Clause 23. The Clauses 28 (B) (1) (a) and 28 I, will be amended by

the inclusion of a provision facilitating the involvement of the Viharadhipathi in the process pertaining to the recovery of temple property.

It was submitted by the State that Clauses 26, 29 (7) and 32 will be amended by deleting reference to the punitive aspect.

An undertaking was given by the State that form C in the Schedule to this Amendment Act which is done under Sec. 28 D Should have the affidavit to read "I, ……..being a Buddhist……..", the signature and designation if any of the "Affirmant" and only have in the jurat the word "Affirmed."

The document by which the State agreed to the undertakings hereinbefore mentioned, is annexed hereto for clarity.

Conclusion :

We determine that, as per the undertakings given by the Senior State Counsel representing the Hon. Attorney General, the question of inconsistency with the Articles of the Constitution in any one of the Clauses of the Bill ceases to exist. We therefore hold that, when amended and/or deleted the aforementioned Clauses as undertaken by the State, the provisions of the Bill are not inconsistent with the Constitution and may be passed by Parliament by a simple majority of members present and voting.

We wish to place on record our deep appreciation of the assistance given by the Senior State Counsel and the other learned Counsel who made submissions in this matter before this Court.

Shanthi Eva Wanasundera
Judge of the Supreme Court.

Anil Gooneratne
Judge of the Supreme Court.

K. T. Chitrasiri
Judge of the Supreme Court.

First Reading:	29.01.2016 (Hansard Vol.242; No. 06; Col. 589)
Bill No:	75
Sponsor/ Relevant Minister:	Minister of Buddhasasana
Decision of the Supreme Court Announced in Parliament :	23.02.2016 (Hansard Vol. 242; No. 11; Col. 1073 - 1079)
Second Reading :	Listed on the Order Paper for Second Reading.

S.C. (SD) No. 19/2016

"BUDGETARY RELIEF ALLOWANCE OF WORKERS BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Anil Gooneratne	-	Judge of the Supreme Court
K. T. Chitrasiri	-	Judge of the Supreme Court

S.C. (SD) No. 19/2016

Petitioners	:	Free Trade Zones & General Services Employees Union Sri Lanka Nidahas Sewaka Sangamaya Inter Company Employees Union United Federation of Labour Ceylon Federation of Trade Unions Ceylon Federation of Labours National Union of Seafarers The Ceylon Estate Staffs' Union
Counsel	:	Chrishmal Warnasuriya with Wardani Karunaratne and J. Wickramasuriya instructed by Lanka Dharmasiri
Respondent	:	Hon. Attorney General
Counsel	:	Janak de Silva, Senior Deputy Solicitor General with Chathura Gunatilake, State Counsel

Court assembled for hearing at 10.00 a.m. on 23.02.2016.

A Bill bearing the title "Budgetary Relief Allowance of Workers" was published in the *Gazette* of the Republic of Sri Lanka on 14th January 2016 and placed on the Order Paper of Parliament on 9th February 2016.

Eight Petitioners have challenged the constitutionality of this Bill presented to this Court under the provisions contained in Article 121(1) read with Article 78 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

When the Bill was taken up for consideration, Learned Deputy Solicitor General took up a preliminary objection that the petition should be rejected in *limine* for non-compliance with the mandatory provisions stipulated in Article 121 (1) of the Constitution. The contention of the Learned Deputy Solicitor General was that in terms of Article 121 (1), there must be material placed before Court either in the petition or in the affidavit that not less than three fourths of the Members of the Petitioners' Union are citizens of Sri Lanka. Counsel submitted that in the absence of such material, the Court is not seized of jurisdiction to make a determination on the petition.

Article 121(1) of the Constitution reads thus :

> *"The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the president by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament and a copy thereof shall at the same time be delivered to the Speaker. In this paragraph "citizen" includes a body, whether incorporated or, unincorporated if not less than three fourths of the members of such body are citizens."*

In the instant application, admittedly, there is no averment to show that not less than three fourths of the Members of the eight Unions are citizens.

The Supreme Court, in the Sri Lanka Telecommunications Bill (S.C. Special Determination 5/91, 6/91 and 7/91) determined the approach that is to be adopted in interpreting Constitutional provisions having regard to their aims, scope and objectives. The Court referred to the case of *Vishvalingam* Vs. *Don John Francis Liyanage* — S. C. Application No. 48/83 (F.R.D. Volume 2 page 542) and stated thus:-

The Legal principles embodied in Article 121 are —

(i) That the constitutional jurisdiction of the Supreme Court may be invoked for the purpose of adjudicating on the constitutionality of a Bill;

(ii) the persons who may invoke such jurisdiction;

(iii) the manner by which such jurisdiction may be invoked;

(iv) the period of time within which such jurisdiction may be invoked;

(v) the consequences of such invocation, *i.e.* suspension of considering the Bill by Parliament for a period of 3 weeks within which the Supreme Court should convey its decision.

These provisions which require Parliament to be informed that the Bill is before the Supreme Court, under Article 121 (1) and it must be regarded as mandatory.
It must be noted that the Constitution uses the word "citizen" and "person" in several of its Articles. In Chapter III dealing with Fundamental Rights a "citizen" has been guaranteed the Fundamental Rights set out in Articles 12 (2) and 14 (1) whereas a "person" has been guaranteed the Fundamental Rights in Articles 10, 11, 12 (1) and 13. This clearly shows that the legislature has used different words with a specific distinction in mind. As determined by this Court in the Sri Lanka Telecommunications Bill (Supra), the provisions contained in Article 121 are mandatory in its nature and therefore it is necessary for strict compliance by parties who would be invoking the said jurisdiction. Learned Deputy Solicitor General drew the attention of Court to Article 121(2) of the Constitution that the words "***so invoked***" necessarily refer to jurisdiction that would be invoked in accordance with Article 121(1) of the Constitution.

The Learned Counsel for the Petitioners claimed that the Petitioners are Trade Unions registered under the Trade Unions Ordinance and as such, they can sue and be sued in view of Section 30 (1) of the Trade Unions Ordinance. Bindra (Interpretation of Statutes, 9th

Edition - page 1168) states that, *"While the Constitution is the direct mandate of the people themselves, the statute is an expression of the will of the legislature only, though the legislature is also the representative of the people. A Constitution is but a higher form of statutory law....."* We are of the view, that Section 30 (1) gives the Petitioners the right to sue and be sued whereas Article 121 (1) of the Constitution which is the Supreme Law of Sri Lanka lays out a different constitutional requirement which has to be mandatorily complied with. *"If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results: Vacher & Sons Ltd Vs. London Society of Compositors (1913) All E.R. at 121 — Per Lord Atkinson".* This Article 121 (1) only allows a body whether incorporated or unincorporated, to challenge the constitutionality of a Bill provided that not less than three fourths of the Members of such body are "citizens". The Petitioners have failed to satisfy this requirement.

This being so, this Court has no jurisdiction to proceed further with the Petition as the jurisdiction of the Court has not been duly invoked. We accordingly, reject the petition. Upon being pointed out to the Learned Deputy Solicitor General, that Clause 3 (9) gives wide powers to the Minister with regard to the operation of the provisions of the section in relation to any industry or service, the learned Deputy Solicitor General acting in the best traditions of the Attorney General's Department, informed that appropriate guidelines would be formulated for the Minister to exercise his discretion and same would be moved at the Committee Stage amendment.

Since the Court has already decided to reject the Petition, it did not consider any of the submissions by Mr. Faisz Musthapa, P. C. who sought to intervene on behalf of Kanishka Weerasinghe, Director General of the Employers' Federation of Ceylon.

Subject to the aforesaid observations, the Petition is rejected.

K. Sripavan
Chief Justice.

Anil Gooneratne
Judge of the Supreme Court.

K. T. Chitrasiri
Judge of the Supreme Court.

First Reading:	10.02.2016 (Hansard Vol.242; No. 08; Col. 739 - 740)
Bill No:	78
Sponsor/ Relevant Minister:	Minister of Labour and Trade Union Relations
Decision of the Supreme Court Announced in Parliament :	08.03.2016 (Hansard Vol. 243, No. 01, Col. 01 - 05)
Second Reading :	11.03.2016 (Hansard Vol. 243, No. 04, Col. 636)
Committee of the whole ***Parliament and Third Reading :***	11.03.2016 (Hansard Vol. 243, No. 04, Col. 636 -638)
Hon. Speaker's Certificate :	23.03.2016
Title :	Budgetary Relief Allowance of Workers Act, No 4 of 2016.

S.C. (SD) No. 20/2016

"NATIONAL MINIMUM WAGE OF WORKERS BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Anil Gooneratne	-	Judge of the Supreme Court
K. T. Chitrasiri	-	Judge of the Supreme Court

S.C. (SD) No. 20/2016

Petitioner	:	Free Trade Zones & General Services Employees Union
Counsel	:	Chrishmal Warnasuriya with Wardani Karunaratne and J. Wickramasuriya Instructed by Lanka Dharmasiri
Respondent	:	Hon. Attorney General
Counsel	:	Janak de Silva, Senior Deputy Solicitor General with Chathura Gunatilake, State Counsel

Court assembled for hearing at 10.00 a.m on 23.02.2016.

A Bill bearing the title "National Minimum Wage of Workers" was published in the *Gazette* of the Republic of Sri Lanka on 14th January 2016 and placed on the Order Paper of Parliament on 9th February 2016.

When the Bill was taken up for consideration, learned Deputy Solicitor General took up a preliminary objection stating that the petition should be rejected *in limine* for non compliance with the mandatory procedure stipulated in Article 121 (1) of the Constitution.

The contention of the learned Deputy Solicitor General was that in terms of Article 121 (1), the Petitioner being a Trade Union, failed to show/establish or adduce any material to demonstrate that the Petitioner's Members fall within the criteria which confers *locus standi* in terms of Article 121 (1) of the Constitution.

Article 121 (1) of the Constitution reads thus :

"The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any Citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament and a copy thereof shall at the same time be delivered to the Speaker. In this paragraph "citizen" includes a body, whether incorporated, or unincorporated, if not less than three fourths of the members of such body are citizens."

The Supreme Court, in the Sri Lanka Telecommunications Bill (S. C. Special Determination 5/91, 6/91, and 7/91) determined the approach that is to be adopted in interpreting constitutional provisions having regard to their aims, scope and objectives. The Courts referred to the case of *Vishvalingam Vs. Don John Francis Liyanage - S.C. Application No. 48/83 (F. R. D. Volume 2 page 542) and stated thus:-*

The legal principles embodied in II Article 121 are -

(i) that the constitutional jurisdiction of the supreme Court may be invoked for the purpose of adjudicating on the constitutionality of a Bill;

(ii) the persons who may invoke such jurisdiction;

(iii) the manner by which such jurisdiction may be invoked;

(iv) the period of time within which such jurisdiction may be invoked;

(v) the consequences of such invocation, *i.e.* 'suspension of considering the Bill by Parliament for a period of 3 weeks within which the Supreme Court should convey its decision.

These provisions which require Parliament to be informed that the Bill is before the Supreme Court, under Article 121 (1) must be regarded as mandatory.

It is observed that the Constitution in Chapter III dealing with fundamental rights draws a distinction between "persons" and "citizens." Articles 10, 11, 12 (1), 13 (1) and 13 (2) deal with fundamental rights guaranteed to all persons while Articles 12 (2), 14 (1) and 14A (1) enumerate fundamental rights guaranteed to citizens. Admittedly the Petitioner in the instant application is a Trade Union and not an individual.

The learned Counsel for the Petitioner claimed that the Petitioner is a Trade Union registered under the Trade Unions Ordinance and as such, it can sue and be sued in view of Section 30 (1) of the Trade Unions Ordinance. Whilst a registration under the Trade Unions Ordinance confers limited legal personality on a Trade Union that does not necessarily mean that the said Union is automatically equipped with the *requisite locus standi* to invoke the provisions of Article 121 (1) of the Constitution.

Constitutional provisions are required to be understood and interpreted with an object–oriented approach. The successful working of the Constitution depends upon the democratic spirit underlying it being respected in letter and in spirit. We are of the view, that Section 30 (1) gives the Petitioners the right to sue and be sued whereas Article 121 (1) of the Constitution which is the Supreme Law of Sri Lanka lays out a different constitutional requirement which has to be mandatorily complied with. This Article only allows a body whether incorporated or unincorporated, to challenge the constitutionality of a Bill provided that not less than three - fourths of the Members of such body are "citizens". The Petitioners have failed to satisfy this requirement.

This being so, this Court has no jurisdiction to proceed further with the Petition as the jurisdiction of the Court has not been duly invoked. We accordingly, reject the Petition. Since the Court has already decided to reject the Petition, it did not consider any of the submissions made by Mr. Faisz Musthapa, P. C. who sought to intervene on behalf of Kanishka Weerasinghe, Director General of the Employers' Federation of Ceylon.

K. Sripavan
Chief Justice.

Anil Gooneratne
Judge of the Supreme Court.

K. T. Chitrasiri
Judge of the Supreme Court.

First Reading:	10. 02. 2016 (Hansard Vol.242; No. 08; Col. 739)
Bill No:	77
Sponsor/ Relevant Minister:	Minister of Labour and Trade Union Relaions
Decision of the Supreme Court Announced in Parliament:	08. 03. 2016 (Hansard Vol. 243; No. 01; Col. 05 - 07)
Second Reading:	11. 03. 2016 (Hansard Vol. 243; No. 4; Col. 633)
Committe of the Whole Parliament and Third Reading:	11. 03. 2016 (Hansard Vol. 243; No. 4; Col. 634 - 638)
Hon. Speaker's Certificate:	23. 03. 2016
Title:	National Minimum Wage of Workers Act, No. 3 of 2016.

S.C. (SD) No. 22/2016, to S. C. (SD) No. 25/2016

"RIGHT TO INFORMATION BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Anil Gooneratne	-	Judge of the Supreme Court
Nalin Perera	-	Judge of the Supreme Court

S.C. (SD) No. 22/2016

Petitioner : N. Dharshana Weraduwage

Counsel : Petitioner in Person

S.C. (SD) No. 23/2016

Petitioner : Lt. Col.(Retd.) Anil Amarasekara

Counsel : Manohara de Silva, P. C. with Canishka Witharana, Malini Dissanayake, Tissa Yapa and Anusha Perera

Intervenient Petitioners : Professor Wijesooriya Arachchilage Don Sarath Wijesooriya
Weligodage Saman Rathnapriya
Benedict Joseph Stalin
Dharmasiri Bandaranayake

Counsel : M. A. Sumanthiran with Viran Corea, Sarita de Foseka and T. Arulanandan instructed by Sanjeewa Kaluarachchi for the Intervenient Petitioners.

Intervenient Petitioner : Dr. Gunadasa Amarasekera

Counsel : K. Tiranagama instructed by Swarnapali Wanigasekera

S.C. (SD) No. 24/2016

Petitioners : Benthara Gamage Indika Gamage
Gonsalge Isuru Buddhika Sirinimal

Counsel : Thishya Weragoda with Iresh Seneviratne,Udari Mawaththa, Chintaka Sugathapala instructed by Niluka Dissanaike

Intervenient Petitioner : Transparency International Sri Lanka

Counsel : J. C. Weliamuna with Pulastri Hewamanne, Senura Abeywardene, Sulakshana Senanayake, Pubudu Silva and Sankitha Gunaratne

Intervenient Petitioners : Lokupitumpage Roshan Namal Wijethunga
Dr. Ranga Prasanna Kalansooriya

Counsel : Dr. Jayampathi Wickrarmaratne, P. C. with J. C. Weliamuna, Deanne Uyangoda, Chathurika Rajapaksha, Instructed by Lilanthi de Silva

S.C. (SD) No. 25/2016

Petitioner	:	Nuwan Ballantudawa
Counsel	:	Canishka Witharana, with Malmi Dissanayake, Tissa Yapa and H. M. Tillekeratne
Intervenient Petitioner	:	Amal Randeniya
Counsel	:	Saliya Pieris with Pulastri Hewamanne
Intervenient Petitioner	:	Liyana Arachchilage Jagath Bandara Liyana Arachchi
Counsel	:	Dr. Jayampathi Wickrarmaratne, P. C. with J. C. Weliamuna, Deanne Uyangoda, Chathurika Rajapaksha, Instructed by Lilanthi de Silva
Intervenient Petitioner	:	Transparency International Sri Lanka
Counsel	:	J. C. Weliamuna with Pulastri Hewamanne, Senura Abeywardene, Sulakshana Senanayake, Pulasthi Silva and Sankitha Gunaratne
Intervenient Petitioner	:	Geoffre Alagaratnam, P C
Counsel	:	Saliya Peris with Pulastri Hewamanne
Respondent	:	Hon. Attorney General
Counsel	:	Nerin Pulle, Deputy Solicitor General with Nirmalan Wigneswaran, E. D. Wickremanayake, State Counsel

Court assembled for hearing at 10.00 a.m. on 05.04.2016 and on 06.04.2016

A Bill titled "Right to Information" has been published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka and has been placed on the Order Paper of Parliament on 24th March 2016. Four Petitioners challenged the constitutionality of the Bill by separate four Petitions filed by them.

The Preamble to the Bill states thus :-

"WHEREAS the Constitution guarantees the right of access to information in Article 14A thereof and there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance."

Part 1 of the Bill sets out that every citizen has the Right of access to information and establishes that the provisions of the Bill shall prevail over other written laws;

Part II provides the several grounds on which right or access may be denied;

Part III specifies the duties of Ministers and Public Authorities with regard to maintaining records and the submission of annual report to the Right to Information Commission.

Part IV provides for the establishment of an "Right to Information Commission", its composition, duties, powers and functions of the said Commission.

Part V refers to the appointment of "Information Officers" through which the procedure specified therein may be utilized to obtain information.

Part VI sets out the procedure for appeals against rejected requests for access to information.

Part VII specifies the duty to disclose reasons for a decision, offences under the Bill and the interpretation of certain words and phrases within the Bill.

Since the Bill was enacted to foster a culture of transparency and accountability in public authorities and guarantees the right of access to information as provided in Article 14A of the Constitution it becomes necessary to examine the legal principles underlying the said Article.

Article 14 A of the Constitution reads thus :-

"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 statute of a Provincial Council;

(c) Any local authority; and

(d) Any other person, who is in possession of such information relating to any institution referred to in sub - 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. (emphasis added)

The right to information was to some extent recognized as being included in the "freedom of speech and expression" in *Environmental Foundation Ltd. Vs. Urban Development Authority* [(2009) 1. S. L. R. 123]. S. N. Silva, C. J. held that although the freedom of information was not specifically guaranteed in the Constitution, for the "freedom of speech and expression including publication" to be meaningful and effective, it should carry with its scope an implicit right of a person to secure relevant information form **public authority** in respect of a matter that should be in the **public domain.** (emphasis added)

Thus, the "freedom of speech and expression including publication" which includes an implicit right to secure relevant information should be broadly interpreted in the light of fundamental principles of democracy and the Rule of Law which form the foundation of the Constitution, subject however to such restrictions and to the extent provided in the Constitution. The fundamental principle involved here is the person's right to know the information. In the case of *Dinesh Trivedi Vs. Union of India* (1977) 4 S. C. 306, Ahmadi C. J. stated as follows :-

"In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government, which having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is by no means, absolute"

The State has the right to regulate the exercise of a fundamental right in order to prevent it being abused, though it cannot curtail the right itself except on permissible grounds. Thus, it is open to the legislature to enact laws or regulations to regulate without transgressing the territory of restriction or abridgement. Any regulatory law or regulation impinging upon fundamental rights should therefore be closely scrutinized. The areas in respect of which such laws and regulations are to be enacted is a matter for the legislature. Once the legislature presents the Bill in respect of any matter referred to in Article 14A, the duty of this Court is to determine whether any of the provisions of the Bill are inconsistent with the Constitution,

The express recognition of the right as enshrined in Article 14A undoubtedly advances the sovereignty exercised and enjoyed by the people and accords with the Constitutional directive postulated in Article 4 (d) of the Constitution, which requires that "the fundamental rights which are by the Constitution declared and recognized shall be **respected, secured and advanced by all organs of government** and shall not be abridged, **restricted or denied, save in the manner and to the extent hereinafter provided".** (emphasis added)

Accordingly, the right of access to information like all other rights recognized under the Constitution should also be enjoyed subject to certain overriding public interests in non-disclosure as well as the constitutional duties stipulated under Article 28 (e) to the Constitution, where it is specifically stipulated that the exercise of and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka to respect the rights and freedoms of others. Hence, Clause 5 of the Bill in accordance with Article 14 (A) (2) of the Constitution performs and equally important task in ensuring that the right of access to information is suitably restricted to reflect these important countervailing considerations.

Therefore, the underlying approach of the Bill is to meaningfully give effect to the right of access to information enshrined in Article 14A(1) while successfully balancing such right with restrictions that are necessary in a democratic society as set out in Article 14A (2).

Mr. Pulle, Deputy Solicitor General assisted Court in the consideration of various Clauses of the Bill. The Court examined the Clauses contained in the said Bill and heard the submissions of the Petitioners, Counsel for the Petitioners and the Counsel for the Intervenient-Petitioners.

Counsel for the Petitioners objected to Clauses 5 (1) (c) (v), 5 (1) (d), 5 (1) (j), 5 (3), 6, 8(1), 9 (2) (a), 12, 19, 20, 40, 43 on the basis that the said Clauses violate several provisions including Articles 3, 4, 12, 13, 14, 27 and 111c of the Constitution.

Clauses 5 (1) (c) (v), 5 (1) (d) and 5 (3)

The main argument of the Counsel for the Petitioners was that "economy of Sri Lanka" referred in Clause 5(1)(c) is not caught up under Article 14A (2) of the Constitution which prescribes the restrictions that can be placed on the right of access to information. Thus, the contention was that the matters pertaining to "economy" does not fall within the permitted restrictions stipulated under Article 14A (2).

Learned Deputy Solicitor General, however, argued that the Petitioners contentions are based on the anachronistic notion of equating "national security" to "military security". Counsel stated that the concept of "national security" has undergone considerable growth and evolution from its traditional connotation of defence of a territory from internal or external attack or "military security". Mr. Pulle relied on the case of *Ex - Armymen's Protection Services private Limited Vs. Union of India and Others* [(2014) no. 2876/14] decided by the Indian Supreme Court where Kurian, J. observed as follows:-

"It is difficult to define in exact terms as to what is **national security**. However, the same would generally include socio-political stability, territorial integrity, **economic solidarity and strength**, ecological balance, cultural cohesiveness, external peace, etc. What is in the interest of national security is not a question of law. It is a matter **of policy**. It is not for the Court to decide whether something is in the interest of State or not. It should be left to the Executive. To quote Lord Hoffman in Secretary of State for the Home Department v. Rehman.

> *"The matter of national security is not a question of law.* ***It is a matter of judgment and policy.*** *Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of* ***national security*** *are not a matter for* ***judicial decision. They are entrusted to the executive****." (emphasis added)*

Ahmadi C. J. in Dinesh Trivedi's case (supra) quoted from the case of *S. P. Gupta Vs. Union of India.* where a seven judge Bench of the Constitutional Court declared that the disclosure of documents relating to the affairs of State involves two competing dimensions of public interest, namely, the right of the citizen to obtain disclosure of information, which competes with the right of the State to protect the information relating to its crucial affairs. It was further held that, in deciding whether or not to disclose the contents of a particular document, a judge must balance the competing interests and make his final decision depending upon the particular facts involved in each individual case. It is important to note that it was conceded that there are certain classes of documents which are necessarily required to be protected, e. g. Cabinet Minutes, documents concerning the national safety, documents which affect **diplomatic relations or relate to some State secrets** of the highest importance, and the like in respect of which the court would ordinarily uphold Government's claim of privilege. (emphasis added).

Though Petitioners argue that the people at large have a right to know about the full details of entering into of overseas trade agreements referred to in Sub - Clauses 1 (c) (v) and 3 of Clause 5 for the maintenance of democracy and for ensuring transparency in the affairs of the Government, like all other rights, even this right has recognized limitations; it is by no means absolute. Accordingly, the inclusion of a restriction against the disclosure of information that would cause serious prejudice to the economy of Sri Lank is justified as part and parcel of the interests of "national security". The combined effect of Clauses 5 (1) (c) (v) and 5 (3) read with Article 157 of the Constitution is that overseas trade agreements cannot be challenged in a Court of law and the fact that information relating to the same are denied would prevent those agreements from being challenged prior to their formulation. In any event, Clause 5 (1) (c) (v) provides the following pre-qualifications on the information that can be restricted if:-

(a) The disclosure of the information would cause **serious prejudice** to the economy by disclosing prematurely.

(b) The information **should relate to** decisions to change or continue Government economic of financial policies (emphasis added).

Dr. Jayampathy Wickramaratne placed his argument on a different basis and stated that the impugned restrictions in Clauses 5 (1) (c) (v) and 5 (3) have been included to ensure a balance between the right to information and the wider interests of the public, especially with respect of economic wellbeing and security of the State, to prevent "public disorder and crime" and to protect "the rights of others", . Article 14 A (2) contemplates the prevention of disorder and crime and the need to protect the rights of others. Counsel argued that the impugned restrictions fall within the substantive ambit of protecting the rights of others, in the context of ensuring the economic security of the public and also of preventing disorder and crime where the release of information enables wrongful gains and profiteering by certain elements at the expense of the public.

In **Autronic AG Vs. Switzerland** A 178 (1990) 12 EHRR 485, the European Court of Human Rights held that a state's interference with the right to information guaranteed under Article 10 of the European Convention on Human Rights, was compatible with its obligation under the Convention where the restrictions were in pursuance of the "prevention of disorder" and the need to prevent the release of confidential information, both of which were reasonable interferences under the Convention. The principle established by this case is that if the disclosure of information can create disorder in a particular sphere of activity or affects the rights of others or lead to a crime, then it may be withheld in the wider public interest.

It may thus be noted that in the case of overseas trade agreements, a premature disclosure may benefit the person who requested such information but may adversely affect the economy of the country and thus the rights of the other people. Releasing the details of various reports, notes, letters, and other forms of written evidence while the negotiations are going on may help the party or his personal self-interest but adversely affects the interest of the public and create a disorder by failing to protect the rights of others. The impugned restrictions can even be prescribed under Articles 15 (2) and 15 (5) not only to protect the right of others but also to regulate the exercise and operation of the fundamental rights declared and recognized by Article 14 (1) (a) and 14 (1) (g) in the interest of national economy.

Thus, it is not a blanket prohibition on all information relating trade agreements. The Court is inclined to agree with the Learned Deputy Solicitor General that the word "national security" be given an interpretation to ensure that the vital interests of the nation relating to "trade secrets and trade agreements" are safeguarded. If two public interests conflict, the Court will have to decide whether the public interest which formed the foundation for claiming privilege would be jeopardized if disclosure is ordered and on the other hand, whether fair administration of justice would suffer by non - disclosure and decide which way the balance tilts. It is observed that in view of Clause 5 (4) a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure. It is not a Rule of Law to be applied mechanically in all the circumstances. Thus, the Bill ensures that a balance is maintained between competing interests which would ultimately serve public interest and promote the discussion of public affairs. Accordingly, the inclusion of a restriction against disclosure of information that would cause serious prejudice to the economy of Sri Lanka is justified as part and parcel of protecting the rights of others and the economy of Sri Lanka. The Court therefore, holds, that Clauses 5 (1) (c) (v), 5 (1) (d) and 5 (3) are not inconsistent with any of the provisions of the Constitution.

Mr. Thishya Weragoda, in S. C. S. D. 24/2016 appeared for the First and the Second Petitioners who are the President and the Secretary of the Sri Lanka IT Professionals Association respectively and contended that Clauses 5 (1) (c) (v) and 5 (3) are in violation of Article 12 (1) and 14 (1) (g) of the Constitution, on the ground that the protection afforded to the Petitioners would be violated, if the said Bill is passed by Parliament.

Where a right or power given by the Constitution is challenged, the duty of the Court is to keep close to the words of the constitutional instrument and to see first whether the power is in fact granted, and secondly, whether there is anything else which restricts the rights so granted.

The freedom of speech and expression in Article 14 (1) (a) which carries within its scope an implicit right of a person to secure relevant information from a public authority and which could be exercised in association with others in any lawful occupation, profession, trade, business or enterprise as provided in Article 14 (1) (g) is in any event, subject to such restrictions as may be prescribed by law in terms of Article 15 (5), in the interest of national economy for purposes of carrying on any occupation. Hence, the Court does not agree with the Learned Counsel that clauses 5 (1) (c) (v) and 5 (3) are in violation of Article 12 (1) and 14 (1) (g) of the Constitution.

Clause 5 (1) (j)

This Clause denies the right of access to information only if the disclosure of such information would amounts to Contempt of Court. However, Article 14 A (2) restrict the right to information for the purposes of "maintaining the authority and impartiality of the judiciary" as well. Failure to include this restriction violates Articles 3, 4, 12 (1) and 14 A (2) of the Constitution.

Clause 6

Clause 6 of the Bill provides for the severability of information, so that information that is exempt can be retained whilst information that is not can be disclosed. The Petitioners claim that the said provision infringes Articles 14 A (1) and (2) of the Constitution and thereby infringes other Articles thereof, including Article 1, 3, 4, 12, 13, 14, 27 and 111C of the Constitution.

As indicated above, the underlying approach to the Bill is to meaningfully give effect to the right of access to information enshrined in Article 14 A (1) whilst successfully balancing such right with restrictions that are necessary in a democratic society as set out in Article 14 A (2) Clause 6 is a prime example of achieving an equitable middle path. Claus 6 ensures that any restriction on a citizen's right of access to information, even in relation to a single record or document, is enforced only to the extent that it is necessary and never as a blanket ban. Furthermore, it takes into account certain practical considerations by requiring that access, if at all, on reasonable severability being achievable between exempted and permitted information. Hence, Clause 6 not only identities the distinct probability that a single record or document may contain both exempted and permitted information but also to provide for a practical solution whereby competing interests may be balance. Thus, Clause 6 does not violate any of the provisions of the Constitution.

Clause 8 (1)

Mr. Canishka Witharana brought to the notice of Court that there is a discrepancy between the English version and the Sinhala Version, in that the word "person" referred to in the said Clause should be corrected to read as "citizen" as appearing in the Sinhala version of the Bill. The Court notes that in the event of any inconsistency between the Sinhala text and the English text, the Sinhala text shall prevail.

Clause 9 (2) (a)

This Clause empowers the Minister to make available updated information to a member of public upon a written request. This Clause violates Articles 3, 4, 12 (1) and 14 of the Constitution as the right of access to information is given to a "citizen" and not to a member of the public.

Clause 12

The Petitioners proposed that the Commission be constituted exclusively by retired judicial officers as in the case of the Commission to Investigate Allegations of Bribery or Corruption and that the commission be made subject to Parliamentary control.

Learned Deputy Solicitor General submits that salutary safeguards have been put in place in the Bill in respect of the Commission, in the context of its composition as well as in the discharge of its obligations. Extremely stringent safeguards have been put in place to ensure that the Commission comprises of persons "who have distinguished themselves in public life, with proven knowledge, experience and eminence in the fields of law, governance, public administration, social services, journalism, science and technology or management" (Clause 12 (2) (i)). The Constitutional Council has been vested with the power to ensure persons nominated satisfy the criteria and to reject nominations that do not meet the criteria set out above and call for fresh nominations. (Clause 12 (2) (b)). In fact, the Constitutional Council could make its own nominations in the event, the organizations referred to in Clause 12 (1) do not provide satisfactory nominations. (Clause 12 (3)). Thus the Bill has taken utmost precaution to ensure suitable nominations are made through the Constitutional Council.

The proceedings before the Commission are not judicial proceedings; they are administrative proceedings requiring the evaluation of information. The Commission to Investigate Allegations of Bribery or Corruption established under Act No. 19 of 1994 is not analogous to the "Right to Information Commission" because the subject matter of the respective

Commissions are fundamentally different and must be viewed through completely different procedural perspectives - the former from a criminal prosecution and the latter from the balancing of competing interests in the informational sphere.

From a functional perspective, adequate safeguards have been placed by providing for an appeal to the Court of Appeal and thus ensuring judicial oversight. The funds of the Commission are subject to audit by the Auditor General. Clause 16 (2) ensures transparency in relation to the funding received by any other sources, and thus the fears expressed by the Petitioners cannot materialized. Clause 18 mandates that provisions of Part II of the Finance Act No. 38 of 1971 shall apply to the financial control and accounts of the Commission. Clause 37 further provides that the report containing the activities of the Commission shall be tabled before Parliament and a copy thereof shall be sent to the President.

Article 33 (2) (h) of the Constitution stipulates that in addition to the powers, duties and functions expressly conferred or imposed on or assigned to the President by the Constitution or other written law, the President shall have the power - (h) to do all such acts and things, not inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage the President is authorized or required to do. Article 41 G (2) of the Constitution provides that the Constitutional Council shall perform and discharge such other duties and functions as may be imposed or assigned to the Council by the Constitution, **or by any other written law**. (emphasis added)

The appointment of the Members by the President upon the nomination of the Constitution Council is therefore in accordance with the express provisions of the Constitution and is not inconsistent with any provisions thereof. This Court in any event cannot decide as to who should be the Members of the Commission. The legislative function is the primary responsibility of Parliament as the elected body representing the people. The only remedy would be for the Court declare the incompatibility of the Bill with the provisions of the Constitution.

Clauses 19 and 20

The Petitioners challenge the two Clauses on the basis that they are not in accordance with the provisions of the Constitution, in that the members, officers and other employees cannot be deemed to be "public officers" and they are not appointed by the Public Service Commission.

Learned Deputy Solicitor General states that the above provision would be amended to accord with the standard provisions found in several acts such as the Commissions of Inquiry Act, No. 17 of 1948 (section 9), the Commission to investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (section 18 (1))and the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 (section 23) The provisions fo the respective Acts, are set out below respectively:

> Section 9 of the Commissions of Inquiry Act.
>
> *The Members of a Commission appointed under this Act Shall, so long as they are acting as such Members, be deemed to be* ***public servants*** *within the meaning of the penal Code, and every inquiry under this Act shall be deemed to be judicial proceeding within the meaning of that Code.*

Section 18 (1) of the Commission to Investigate Allegations of Bribery or Corruption Act

> *"The Members of the Commission, the Director General and Officers and Servants, appointed to assist the Commission shall be deemed to be* ***public servants*** *within the meaning of the Penal Code, and every investigation conducted under this Act shall be deemed to be judicial proceeding within the meaning of that Code".*

Section 23 of the Human Rights Commission of Sri Lanka Act

> *"The Members of the Commission and the Officers and Servants appointed to assist the Commission shall be deemed to be* ***public servants*** *within the meaning of the Penal Code, and every inquiry or investigation conducted under this Act, shall be deemed to be judicial proceeding within the meaning of that Code" (emphasis added).*

Thus, the words "public officers" appearing in Clause 19 be substituted with the words "public servants".

Clauses 19 and 20 of the Bill are identical to Clauses included in many enactments to ensure inter alia the following:

(a) That the functions of the officers of the institution are not obstructed;

(b) That the officers of the institution do not conceal a design to commit an offence which should be prevented.

(c) That persons participating in any proceedings before the body do not commit perjury; and

(d) To ensure that there are adequate safeguards against bribery and corruption, Clause 20 provides for the application of Bribery Act to the Commission.

These Clauses do not convert the proceeding into judicial proceedings nor do they make the Officers administering the proceeding judicial Officers. The very fact that the proceedings are deemed to "judicial proceedings" for the purposes of a specific enactment, implies that they are **not** judicial proceedings.

Clause 19 in its present form violates Articles 3, 4, 12 (1) and 55 of the Constitution.

Clause 40

The Petitioner in S. C. (S. D.) 22/2016 have alleged that Clause 40 would effectively provide immunity to information officers who release sensitive information, the disclosure of which would otherwise be punishable under Section 125 of the Army Act, No. 17 of 1949 (as amended) and similar provisions of the Navy Act No. 34 of 1950 (as amended) and the Air Force Act No. 41 of 1949 (as amended).

The argument of the Petitioner is manifestly misconceived. As expressly stated in Clause 40, such immunity from punishment shall only be available to an information officer who releases or discloses " information **which is permitted to be released or disclosed on a request** submitted under this Act. "Therefore, in considering what information may be permissibly released, it is necessary to refer back to Clause 5. Upon perusal of Clause 5, it is

evident that Clause 5 (1) (b) expressly provides that a request for access to information shall be refused where the disclosure of such information "would undermine the defence of the State or its territorial integrity or national security". Hence, under no circumstances would an information officer be afforded the benefit of Clause 40, where an injurious disclosure is made of the type of information contemplate under any of the aforementioned acts. (emphasis added).

In any event, in terms of Clause 4, the provisions of this Bill shall have effect notwithstanding anything to the contrary in any other written law.

Clause 43

This Clause defines a "Public Authority" as in paragraphs (j) and (k) in the following manner:-

(j) higher educational institutions including private universities and professional institutions;

(k) private educational institutions including institutions offering vocational or technical education.

In terms of Clause 3, every citizen shall have a right of access to information which is possession, custody or control of a "public authority". Article 14A (1) refers to the institutions from whom information could be obtained. The information could be obtained only from those institutions or persons referred in articles 14 (1) (a), 14 (1) (b), 14 (1) (c) and 14 (1) (d).

The institutions refereed to in Articles 14 (1) (a), 14 (1) (b), 14 (1) (c) are either controlled by the State or State agencies. The persons referred to in Article 14 (1) (d) are persons who are in possession of any information from the institutions controlled by the State. Private educational institutions or private universities are not caught up within the ambit of institutions which are partly or wholly controlled by the State. Hence, these two definitions violate Articles 3, 4 and 14A of the Constitution.

The definition to the term "public funds" is superfluous as the term "public funds" is not used in the Bill. The learned Deputy Solicitor General and Mr. Weliamuna agreed that the said definition should be deleted from the Bill.

Conclusion

The Bill contemplates the protection of individual right and/or collective rights of citizens in line with the spirit of Article 14 of the Constitution and overriding public interest reflected under Clause 5 (4) of the Bill. The Court considered whether the Bill contains an inconsistency with Article 3 read with Article 4 (d) which would warrant the application of Article 83 requiring a referendum. Article 3 is a safeguard which prevents and alienation of the elements that constitute sovereignty of the people and its exercise as provided in Article 4. The Court makes the following determination in terms of Article 123 (2) (b) of the Constitution:-

(i) Clause 5 (1) (j) violates Articles 3, 4, 12 (1) and 14A (2) of the Constitution and may only be passed by the special majority required under the provisions of Article 84 (2) of the Constitution.

(ii) Clause 9 (2) (a) violates articles 3, 4, 12 (1) and 14 of the Constitution and may only be passed by the special majority required under the provisions of Article 84 (2) of the Constitution.

(iii) Clause 19 violates Articles 3, 4, 12 (1) and 55 of the Constitution and may only be passed by the special majority required under the provisions of Article 84 (2) of the Constitution.

(iv) Clause 43 (j) and 43 (k) violate Articles 3, 4 and 14A of the Constitution and may only be passed by the special majority required under the provisions of Article 84 (2) of the Constitution.

Hence, the Bill in its present form is required to be passed by the special majority as provided for in Article 84 (2) of the Constitution and approved by the people at a Referendum.

However, if following amendments are made to the aforesaid Clauses, the inconsistency will cease to operate, and the Bill may be passed by a simple majority.

Clause 5 (1) (j) - the disclosure of such information would be in contempt of court or **prejudicial to the maintenance of the authority and impartiality of the judiciary**.

Clause 9 (2) (a) - the words "member of the public" to be replaced by the word "**citizen**".

Clause 19 - The words "public officers" to be replaced by the words "**public servants**".

Clause 43 (j) "higher educational institutions including private universities and professional institutions, **which are established, recognized or licensed under any written law or funded, wholly or partly, by the State and/or a public corporation or any statutory body established or created by a Statute of a Provincial Council.**

Clause 43 (k) "private educational institutions including institutions offering vocational or technical education, **which are established, recognized or licensed under any written law or funded, wholly or partly, by the State and/or a public corporation or any statutory body established or created by a Statute of a Provincial Council.**

The Court wishes to place on record its deep appreciation of the valuable assistance given by the Learned Counsel for the Petitioners, the President's Counsel for the Intervenient - Petitioners, the Petitioner in S.C. S.D. 22/2016, the Learned Counsel for the Intervenient Petitioners and the Learned Deputy Solicitor General who appeared on behalf of the Attorney General.

K. Sripavan
Chief Justice.

Anil Gooneratne
Judge of the Supreme Court.

Nalin Perera
Judge of the Supreme Court.

First Reading:	24. 03. 2016 (Hansard Vol.243; No. 06; Col. 856)
Bill No:	91
Sponsor/ Relevant Minister:	Minister of Parliamentary Reforms and Mass Media
Decision of the Supreme Court Announced in Parliament:	03. 05. 2016 (Hansard Vol. 243; No. 10; Col. 1374 - 1406)
Second Reading:	23. 06. 2016 (Hansard Vol. 244; No. 12; Col. 1406 - 1512) 24.06.2016 (Hansard Vol. 244; No. 13; Col. 1569 - 1661)
Committee of the Whole Parliament and Third Reading:	24.06.2016 (Hansard Vol. 244; No. 13; Col. 1661 - 1678)
Hon. Speaker's Certificate:	04. 08. 2016
Title:	Right to Information Act, No. 12 of 2016.

S.C. (SD) No. 27/2016

"HOMOEOPATHY BILL"

BEFORE :

Sisira J. de Abrew	-	Judge of the Supreme Court
Upaly Abeyrathne	-	Judge of the Supreme Court
Anil Gooneratne	-	Judge of the Supreme Court

S.C. (SD) No. 27/2016

Petitioners	:	Sithambiralalage Don Martin Sebastian Premalal Perera Nimal Gamini Wijethunge
Counsel	:	J. C. Weliamuna with Pulasthi Hewamanne and Sulakshana Senanayake for the Petitioners
Respondent	:	Hon. Attorney General
Counsel	:	Nerin Pulle, Senior Deputy Solicitor General.

Court assembled for the hearing of the Petition at 10.00 a.m. on 24.06.2016.

The Petitioners have filed this petition invoking the jurisdiction of this Court under Article 121 of the Constitution.

At the hearing before this Court, learned Senior Deputy Solicitor General raised a preliminary objection. He Submitted that in order to invoke the jurisdiction of this Court under Article 121 (1) of the Constitution, the petition should be filed within one week of the Bill being placed on the Order Paper of the Parliament. He further submitted that the Bill in this case has been placed on the Order Paper of the Parliament on 07.06.2016 and the petition has been filed on 15.06.2016. He therefore submitted that the Petitioners have not complied with Article 121 (1) of the Constitution and the petition should be rejected.

Court notes that the Bill has been placed on the Order Paper of the Parliament on 07.06.2016 and the petition has been filed on 15.06.2016. We therefore note that the petition of the Petitioners has been filed outside the time period stipulated in Article 121 (1) of the Constitution.

Mr. J. C. Weliamuna, learned Counsel appearing for the Petitioner concedes that the Bill was placed on the Order Paper of the Parliament on 07.06.2016. He further concedes that the petition has been filed after one week from the date on which the Bill was placed on the Order Paper of the Parliament. When we consider the above submissions we hold that the petition has not been filed in this Court within one week of the Bill being placed on the Order Paper of the Parliament and the Petitioners have failed to comply with Article 121 (1) of the Constitution. If the petition has not been filed within the time period stipulated in Article 121 (1) of the Constitution, the petition should be rejected.

Mr. Nerin Pulle, Senior Deputy Solicitor General submitted that the Petitioners have failed to deliver a copy of the petition filed in this Court to the Hon. Speaker of the Parliament within the time period stipulated in article 121 (1) of the Constitution.

Mr. J. C. Weliamuna concedes this position as well. However, Mr. Weliamuna cited the S. C. Special Determination 1 - 5/1998 dated 18.03.1998 and drew the attention of the Court to the maxim 'lex *non cogit ad impossibilia*' which was considered in the said Determination. He submitted that there was an impossibility in filing the petition within the time period stipulated in Article 121 (1) of the Constitution. Since the gazette in which the Bill was published was issued on 18.04.2016. He further submitted that the period between 18.04.2016 and 07.06.2016 was too long for the Petitioners to remember the events.

We now advert to the said contention. We note that the Bill was published in the Government Gazette dated 12th of April 2016 and the said Gazette was issued on 18th of April 2016. The Bill was placed on the Order Paper on 07.06.2016. When we consider the said time period, we are unable to agree with the contention of learned Counsel for the Petitioners. We would like to cite the following passage of the said Determination; "Such a determination can only be made where a petition duly invokes the jurisdiction of this Court; where it does not, this Court cannot entertain it and will not make a determination".

When we consider the submissions made by both parties, we hold that the Petitioners have failed to file the petition in this Court within the time period stipulated in Article 121 (1) of the Constitution. We further hold that the Petitioners have not delivered a copy of the petition filed in this Court to the Hon. Speaker within the time period stipulated in Article 121 (1) of the Constitution. For the above reasons, we uphold the preliminary objection raised by learned Senior Deputy Solicitor General. We further hold that the jurisdiction of this Court has not been duly invoked by the Petitioners.

For the above reasons, we reject the petition of the Petitioners. We do not proceed to make a 'determination'.

Sisira J. de Abrew
Judge of the Supreme Court.

Upaly Abeyrathne. J.
Judge of the Supreme Court.

Anil Gooneratne
Judge of the Supreme Court.

First Reading:	07. 06. 2016 (Hansard Vol.244; No. 06; Col. 533)
Bill No:	109
Sponsor/ Relevant Minister:	Minister of Health, Nutrition and Indigenous Medicine
Decision of the Supreme Court in Parliament:	05. 07. 2016 (Hansard Vol. 245; No. 01; Col. 01 - 04)
Second Reading:	05. 07. 2016 (Hansard Vol. 245; No. 01; Col. 68 - 134)
Committee of the whole Parliament and Third Reading:	05.07.2016 (Hansard Vol. 245; No. 01; Col. 134 - 148)
Hon. Speaker's Certificate:	27. 07. 2016
Title:	Homoeopathy Act, No. 10 of 2016.

S.C. (SD) No. 28/2016, S.C. (SD) No. 29/2016

"FISCAL MANAGEMENT (RESPONSIBILITY) (AMENDMENT) BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Priyantha Jayawardena, PC	-	Judge of the Supreme Court
Nalin Perera	-	Judge of the Supreme Court

S.C. (SD) No. 28/2016

Petitioner : Jayakodi Arachchige Sisira Jayakodi

Counsel : Canishka Witharana, Tissa Yapa and H. M. Thilakarathna

S.C. (SD) No. 29/2016

Petitioner : Bandula Chandrasiri Gunawardane

Counsel : Canishka Witharana, Tissa Yapa and H. M. Thilakarathna

Respondent : Hon. Attorney General

Counsel : Indika Demuni de Silva, Additional Solicitor General with Suren Gnanaraj, State Counsel

Court assembled for hearing at 11.30 a. m. on 24th June 2016.

A Bill titled, "Fiscal Management (Responsibility) (Amendment)" has been placed on the Order Paper of Parliament on 10th June 2016. Two Petitioners invoked the Constitutional jurisdiction of this Court vested in terms of Article 121 of the Constitution by presenting two Petitions dated 10th June 2016.

The above two Petitions presented in terms of Article 121 (1) of the Constitution were taken up for hearing and considered together since it was agreed that the grounds of constitutionality raised in both Petitions were identical.

Clause 1 of the said Bill was challenged on the basis that it is retrospective in operation and as such contravenes various Articles of the Constitution, including Articles 3, 4, 12 (1), 12 (2) and 14 (a) - (i).

Clause 2 of the said Bill was challenged on the ground that it provides for the increase in the ratio of Government Guarantee in relation to gross domestic product from 7 percent to 10 percent, thereby violates Articles 3, 4, 148, 149, 150 and 151 of the Constitution.

The thrust of the argument of the Learned Counsel for the Petitioner is that if the intended Bill is permitted to be operative with retrospective effect, the fiscal and legislative powers of the Parliament would be infringed.

In considering the submissions of Learned Counsel for the Petitioner, the Court has to be vigilant in exercising its jurisdiction under Article 121 of the Constitution, namely, to consider whether the Bill or any provision thereof is inconsistent with the Constitution, as provided in Article 123. The Court cannot exceed its jurisdiction in respect of Bills and grant relief to the Petitioner in the same way it exercises its jurisdiction in terms of Article 126 of the Constitution.

Article 75 of the Constitution provides that the legislative power of Parliament in enacting laws having retrospective effect may be exercised in the following manner:

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

Provided that Parliament shall not make any law-

(a) Suspending the operation of the Constitution or any part thereof, or

(b) Repealing the Constitution as a whole unless such law also enacts a new Constitution to replace it."

In this backdrop, I must emphasize that the power of Parliament to legislate prospectively as well as retrospectively is constitutionally guaranteed and in that behalf this Bill is no different from any other legislation. The legislature may increase the ratio of Government guarantee and decides upon either prospectively or even retrospectively. In relation to the Inland Revenue (Amendment) Bill (S.C.) (S.D.) 3/1980 this Court made the following observations.

> "….. 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**." (emphasis added)

The Supreme Court in S. C. (S. D.) No. 29/2004 regarding "Value Added Tax (Amendment) Bill", following its previous determination in S. C. (S. D.) 28/2004 observed as follows :-

> *"It is settled law, that law dealing with tax matters and otherwise valid creates no unreasonable restriction and would even be retrospective. Such retrospective taxation cannot be regarded as unreasonable. The general notion is that the Legislature is empowered to enact laws, which could be applicable with retrospective effect (Government of Andra Pradesh v. H. M. J. A. 1975 SC 2037). This would include the tax laws (Jawahaumal v. State of Rajasthan A. 1966 SC 764) and retrospective taxation cannot be regarded as unreasonable unless it is clearly prohibitive. More importantly, Parliament is empowered to enact laws having retrospective effect. Article 75 of the Constitution reads thus ….. The Bill does not refer to any kind of such amendment (i. e. suspending the operation of the Constitution or repealing the Constitution) and the relevant Clauses which are of retrospective effect are only dealing with fiscal matters…. We therefore determine that none of those provisions of the Bill are inconsistent with the Constitution or any provision thereof".*

Thus, I do not see any merit in the submission of the Learned Counsel for the Petitioner that the Bill cannot operate retrospectively. In deciding whether a fiscal legislation 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 it taxes some persons or objects and not others. It is only when within the range of its selection, the law operates unequally that it cannot be justified on the basis of any valid classification.

The next matter to be considered is whether Clause 2 of the said Bill violates any of the provisions of the Constitution. Article 148 of the Constitution provides thus:-

> *"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."*

The use of the word "shall" in Article 148 makes it mandatory that the full control of matters relating to "Public Finance" is with the Parliament. It imposes and obligation on Parliament to exercise control in the following manner as laid down in S. C. (S. D.) 3/2008 —

(i) Control over the sources of finances. 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; and

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

It must be noted that the increase of Government Guarantee from 7 percent to 10 percent arises from a budget proposal to give effect to the fiscal strategy and the policy of the Government. At the hearing before us, the Learned Additional Solicitor General tendered to Court the Budget proposals presented by the Hon. Minister of Finance on 20th November 2016. Item 422 of the said proposals reads thus:-

> *"Honourable Speaker, I propose to increase the Guarantee limit under the Fiscal Management (Responsibility) Act (FMRA) from current 7 percent, of GDP to 10 percent of GDP, and to enable the issuance of guarantees to Public Private Partnerships in which the Government holding is less than 50 percent, at a fee. Regulations will be issued enabling the issuance of Treasury Guarantees on a fee basis".*

Thereafter, on 13th May 2016, a Cabinet Memorandum was presented seeking Cabinet approval to:-

(i) Increase the Government guarantee limit from 7 percent to 10 percent as envisaged in the Budget of 2016

(ii) To publish the amendment to the Fiscal Management (Responsibility) Act in the Government Gazette; and

(iii) To place the Bill before Parliament to be enacted as law.

On 17th May 2016, the approval was granted by the Cabinet of Ministers to the Cabinet Memorandum dated 13th May 2016. Thus, it becomes the policy decision of the Government to increase the Government guarantee limit from 7 percent to 10 percent. The Court cannot strike down a policy decision taken by the Government merely because it feels that another policy decision would be wiser or logical. The Courts is not expected to express its opinion as to whether at a particular situation any such policy should have been adopted or not. It is best left to the Government to decide on such matters which affects the interests of the economic progress and fiscal management of the country. On being questioned, Learned Counsel for the Petitioner correctly conceded that "it is not for the Court to decide whether

the Government guarantee be increased to 10 percent or reduced to 4.5.percent. The proposed increase in the Government guarantee would ultimately be debated in Parliament and its approval be sought which is mandatorily spelt out in Article 148 of the Constitution, over public finance.

I must re - iterate that in a modern democracy the supreme power of the State is shared amongst the three principal organs, the Executive, the Legislature and the Judiciary. Each holds a distinct position in the overall constitutional scheme and has broadly separate functions and responsibilities from those vested in the other organs. The Constitution envisages that all three organs should function continuously according to their true nature and responsibilities. So that the totality of the constitutional system is held in constant balance. In this set up, it is not prudent or appropriate for the judiciary to encroach upon the territory of the legislature and fix the limit for the Government guarantee.

Learned Counsel for the Petitioner sought to argue that the fixing of Government guarantee goes beyond Article 148 of the Constitution thereby placing the country and the people at a risk that was never legitimately expected at the time of exercising their right of franchise.

Learned Additional Solicitor General contended that people have their elected representatives in Parliament who would finally authorize whether the limit fixed to the Government guarantee be varied or not. It was also argued by the Learned Additional Solicitor General that the policy behind the amendment is to promote the principles contained in Articles 27 (2) (c), (d) & (e) of the Constitution, as set out in the Directive Principles of State Policy which have to 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. We are in agreement with submissions made by the Learned Additional Solicitor General.

For the reasons stated above, we make a determination that neither the Bill as a whole nor any of its provisions is inconsistent with the Constitution.

K. Sripavan
Chief Justice.

Priyantha Jayawardene, PC
Judge of the Supreme Court.

Nalin Perera
Judge of the Supreme Court.

First Reading:	10. 06. 2016 (Hansard Vol.244; No. 09; Col. 907)
Bill No:	113
Sponsor/ Relevant Minister:	Minister of Finance
Decision of the Supreme Court Announced in Parliament:	05. 07. 2016 (Hansard Vol. 245; No. 01; Col. 05 - 08)
Second Reading:	09. 08. 2016 (Hansard Vol. 245; No. 07; Col. 1021 - 1086)
Committee of the whole Parliament and Third Reading:	09.08.2016 (Hansard Vol. 245; No. 07; Col. 1086 - 1088)
Hon. Speaker's Certificate:	23. 08. 2016
Title:	Fiscal Management (Responsibility) (Amendment) Act, No. 13 of 2016.

S.C. (SD) No. 30/2016 to S. C. (SD) No. 33/ 2016

"VALUE ADDED TAX (AMENDMENT) BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Priyasath Dep, PC	-	Judge of the Supreme Court
Upaly Abeyrathna	-	Judge of the Supreme Court

S.C. (SD) No. 30/2016

Petitioner : Jayakodi Arachchige Sisira Jayakodi

Counsel : Manohara de Silva, PC with Canishka Witharana, Tissa Yapa and H.M. Thillakarathne.

S.C. (SD) No. 31/2016

Petitioner : P. Liyanaarachchi

Counsel : Dharshana Weraduwage

S.C. (SD) No. 32/2016

Petitioner : Athauda Arachchige Nishad Buddhika Wimalasiri

Counsel : Dr. W. D. Rodrigo, PC with Oshada Rodrigo

S.C. (SD) No. 33/2016

Petitioner : Nishantha Wimalachandra

Counsel : Canishka G. Witharana, with H.M. Thillakarathne and Tissa Yapa

Respondent : Hon. Attorney General

Counsel : Farzana Jameel, Additional Solicitor General with Nerin Pulle, Deputy Solicitor General, Shaheeda Barrie, Senior State Counsel and Dr. Avanti Perera, Senior State Counsel.

Court assembled for hearing at 11.00 a.m. on 21.07.2016.

A Bill bearing the Title " Value Added Tax (Amendement)" was published in the Gazette of the Republic of Sri Lanka on 24.06.2016 and placed on the Order Paper of Parliament on 08.07.2016. Four Petitioners challenged the constitutionality of the Bill by separate petitions presented to this Court.

Upon Receipt of the Petitions, the Court issued notice on the Hon. Attorney General as provided in Article 134 (1) of the Constitution. Learned Counsel for the Petitioners in S.C.S.D. 30/16, S.C.S.D 32/16 and S.C.S.D. 33/16 while challenging Clauses 2,3,4,5,6,7,8,9,13,14

and 15 on the ground that the said Clauses violate Articles 3, 4, 11,12 (1),12 (2), 14, 27, 28 ,72, 73 ,74, 75, 80, 148,149 and 150 of the Constitution, took up the position in their petitions that the Bill was placed in Parliament violating the mandatory procedure laid down in Article 152 of the Constitution and therefore the entire Bill is inconsistent with Articles 4, 148 and 152 of the Constitution.

Learned Counsel for the Petitioners in S.C.S.D. 31/16 only challenged Clauses 2 (3), 3, 5 ,6, 10 (2) (b), 14 (2) (a), 14 (2) (b) and 15 on the basis that the Clauses violate Articles 3,4,12 (1) and 27 (1) of the Constitution.

Article 152 of the Constitution provides as follows:-

> *" 152. No Bill or motion, authorizing the disposal of, or the imposition of charges upon, the Consolidated Fund or other Funds of the Republic, or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force shall be introduced in Parliament except by a Minister, and unless such* ***Bill*** *or motion has been approved either by the Cabinet of Ministers or in such manner as the Cabinet of Ministers may authorize."*

According to Article 152;

No Bill or Motion

a. authorizing the disposal of, or the imposition of charges upon, the Consolidated Fund or other funds of the Republic; or,

b. the **imposition of any tax** or the repeal, augmentation or reduction of **any** tax for the time being in force.

c. shall be **introduced** in Parliament.

except

a. by a Minister, and

b. unless **such Bill or motion** has been **approved** either by the Cabinet of Ministers or in such manner as the Cabinet of Ministers may authorize.

It may be important to mention as to why Article 152 speaks of "Bills or Motion" that "shall be introduced in Parliament." The reason is that some fiscal matters need authorization by Parliament through an Act of Parliament and others need authority of Parliament by mere resolution brought by way of motion.

The following Articles specifically require either law or **resolutions** to be passed by Parliament;

Article 36 - pertaining to Salary and Pension of the President

Article 68 - pertaining to Allowances of Members of Parliament, including Speaker, Deputy Speaker, Ministers, Deputy Ministers etc. (either by law or by resolution)

Article 150 - pertaining to withdrawals from the Consolidated Fund (either by law or by resolution)

Article 154 B (12) - pertaining to salaries of Governors of the Provincial Councils.

Therefore it is seen that whenever the Constitution does not require a "law" to be passed by Parliament, but still require "authorization" of Parliament, it can be done by **resolution by way of a motion**."

The aforesaid Article 152 is a special provision brought in by the legislature as to Bills affecting "public revenue". The Bill in question no doubt seeks to increase value added tax and/or repeal any tax for the time being in force in keeping with the budget proposals of 2016. Article 148 makes it mandatory that no tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or **under the authority of a law passed by Parliament** or of any existing law. (emphasis added). Accordingly, Article 152 is a special provision dealing with the manner in which such a Bill affecting public revenue **shall be** introduced in Parliament. In order to satisfy the requirements contained in Article 152 the following conditions have to be satisfied—

(i) The **Bill** has to be approved by the Cabinet of Ministers or in any other manner the Cabinet of Ministers may authorize; and

(ii) It is only a Minister who can introduce such Bill in Parliament.

Article 78 (2) of the Constitution provides that the passing of a Bill by Parliament shall be **in accordance with the Constitution and the Standing Orders of Parliament**, (emphasis added). Thus, before a Bill is passed it has to not only satisfy the requirements of the Constitution but also the provisions contained in the Standing Orders.

The Standing Order No. 133 relating to "Public Money" reads thus :-

> *"133. Parliament will not proceed upon the consideration of any motion, Bill or amendment thereto authorizing disposal or imposition of charges upon the consolidated Fund or other funds of the Republic or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force unless introduced by a Minister who shall, before making such motion, introducing such Bill or moving such amendment,* ***signify to Parliament the approval of the Cabinet of Ministers to such*** *motion,* ***Bill*** *or amendment." (emphasis added)*

The fundamental rule of interpretation is that Article 152 of the Constitution is to be understood according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used as a whole. When we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning.

The combined effect of Article 152 read with Standing Order 133 makes it abundantly clear that prior to the presentation of Bill in Parliament it is mandatory that : -

(i) The approval of the Cabinet of Ministers on such **Bill** has to be obtained;

(ii) When introducing, the **Bill** has to signify to Parliament the approval of the Cabinet of Ministers; and

(iii) The **Bill** has to be introduced to Parliament by a Minister. (emphasis added)

The use of the words "shall be introduced in Parliament….. unless such Bill" in Article 152 of the Constitution and the words "Minister who shall before…. Introducing such Bill… signify to Parliament" in Standing Order 133 in our view impose a duty on the Minister to comply with those provisions. Thus, the provisions contained in Article 152 of the Constitution and Standing Order 133 are imperative in character and the failure to follow them render the subsequent proceedings a nullity. We would like to emphasize, when there are two Articles in the Constitution one dealing with the control of Parliament over "public finance" (Article 148) and the other dealing with "public revenue" (Article 152) the provisions of the latter Article should not affect the provisions of the former. However, where the Constitution makes specific provision regarding the procedure to be adopted in respect of Bill affecting "public revenue" (Article 152) that special provision has to be followed in order to achieve the intention of the legislature, before the Bill is introduced to Parliament in terms of Article 148, in other words, Article 152 being a Special Provision is to be strictly interpreted and complied with over any other provision in the Constitution applicable generally regarding enactment of laws. It is not permissible to contend that Parliament which include the Cabinet of Ministers in any event, finally decides, whether the Bill has to be passed in its entirety or not. If there is a flaw in the procedural step in introducing the Bill in Parliament, it is the paramount duty of this Court to ensure that constitutional provisions are not violated and the powers conferred upon each Branch of the Government by the Constitution is safeguarded.

Learned Additional Solicitor General sought to argue that the power of this Court to grant relief is limited to Article 123 since the jurisdiction of the Court was invoked by the Petitioners in terms of Article 121 of the Constitution. In short, her argument was that this Court cannot go into the due compliance of the legislative process in Parliament.

It would be worthwhile to mention that this Court is the ultimate interpreter of the Constitution and this Court is assigned the delicate task of determining the powers conferred upon each branch of the Government and whether any action of that branch transgresses such power. Article 124 of the Constitution referring to the validity of the Bills and the legislative process reads thus:-

> *" **124.** Save as otherwise provided in Articles 120 and 121, no Court or tribunal created and established for the administration of justice, or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or **its due compliance with the legislative process** on any ground whatsoever." (emphasis added)*

What is prohibited is not the Court examining "**due compliance with the legislative process**" under Articles 120 and 121, but examining such legislative process **other than** in situations mentioned in Articles 120 and 121. The opening sentence " **save as otherwise provided in Articles 120 and 121**", makes it very clear that **under Article 121 the legislative process can be examined.**

The aforesaid Article authorizes the Court to go into the question agitated by the Petitioners in S.C.S.D. 30/16, S.C.S.D. 32/16 and S.C.S.D. 33/16 on the basis that they are matters exclusively within the domain of this Court. It may be relevant to quote the following observations made by the Supreme Court of India in *S.P. Gupta and Others Vs. Union of India and Others* (1982) A.I.R. at 573.

" so long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history that the Consitution is the Suprema lex, the paramount law of the land and there is no department or branch of Government above or beyond it. Every organ of Government, be it the Executive or the Legislature or the Judiciary derives its authority from the Constitution and it has to act within the limits of its authority..."

Learned President's Counsel in S.C.S.D. 30/16 argued that Article 152 of the Constitution provides for a process before a fiscal Bill is presented to Parliament and that the Parliamentary proceedings of the legislative process will begin when the Bill is presented to Parliament. However, before the proceedings in Parliament commences, the legislative process commences with an act of the Executive. Though the Court will not interfere with proceedings of Parliament, it would definitely examine the vires of the acts of Executive.

Other than Private Members's Bills, all other Bills must comply with the process the Constitution presecribes. Accordingly, Counsel submitted that any step that needs to be taken by the Executive before a Bill is presented to Parliament is mandatory and must be strictly complied with.

It is therefore important to bear in mind that the built- in safeguards in the Constitution have to be duly complied with. If the Bill is presented to the Cabinet, it may or may not signify its approval. It may even approve the Bill subject to certain amendments. These procedural safeguards are the handmaids of equal justice and guarantee equal protection of law to the citizens of this country. In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication, beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specially pointed out. In case of doubt they are construed most strongly against the Government and in favour of the citizen.

It is a well settled principle of law that when the legislature has empowered an authority to impose tax after doing a certain act, it cannot impose the taxes unless that act is done and the authority must show, if challenged that the act was in fact done. (Vide Chairman Dhanbad Municipality Vs. Janesewar A.I.R. 1934 Pat 82 page 84)

When the Petitioners challenge that Article 152 of the Constitution has not been complied with, the burden is on the respondent to establish that the said Article had in fact been complied with.

Learned Deputy Solicitor General tendered to Court the following document :-

(i) A letter dated 09.03.2016 addressed to the Acting Secretary, Ministry of Finance by the Secretary to the Cabinet of Ministers.

(ii) A document containing the decision of the Special Cabinet Meeting held on 04.03.2016.

(iii) A letter dated 14.06.2016 addressed to Dr. R.H.S. Samaratunga, Secretary, Ministry of Finance by Mr. S. Abeysinghe, Secretary to the Cabinet of Ministers.

The first two documents referred to above show, the decision of the Cabinet of Ministers in the following manner (both documents have identical versions):-

Value Added Tax (VAT)

" The Cabinet was informed that the imposition of two VAT rates i.e. 8.0% and 12.5% instead of single rate of 11% as proposed the Budget Speech for 2016 is administratively cumbersome and will result in a shortfall in revenue collection further deepening the crisis. Therefore, it was agreed that the single VAT rate of 15% be imposed. The exemptions on telecommunication, private education and private health will be removed as proposed in the Budget Speech 2016.

The Cabinet took the cognizance of the fact that this increase of VAT will not have a substantial impact on the low income groups of the society as all essential food items and electricity are exempted from VAT. However, VAT will have to be imposed on selected wholesale and retail items excluding those exempted essential items."

The third document reads as follows:-

"Cabinet Decision

Given below is an extract of Item (47) of the Minutes of the Cabinet Meeting held on 2016.06.14.

Item (47)

Cabinet Paper No. 16/1126/719/060, a Memorandum dated 2016.06.13 by the Minister of Finance on " Value Added Tax (VAT), Nation Building Tax (NBT) and Income Tax Amendments". Cabinet noted that approval has already been granted at its Special Meeting held on 2016.03.04, to implement the tax proposals referred to under (a), (b) and (c) in the Memorandum. After discussion, it was decided to grant approval -

(i) To instruct the Legal Draftsman to draft legislation for the purpose, as proposed in the Memorandum; and

(ii) To submit the draft legislation prepared as at (i) above, to Parliament for approval, subject to following the relevant formalities.

It was also decided to treat this decision as confirmed and to authorize the Secretary to the Cabinet of Ministers to convey the same to the relevant authorities for necessary action accordingly."

The tax proposal referred to under (a) of the Cabinet Memorandum dated 13.06.2016 is as follows:-

"Rate to be increased from 11% to 15% instead of the budget proposal to increase VAT to 12.5% for service sector and 8% for imports and manufacturing sector. Further, it was proposed to remove exemption of VAT on telecommunication, health, wholesale and retail sector and to reduce the threshold for registration from Rs. 15 Million to Rs. 12 Million per annum.

These changes were implemented with effect from 02.05.2016……..

Cabinet approval is sought to direct Legal Draftsman to prepare draft legislations pertaining to the above Cabinet decisions and to send the draft legislation to Parliament after obtaining Attorney-General's approval."

Thus, it could be seen that after the draft legislation was prepared by the Legal Draftsman it was decided to send the said legislation to Parliament after obtaining the approval of the Attorney–General. No evidence was placed before Court to establish that the **Bill** was approved by the Cabinet of Ministers or authorized by the Cabinet before it was introduced in Parliament as provided in Article 152 of the Constitution. The Hansard of 8th July 2016, makes it clear that the Hon. Minister of Finance who introducted the Bill to Parliament, **did not signify to Parliament** the approval of the Cabinet of Ministers as required by Standing Order 133, before introducing the Bill. Provisions regulating the imposition, assessment and collection of taxes are to be given strict construction as they impose financial burden on the taxpayer. We are therefore of the view that provisions contained in Article 152 of the Constitution have to be strictly complied with as it relates to " public revenue."

Learned President's Counsel reminded us the observations made in S.C.F.R. Application 169/2016 - (S. C. Minutes of 22.06.2016) in the following manner:-

"It is a cardinal principal of interpretation that words in Article 148 must be understood in their natural, ordinary and proper sense. The golden rule is that the words must prima facie given their ordinary meaning. It is another rule of construction that when the words of the Constitution are clear, plain and unambiguous then the Court is bound to give effect to that meaning irrespective of the consequences. The Court can't brush aside the words used in Article 148 as being inappropriate or surplus. Thus, the Court reiterates that the Constitutional provisions must be interpreted having regard to the Constitutional objectives and goals and not in the light of how the Government may be acting at a given point of time. The Court has to uphold the principle of rule of law which is vital for the real establishment of democracy and the maintenance of the rule of law. Therefore far from interfering with good governance of the State, the Court helps the good governance by reminding the Executive and its officers that they should act within the four corners of the Constitution and not contravene any of its provisions"

Thus, in the same way Article 148 had to be complied with, Article 152 too should be strictly complied with and the Court can't brush aside the words used in Article 152 as being inappropriate or surplus.

Since the due process had not been complied with in terms of Articles 78 (2) and 152 of the Constitution before the Bill was introduced in Parliament, we make a determination in terms of Articles 120 and 121 read with Articles 123 and 152 of the Constitution that no determination would be made at this stage on the other grounds of challenge raised by the Petitioners.

We shall place on record our deep appreciation of the assistance given by the Learned Counsel for the Petitioners and the Learned Deputy Solicitor General who appeared for the Hon. Attorney General.

K. Sripavan
Chief Justice.

Priyasath Dep, PC, J.
Judge of the Supreme Court.

Upaly Abeyrathna, J.
Judge of the Supreme Court.

First Reading:	08. 07. 2016 (Hansard Vol. 245; No. 03; Col. 405)
Bill No:	136
Sponsor/Relevant Minister:	Minister of Finance
Decision of the Supreme Court Announced in Parliament:	09. 08. 2016 (Hansard Vol. 245; No. 07; Col. 946 - 952)
Remarks:	Withdrawn on 23.08.2016 (Hansard Vol:245; No.11; Col. 1558)

S.C. (SD) No. 34/2016

" NATION BUILDING TAX (AMENDMENT) BILL"

BEFORE	:		
	K. Sripavan	-	Chief Justice
	Anil Gooneratne	-	Judge of the Supreme Court
	Prasanna S. Jayawardena, PC	-	Judge of the Supreme Court
Petitioner	:	P. Liyanaarachchi	
Counsel	:	Dharshana Weraduwage	
Respondent	:	Hon. Attorney General	
Counsel	:	Mrs. Farzana Jameel, PC, Additional Solicitor General with Yuresha de Silva, Senior State Counsel	

Court assembled for hearing on 20th September 2016.

The Bill titled " Nation Building Tax (Amendment)" which seeks to amend certain provisions of the Nation Building Tax Act No.9 of 2009 was challenged by the Petitioner as to its constitutionality.

The Petitioner alleges that Clauses 1, 2 (2) (a) (iii), 2 (2) (b), 4 (2) (b) and 5 violate Articles 03, 04,12 (1),13 (6), 27 (1), 27 (2) (a),111 (c) of the Constitution. The main argument of the Petitioner is that the aforesaid Clauses, purporting to have retrospective operation violate Articles 03, 04 and 12 (1) of the Constitution.

Article 75 of the Constitution empowers the Parliament to make laws including laws having retrospective effect. Thus, it is well recognized that the power to legislate includes the power to legislate prospectively as well as retrospectively. This Court expressing its view in respect of a Special Determination on the Bill titled " Code of Criminal Procedure (Special Provisions)" S.C. S.D. 16/2012 and S.C.S.D 17/2012 noted as follows with regard to the enactment of retrospective legislation :-

> *"Retrospective legislation would in most instances validate or invalidate the rights of parties and therefore the mere fact that in this instance Clause 8 validates the acts referred to therein with retrospective effect does not necessarily mean that it constitutes a usurpation of judicial power by the legislature."*

Further, in relation to the **Inland Revenue (Amendment) Bill** S.C.S.D 3/1980, this Court made the following observations :-

> *" ....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."*** *(emphasis added).*

Thus, once the legislature decides to give retrospective operation to the Nation Building Tax (Amendment) Bill with effect from 1st January 2016, the Court should not substitute its own opinion for the opinion of the legislature. As Warrington L.J. in ***Short*** Vs. ***Poole Corp (1926) C.H. Division 60(91)*** stated that *" With the question whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."* Accordingly, the power to tax retrospectively is an incident of sovereignty and is co - extensive with the subjects to which the sovereignty extends. It is unlimited in its range acknowledging in its very nature no limits so that security against its abuse, if any, is to be found only in the responsibility of the legislature which imposes the tax on the people who are to pay it.

Learned Counsel for the Petitioner submitted that Clause 4 (2) (b) of the Bill introduces Nation Building Tax in addition to the existing tax on telecommunication levy. In the case of *Ananthakrishnan* Vs. *Madras AIR* (1952) 395 at 408 the Court observed as follows:-

> *"The Law undoubtedly is that the sovereign power of taxation is absolute, that it could be exercised up to any limit, that the determination of that limit is for the legislature and that it knows no limitations except what are prescribed by the Constitution. The laws fixing taxes cannot be questioned on the ground that the tax is heavy and oppressive..."*

Thus, it is well established in taxing matters, the legislature has the greatest freedom in selecting persons or objects it will tax and such steps taken by the legislature is not open to attack on the basis that the legislature taxes some persons or objects and not others. Once the legislature decides the limit within which the law applies, the law cannot operate unequally within the limit so decided by the legislature.

This Court in S.C. Special Determination No. 17/1997 (Bill to Amend the Inland Revenue Act No. 28 of 1979) referred to the approach that should be followed by Court with regard to taxing Statutes as follows :–

> *" The Principles that govern the approach of the Court to taxing statute, where the basis of classification is challenged, were lucidly set out by Hedge J. in the following terms:*
>
> *It is not in dispute that taxation laws must also pass the test of Article 14. That has been laid down by this Court in Moopil Nair v. State of Kerala (1961 3 SCR 77). But as observed by this Court in East India Tobacco Co.vs State of Andhar Pradesh (1963 1 SCR 404, 409), in deciding whether the taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14. It is well settled that a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably.*
>
> *Mr. Goonewardena cited the decision of the Supreme Court of India, Kerala Hotel Restaurant Association vs. State of Kerala and others, 1990 S.C. cases (Tax 309) where Verma J. stated " The extent to which the revenue is required from a particular source is a matter of fiscal policy and if the legislature chooses to be satisfied with the raising of that amount alone which can be recovered from the affluent, it cannot*

be faulted for not dragging the impecunious also in the tax net. Even otherwise the play in the joints permitted to the legislature for making classification in a taxing provision is greater....." In the Course of his judgement Verma J. cited the following passage from the judgment of Venkarachaliah J.in the case of P.M. Ashwathanarayana Setty Vs. State of Ikarnataka (1989) Supp (1) SCC (696): " Though other legislative measures dealing with economic regulations are not outside Article 14, it is well recognized 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 way."

The Court therefore does not see any violation of the provisions of the Constitution by imposing Nation Building Tax in addition to the telecommunication levy.

Counsel further argued that the validation Clause, namely, Clause 5, violates Articles 3, 4, 12(1) and 27(1) of the Constitution.The legal effect of the said Clause is to validate certain taxes calculated and collected by the Commissioner-General of Inland Revenue and the Director General of Customs under Sections 4 and 5 respectively of the Principal enactment from persons to whom the Act applies and further to provide that such provisions shall not affect any decision or order made by any Court or any proceedings pending before any Court in respect of any such tax collected.

This Court while expressing its determination on the " Powers of Attorney (Amendment) Bill - S.C. (S.D.) 8/2013 quoted with approval the following passage from M.M. Seervai in constitutional Law of India" 4th Edition, Vol 3 - page 2311:–

Citing the Supreme Court judgment of India in ***Mahal Chand Sethia*** Vs.***W.B.(cr. App 75 of 1969)*** Seervai states:

"An Amending Act Simpliciter will cure the defect in the statute only prospectively. But as a legislature has the competence to pass a measure with retrospective effect, it can pass an Amending Act to have effect from a date which is past. Usually legislatures pass Acts styled Amending and Validating Acts, the objects being not only to amend the law from a past date but to protect actions already taken which would otherwise be invalid as done without legislative sanction. There is nothing in our Constitution which creates a fetter on legislature's jurisdiction to amend laws with retrospective effect and validate transactions effected in the past"

Accordingly, the Bill which seeks to give effect to validate certain taxes collected from persons to whom this Act applies with effect from 1st January 2016 is not inconsistent with the provisions of the Constitution.

In the circumstances set out above, we determine that neither the Bill as a whole nor any of its provisions thereof is inconsistent with the Constitution.

K. Sripavan
Chief Justice.

Anil Gooneratne
Judge of the Supreme Court.

Prasanna S. Jayawardene, PC
Judge of the Supreme Court.

First Reading:	07. 09. 2016 (Hansard Vol. 246; No. 02; Col. 179-180)
Bill No:	135
Sponsor/ Relevant Minister:	Minister of Finance
Decision of the Supreme Court Announced in Parliament:	22. 09. 2016 (Hansard Vol. 246; No. 07; Col. 844 - 847)
Second Reading:	26.10.2016 (Hansard Vol. 247; No. 07; Col. 951)
Committee of the whole Parliament and Third Reading:	26.10.2016 (Hansard Vol. 247; No. 07; Col. 951 –954)
Hon. Speaker's Certificate:	07.11.2016
Title:	Nation Building Tax (Amendment) Act, No. 22 of 2016.

S.C. (SD) No. 35/2016

"ENGINEERING COUNCIL, SRI LANKA BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Priyantha Jayawardena, PC	-	Judge of the Supreme Court
Prasanna Jayawardena, PC	-	Judge of the Supreme Court

S.C. (SD) No. 35/2016

Petitioners	:	Habeeba Mohamed Maraikayar Mohamed Azeem Denesh Sanjeewa Ranasinghe Nallaiah Kangatharan Jagath Bandula Gurusinghe Gayan Weerasin Haripriya Kamalanath Hettiarachchi Susanthawenerath Yapa W.M. Kusal Madawa Chathuranga S.M. Pathum Lakshan Samarakoon Mabotuwana Vithanage Chandani Pujitha Uduwana S.A.S. Kalpa Prasanna Pieris Damitha Wijethunge S.M.T.L. De Silva Leyart Silva Wickramarachchige Udayasiri Perera Wickramarathna Chandana Haputhanthri H.H. Sri Lal
Counsel	:	Manohara de Silva, PC with Hirosha Munasinghe instructed by Nimal Hippola
Intervenient - Petitioners	:	Institution of Engineers Sri Lanka Wimalasena Gamage Jayawilal Meegoda Jayalath Arachchige Graine Rufus Jayalath
Counsel	:	Faisz Musthapha, PC with Faisza Markar and Pulasthi Rupasinghe Instructed by Mrs. U. Wickramaarachchi.
Respondent	:	Hon. Attorney General
Counsel	:	Janak de Silva, Senior Deputy Solicitor General with Manohara Jayasinghe, Senior State Counsel.

Court assembled for hearing at 10.30 a.m. on 7th October, 2016.

A Bill Titled " Engineering Council, Sri Lanka" which states in its Preamble "An Act to provide for the establishment of the Engineering Council, Sri Lanka which shall be responsible for the maintenance of professional standards and conduct of engineering practitioners; registration of different categories of engineering practitioners; and to provide for matters connected therewith or incidental thereto" has been gazetted on 1st August, 2016 and was placed on the Order Paper of Parliament on the 20th of September, 2016.

A Petition has been presented in terms of Article 121 (1) of the Constitution invoking the constitutional jurisdiction of this Court seeking a determination by this Court, in terms of Article 123 of the Constitution. The Intervenient - Petitioners filed a Petition seeking to be heard on this matter and this Court has in terms of Article 134 (3) of the Constitution, heard submissions made on their behalf.

At the hearing, the Learned President's Counsel appearing for the Petitioners submitted that, Clause 3 of the Bill which sets out the composition of the Council provides that, 9 members of the Council out of 13 members who are appointed by the Prime Minister to the Council are Chartered Engineers and, thereby Chartered Engineers would form the majority of the Council, which is inconsistent with Articles 3, 4 (d), 12 (1), 12 (2), 14 (1) (g) and 43 of the Constitution.

He further submitted that, although the provisions of the Bill vest the power of registering "Engineering Practitioners" in the Council and Clause 41 defines "Engineering Practitioners" to include Engineering Diplomats and Engineering Technicians, these two categories of "Engineering Practitioners" are not represent in the Council. On this basis, the Learned President's Counsel submitted that, Clause 3 (b) of the Bill is inconsistent with Article 12 (1) of the Constitution. He submitted that, the inconsistency would cease if provision is made in Clause 3 (b) by including the representation of these two categories on the Council.

Mr. Faisz Musthapa, PC who appeared for the Intervenient - Petitioners submitted that since Clause 3 (a) (ii) provides that the Director - General of Tertiary and Vocational Education Commission established under the Tertiary and Vocational Education Commission Act, No. 20 of 1980 or his representative is a member of the Council, there is a representation of Engineering Diplomats. However, both Senior DSG and Musthapha PC agreed that, Clause 3 (b) does not include a representation from "Engineering Technicians" in the Council.

We are in agreement that, the absence of any representation on the Council of "Engineering Technicians" who are a category of "Engineering Practitioners" referred to in Clause 41, results in a violation of Article 12(1) of the Constitution. However, the said inconsistency would cease if a suitable amendment is made providing to have representation of the Engineering Technicians.

The Learned President's Counsel for the petitioners also submitted that, in terms of Clause 3(b), the majority of the composition of the Council consisted of Chartered Engineers. He Submitted that all categories of "Engineering Practitioner" referred to in Clause 41 should have reasonable representation on the Council and that, Clause 3 (b) of the Bill should be amended to include a fair representation of all the categories referred to in Clause 41 of the Bill. He further submitted that the failure to have a fair representation of all the categories referred to above is inconsistent with Articles 12 (1) and 14 (1) (g) of the Constitution.

He further submitted that Clause 4(1) provides for the appointment of a Chartered Engineer as the Chairman of the Council and that, Clause 9 (1) and Clause 9 (2) (b) provide that, when the Chairman is absent, the members present could elect a Chairman for that meeting, and that, where there is an equality of votes at a meeting, the Chairman shall have a casting vote in addition to his original vote. The Petitioners submitted that, as the majority of the members of the Council consist of Chartered Engineers, this will invariably result in the appointment of a Chartered Engineer to Chair the meeting. Counsel argued that, as a result of these provisions, any determination by the Council affecting other Engineers will invariably be in favour of Chartered Engineers. On this basis Counsel submitted that, the said Clauses violate Articles 12 (1) and 12 (2) of the Constitution.

The Learned Senior DSG and Mr. Faisz Musthapha agreed that, said Clause 3 (b) should be amended to provide for a reasonable representation of all the categories of "Engineering Practitioner" referred to in Clause 41 of the Bill whilst Chartered Engineers should continue to from the majority of the members of the Council since there was rational and reasonable basis of classification which justified Chartered Engineers forming the majority of the Council.

Having considered the submissions we are of the opinion that the failure to include a fair representation of all the categories of " Engineering Practitioner" referred to in Clause 41 is inconsistent with Article 12 (1) and 12 (2) of the Constitution and such inconsistency would cease if Clause 3 (b) is amended so as to provide for a reasonable representation on the Council of all the categories of "Engineering Practitioners" referred to in Clause 41. We also agree with the submission made by the Learned Senior DSG and Mr. Faisz Musthapa that, there is a rational and reasonable basis of classification which justifies Chartered Engineers forming the majority of the Council.

The Learned President's Counsel for the Petitioners submitted that in terms of Article 3 of the Constitution sovereignty is vested in the people and is inalienable and that, the executive power of the people is exclusively exercised by the President in terms of Article 4 (b) of the Constitution. Further, though the said executive power may be exercised by the President it can be delegated, but not alienated. Article 43 (2) of the Constitution provides for the President to appoint Ministers to be in charge of the Ministries to be determined on the advice of the Prime Minister. However, Article 43 (3) has conferred power on the President to charge the assignment of subjects and functions and the composition of the Cabinet of Ministers at any time.

Learned President's Counsel submitted that, despite the above provisions of the Constitution which vest the aforesaid powers exclusively in the President, Clauses 3 (b), 4 (1), 4 (2), 4 (3), 4 (4), 4 (6), 5 (1), 5 (2), 8 (2), 8 (3) , 8 (4) (a), 8 (4) (b), 8 (5), 8 (6), 11, 16 (6), 20 (1) , 20 (3), 21 (1), 21 (8), 29, 30 (1), 30 (2), 31 (1), 31 (2), 34 (1), 34 (2), 38 (1), 38 (2), 38 (3) (a) and 38 (4) of the Bill vest, exclusively in the Prime Minister, the power of appointment and removal of the members of the Council, remuneration of the members of the Council, prescribing regulations regarding professional misconduct, appointing the members of the Appeals Board and making regulations relating to the Appeals Board, issuing directions to the Council, making regulations under the Act and several other powers which are executive functions within the meaning of Article 4 (b) of the Constitution.

He further submitted that, therefore, the aforementioned Clauses of the Bill are in violation of Articles 4 (b), 43 (1) and 43 (3).

Mr. Manohara de Silva drew the attention of Court to SD 04/2015 where this Court determined the constitutionality of the Bill entitled " Nineteenth Amendment to the Constitution", this Court determined that, *"Though Article 4 provides the form and manner of exercise of the sovereignty of the people, the ultimate act or decision of his executive functions must be retained by the President. So long as the President remains the Head of the Executive, the exercise of his powers remain supreme or sovereign in the executive field and others to whom to such power is given must derive authority from the President or exercise the Executive power vested in the President as a delegate of the President. The President must be in a position to monitor or to give directions to others who derive authority from the President in relation to the exercise of his Executive power. Failure to do so would lead to a prejudicial impact on the sovereignty of the People."*

Mr. Faisz Musthapha who appeared for the intervenient - Petitioners agreed with the aforesaid submissions of the Learned President's Counsel for the Petitioners.

We agree with the submissions made by the Learned President's Counsel for the Petitioners and the Intervenient - Petitioners that the executive power of the President cannot be alienated or abrogated under the Constitution. Therefore, we are inclined to agree that, the aforesaid Clauses amount to an alienation and/ or abrogation of the executive powers of the President conferred by the Constitution and thus, the said Clauses of the Bill are inconsistent with Article 4 (b) of the Constitution read with Article 3 and Articles 43 (1) and 43 (3) of the Constitution.

Therefore, we are of the opinion that the Clauses No.3 (b), 4 (1), 4 (2), 4 (3), 4 (4), 4 (6), 5 (1), 5 (2), 8 (2), 8 (3), 8 (4) (a), 8 (4) (b), 8 (5), 8 (6), 11, 16 (6), 20 (1), 20 (3), 21 (1), 21 (8), 29, 30 (1), 30 (2), 31 (1), 31 (2), 34 (1), 34 (2), 38 (1), 38 (2), 38 (3) (a) and 38 (4) are inconsistent with Articles 3, 43 (1) and 43 (3) and required to be passed by the special majority required under Article 84 (2) and approved by the people at a referendum by virtue of provisions of Article 83.

If the aforesaid Clauses of the Bill are amended by replacing the words " Prime Minister" with the word "Minister", there would be no inconsistency with the Constitution.

However, such an amendment would not preclude the President from assigning the subject and functions of the Bill under consideration to the Prime Minister under and in terms of Article 43 (3) of the Constitution.

The Learned President's Counsel for the Petitioners submitted that, although Clause 4 (4) states " The Prime Minister may for reasons assigned remove the Chairman from the office of Chairman", the guidelines for taking such a decision are not provided in the Bill, and thereby it violates Article 12 (1) of the Constitution.

In the determination of Private Medical Institutions (Registration Bill) S.D. 2 of 2000 it was held that "the Clause 'A minister may at any time after assigning reasons remove an appointed member of the Council from office.' would become subject to judicial review and the potentiality of arbitrary action being the basis of the inconsistency with Article 12 (1) would thus be removed."

In the light of the aforesaid determination, the Petitioners' contention that the said Clause is inconsistent with the Constitution cannot be sustained.

In the circumstances, we are of the opinion that Clause 4 (4) of the Bill specifies that, reasons need to be assigned for the removal of the Chairman from the office, and as such the said Clause is not inconsistent with the provisions of the Constitution.

The Learned President's Counsel submitted that according to Clause 9 (3) Chairman can refuse a meeting being called on a written request by a member of the Council, for justifiable reasons. He submitted that, guidelines have not been stipulated and that, therefore, conferring such discretion on the Chairman is arbitrary and violative of Article 12 (1) of the Constitution.

We are of the view that, Clause 9 (3) is inconsistent with Article 12(1). However, if the words "Justifiable reasons" in Clause 9 (3) are replaced with the words "for reasons assigned" the said inconsistency would cease to exist.

The Learned President's Counsel for the Petitioners submitted that Clause 39 (2) (e) does not provide the guidelines that are required to determine the roles, responsibilities and competence of different categories of the engineering practitioners registered under this Act and thereby it violates Article 12 (1) of the Constitution. The said Clause states as follows; "Providing for roles, responsibilities and competence of different categories of the engineering practitioners registered under this Act."

The Senior DSG submitted that a specific provision could be made to add the words " taking into consideration their academic qualifications and practical experience" at the end of the said Clause 39 (2) (e).

Clause 41 of the Bill defines who is to be regarded as an "Engineering Practitioner". Clause 41 further states that the Engineering Practitioners referred to in the said Clause should possess corresponding qualifications specified in Schedule A of the Bill: The Learned President's Counsel for the Petitioners submitted that Clause 14 (1) requires that the Engineering Practitioners shall not engage in practice of the Engineering profession unless such Engineering Practitioner is registered under Clause 15.

The Learned President's Counsel for the Petitioners submitted that the words "and recognized by the Council" do not give any guidelines for the criteria that needs to be adopted in using the discretion of the Council to accord recognition and that, therefore, the use of said phrase in Schedule A is violative of Articles 12 (1) and 14 (1) (g) of the Constitution.

He further submitted that the said institutions and the Tertiary and Vocational Education Commission, referred to in Schedule A are regulated by their respective Acts enacted by Parliament and therefore, that once an Engineering Practitioner is admitted as member of one of the said institutions or has been recognized by one of the said institutions or has been recognized by the Tertiary and Vocational Education Commission (as the case may be), there is no need for the Council also to separately review whether that person should be recognized as being eligible for registration as an Engineering Practitioner. On this basis, he submitted that, the use of said phrase in Schedule A is superfluous and violates Articles 12 (1) and 12 (2) of the Constitution. Faisz Musthapha, PC for the Intervenient - Petitioners too agreed with the said submission and both Learned President's Counsel suggested if the said words " and recognized by the Council" are deleted from Schedule A of the Bill, there will be no inconsistency with Articles 12 (1) and 12 (2) of the Constitution.

We are of the view that, if the words "and recognized by the Council" are deleted from Schedule A which relate to "Chartered Engineer", "Associate Engineer", "Affiliate Engineer" "Incorporated Engineer", "Engineering Diplomat" and "Engineering Technician (i)", it would cease the inconsistency with the Constitution.

In the foregoing circumstances, our determination is summarized as follows;

(i) The omission to nominate Engineering Technicians in the Council under Clause 3 (b) is inconsistent with Article 12 (1) of the Constitution. However, the said inconsistency would cease if a suitable amendment is made to have a fair representation of the Engineering Technicians, in the Council.

(ii) The failure to nominate a fair representation of all the categories of "Engineering Practitioners" referred to in Clause 41 is inconsistent with Article 12 (1) and 12 (2) of the Constitution and such inconsistency would cease if Clause 3 (b) is amended so as to provide for a reasonable representation on the Council of all categories of "Engineering Practitioners" referred to in Clause 41.

(iii) The Clauses No. 3 (b), 4 (1), 4 (2), 4 (3), 4 (4), 4 (6), 5 (1), 5 (2), 8 (2), 8 (3), 8 (4) (a), 8 (4) (b), 8 (5), 8 (6), 11, 16 (6), 20 (1), 20 (3), 21 (1), 21 (8), 29, 30 (1), 30 (2), 31 (1), 31 (2), 34 (1), 34 (2), 38 (1), 38 (2), 38 (3) (a) and 38 (4) are inconsistent with Articles 3, 43 (1) and 43 (3) and require to be passed by the special majority required under Article 84 (2) and approved by the people at referendum by virtue of provisions of Article 83.

However, if the aforesaid Clauses of the Bill are amended by replacing the words "Prime Minister" with the word " Minister", there would be no inconsistency with the Constitution and the Bill can be passed with a simple majority.

(iv) Clause 9 (3) is inconsistent with Article 12 (1). However, if the words " justifiable reasons" in Clause 9 (3) are replaced with the words "for reasons assigned", the said inconsistency would cease to exist.

(v) Clause 39 (2) (e) does not provide for the guidelines that are required to determine the roles, responsibilities and competence of different categories of the Engineering Practitioners registered under this Act and thereby it violates Article 12 (1) of the Constitution. However, if the said Clause is amended as suggested by the Senior DSG by adding the words "taking into consideration their academic qualifications and practical experience" at the end of the said Clause 39 (2) (e) the said inconsistency would cease to operate.

On the foregoing basis, we make a determination in terms of Article 123 (1) of the Constitution, that upon the aforesaid amendments being given effect to, the Bill and the provisions thereof, will be consistent with the Constitution.

We wish to place on record our deep appreciation for the valuable assistance rendered by the Senior Deputy Solicitor General and the President's Counsel representing the Petitioners and the Intervenient - Petitioners.

K. Sripavan
Chief Justice.

Priyantha Jayawardena, PC
Judge of the Supreme Court.

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

First Reading:	20. 09. 2016 (Hansard Vol. 246; No. 05; Col. 615)
Bill No:	137
Sponsor/ Relevant Minister:	Minister of Power and Renewable Energy
Decision of the Supreme Court Announced in Parliament:	20. 10. 2016 (Hansard Vol. 247; No. 05; Col. 602 - 607)
Second Reading:	23. 02. 2017 (Hansard Vol. 250; No. 11; Col. 1679 - 1756)
Committee of the whole Parliament and Third Reading:	23. 02. 2017 (Hansard Vol. 250; No. 11; Col. 1756 - 1772)
Hon. Speaker's Certificate:	09. 03. 2017
Title:	Engineering Council, Sri Lanka Act, No. 4 of 2017.

S.C. (SD) No. 36/2016 to S. C. (SD) No. 39/ 2016

"VALUE ADDED TAX (AMENDMENT) BILL"

BEFORE :

K. Sripavan	-	Chief Justice
Anil Gooneratne	-	Judge of the Supreme Court
Prasanna S. Jayawardena, PC	-	Judge of the Supreme Court

S.C. (SD) No. 36/2016

Petitioner : Udaya Prabath Gammanpila

Counsel : Manohara de Silva, PC with Arindra Wijesurendra and Hirosha Munasinghe

S.C. (SD) No. 37/2016

Petitioner : Bandula Chandrasiri Gunawardane

Counsel : Manohara de Silva, PC with Canishka Witharana

S.C. (SD) No. 38/2016

Petitioner : Jayakodi Arachchige Sisira Jayakodi

Counsel : Canishka Witharana with A.H.M. Tilakaratne

S.C. (SD) No. 39/2016

Petitioner : Gange Dinesh de Silva

Counsel : Shantha Jayawardene with Chamara Nanayakkarawasam

Respondent : Hon. Attorney General

Counsel : Farzana Jameel, Additional Solicitor General with S. Barrie, Senior State Counsel.

Court assembled for hearing on 17th October 2016.

A Bill titled " Value Added Tax (Amendment)" was published in the Government *Gazette* of 09.09.2016 and placed on the Order Paper of Parliament on 04.10.2016.

Four Petitioners invoked the jurisdiction of this Court by separate Petitions, seeking determination as to whether the Bill or any provision thereof is inconsistent with the Constitution.

The main grounds of challenge by the Petitioners and the determination of this Court may be broadly laid down as follows:-

(a) Clause 4 (15) provides that "the value of supply of healthcare services shall be the value of such supply less the cost of diagnostic tests, dialysis and services provided by the Out Patient Department but excluding medical consultation services", which description and /or classification has no rational or reasonable objective basis and is illogical, unreasonable, discriminatory and arbitrary.

It was submitted that the aforesaid Clause is inconsistent with the right to equality so long as the said Clause excludes **medical consultation services**. In deciding whether a taxation statute is discriminatory or not, it is necessary to bear in mind that the State has a wide discretion in selecting persons or objects it will tax and that a Statute is not open to attack on the basis 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 would be violative of Article 12.

More than three decades ago, the former Constitutional Court stated with regard to certain provisions of the Finance Amendment Act, of 1978 relating to the imposition of Turnover Tax *"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 statue 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".* [reported in Decisions of the Constitutional Court of Sri Lanka Vol. 6 1978 p. 1 at p. 3].

This Court in S.C. Special Determination No. 17/1997 (A Bill to amend the Inland Revenue Act No. 28 of 1979) quoted the following passage from the Judgement of **P. M. Ashwathanarayana Setty vs. State of Karnataka (1989) Supp (1) S.C. 118 :–**

> *"Though other legislative measures dealing with economic regulations are not outside Article 14, it is well recognized 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 way."***

Thus, the power to tax certain categories of healthcare services and excluding certain other categories is an incident of sovereignty and its abuse, if any, is to be found only in the responsibility of the legislature which imposes the tax to the constituency who are to pay it. Learned Counsel also submitted that, the proviso to Clause 4 (15) vests an unfettered power

in the Minister to make Regulations with regard to categories of supply healthcare services which may be excluded from the incident of VAT and that, the vesting of such unfettered power in the Minister is arbitrary and in violation of Article 12 (1) of the Constitution.

However, we not that, a reading of this proviso makes it very clear that, any proposed Regulations must have the concurrence of both the Minister in Charge of Finance and the Minister in Charge of Health and, thereafter, be considered by the Cabinet and be approved by the Cabinet and be published in the *Gazette*, and , thereafter, be placed before Parliament for approval and become effective only upon approval by Parliament.

In these circumstances, we do not see any merit in the submission of Counsel that Clause 4 (15) is inconsistent with Article 12 (1) of the Constitution.

(b) Clause 13 (2) of the Bill amends sub - section 3 of Section 25c of the Principal Enactment with retrospective operation with no rational nor reasonable objective basis and therefore is illegal, illogical, unreasonable, discriminatory and arbitrary.

Article 75 of the Constitution demonstrates the ambit of the legislative power of Parliament as follows:

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

Thus, the scope and ambit of the legislative competence to enact retrospective legislation is permitted by Article 75 of the Constitution. Retrospective legislation would in most instances validate or invalidate the rights of parties. The aforesaid Clause which is of retrospective effect is only dealing with fiscal matters.

Where a similar question arose regarding "Value Added Tax (Amendment) Bill" S.C. S.D. 29/2004, this Court following the previous Supreme Court Determination in S.C.(S.D) 28/2004 observed as follows:-

> *" It is settled law that law dealing with tax matters and otherwise valid, creates no unreasonable restriction and would even be retrospective. Such retrospective taxation cannot be regarded as unreasonable. The general notion is that the Legislature is empowered to enact laws, which could be applicable with retrospective effect (Government of Andra Pradesh Vs. H.M.J.A 1975 S.C. 2037). This would include the tax laws (Jawahaumal vs. State of Rajastan A 1966 SC 764) and retrospective taxation cannot be regarded as unreasonable unless it is clearly prohibitive. More importantly, Parliament is empowered to enact laws having retrospective effect."*

In the circumstances, we see no merit in the Petitioners' contention that, Clause 13 (2) of the Bill is inconsistent with the Constitution.

(c) Clause 17 (2) (C) removes " healthcare services provided by medical institutions or professionally qualified persons" from the list of exempted items commencing from the date on which the said Bill comes into force.

As we observed, in taxation matters, it is well established that the legislature has the greatest freedom in classification. The State has a wide discretion in selecting the persons, or objects it will tax and a Statute is not open to attack on the ground that it taxes some

persons or objects and not others. The law undoubtedly is that the sovereign power of taxation is absolute, that it could be exercised up to any limit, that the determination of that limit is for the legislature and not for the Courts. Legislative measures which Parliament intends to introduce in the exercise of its legislative power to pass tax statutes, could be considered as being in violation of Article 12 of the Constitution only where such measures are manifestly unreasonable or manifestly discriminatory. Other than in such strictly limited circumstances, it is no part of the function of a court to inquire into the exercise of legislative power of taxation with regard to the amount or persons or property on which a tax is imposed.

When a similar matter was argued in the Inland Revenue (Amendment) Bill - S.C.(S.D) 3/1980, this Court made the following observations:-

> *".....This is however, fiscal legislation and it is a matter for 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."*

Thus, there is no substance in the argument that Clause 17 (2) (c) is inconsistent with the Constitution.

(d) Clause 18 of the Bill purports to legalize the unlawful collection of Value Added Tax from 01.01.2016 until the date on which the said Bill comes into operation.

This Court dealt with an identical issue in the Bill titled "Nation Building Tax (Amendment)" S.C.(S.D.) 34/2016 and observed as follows: -

"Citing the Supreme Court judge of India in Mahal Chand Sethia Vs. W.B. (Cr. App 75) Seervai states thus:-

> *An amending Act simpliciter will cure the defect in the Statute only prospectively. But as the Legislature has the competence to pass a measure with retrospective effect, it can pass an Amending Act to have effect from a date which is past. Usually, Legislatures pass Acts styled Amending and Validating Acts, the object being not only to amend the law from a past date but to protect actions already taken which would otherwise be invalid as done without legislative sanction."*

In its Special Determination on the Bill titled "Code of Criminal Procedure (Special Provisions)" S.C. (S.D.) 16/2012 and 17/2012 this Court held that retrospective legislation may be enacted by Parliament to validate previous Acts.

The Court further noted that the mere fact that a particular Clause validates the Acts referred to therein with retrospective effect does not necessarily mean that it constitutes a usurpation of judicial power by the Legislature. The power to enact retrospective laws necessarily includes the power of Parliament to validate Acts, which unsupported by any law. However, the proviso to the said Clause makes specific provision that the said Clause shall not affect any decision or order made by any Court or any proceedings pending in any Court in respect of any tax collected from 01.01.2016 until the date on which the Bill comes into operation.

Learned Counsel for the Petitioners in S.C. (S.D) 36/2016; 37/2016 and 39/2016 sought to argue that Clause 18 of the Bill purports to legalize the unlawful collection of Value Added Tax from 01.01.2016 and if not paid that it would create an offence retrospectively, violating Article 13 (6) of the Constitution.

We must state that provisions regarding the offence and the imposition of penalties already exist in the Statute book itself and are not newly created. What is prohibited by Article 13 (6) is the retrospective creation of an offence or imposition of a penalty for any offence which is more severe than the penalty in force at the time the offence was committed. The Supreme Court while making its determination on the Bill titled "Code of Criminal Procedure (Special Provisions)" S.C. (S.D.) 16/2012 and 17/2012 observed as follows:-

> *"It is pertinent to note that the Constitution prohibits retrospective legislation by Parliament only to the extent set out in Article 13(6). Article 13(6) is applicable in instances where an offence is* ***created*** *with retrospective effect or where the penalty is enhanced with retrospective effect and subject to this limitation Parliament can enact laws with retrospective effect."*

Learned Additional Solicitor General argued that Value Added Tax Act is not a penal statute. The object of the said Act is to charge a tax on the "added value" from the consumer and to pay the amount so recovered to the Inland Revenue. In terms of Section 2 of the said Act Only a " registered person" can charge the tax at the point of supply. In terms of the Bill, in order to be a " registered person" one has to have a turnover of taxable supplies of goods to the value of Three Million Rupees per quarter. Those who satisfy the threshold requirement shall register in terms of Clause 7 only after the Bill becomes law. If such a person has not collected the "tax" at the time of supply he may establish such fact to the Inland Revenue, and shall not become a "defaulter". Thus, the object of the Act is not to recover the tax from those "registered persons" who have not collected the tax as they were not legally obliged to collect same, but from those who have collected it for the period given in Clause 2 and not paid the same to the revenue. In any event if a person has charged the Value Added Tax and not remitted to the revenue, it becomes a civil liability and Article 13(6) of the Constitution would not apply. The alternative argument put forward by the Additional Solicitor General was Article 13 and its sub articles apply to a criminal justice system where trial and punishment for an offence is involved and not to a taxing statute; which is not penal in substance.

Learned Additional Solicitor General referred to Court an Article title "Constitutionality of Retroactive Tax Legislation" by the Congressional Research in the U.S. which at page 6 states thus:-

> *"From its earliest days, the Court has interpreted the Clause [Ex. Post Factor Clause] to apply only to criminal punishment. Thus, the analysis begins with determining as a matter of statutory construction, whether the legislation in issue is civil or criminal, Taxation is typically not a criminal punishment and therefore the Ex. Post Facto Clause is generally understood not to apply to tax legislation"*

Thus, the words "offence" and "penalty" referred to in Article 13 (6) contemplate the criminal offences proper and the sanctions of punitive nature. The guarantee of Article 13 (6) would not be applicable in case of proceeding initiated under a taxing Statute as the penalty concerned is of revenue nature. (Vide Fundamental Rights in Sri Lanka - A Commentary (1993) by S. Sharvananda - page 162)

Thus, we do not see any merit in the submission of the Counsel for the Petitioners.

(e) Though not set out in their Petitions, Learned President's Counsel and Learned Counsel for the Petitioners also submitted when this matter was taken up for hearing, that Clauses 2 (2), and (3) of the Bill which seek to amend Section 2 of the Principal Enactment, Clause 3 of the Bill which seeks to amend section 3 of the Principal Enactment, Clause 5 of the Bill which seeks to amend Section 5 of the Principal Enactment and Clause 7 of the Bill which seeks to amend Section 10 of the Principal Enactment have the effect of retrospectively increasing the rate of Value Added Tax for the periods specified in these Clauses and retrospectively reducing the threshold beyond which a person requires to charge Value Added Tax on supplies made by him and to register under the Principal Enactment.

As set out earlier, the Legislature has the power to enact taxation laws creating taxes which apply retrospectively to periods of taxation prior to the Statue. Thus, we are of the view that, the fact that, these Clauses related to period of which are time prior to the Bill, do not render these Clauses inconsistent with the Constitution.

The Petitioners have also submitted that, the above Clauses have the effect of requiring persons, who were hither to not liable to *charge* Value Added Tax at the time of supply to have charged Value Added Tax for the periods referred to in these Clauses despite these periods of time being *prior* to the date of the Bill. In this connection, they refer to Section 2 (1) (a) of the Principal Enactment which requires a person to charge Value Added Tax at the time of supply. The Petitioners submit that, in these circumstances, the non - charging of Value Added Tax for the periods referred to in these Clauses (which are prior to the date of the Bill), will render such persons guilty of offences under the Principal Enactment even though such persons were unaware that they should charge Value Added Tax during such periods of time.

However, these submissions are incorrect since, as we have stated above, Section 2 of the Principal Enactment makes it clear that, only a "registered person" is required to charge Value Added Tax at the time of supply. Therefore if a person was not liable in terms of the Principal Enactment to charge Value Added Tax during the aforesaid periods referred to in these Clauses, he cannot be liable to *have charged* Value Added Tax during these periods.

In this connection, we note the submissions made on behalf of the Honourable Attorney General that, "*The intention is that any supplier whose turnover or volume of suppliers exceeds such sum* ***will be*** *required to register. Thus the question of not having collected tax from 1st April 2016 until the Act comes into force will not arise* ***because VAT can be collected only after registration****. In such a case, since such persons have not registered before,* ***there*** *will be no legal requirement or indeed the possibility of his having charged VAT." and " Thus although registration is* ***based on the figures/ turnover in the past (and to that extent looks to the past) the consequences of registration, namely the obligation to charge VAT at the new rate, will arise only after registration.*****"**

We have examined the rest of the Clauses of the Bill and agree with the Learned Additional Solicitor General that the remaining Clauses of the Bill are not inconsistent with the Constitution. We therefore determine that neither the Bill nor any provision thereof is inconsistent with the provisions of the Constitution.

We wish to place on record our appreciation of the valuable assistance rendered to Court by Counsel in examining the constitutionality of the Bill.

K. Sripavan
Chief Justice.

Anil Gooneratne, J.
Judge of the Supreme Court.

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

First Reading:	04. 10. 2016 (Hansard Vol.247; No. 01; Col. 72)
Bill No:	140
Sponsor/ Relevant Minister:	Minister of Finance
Decision of the Supreme Court Announced in Parliament:	25. 10. 2016 (Hansard Vol. 247; No. 06; Col. 611 - 616)
Second Reading:	26. 10. 2016 (Hansard Vol. 247; No. 07; Col. 958)
Committee of the whole *Parliament and Third Reading:*	26. 10. 2016 (Hansard Vol. 247; No. 07; Col. 958 - 984)
Hon. Speaker's Certificate:	01. 11. 2016
Title:	Value Added Tax (Amendment) Act, No. 20 of 2016.

DECISIONS
OF
THE SUPREME COURT
ON
PARLIAMENTARY BILLS
2017

D I G E S T

S. C. (SD) No. 01/2017 to S.C. (SD) No. 04/ 2017

"FOREIGN EXCHANGE BILL"

BEFORE :

S. Eva Wanasundera, PC	-	Acting Chief Justice
B. P. Aluwihare, PC	-	Judge of the Supreme Court
Prasanna S. Jayawardena, PC	-	Judge of the Supreme Court

S.C. (SD) No. 01/2017

Petitioner	:	N. Dharshana Weraduwage
Counsel	:	N. Dharshana Weraduwage (appeared in Person)
Respondent	:	Hon. Attorney General
Counsel	:	Arjuna Obeysekera, Senior Deputy Solicitor General, Ms. Anusha Jayatileke, State Counsel

S.C. (SD) No. 02/2017

Petitioner	:	Bandula Chandrasiri Gunawardena
Counsel	:	Canishka Witharana
Respondent	:	Hon. Attorney General
Counsel	:	Arjuna Obeysekera, Senior Deputy Solicitor General, Ms. Anusha Jayatileke, State Counsel

S.C. (SD) No. 03/2017

Petitioner	:	Nagananda Kodituwakku
Counsel	:	Nagananda Kodituwakku (appeared in person)
Respondent	:	Hon. Attorney General Ravi Karunanayake
Counsel	:	Nerin Pulle, Deputy Solicitor General, Suren Gnanaraj, Senior State Counsel

S.C. (SD) No. 04/2017

Petitioner	:	Ekanayake Mudiyanselage Athapaththuwe Gedara Hasitha Chathuranga Ekanayake
Counsel	:	Canishka Witharana
Respondent	:	Hon. Attorney General
Counsel	:	Nerin Pulle, Deputy Solicitor General, Suren Gnanaraj, Senior State Counsel

Court assembled for the hearing on 24.04.2017 at 10.00 a.m. and Court finalized the Determination on 28.04.2017.

The Bill entitled "Foreign Exchange" was published in the Gazette of the Democratic Socialist Republic of Sri Lanka on the 24th March, 2017 and placed on the Order Paper of Parliament on the 7th April, 2017.

The Petitioners by their Petitions filed under the numbers as aforementioned have invoked the jurisdiction of the Supreme Court under Article 121 read with Article 120 of the Constitution challenging the constitutionality of the Bill on the ground that Clauses 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 16, 17, 18, 19, 21, 22, 24, 25, 26, 29, 30 and 32 of the Bill entitled "Foreign Exchange (An Act to provide for the promotion and regulation of foreign exchange; to vest the responsibility for promoting and regulating foreign exchange in the Central Bank as the Agent of the Government; to provide for the repeal of the Exchange Control Act (Chapter 423); and to provide for matters connected therewith or incidental thereto) are inconsistent with Articles 3, 4, 12 (1), 12 (2), 14 (1) (g), 75 and 148 of the Constitution.

These Petitions were referred to this Bench by His Lordship the Chief Justice and were taken up for consideration together on the 24th of April, 2017 with the consent of all parties.

All Counsel who appeared for the Petitioners made submissions to the effect that the provisions of the Bill would result in the Central Bank of Sri Lanka being divested of the independence which is vested in the Central Bank. It is therefore necessary to examine whether the provisions contained in the Bill in fact takes that independence away from the Central Bank which was created by the Monetary Law Act as well as how the Central Bank was placed in the Exchange Control Act which the Bill moves to repeal and replace.

It is noted that the provisions in the Bill does not propose any changes to the duties and functions of the Central Bank which are specified in the Monetary Law Act. The Bill in fact has no effect on the provisions of the Monetary Law Act which will continue to remain in full force. Thus, the Central Bank will continue to be required by the Monetary Law Act to perform the duties and functions described in Chapter IV and Chapter V of the said Act. Exchange Control can be described as various methods of control by which transactions in foreign currencies and foreign exchange within Sri Lanka that are implemented by the Central Bank.

Clause 2 (2) of the Bill reads as follows:

The Minister assigned the subject of the Central Bank may, from time to time, issue such directions as may be necessary for the implementation of the provisions of this Act and it shall be the duty of the Monetary Board to cause these directions to be carried out.

The Petitioners contention is that the Minister is a political figure and that the directions given by the Minister to be carried out by the Monetary Board could be arbitrary and as such that Clause is inconsistent with Articles 3, 4 (a), 14 (1) (g) and 148 of the Constitution. It is mentioned in general in all the Petitions. The Petitioners contend that the power conferred on the Minister to issue directions on the Central Bank and the Monetary Board would result in that agency losing their independence as guaranteed by the Monetary Law Act and the Exchange Control Act and would subject that institution, namely the Monetary Board, created by Parliament, to the arbitrary whims of the Minister.

The functions of the Central Bank are two fold and can be categorized as core functions and agency functions according to the provisions in the relevant Acts of Parliament. In terms of the Monetary Law Act, 'Economic and Price Stability' and 'Financial System Stability' are core functions of the Central Bank. The functions of the Central Bank relating to 'Foreign

Exchange Management' are set out in Chapters IV and V of the Monetary Law Act and the functions relating to 'Public Debt Management' are set out in Part VI of the Act. Clause 2 of the Bill does not seem to change the existing role of the Central Bank in relation to **the foreign exchange management** contained in the Monetary Law Act.

Apart from that, the Exchange Control Act, No. 24 of 1953 as amended, which is to be repealed by this Bill, as at this moment contains a similar Section, *i.e.* Section 2 (1) which reads as follows:-

"The Central Bank of Ceylon shall as agent of the Government, be responsible for carrying out the provisions of this Act, and it shall be the duty of the Monetary Board to cause those provisions to be carried out **in accordance with such directions as may from time to time be issued in that behalf by the Minister."**

The Central Bank **is not an autonomous institution.** It is an **agent of the government which would be accountable to the Executive, the Parliament.** The Government will regulate the activities of the agent through directions by the Minister who is a member of the Government. The Minister cannot give directions at his whims as alleged but **only for the implementation of the provisions of the Act.** The link between the Government and the Central Bank was very much explained in the report of John Exter at the time the Monetary Law Act was going to be established, on "the Establishment of a Central Bank of Ceylon". He has stated that "No Agency which is a creature of the Government can be entirely independent of the Government. While the Government may be prepared to give an independent regulatory agency rather wide discretion in a field such as that of money, there is no gain saying that in the last analysis the Government must assume responsibility for monetary policy as for other policies. The ideal which it is hoped that the proposed law will achieve is one in which there will be continuous and constructive co - operation between the Monetary Board and the Government."

It is also observed by this Court that many sections such as Sections 44, 46, 47, 52 (7), 52 (8) of the existing law, *i.e*. the Exchange Control Act are clear examples to be understood that the **Central Bank is merely carrying out an agency function** vested in it by the Exchange Control Act, and **has been at all times subject to the control of the Minister.**

As such, this Court holds that Clause 2 of the Bill is not inconsistent with the Articles of the Constitution.

Clause 4 of the Bill speaks about three categories of dealers in foreign exchange, namely authorized dealers, restricted dealers and the new category named as "any person who is granted special permission for a specific purpose". The Petitioners contend that by appointing this third category, it would jeopardize the national economy **on the basis that such persons would not be accountable to the Central Bank or the Parliament.**

Clause 4 (2) (c) provides for the Central Bank to grant special permission to any such person for a specific purpose and subject to such terms and conditions as may be prescribed by the Minister by an Order published in the Gazette. It is understood that the conditions of the permit issued to such a person are under the guidelines and directions issued by the Central Bank in terms of Clause 9 of the Bill. In case of any action contrary to the said terms and conditions, there are sanctions provided, including the suspension of the permit. Another safeguard is the publication in the Gazette.

In this regard however this Court wishes to place a quote from the Determination in SCSD 05/2014. It states that " When considering the exercise of statutory power certain fundamental principles can never be overlooked. The first is that our Constitution and System of Courts are founded on the rule of law; secondly statutory power conferred for public purpose is conferred as it were upon trust and not absolutely."

However, this Court observes that, the Minister determines a class of persons who are neither authorized dealers nor restricted dealers. The said authorized dealers and the restricted dealers obtain permission from the Central Bank to deal in foreign exchange. The class of persons who is determined by the Minister at his discretion only, is published by an Order in the Gazette. This Order of the Minister does not seem to be subject to the checks and balances in our system because it is not made imperative to be placed before Parliament, unlike the Regulations made by the Minister under Clause 28 (3) of the Bill which are placed before the Parliament for approval and shall be deemed to be rescinded if not approved by Parliament.

But, this Court observes that in this Clause 4 (2) (c), the words "subject to the provisions of Section 9" is included at the commencement. Section 9 (4) states that "The Central Bank may from time to time subject to the approval of the Minister issue guidelines and directions to any person, class or classes of persons not being an authorized dealer or restricted dealer, permitted to deal in foreign exchange within Sri Lanka under paragraph (c) of subsection 2 of Section 4." It is stressed that the Central Bank is in authority in issuing guidelines and directions and making the list of such person. The Minister will not be in a position to determine a person on his own but will be guided by the guidelines and lists issued by the Central Bank.

This Court therefore holds that the said Clause 4 (2) (c) is not inconsistent with the Articles of the Constitution.

The Petitioners **contend again**, that Clause 4 is designed in such a way to exclude regulation of Gold which was regulated hitherto through the Exchange Control Act which can have allegedly "unforeseeable consequences endangering the national economy, security, fundamental rights and sovereignty of the people of Sri Lanka." The Petitioners also contend that this Clause excludes the application of uniform rates of exchange.

It is to be noted that at the time of enactment of the Exchange Control Act, the Bretton Woods Agreement for the management of currencies and exchange rates was in effects enable countries to settle international balances of payments in US Dollars. US Dollars were convertible to Gold a fixed exchange rate of USD 35 per ounce. It was therefore necessary that, like foreign exchange, Gold too was to be regulated. In 1971 the convertibility of USD to Gold was ended. But the Exchange Control Act was not amended. In 2002, the Central Bank, by an Order published in **Gazette No. 1263/10** dated 22.11.2002 granted general permission in terms of Sections 5, 21, and 22 of the Exchange Control Act for any person to buy, sell, import or export gold, without any restrictions **but subject to the requirement that the quantity, value and purpose of such gold must be declared to Sri Lanka Customs**. In 2010, the Controller of Exchange by Regulations published in **Gazette No. 1730/03** dated 02.01.2012 specified that an import license would be required for the importation of Gold and that such importation shall be subject to such restrictions as may be imposed by the Controller of Import and Export.

In the said circumstances, since sufficient provisions exist in the Customs Ordinance and the Import and Export Control Act to regulate the import and export of Gold, the Regulation of Gold by the Central Bank, had been relaxed since 2002. The Central Bank and the Department of Exchange Control has had no control since then regarding Gold. It is observed that many of the provisions contained in the Exchange Control Act are no longer applicable or relevant in the present economic setting which has developed as explained. The State has explained the scenario well in their submissions culminating to the need to replace the existing Exchange Control Act with the new law to promote and regulate foreign exchange with a view to assist the growth of the economy in that regard. We believe that there is no reason to state that Clause 4 is designed to exclude regulating Gold business to the detriment of the people and we hold that the said Clause is not inconsistent with the Constitution.

The application of uniform rates of exchange has also changed with time and the amendment which was brought to amend the Monetary Law Act in 2002, namely amendment Act, No. 32 of 2002 has placed Section 76A within the Monetary Law Act which explicitly demonstrates that Sri Lanka does not adopt a fixed exchange rate policy any longer and the exchange rates are now market determined.

Moreover, in 1994, Sri Lanka adopted Article VIII of the Articles of Agreement on the International Monetary Fund, which required the member countries to remove all foreign exchange restrictions relating to 'current transactions'. The Bill has considered the development that had already taken place with regard to matters concerning Foreign Exchange and placed the necessary provisions and done away with other provisions such as Gold exchange which is not necessity any more. The Bill is drafted to promote and regulate foreign exchange in a manner that would assist growth of the economy and development of the country having regard to the present economic framework.

Clauses 5, 6 and 7 deal with current and capital transactions by dealers. Even though the Petitioners contend that money laundering can take place, we observe that the said provisions do not provide any exemption or immunity to any person from the prevention of Money Laundering Act, No. 5 of 2006.

However, Clause 6 (1) provides that any person shall be entitled to deal in foreign exchange for a 'current transaction' through an authorized dealer or through a restricted dealer. A current transaction is defined in Clause 32 read with the Schedule, which list contains four types of transactions. Therefore the authority given by Clause 6 (1) to deal in foreign exchange is dependent on the types of transactions listed in the Schedule. If the proposed transaction is not one which falls within one of the said four types of transactions, the proposed transaction would be unlawful if it is carried out.

The maintenance of the Rule of Law requires that the Bill should contain provisions which seek to prevent the occurrence of unlawful transactions as far as is reasonably possible. The objective can be achieved by requiring the authorized dealer or restricted dealer to verify that the proposed transaction is, in fact a 'current transaction'. However, Clause 6 (3) as it stands does not statutorily require the authorized dealer or restricted dealer to verify that the proposed transaction is, in fact, a 'current transaction'. Instead, Clause 6 (3) only provides that, the authorized dealer "**may** request the person……". Thus as it stands Clause 6 (3) is arbitrary and inconsistent with Article 12 (1). This inconsistency will be removed by substituting the word "may" in Clause 6 (3) with the word "shall". The same inconsistency prevails in Clause 7 (6), and as such the inconsistency will cease to be if the word 'may' is substituted with the word '**shall**'.

The Petitioners contend that Clause 8 (3) read with clause 29 of the Bill serves to remove criminal liability with retrospective effect, of persons who had previously engaged in illegal transactions in contravention of the provisions of the Exchange Control Act. We observe that Clause 8 (3) seeks only to exempt certain persons of paying any other fee, tax or surcharge levy. It does not seem to provide amnesty to those who had contravened the provisions of the Exchange Control Act. Clause 29 provides for the continuance of all prosecutions and investigations under the Exchange Control Act.

We observe that the offences recognized under the Monetary Law Act, the Prevention of Money Laundering Act, the Convention on the Suppression of the Terrorist Financing Act or the Bribery Act continues to operate and any person who has committed an offence with regard to foreign exchange cannot evade getting penalized under the provisions contained in the said Acts even though the Bill in hand does not provide for any sanctions for penal offences. The reasoning behind having no penal provisions seems to be due to the 'liberalization of exchange controls' under the Bill.

The Petitioners once again complain that Clauses 9, 10 and 11 contain provisions granting excess power to the Minister who can act arbitrarily which would be inconsistent with Article 12 (1) of the Constitution.

With regard to the matters falling within the purview of the Bill, the Government is the principal; the Central Bank is the Agent; and the Minister cannot act arbitrarily due to the safeguards within the provisions itself with regard to current transactions and capital transactions. However, the contentions of the Petitioners with regard to the actions of the Minister as inconsistent with the Articles of the Constitution can be remedied by changing the wording in Clause 11 (1) by deleting the words "may with the approval of the" and substituting the same with the words, "may, upon the Minister being informed", to read the amended portion or Clause 11 (1) as "…… the Central Bank may, upon the Minister being informed, issue a notice directing any such authorized dealer or restricted dealer ……". The same amendment can be done to Clause 11 (5) of the Bill so that there would not exist any inconsistency thereafter.

With regard to penalties that could be imposed for a violation on an authorized dealer or a restricted dealer vis a vis the penalty that can be imposed on a person who is neither an authorized dealer nor a restricted dealer, it is observed that there exists a disparity of the suggested penalties. This Court is of the view that if it is corrected in the following manner this disparity will cease to be. Clause 11 (5) should be amended to read as follows:

"Where any other person, classes of persons, not being an authorized dealer or restricted dealer acts in violation of the provisions of paragraphs (a), (b), (c), and (d) of subsection (1), the Central Bank may, after giving such person a reasonable opportunity of being heard, require such person in writing, to pay as a penalty a sum not exceeding rupees one million or in case of a violation of paragraphs (a) or (b) of subsection (1) to pay a penalty of an amount not exceeding the amount or value of such current transaction or capital transaction or value of such foreign asset or any part thereof in foreign exchanges or Sri Lanka currency together with such expenses incurred by the Central Bank for the detection and investigation of such transaction."

The Petitioners contend that the role of the Minister in appointing the members of the Board of Inquiry under Clause 13, amounts to an interference by the Minister. We observe that the Minister is required to appoint persons of integrity who would act independently and according to law. The Minister cannot go beyond these safeguards.

Even though some of the Petitioners have contended that Clauses 14, 15, 16, 17, 18, 19 and 21 are inconsistent with the Constitution the reasons for that contention is not placed before this Court and neither can this Court find any reason for that contention.

The Petitioners contend that Clause 22 of the Bill provides for a **discretion** to the Minister to comply with the advice given by the Monetary Board and **if not complied with**, it could have unforeseeable consequences on the economy of the country. The Petitioners seem to draw the attention of Court as to what would happen if the Minister in his own way fails to comply with the advice of the Monetary Board.

This Court observes that Clause 22 has been put in place for preservation of financial stability in the country. It provides for a procedural framework within which the Government shall take steps as may be necessary to counter a potential threat to financial stability of the country arising as a probable result of a high or low remittance of foreign exchange into or out of Sri Lanka. The Minister acting on the advice of the Monetary Board and with the approval of the Cabinet of Ministers is directed to take such steps as may be necessary to restrict or regulate remittances of foreign exchange into or out of Sri Lanka for a period not exceeding six months. He has to do so by publishing the same in the Gazette. The Order of the Minister shall be valid notwithstanding the provisions contained in Clauses 5, 6, 7 and 8, provided that such Order shall be communicated forthwith to Parliament and shall not be disapproved by Parliament. The Minister can extend the period with the approval of the Parliament.

However we observe that the Monetary Law Act, Sec. 68 (1) (a) and (1) provide that it shall be the duty of the Monetary Board inter alia to adopt such policies and take such remedial measures as are appropriate and authorized by such Act whenever international payments or remittances are being made, which would constitute an actual and potential threat to the financial stability of national welfare of the country. Then, the Monetary Board should submit a detailed report to the Minster in charge of the subject of Finance setting out the nature, cause and magnitude of such threat, the measures which the Monetary Board has already taken and further monetary, fiscal or administrative measures which it proposes to take or recommends for adoption by the Government. In this back drop, we cannot see the Minister who is required by Clause 22 to act with the approval of the Cabinet, using his discretion not to comply with the advice of the Monetary Board **as it is a crisis situation that the Bill has provided for**.

Therefore this Court holds that Clause 22 of the Bill is not inconsistent with the Articles of the Constitution.

Even though some of the Petitioners contend that Clauses 23, 24, 25, 28, 29, 30 and 32 are inconsistent with the Constitution, since they provide for expenses, contracts, obligations under the written laws, regulations, repeal and savings, currency and securities and interpretation, there does not seem to be any inconsistency with the Articles of the Constitution. However, this Court is of the view that the time limit granted is too long. This Court suggests that Clause 28 (3) should be corrected to read as "Every Regulation made under subsection (1) shall within three months from the date of the publication……", as an improvement of that provision.

While being cognizant that Article 75 of the Constitution vests in Parliament, the power to make laws which have retrospective effect except in the circumstances described in Article 13 (6), this Court observes that, on the face of Clauses 29 (a) and 29 (b) of the Bill, the intention is that, all pending suits, actions and proceedings instituted under the Exchange

Control Act and all pending investigations and inquiries under the Exchange Control **Act are to be continued**. In the circumstances, it would be nothing but appropriate to state that the continuation and determination should be done according to the provisions of the repealed Act because the penal sanctions are contained within the existing Exchange Control Act and not in the new Act yet to be implemented. For this purpose, this Court suggests that Clause 29 (2) should be corrected to read as "Notwithstanding……(a)……. and proceedings instituted under **that Act**; and (b)…….and inquiries instituted under **that Act** and shall…….".

The Bill has sought to give effect to the fiscal policy of the Government as set out in the 2016 and 2017 Budget proposals which were presented by the Government and approved by the Parliament.

The Cabinet has deliberated on the subject matter of foreign exchange which affects the economy of this country and found that a proper legal framework is needed for the management and regulation of foreign exchange and to encourage Sri Lankan citizens to remit to Sri Lanka foreign exchange they have in their possession outside Sri Lanka. The existing Exchange Control Act was enacted long ago in 1953, at a time when exchange control was the norm and it contains criminal offences which are rather harsh. Most countries in the world have liberalized exchange control laws and also moved away from criminal offences to civil penalties. The existing law has not been successful in preventing the outflow of foreign exchange out of the country through legal and non legal channels. Therefore a new law was required to provide incentives for Sri Lankans having money outside the country to remit that money to Sri Lanka without having to face with criminal penalties. The Bill in hand contains provisions to cater to the said need as well as intervention by the Government if any outflows of foreign exchange becomes a threat to the national economy. The decision to bring up this Bill is nothing but a matter of policy.

The Legislature enjoys a wide discretion in formulating policy on economic matters of the country. This Court has always confined the scrutiny of any Bill strictly in accordance with the Supreme Court jurisdiction conferred by Articles 121 and 123 of the Constitution. The Policy Making Power is left to the authorities in whom it is vested by law. This Court has been reluctant to intervene in matters of policy unless such policy is found to be manifestly unreasonable.

In the Determination No. SCSD 3/1980, this Court observed thus:

"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."

This Court observes that " regulation of foreign exchange" is within the scope and ambit of Parliament's control over public finance, as provided for in Article 148 of the Constitution. This Bill therefore is a law to be enacted in furtherance of Parliament's control over a source of public finance, namely foreign exchange.

In SC Determination No. 03/2008, this Court has determined thus:

"Parliament is the custodian of legislative power of the People and will exercise that power of the people and will exercise that power in trust for the People in whom sovereignty is

reposed. Legislative power includes the 'full control over public finance' as stated in Article 148, cited above, which in our opinion is also a vital component of the balance of power firmly established by the Constitution in relation to the respective organs of Government."

The Bill in hand is with regard to foreign exchange, which is a source of public finance. The Parliament has made the policy decisions with regard to implementation of the proposed Bill. The provisions of the Bill are not inconsistent with the Constitution subject to the corrections mentioned above as suggested by this Court.

This Court concludes of the reasons set out above that the Foreign Exchange Bill is not **inconsistent** with any provisions of the Constitution when corrected as suggested by this Court and as such **may be passed by Parliament by a simple majority of members present and voting.**

This Court wishes to place on record our appreciation for the valuable assistance rendered to court by Senior Deputy Solicitor General, Arjuna Obeysekera, Deputy Solicitor General Nerin Pulle, Senior State Counsel, Suren Gnanaraj and State Counsel, Ms. Anusha Jayatileke.

S. Eva Wanasundera, PC
Acting Chief Justice.

Buvaneka Aluwihare, PC
Judge of the Supreme Court.

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

First Reading:	07. 04. 2017 (Hansard Vol.251; No. 12; Col. 1481)
Bill No:	175
S***ponsor/ Relevant Minister:***	Prime Minister and Minister of National Policies and Economic Affairs
Decision of the Supreme Court Announced in Parliament:	03. 05. 2017 (Hansard Vol. 252; No. 01; Col. 01 - 09)
Second Reading:	25. 07. 2017 (Hansard Vol. 253; No. 05; Col. 668 - 744)
Committee of the whole Parliament and Third Reading:	25. 07. 2017 (Hansard Vol. 253; No. 05; Col. 744 - 763)
Hon. Speaker's Certificate:	28. 07. 2017
Title:	Foreign Exchange Act, No. 12 of 2017.

S.C. (SD) No. 05/2017, S.C. (SD) No. 06/2017

" REGISTRATION OF ELECTORS (SPECIAL PROVISIONS) BILL"

BEFORE :

Priyasath Dep, PC	-	Chief Justice
Sisira J. de Abrew	-	Judge of the Supreme Court
Nalin Perera	-	Judge of the Supreme Court

S.C. (SD) No. 05/2017

Petitioner	:	Udaya Prabath Gammanpila
Counsel	:	Manohara de Silva, PC with W. David Weerarathne, Aloka de Silva and Boopathi Kahatuduwa

S.C. (SD) No. 06/2017

Petitioner	:	Nishantha Wimalachandra
Counsel	:	Kanishka Witarana with H.M. Thillakarathne
Respondent	:	Hon. Attorney General

Court assembled for the hearing on 17.05.2017 at 10.00 a.m. and 19.05.2017 at 10.00 a.m.

A Bill titled "Registration of Electors (Special Provisions)" was Gazetted on 11.04.2017 and was placed on the Order Paper of Parliament on 03.05.2017.

The long title of the Bill reads as "An act to make special provisions to exempt internally displaced persons from certain requirements of the Registration of Electors Act, No.44 of 1980 and to provide for matters connected therewith or incidental thereto".

It is appropriate at this stage to refer to the background to the presenting of this Bill to the Parliament. The Registration of Electors Act No. 44 of 1980 as amended by Act No. 10 of 1989 is the principal law governing the procedure for the registration of an elector.

Section 6 of that Act provides that the name of a persons shall only be entered and retained in the electoral register of the electoral district of his "*qualifying address*". Section 4 (2) of that Act defines a "qualifying Address" to mean *"the address at which a person was ordinarily resident in any electoral district on the first day of June in any year".*

It was found that persons who had their permanent residence in the Northern and Eastern Province but who became internally displaced due to the armed conflict in those areas could not satisfy the legal requirement of a "qualifying address" under the Registration of Electors Act. As a result, these persons were deprived of their sovereign right to exercise their franchise.

In order to find a solution to this problem, then Minsiter of Justice submitted a Cabinet Memorandum dated 8th May 2013 which stated as follows:

> *"02. During the armed conflict which engulfed our country for thirty years, a large number of civilians were forced to flee their places of residence especially, in the Northern Province. Such displaced families and individuals had abandoned their land and properties and sought temporary residence and accommodation in other parts of Sri Lanka, or were housed in camps in other parts of Sri Lanka.*
>
> *03. It has been reported that a large number of applications submitted by displaced individuals to register as an "elector" in electoral districts in the Northern Province where they had their permanent residence before displacement were rejected by the Commissioner of Elections in terms of the law.*
>
> *04. A large number of internally displaced individuals from the Northern Province find it difficult to comply with the requirement of a qualifying address and also to be present at the qualifying address when officials make house - to - house inquiry for the purpose of revising the register".*

The Cabinet of Ministers had granted the approval and the Bill titled Registration of Electors (Special Provisions) was presented to the Parliament and was passed in Parliament and the Act No. 27 of 2013 was certified by the Speaker on 20th June 2013. This Bill was operative for a period of two years and lapsed on 20th June 2015.

The Learned Deputy Solicitor General in order to justify the presenting this Bill, produce a letter dated 15.10.2015 submitted by Commissioner of Elections who had made a request to enact a similar law.

The Learned Deputy Solicitor General referring to the letter of Commissioner of Elections, submitted that due to the continuing difficulties experienced by Internally Displaced Persons, who have still not been able to return to their permanent residence in the Northern Province there is a need for a similar law to be re - enacted by Parliament to enable such persons, whose name appeared in the register of electors for any electoral district in the Northern Province for any year prior to 2009 and whose name has not been subsequently entered in any electoral register subsequent to 2009, to be registered in the register of electors of the electoral district he was permanently resident prior to May 18, 2009.

This is reason for introducing this Bill.

The Learned Deputy Solicitor General Submitted that the provisions of this Bill is identical to the provisions contained in Act No. 27 of 2013, subject to certain minor amendments. Therefore he submits, that the Bill as a whole and its clauses are not inconsistent with the provisions of the Constitution.

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

The Petitioners alleged that clause 01– 08 that means the entire Bill is inconsistent with Articles 3,4,12 (1) and 12 (2) of the Constitution.

The preamble to the Bill which clearly sets out the intent and the object of the Bill. It states that certain persons have been internally displaced as a result of any actions of a terrorist militant or other group during the recent past and the State has formulated a policy to enable internally displaced persons and their children eligible to vote to exercise their right to franchise in the electoral district in which their permanent places of residence were situated prior to being internally displaced. It has now become necessary to make special legal provisions in order to give effect to such policy;

Clause 1 refers to the short title of the Bill which reads as ' This Act may be cited as the Registration of Electors (Special Provisions) Act No..... of 2017'.

Clause 2 is most important clause which refers to the internally displaced persons who are eligible to be registered as voters. Clause 2 reads as follows :–

Notwithstanding anything to the contrary in the Registration of Electors Act, No. 44 of 1980, and subject to the Article 89 of the Constitution, any citizen of Sri Lanka -

(a) Who is or had been an internally displaced person;

(b) Whose name appeared in the register of electors for any electoral district in the Northern Province or Eastern Province for any year, until the end of the year 2009; and

(c) Whose name has not been entered in any register in operation subsequent to the year 2009,

Shall on proof of the matters specified in paragraphs (a), (b), and (c) and on production of a certificate issued by the Grama Niladhari of the area in which he is presently residing to the effect that he is or had been an internally displaced person, be entitled to the registering officer of the electoral district within which he was permanently resident prior to May 18, 2009, to be registered in the register of electors of such electoral district.

(2) The application referred to in subsection (1), shall be made on or before the date specified by the Election Commission by notice published in the Gazette and in at least one newspaper each in the Sinhalese, English and Tamil languages.

Clause 2 (3) refers to the eligibility of children to be registered as voters. Clause 2 (3) reads as follows :–

Notwithstanding the provisions of subsection (1), the entitlement granted under that subsection shall be extended to the children of the citizen referred to in subsection (1).

(a) Who had not attained the age of eighteen years on the date on which such citizen became an internally displaced person and have attained the age of eighteen years or more on the date on which the revision commenced in respect of the register in operation, at the time in which the application is made;

(b) Who are born after such citizen became an internally displaced person and have attained the age of eighteen years or more on the date on which the revision commenced in respect of the register in operation, at the time in which the application is made; and

(c) Whose name has not been entered in any register in operation subsequent to the year 2009, on production of the birth certificate of such child sought to be registered and a certificate issued by the Grama Niladhari of the area in which he is presently residing on proof of the matters specified in paragraphs (a), (b) and (c) above.

Clause 2 of the Bill cannot be considered in isolation. It has to refer to the interpretation given to the term internally displaced person in Clause 8 which is the interpretation section. It states:

> " Internally Displaced Person" means a citizen of Sri Lanka who was permanently resident in the Northern Province or Eastern Province and who was forced or obliged to leave from his residence at any time prior to May 18, 2009, as a result of any action of terrorist militant or other group, and currently resides in Sri Lanka outside his original place of residence in the Northern Province or Eastern Province or had resettled in his original place of residence subsequent to the date on which the revision of the register of electors for the year 2012 commenced;

The Petitioners in both Petitions alleged that the entire Bill is violative of Article 3, 4, 12 (1), and 12 (2) of the Constitution. It is the position of the Petitioners that the definition given to internally displaced persons who are entitled to get their names registered in the electoral register under Clause 2 is arbitrary and discriminatory and violative of fundamental rights guaranteed under Article 12 (1) and 12 (2) of the Constitution. As a violation is in respect of franchise it attracts Article 3 and 4 of the Constitution as franchise is a part of the sovereignty of the people which is inalienable.

The Learned President's Counsel who is appearing for the Petitioner in SC/SD No. 05/2017 highlighted the following category of persons who are not included in the definition of internally displaced persons and not including other reasons/ causes for such displacement.

1. All persons who had to leave his residents due to the actions of the terrorist, militant or other group and is now residing outside his original place of residence would not be considered an "Internally Displaced Person" if his original place of residence was not in the Northern Province or the Eastern Province, but in any other province. It is well known that residents of North Western, North Central, Uva and few places in Southern Province bordering Yala were displaced due to terrorist activity.

   Therefore a person who had to leave his residence from any province other than the Northern Province or the Eastern Province due to acts of terrorism would not be considered as an Internally Displaced Person.

2. Any person who is displaced not due to any terrorist activity but due to a natural disaster such as Tsunami, Floods, Cyclone, Fire or Earth slip will not be considered an " Internally Displaced Person". If a person is an Internally Displaced Person the reason of him being an Internally Displaced Person should not make any differentia of a person is internally displace. What does it matter whether it was due to terrorism or a natural disaster.

3. A person who has now resettled in the electoral district where he was originally residing has been included in the definition of "Internally Displaced Person". If a person whether he was in the Northern Province, Eastern Province or any other Province was originally displaced but now resettled there is no justifiable reason to exempt him from the provisions of Registration of Electors Act since there cannot be any issue for him to register on 1st June 2017 and thereafter to be included in the register of electors of his electoral district.

The Petitioners submit that the classification made in Clause 8 is therefore arbitrary, discriminatory and is in violation of Article 12 (1) of the Constitution. The Petitioners submitted that when the Bill seeks to exempt provisions of the general law namely Registration of Electors Act No. 44 of 1980 classification should be based on intelligible differentia.

The Learned Deputy Solicitor General submitted that former Commissioner of Elections (presently Chairman of the Election Commission) by letter dated 15.10.2015 addressed to H.E. the President, the Hon. Prime Minister, the Cabinet of Ministers and the Hon. Minister of Justice requested that in view of there being several Internally Displaced Persons in the Northern Province who are yet to be resettled, it would be necessary to enact a similar law due to the lapsed of the previous law.

This Bill, which is sought to be challenged in these proceeding contains provisions similar to those contained in Act No. 27 of 2013 subject to certain minor amendments.

The Learned Deputy Solicitor General further submitted that by enabling the registration of internally displaced persons to exercise their franchise, the aforementioned Bill as a whole facilitates the internally displaced persons to their exercise of the Sovereignty which has been constitutionally recognized under Articles 3 and 4 (e) of the Constitution.

The Learned Deputy Solicitor General further submitted that enabling the internally displaced persons to be included in the relevant register of electors, is in furtherance of their rights guaranteed by Article 14 (1) (a) of the Constitution, which guarantees the freedom of expression.

He cited the case of *Karunathilaka V Dayananda Dissanayake* [1999] 1 Sri LR 157, where this Court held that the freedom of speech and expression guaranteed under Article 14 (1) (a) encompasses the right to vote.

This Court considered the fact that prior to the enactment of the Registration of Electors (Special Provisions) Act No. 27 of 2013, which has identical provisions, this Court examined the Bill in S.C. (S.D) 16/2013 and determined that the Bill is consistent with the Constitution. The Court opined that the Bill has the effect of enhancing franchise. We are in agreement with the said determination and the opinion expressed.

The position of the Attorney General is that the Bill is consistent with the provisions of Constitution. However in view of the matters raised by the Learned President's Counsel, the Learned Deputy Solicitor General informed Court that at the committee stage following amendment will be made to the definition of internally displaced person.

"Internally Displaced Person" means a citizen of Sri Lanka who was permanently resident in Sri Lanka and forced or obligated to leave his permanent residence at any time prior to May 18, 2009 as a result of any action of terrorist militant or other group and continues to permanently reside in Sri Lanka, outside his original place of residence.

Further Learned Deputy Solicitor General agreed to consider amending other clauses to prevent persons taking advantage of exemptions granted by the Act and registering themselves as voters.

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

We wish to place on record our deep appreciation of the assistance given by the Learned Deputy Solicitor General and the Counsel who made the submissions on this matter.

Priyasath Dep, PC
Chief Justice.

Sisira J. de Abrew
Judge of the Supreme Court.

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

First Reading:	03. 05. 2017 (Hansard Vol. 252; No. 01; Col. 59)
Bill No:	177
Sponsor/ Relevant Minister:	Minister of Justice
Decision of the Supreme Court Announced in Parliament:	06. 06. 2017 (Hansard Vol. 252; No. 08; Col. 1024 – 1038)
Second Reading:	04. 07. 2017 (Hansard Vol. 253; No. 01; Col. 87 – 148)
Committee of the whole Parliament and Third Reading:	04. 07. 2017 (Hansard Vol. 253; No. 01; Col. 149 – 151)
Hon. Speaker's Certificate:	21. 07. 2017
Title:	Registration of Electors (Special Provisions) Act, No. 10 of 2017.

S.C. (SD) No. 07/2017

"CODE OF CRIMINAL PROCEDURE (SPECIAL PROVISIONS) (AMENDMENT) BILL"

BEFORE :

Sisira J. de Abrew	-	Judge of the Supreme Court
Anil Gooneratne	-	Judge of the Supreme Court

S.C. (SD) No. 07/2017

Intervenient - Petitioner	:	M.A. Sumanthiran
Counsel	:	Niran Anketell
Petitioners - Respondents	:	Centre for Policy Alternatives (Guarantee) Limited Dr. Paikiasothy Saravanamuttu
Counsel	:	Viran Corea with Pulasthi Hewamanne and Luwie Ganeshathasan
Respondent	:	Hon. Attorney General
Counsel	:	Yasantha Kodagoda, PC, Assitant Solicitor General with Ayesha Jinasena, Deputy Solicitor General

Court assembled for the hearing on 06.06.2017.

Learned Additional Solicitor General appearing for the Hon. Attorney General submits that he has received instructions from the Ministry of Justice not to proceed with the proposed Bill presented to the Parliament and that the Minister of Justice had decided to withdraw the proposed Bill from the Parliament.

Learned Counsel appearing for the Petitioner makes an application to withdraw the petition based on submissions made by the Learned Additional Solicitor General.

The application for withdrawal of the petition is allowed. Petition is accordingly dismissed.

Registrar of this Court is directed to communicate the order of this Court to the Hon. Speaker.

Sisira J. de Abrew
Judge of the Supreme Court.

Anil Gooneratne, J.
Judge of the Supreme Court.

First Reading:	25. 05. 2017 (Hansard Vol. 252; No. 06; Col. 810)
Bill No:	180
Sponsor/ Relevant Minister:	Minister of Justice
Decision of the Supreme Court Announced in Parliament :	22. 06. 2017 (Hansard Vol. 252; No. 13; Col. 1817-1818)
Remarks :	Withdrawn on 11.08.2017 (Hansard Vol. 254; No.4; Col. 527)

S.C. (SD) No. 09/2017 to S.C. (SD) No. 18/2017

"INLAND REVENUE BILL"

BEFORE :

Priyasath Dep, PC	-	Chief Justice
Anil Gooneratne	-	Judge of the Supreme Court
Nalin Perera	-	Judge of the Supreme Court

S.C. (SD) No. 09/2017

Petitioner : Raja Nihal Hettiarachchi

Counsel : Nigel Hatch, PC with Ms. Shiroshini Illangage & Ms. S. Jayamaha

S.C. (SD) No. 10/2017

Petitioner : Upali Senaka Samarasinghe

Counsel : Romesh de Silva, PC with F.N. Gunasekera, Sugath Caldera, Manjuka Fernandopulle and Niran Anketell Instructed by H. Chandrakumar de Silva

S.C. (SD) No. 11/2017

Petitioner : The Insurance Association of Sri Lanka

Counsel : Romesh de Silva, PC with F.N. Gunasekera, Sugath Caldera, Manjuka Fernandopulle and Niran Anketell Instructed by H. Chandrakumar de Silva

S.C. (SD) No. 12/2017

Petitioner : Jeewandarage Thushara Chandana

Counsel : Shantha Jayawardene with Chamara Nanayakkarawasam and Niranjan Arulpragasam Instructed by Dinesh de Silva

S.C. (SD) No. 13/2017

Petitioner :
1. The Inland Revenue Deputy Commissioner's Association (also known as the Commissioner's Association)
2. The Inland Revenue Staff Officers' Association
3. The Inland Revenue Executive Officers' Union
4. The Inland Revenue Service Union
5. The Inland Revenue Employees' General Union

And 06 others

Counsel : Sanjeewa Jayawardena, PC with Nilshantha Sirimanne and Ms. Lakmini Warusevithane

S.C. (SD) No. 14/2017

Petitioner	:	Mahinda Gunaweera
Counsel	:	Sanjeewa Jayawardena, PC with Nilshantha Sirimanne and Ms. Lakmini Warusuvithane

S.C. (SD) No. 15/2017

Petitioner	:	Amal Randeniya
Counsel	:	M. U. M. Ali Sabry, PC with Ruwantha Cooray and Samhan Munzir Instructed by Sanath Wijewardana

S.C. (SD) No. 16/2017

Petitioner	:	Pindeniyage Prematilake and 09 Others
Counsel	:	Manohara de Silva, PC with Arinda Wijesurendra and Boopathy Kahathuduwa

S.C. (SD) No. 17/2017

Petitioner	:	Bandula Chandrasiri Gunawardane
Counsel	:	Canishka Witharana with H.M. Thilakarathna

S.C. (SD) No. 18/2017

Petitioner	:	Jayakodi Arachchige Sisira Jayakody
Counsel	:	Canishka Witharana with H.M. Thilakarathna
Respondent	:	Hon. Mangala Samaraweera Hon. Attorney General
Counsel	:	Ms. Farzana Jameel, PC, ASG with Arjuna Obeysekera, SDSG, Ms. Chaya Sri Nammuni, SC, K. de Silva Balapatabendi, SC & Ms. Hashini Opatha, SC.

Court assembled for hearings at 10.00 a.m. on 13.07.2017, 18.07.2017, 20.07.2017, 21.07.2017, 24.07.2017 and 25.07.2017.

Determination :

A Bill entitled 'Inland Revenue' was published in the Government Gazette on 19.06.2017 and placed on the Order Paper of the Parliament on 05.07.2017.

Ten Petitions were filed by citizens and associations invoking the jurisdiction of the Supreme Court under Article 121(1) to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution.

According to the preamble to the Bill this is an 'Act to Provide for the Imposition of Income Tax for any Year of Assessment Commencing on or after 1 of April, 2017'.

This Bill is a fiscal Bill concerning public revenue and it attracts Article 148 of the Constitution which states:

148. Parliament shall have all 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 any existing law.

There are several Indian Cases and Special Determinations of this Court referring to the principles to be considered when interpreting fiscal statutes.

In Case of S.K. Dutta, Income Tax Officer, Assam and others vs. Lawrence Singh Ingty, [AIR 1968 Volume Supreme Court] Hedge J. referring to previous cases of the Supreme Court of India stated the principles that govern the approach of the Court to a taxing statue, where the basis of classification is challenged.

> "In deciding whether the taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14. It is well settled that a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably."

The State cited a passage from the judgment of Venkatachaliah J. in the Indian case of P.M. Ashwathanarayana Setty vs. State of Karnataka (1989 Supp (1) SCC 696) in relation to Article 14 of the Indian Constitution (Similar to Article 12 of the Sri Lankan Constitution) which was referred to in the determination in S.C.S.D. 17/1997 " Inland Revenue (Amendment) Bill" which states thus:

> " Though other legislative measures dealing with economic regulations are not outside Article 14, it is well recognized 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 complexities 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 systems in all possible and reasonable ways."

Therefore this Court will give due consideration to Article 148 of the Constitution and the judgements of the Indian Supreme Court and the Special Determinations of this Court dealing with fiscal legislations when considering the constitutionality of the Bill.

This Court is required to examine the Bill to determine whether the Bill or any provision of the Bill is inconsistent with the Constitution. The Article 121 which confers jurisdiction on the Supreme Court states thus:

> "The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution."

Ten Petitions were filed by the citizens including unions and associations. It is our task to examine the Bill and determine whether the Bill or any provision of the Bill is inconsistent or not. As this Bill provides for the imposition of income tax it comes under Article 148 of the Constitution.

In several Petitions it was alleged that several Clauses of the Bill are inconsistent with Article 12 and 14 (1) g of the Constitution. In SC/SD 9/2017 it was challenged on the basis that Clause 200 is inconsistent with Article 3 and 4 of the Constitution. This Court will proceed to examine the impugned Clauses.

Clause 67

Clause 67 of the Bill was challenged in S.C.S.D. 10/2017 by the Petitioner namely Upali Senaka Samarasinghe, the Secretary General of the Insurance Association of Sri Lanka in S.C.S.D.10/2017 and by the Petitioner Insurance Association of Sri Lanka in S.C.S.D. 11/2017. This Clause deals with the manner in which the profits and income of companies engaged in life insurance to be computed for tax purposes.

The Petitioners alleged that this clause violates Articles 12 (1) and 14 (1) g of the Constitution. This clause is related to the manner of determining the profits and income of companies engaged in business of life insurance. We are of the view that this clause is not inconsistent with the provisions of the Constitution as alleged by the Petitioners.

There were several discussions held between the said Petitioners and the Officials of the Ministry of Finance, prior to the publication of the Bill in the Gazette and the said discussions continued even after the filing of these two applications, and the parties reached an agreement. The Learned Additional Solicitor General informed the Court by a motion dated 20 July 2017 the manner in which the profits and income of life insurance companies were to be taxed. In the said motion reference was made to the amendments that would be moved at the Committee Stage of Parliament to Clause 67 of the Bill which is reproduced below :–

Existing Clause 67 (1) and Clause 67 (2) will be deleted and substituted with the following New Clause Nos. 67 (1) and 67 (2) :–

" 67 (1) In the case of a person engaging in the business of life insurance, whether mutual proprietary, the gains and profits from the business on which tax is payable shall be ascertained by taking the aggregate of :

(a) The surplus distributed to shareholders from the life policyholders fund as certified by the Appointed Actuary functioning within the rules and regulations of the Regulation of the Insurance Industry Act No.43 of 2000, as amended; and

(b) The investment income of the shareholder fund less any expenses incurred in the production of such income,

subject to deductions under section 19 of Chapter II of this Act being claimable in arriving at the income from the business.

(2) For the purpose of subsection (1), the surplus distributed to life insurance policyholders who participate in the profits of a person engaging in the business of life insurance in a given year, as provided in the Regulation of Insurance Industry Act No. 43 of 2000 (as amended) or rules made in that behalf under the said Act, shall be deemed as gains and profits of that person from the business and subject to tax accordingly."

a. Clause 67 (3), Clause 67 (6) and Clause 67 (7) to be deleted.

b. Clause 67(4) and Clause (5) to be re – numbered as Clause 67(3) and Clause 67 (4) respectively.

c. The following new paragraph to be inserted as paragraph (4) the sixth Schedule:

" 4. The portion of the gains and profits of an insurer engaging in the business of life insurance that is deemed as income of the life insurer under Section 67(2) shall be taxed at the rate of fourteen percent for three years of assessment after the commencement of the Act."

Clause 68

Division 111: Non - Governmental Organizations and Charitable Institutuion

This Clause refer to granting of tax reductions to Non - Governmental Organizations providing livelihood support for displaced persons and granting of tax credits to charitable institutions providing institutionalized care for the sick and needy.

Clause 68 reads as follows :

68 (1) A non– government organization shall pay additional tax on three percent of amounts received in each year of assessment by way of grant, donation or contribution or in any other manner at the rate set out in the first schedule.

(2) where the Commissioner General is satisfied that any non - governmental organization is engaged, in any year of assessment, in-

(a) rehabilitation and the provision of infrastructure facilities and livelihood support to displaced persons in any area identified by the Government for the purpose of such rehabilitation and provision; or

(b) any other activity approved by the Minister as being of humanitarian in nature, taking into consideration the nature and gravity of any disaster and the magnitude of relief required to be provided consequently,

The Commissioner General may reduce or remove the tax payable by such non– governmental organization for that year of assessment if it appears that such reduction is just and equitable in all the circumstances of the case.

This Clause 68 (1) of the Bill was challenged on two grounds:

(a) that Non - Governmental Organization (NGO), is loosely defined and that there is no means by which the authenticity or genuineness of its activities can be ascertained, and

(b) that the Commissioner General has been vested with an unfettered discretion to reduce or remove the total tax payable by the NGO.

The Interpretation Clause (Clause 195) of the Bill defines an NGO for the purposes of this Bill as follows:

" non - governmental organization" means any organization or association, whether incorporated or unincorporated, formed by a person or a group of persons on a voluntary basis and which is non governmental in nature, and established and constituted-

(a) for the provision or relief and services of a humanitarian nature to the poor and destitute, the sick, orphans, widows, youth, children; or

(b) generally, for the provision of relief to the needy,

unless such organization or association is determined by the Commissioner - General not to be a non– governmental organization, but in all cases does not include a charitable institution,"

Under the interpretation clause all non government organizations are not included. It includes only non governmental organization established:

(*a*) for the provision or relief and services of a humanitarian nature to the poor and destitute, the sick, orphans, widows, youth, children; or

(*b*) generally, for the provision of relief to the needy,

It is the position of the Petitioners that granting of tax reduction to non governmental organizations is discriminatory. The Respondents submit that Clause 68 (2) of the Bill must be read together with Clause 68 (1) of the Bill.

Clause 68 (1) of the Bill requires a NGO to pay an additional tax of three percent on amounts received in each year of assessment by way of grant, donation or contribution or in any other manner. Therefore, the power of the Commissioner General to reduce or remove the tax payable by a NGO under Clause 68 (2) of the Bill is a power to reduce or remove only the "additional tax of three percent" payable by a NGO under Clause 68(1) of the Bill.

The Respondents submit that Clause 68 (2) of the Bill does not confer power on the Commissioner General to remove the total tax payable by the NGO on other sources of income. The Respondent submitted that Clause 68 in its totality is not vague, or unreasonable and is not inconsistent with the Constitution. We agree with the submissions of the Respondents.

Clause 68 (3) Granting of tax credits against the payment of tax to charitable institutes providing institutionalized care.

According to Clause (3) ' Where any charitable institution provides in any year of assessment institutionalized care for the sick or the needy and where the Commissioner General is satisfied that the cost of provision of such care is borne by such charitable institution, the Commissioner General may, subject to specified conditions, grant a tax credit against the tax payable on the charitable institution's taxable income for the year of assessment, provided it appears to the Commissioner General that such reduction or remission is just and equitable in all the circumstances of the case'.

The complaint of the Petitioners in SCSD 13/2017 and SCSD 14/2017 is that exemptions granted to religious institutions under the present Act, No.10 of 2006 have been taken away and that religious institutions that were hitherto not liable to pay tax, will now become liable under the proposed Bill.

The Respondents state that the complaint of the Petitioners is based on a complete misunderstanding of the existing law.

It is necessary to refer to the definition of Charitable Institute and Charitable Purpose. "Charitable Institution" means the trustee or trustees of a trust or corporation or an unincorporated body of persons established for a charitable purpose only or engaged solely in carrying out a charitable purpose;

"Charitable Purposes" means a purpose for the benefit of the public or any section of the public in or outside Sri Lanka, including the following categories:-

(*a*) the relief of poverty;

(*b*) the advancement of education or knowledge other than by any institution established for business purposes or by any institution established under the Companies Act;

(*c*) activities for the protection of the environment or eco - friendly activities;

(*d*) the advancement of religion or the maintenance of religious rites and practices or the administration of a place of public worship;

(*e*) any other purpose beneficial to the community, not falling within any of the above categories;

Therefore charitable institute includes places of religious worship.

According to this section tax credit is granted for institutionalized care for the sick and the needy which is a function of a welfare state. Granting of this tax credit could not be considered as discriminatory as there is rational basis. Therefore this Clause is not inconsistent with the articles of the Constitution.

Clauses 97 and 98

The Clause 97 of the Bill refers to administration of the act and deals with the appointment of officers. It provides for the appointment of 'Other tax Officials' who can exercise, perform or discharge the power, duty or functions attached to the Commissioner - General.

The Petitioners in SC. SD 13/2017, 14/2017, 16/2017, 17/2017 and 18/2017 have complained that Clauses 97 and 98 violates Article 12 (1) of the Constitution. The Petitioners further complained that in view of the definition of 'Tax Official' Clause 98 would enable the Commissioner General to delegate his functions to a person other than an official of the Inland Revenue Department. Clause 97 reads thus

97 (1). For the purpose of this Act there shall be appointed a Commissioner - General, such number of Deputy Commissioners – General, Senior Commissioners, Commissioners, Senior Deputy Commissioners, Deputy Commissioners, Assistant Commissioners and other tax officials, as may be necessary.

(2) A tax official exercising or performing or discharging any power, duty or function conferred or imposed on or assigned to the Commissioner - General by any provision of this Act, shall be deemed for all purposes to be authorized by the Commissioner - General to exercise, perform or discharge that power, duty or function until the contrary is proved.

(3) -----

(4) -----

98 (1) The Commissioner - General may delegate to an officer of the Department a power or duty conferred or imposed on the Commissioner - General by this Act, other than this power of delegation.

(2) The Commissioner - General may delegate a power or duty to either to a specific individual tax official or to the incumbent of a specific post within the Department.

The Learned Additional Solicitor General informed Court that in view of the concerns expressed by the Petitioners that is proposed to make the following amendments to Clauses 97, 98, 100 and 195 of the Bill during the Committee Stage of Parliament:

(*a*) Clause 97 (1) - the words, 'and other tax officials, as may be necessary' to be deleted.

(*b*) Clause 97(3) - the words, 'or any other person authorized by the Commissioner General to Perform any functions under this Act' to be deleted.

(*c*) Clause 98(1) - the word, 'officer' to be deleted and substituted with the words, 'Tax Official'.

(*d*) Clause 98(2) - the word, 'or to the incumbent of a specific post' to be deleted.

(*e*) Clause 98(3) - the words, 'such other person' to be deleted and substituted with the words, 'Tax Official'.

Clauses 97 and 98 are inconsistent with the Constitution. However, if proposed amendments are made the inconsistency could be removed.

Clause 99 (1)

Clause 99 of the Bill provides for the establishment of the " Inland Revenue Incentive Fund" and the management thereof. It was the complaint of the Petitioner in SC. SD 13/2017 that Clause 99 (1) provides the Minister in Charge of the subject of Finance a discretion as to whether the Inland Revenue Incentive Fund should be established or not and that this is a departure from the present provision contained in Section 210, which merely provides that there shall be established a fund called the Inland Revenue Incentive Fund.

The Learned Additional Solicitor submitted that Clause 99 (1) is drafted in mandatory terms, as it uses the word 'shall', thus leaving no discretion to the Minister. Further it was submitted that Clause 99(1) is in fact an improvement of Section 210 of the present Act for the reasons that Section 210 does not specify who should established the said Fund, whereas that ambiguity has now been removed, by clearly placing a mandatory obligation on the Minister to establish the Inland Revenue Incentive Fund.

I agree with the submissions of the Learned Additional Solicitor General there is no violation of the Constitution.

Clause 100

Clause 100 of the Bill requires persons who are under a duty to act in terms of the Tax Law to maintain secrecy and confidentiality regarding information and documents required of a specific tax payer. Such information and documents received may be disclosed to a certain category of persons as contemplated in Clause 100 (1) (a) to (j) of the Bill. Learned Deputy Solicitor General informed court that the words referred to in Clause 100 (1) (a) as 'other agents' amendments would be moved during the committee stage by the deletion of words 'other agents'

An objection was taken by the Petitioner in SC SD 13/2017 regarding the constitutionality of the above Clause. It was submitted that the Minister of Finance has no supervisory powers over the Inland Revenue Department and as such the Minister cannot have access to such information of a tax payer and that there no rational to permit the Minister to have access to information. Further there could be an abuse by the Minister for other extraneous purposes.

In this regard Learned Additional Solicitor General drew the attention of this court to the provisions contained in Articles 42 (2), 43 (1) and 148 of the Constitution. Article 43 (1) provides that the President shall in consultation with the Prime Minister inter alia determine and assign subjects and functions to Cabinet of Ministers. By Gazette Extraordinary No. 2022/ 34, expressly assign the Department of Inland Revenue to the Minister of Finance and the implementation of the present Act, No. 10 of 2006 to the Minister. Article 148 of the Constitution enacts that Parliament has full control over public finance and Article 42 (2) of the Constitution provides for the collective responsibility of Ministers and to be answerable to Parliament.

> By Constitutional Tradition, a Minister answers to Parliament for his or her department. In the practice of Parliament, praise and blame are addressed to the Minister and not civil servants. Ministers may not excuse the failure of policies by turning upon their expert advisers and administrators. The corollary of the Minister's responsibility is that civil servants are not directly responsible to Parliament for Government policies or decisions although they are responsible to Ministers for their own actions and conduct. Constitutional & Administrative Law, A.W. Brandley and K.D. Ewing 12 Ed 1997 pg. 122
>
> The evidence of Parliamentary questions is a feature of Parliamentary democracy and must relate to public affairs with which a Minister is connected, matters of administration for which he is responsible, that is, which come within the work of his department or a next steps Agency, or his official duties or powers.
>
> Constitutional and Administrative Law O' Hood Phillips & Jackson. 18 th Ed 2001 Pg. 261, 262

When questions are raised in Parliament regarding the affairs of the Inland Revenue Department may be concerning a particular tax payer Minister of Finance need to answer and the Minister should have access to such information in the course of carrying out supervision of the Department. This court concur with the contention of Learned Deputy Solicitor General as submitted that this would impinge the legislative power of the people if such access is denied to the Minister of Finance according to Clause 100 (1) (b). Further Clause 100 (1) (b) seeks to restrict the Minister to obtain information to in relation to a specific tax payer, where it is necessary for the purpose of carrying out supervision of the Inland Revenue Department.

Clause 100 (2) and (3) further fortify the position of maintaining secrecy and mandatory obligation on the Minister who receives such confidential information to maintain secrecy 'except to the minimum extent necessary' to carry out supervision of the Inland Revenue Department. Such obligation to maintain secrecy contained under Clause 100 (6) of the Bill continues even after the Minister ceases to hold office.

Disclosure of Information to the Attorney General

Attorney General is the Chief Legal Officer of the State and Adviser to the State. If public rights are effected , Attorney General would have a right to intervene in Private litigation. In Criminal Iitigation Attorney General's rights to intervene are wide and vast. Attorney General could intervene even where private plaint is filed and take over the case. Vide *LRC Vs. Grand Central 1981 (1) SLR 250.*

In civil law all actions against the State are instituted by or against the Attorney General. (Section 456 of the Civil Procedure Code). In terms of Section 457 of the Civil Procedure Code A.G. has the power to undertake the defence in action against the State, Ministers, Secretaries and public officers (S.463). A.G. has to watch the interest of wards of court such as persons of unsound mind. (Sections 456 (2) and 572 (2), 575 (1) and minors (Section 589, 591 & 597 (2)) on Breach of a charitable trust an action could be filed only with permission of the A. G. It is a constitutional provisions to advice the Speaker of all Bills placed before Parliament on its constitutionality by the A.G. and A.G. is required to give a certificate to the Speaker of Parliament.

In a variety civil litigation A.G.'s role has been recognized. As such there is justification for A.G. to obtain information for the purpose of civil litigation as in Clause 100 (1) (e) of the Bill, but should be restricted only in cases of filing actions for and against the State. If not it would be unconstitutional. In the circumstances to remove the inconsistency Court suggests the following amendment "Attorney General for the purpose of criminal proceedings or in civil proceedings where actions instituted by the State or actions filed against the State or where the opinion or advice of the Attorney General has been sought in writing by the Department of Inland Revenue."

Public Rulings

Clause 104 - 106 deals with public rulings such rulings are issued by C.G.I.R. to achive consistency and provide guidance to the general public and officers of the department. Public rulings are binding on the C.G.I.R. until withdrawn and it is not binding on a tax payer. It was argued that it would lead to arbitrariness, on the part of the Commissioner General. Reply to same was that before issuing such ruling the C.G.I.R would consult the department officials at various levels prior to issuance of a public ruling. There is nothing unconstitutional in the above clauses.

Private Ruling

Petitioner in SC SD 12/17 challenged Clause 107(5) on the basis that private rulings bind the C.G.I.R. as against all payers and not the tax payer who sought a private ruling.

It was submitted by Learned Deputy Solicitor General that public and private rulings were introduced for the first time by this Bill. It is done to achieve consistency in the administration of the proposed law and provide guidance to the public and the officers of the department.

Clauses 107– 111 provides for private rulings. Tax payer could apply for a private ruling to ascertain the position of the C.G. I.R. regarding a transaction. C.G.I.R. would then appoint a committee of senior officers which is called an ' interpretation' committee to review a private ruling, and issue a private ruling. Private ruling will not bind any other tax payer. It will bind the C.G.I.R. as against only the tax payer who sought a private ruling. It is a transaction which is peculiar to a single tax payer. It is not violative of Article 12(1) of the Constitution. Clause 109 (5) provides that the said opinion is not a decision and cannot be challenged. Clause 107 (6) state private ruling does not bind the tax payer. If the tax payer does not agree with the private ruling it will not bind the tax payer. There is nothing unconstitutional in Clauses 107 - 111 of the Bill.

The Present law requires the Commissioner General of Inland Revenue to give reasons for rejection of a return of a Tax Payer. Clause 136 (5) of the Bill provides for written reasons to be given where a tax payer applies to make an amendment to his self– assessment. However at the Administrative Review under Clause 139 (5) of the Bill, the Commissioner - General

shall consider the tax payer's request and notify the tax payer in writing of the Commissioner General of Inland Revenue's decisions *with reasons*. As such the tax payer is not denied of reasons, although the present Statute provides reasons to be given at an early stage i.e when self assessment is rejected by the Assessor. There is no violation of the Constitutional Provisions though reasons are not given at the earliest opportunity to the tax payer. Reasons would be available at the Administrative Review, when the tax payer request for review (Clause 139 (2)) and thus world entitle the tax payer to appeal to the Tax Appeals Commission. Court observes that it is desirable to given reasons on rejection of tax payer's self assessment, but not mandatory to do so since reasons need to be given at a certain stage of the process. It is not necessary to do so at every stage of the process. There in nothing that offend Constitutional Provisions since reasons are given when the tax payer decides to appeal to the C. G. I. R. and to the Tax Appeal Commission.

Petitioners in SC SD 17/2017 and SC SD 18/2017 submitted that there are different tax rates applied for individuals and companies doing the same activity and engaged in the same professions and that is discriminating. The 1st Schedule contains tax rates for 'resident" and 'non - resident' individuals. The determination of the rate of tax applicable to different classes of tax payers has been recognised by the Supreme Court to be entirely within the realm of Parliament's power of taxations. Thus it is not violative of Articles 3, 4 and 12 (1) of the Constitution.

The dicta in SC SD Nos. 36 and 37/2016 on Value Added Tax (Amendment) Bill… " it is no part or function of a court to inquire into the exercise of legislative power of taxation with regard to the amount or person or property on which a tax is imposed".

The 1st schedule of the Bill refer to tax rates for 'residents' and ' non - residents'. It makes no difference for 'resident' and a 'non - resident' individual for a year of assessment shall be taxed according to the table given in the 1st schedule. It gives the range of taxable income exceeding Rs. 600,000/- to exceeding Rs. 3,000,000/- which is 4% - 24% for the amount in excess at Rs. 3,000,000/-.

The complaint of the above Petitioners is that item 4 (1) of the 1st schedule which sets out tax rates applicable to company shall be taxed at 28% and companies carrying out particular industries and services, will enjoy a tax rate of 14% e.g. company engaged in Agriculture business is taxed at 14%. Petitioner complaints that an individual engaged in the same professions (farming and agriculture) would fall within a tax bracket which can go up to 24%. According to the Petitioners it is discriminatory and violative of Article 12 (1) of the Constitution.

This court in SC SD 3/1980 re "Inland Revenue (Amendment) Bill held "...This is, however, fiscal legislation and it is a matter for the legislature 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 adjustments of diverse elements that requires to be made".

Thus in the circumstances applicability of different rates of tax on different classes of tax payers falls within fiscal policy and not inconsistent with Article 12 (1) of the Constitution.

Clause 167

This Clause empowers the Commissioner General or an authorized officer to issue a departure prohibition order on a person who has failed to pay tax without reporting to the Magistrate's Court. The Petitioner in SC/SD/15/2017 alleged that it is in violation of Article 12 and 13 and 14 (1) (h) and (i) of the Constitution. This Clause reads as follows :–

167. (1) Where the Commissioner General or an authorized officer has reasonable grounds to believe that person may leave Sri Lanka without paying :–

(a) tax that is or will become payable by the person : or

(b) tax that is or will become payable by a company in which the person is a controlling member,

the Commissioner General or authorized officer may issue a departure prohibition order, in writing, to the Controller of Immigration and Emigration stating :–

We are of the view that this clause violates Articles 12, 13 and 14 (1) (h) and (i) of the Constitution. We recommend this inclusion of a provision similar to Section 188 of the Inland Revenue Act No. 10 of 2016 which is consistent with the provisions of the Constitution. Section 188 of Act, No. 10 of 2006 reads thus :

(1) Where the Commissioner General is of opinion that any person who is a defaulter is about to or likely to leave Sri Lanka without paying all income tax, wealth tax or gift tax, which have become default as assessed upon him or otherwise, he may issue a certificate containing particulars of such tax and the name of such person to a Magistrate, who shall on receipt thereof issue a direction to the Inspector General of Police to take such measures as may be necessary to prevent such persons from leaving Sri Lanka without paying the tax or furnishing security to the satisfaction of the Commissioner - General, for payment thereof.

In order to remove the inconsistency the Learned Additional Solicitor General agreed to adopt the wording in Section 188 of the present Law subject to an amendment that the Commissioner General shall have the power to issue a prohibition order valid for 72 hours where the Commissioner - General is of opinion that there is an imminent danger of such person leaving the country with the safeguard that the Commissioner General shall make an application within that period to the Magistrate, is therefore suggested.

1. The proposed clause would thus be as follows:

"(1) Where the Commissioner - General is of opinion that any person who is a defaulter is about to or likely to leave Sri Lanka without paying:

(a) tax that is payable by that person; or

(b) tax that is payable by a company in which that person is a controlling member,

Which have become default as assessed upon him or otherwise, he may issue a certificate containing particulars of such tax and the name of such person to a Magistrate, who shall on receipt thereof issue a direction to the Controller General of Immigration and Emigration to take such measures as may be necessary to prevent such person from leaving Sri Lanka without paying the tax or furnishing security to the satisfaction of the Commissioner - General, for payment thereof.

(2) At the time of issue of his certificate to the Magistrate, the Commissioner - General shall issue to such person a notification thereof by registered letter sent through the post, but the non-receipt of any such notification by such person shall not invalidate proceedings under this section.

(3) Where the Commissioner - General has reasonable grounds to believe that the departure from Sri Lanka of any person who is a defaulter referred to in sub - section (1) of this Section is imminent and that sufficient time is not available to act in terms of sub - section (1) of this Section, the Commissioner - General may issue a departure prohibition order, in writing, to Controller of Immigration and Emigration stating:-

(i) the name and address of the person;

(ii) the amount of tax that is or will become payable by the person or by the company in which the person is a controlling member.

and the Controller General of Immigration and Emigration shall take such measures as may be necessary to prevent such person from leaving Sri Lanka without paying the tax or furnishing security to the satisfaction of the Commissioner - General, for payment thereof.

Provided however, that the Commissioner General shall as soon as may be practicable and in any event within 72 hours of issuing such departure prohibition order, make an application to the Magistrate to have the order confirmed. Such departure prohibition order shall stand revoked if an application is not made to the Magistrate within the aforementioned time period. [Words in italics are the provisions proposed]

(4) The Production of a certificate signed by the Commissioner - General or a Deputy Commissioner, stating that the tax has been paid or that security has been furnished to for the payment of the tax, or payment of the tax to a police officer in charge of a police station, shall be sufficient authority for allowing such person to leave Sri Lanka. Any police officer to whom the amount of any tax has been paid shall forthwith pay such amount to the Commissioner–General".

If the Bill is amended accordingly the inconsistency could be removed.

Clause 200

This Clause refers to the interpretation of the provisions of the Act. This applies also to Court of law in interpreting the provisions of the Act. This refers to the manner of interpreting the Act and its provisions and the material to be considered for the purpose of interpreting the Act. Interpretation of status is a part of the Judicial power. The Learned President Counsel for the Petitioner in SC/SD/9/2017 strenuously argued that Clause 200 encroach upon the judicial power and it violates Article 3 and 4 of the Constitution. Clause 200 is reproduced below:

Interpretation and avoidance of doubts.

200. (1) In interpreting a provision of this Act, a construction that would promote the purpose or object underling the provision or the law (whether that purpose or object is expressly stated in the law or not), shall be preferred to a construction that would not promote that purpose or object.

(2) Subject to subsection (5), in interpreting a provision of this Act, if any material that does not form part of the law is capable of assisting in ascertaining the meaning of the provision, consideration may be given to that material.

(a) to confirm that, meaning of the provisions is the ordinary meaning conveyed by the text of the provision, taking into account its context in this Act and the purpose or object underlying this Act; or

(b) to determine the meaning of the provision when;

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text and taking into account its context in this Act and the purpose or object underlying this Act, leads to a result that is manifestly absurd or its unreasonable.

(3) Without limiting the generality of subsection (2), material that may be considered in interpreting a provision of this Act shall include:

(a) all maters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Department of Government Printing;

(b) any treaty or other international agreement or international assistance agreement that is referred to in the Act;

(c) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the Members of Parliament, by a Minister, before the time when the provision was enacted;

(d) the speech made to Parliament by a Minister on the occasion of a motion related to the Bill containing the provision; and

(e) any relevant material in any official record of proceedings of debates in Parliament or debates of any Parliamentary committee that considered the related Bill.

It is well settled law that interpreting statutes is power vested in Courts and considered as part of the judicial power. When interpreting statutes Courts will follow the well established rules of interpretations. If the language is clear and unambiguous there is no need for interpretation and it is a matter of applying the Law. When Court interpreting statutes it will consider the purpose and object of the Act as disclosed in the preamble, long title or in the body of the Act. Therefore any Act requiring Court to follow a particular method of interpretation or consider material not forming part of the Act amounts to encroaching upon powers of the Judiciary and repugnant to the doctrine of separation of powers recognized in the Article 3 and 4 of the Constitution.

The Learned President's Counsel for the Petitioner in SC/SD/ 09/2017 referred to several cases where it was held that interpreting law is a matter for the Courts. He had cited the case of *Queen v. Liyanage 64 NLR 313, Tuckers Ltd. Vs. Ceylon Mercantile Union 73 NLR 31. CWC vs. Superintended, Beragala Estate 76 NLR 1.*

According to Clause 200 (a), (b) and (c) matters not forming part of the Act such as documents, explanatory memorandum, speech made by the Minister by when introducing the Bill and official records could be considered in interpreting the Act. According to the law as set out in *J.B. Textiles Industries Ltd. Vs. Minister of Finance (1981) 1 SLR 156. De Silva vs. Jeyaraj Fernandopulle (1996) 1 SLR 22* the Hansard could be used under limited circumstances. This Clause permits the extraneous matters and other material not forming part of the Act, to be considered in interpreting the provisions of the Act. We are of the view this Clause violates Articles 3 and 4 of the Constitution.

Second and Fourth Schedule of the Bill

A depreciation allowance is granted in respect of depreciable assets, and calculating the same is contained in the Second and Fourth Schedules of the proposed Bill.

The Second Schedule contains the investment incentives that would be offered under the proposed law. The Petitioners submit that said Second Schedule contain provisions that clearly favour and promote the establishment of business with up to 250 or 350 new employees respectively in the Northern Province.

Second Schedule 1 (1) states that a person who incurs expenses in respect of depreciable assets other than tangible assets during a year of assessment shall be granted an enhanced depreciation allowance computed in accordance with this paragraph, and not, depreciation allowances computed under the Fourth Schedule.

Section (2) A depreciation allowance of **100%** of the expenses incurred by a person on depreciable assets, other than intangible assets during a year of assessment shall be granted to that person for that year where the total expenses incurred by that person during that year on depreciable assets (other than intangible assets) that are **used in a part of Sri Lanka other than the Northern Province** exceeds USD 3 million but does not exceed USD 5 million, and where the person has employed at least 250 new employees during the year of assessment with those new employees being reported in the statement that the person, as a withholding agent, is required to file under section 79.

Section (3) states that a depreciation allowance of **200**% of the expenses incurred by a person on depreciable assets other than intangible assets during a year of assessment shall be granted to that person for that year where the total expenses incurred by that person during that year on depreciable assets (other than intangible assets) that are used in the **Northern Province** exceeds USD 3 million but does not exceed USD 5 million and where the person has employed at least 250 new employees during the year of assessment with those new employees being reported in the statement that the person as a withholding agent, is required to file under section 79.

Section (4) provides that a depreciation allowance of **100%** of the expenses incurred by a person on depreciable assets other than intangible assets during a year of assessment shall be granted to that person for that year where the total expenses incurred by that person during the year on depreciable assets (other than intangible assets) that are used in a part of Sri Lanka other than **Northern Province** exceeds USD 5 million but does not exceed USD 50 million and where the person has employed at least 350 new employees during the year of assessment with those new employees being reported in the statement that the person, as a withholding agent, is required to file under section 79.

Section (5) provides that a depreciation allowance of **200%** of the expenses incurred by a person on depreciable assets other than intangible assets during a year of assessment shall be granted to that person for that year where total expenses incurred by that person during that year on depreciable assets (other than intangible assets) that are used in the **Northern**

Province exceeds USD 5 million but not exceeding USD 50 million and where the person employed at least 350 new employees during the year of assessment with those new employees being reported in the statement that the person, as a withholding agent, is required to file under section 79. A depreciation allowance of 100% is granted by Section 2 & 4 for other parts of the country.

Therefore Item 2 and 3 of the Second Schedule is in respect of business with inter alia up to 250 new employees and investments of between USD 3 millions to 5 million. Out of the said category of business, a depreciation allowance of **200%** is granted in respect of depreciable assets (other than intangible assets) for business in the **Northern Province**, a depreciation allowance of 100% is granted for **other parts of the country.**

Item 4 and 5 of the schedule is in respect of business with inter alia up to 350 new employees and an investment of between USD 5 to 50 million. Out of the said category of business, a depreciation allowance of 200% is granted in respect of depreciable assets (other than intangible assets) for business in the Northern Province. A depreciation allowance of 100% is granted for other parts of the country. It was contended on behalf of the Petitioners that there is no reasonable justification and/ or intelligible differentia to grant the said higher depreciation allowance to the Northern Province.

The Petitioners in SD 16/2017, 17/2017 and 18/2017 therefore are complaining that granting of a higher depreciation allowance to those investing in the Northern Province is discriminatory and violates Articles 12 (1). They further allege that since 90% of the occupation in the Northern Province is by a particular ethnicity, the said concession amounts to a violation of Article 12 (2). The Petitioners further contend that the said provisions are unjustified in that the statistics in relation to poverty and unemployment do not show that the Northern Province is in need of such concession.

It is the position of the Respondents that the argument of the petitioners is misconceived, both in fact and in law. The Respondents submits that in fact, the present Act, No. 10 of 2006 contains **similar** provisions that permit the development of areas known as lagging regions as well as special concessions being afforded to those who invest outside Colombo and Gampaha. Section 20 refers to exemptions of the profit and income of any new industrial undertaking.

Section 20 of the Act, No. 10 of 2006 reads as follows :–

For this purpose a 'new undertaking' in relation to any company and to any year of assessment means an undertaking -

(*a*) Carried on by such company;

(*b*) Located in any area outside the administrative districts of Colombo and Gampaha and specified in part A or B of the second schedule to this section.

(*c*) In which the sum invested before April 1, 2008 -

(1) In any plant, machinery, furniture, building or land used in such undertaking, where such undertaking is an agricultural undertaking; or

(2) In any plant, machinery, furniture, or building used in such undertaking is an undertaking other than an agricultural undertaking

is not less than thirty million rupees.

It was held in *Charanjit Lal Chowdhury V. The Union of India and Others (1951) A.I.R.S.C. 41.* that:-

"A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it. Any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed."

In the case of *Budhan Chaudhry V. State of Bihar (1955) A.I.R.S.C. 191* on a discussion of Article 14 of the Indian Constitution which is the provision regarding Equality, which is similar to Article 12 of the Sri Lankan Constitution, it was held that:-

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order however, to pass the test of permissible classification two conditions must be fulfilled, namely,

(1) That the classification 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) That the differentia must have a rational relation to the object sought to be achieved by the statute in question.

Classification may be founded on different basis;

Namely, geographical; or according to objects or occupations or the like. What is necessary is that there must be a nexus between the bases of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law, but also by a law of procedure."

It is not in dispute that Sri Lanka was ravaged by a war for over 30 years. The most affected region was the Northern Province, followed by certain parts of the Eastern Province. The Respondents has annexed and sighted certain paragraphs of the Budget Speech of 2011 delivered in November 2010 and Budget Speech of 2013 and the Budget Speech of 2017, to show the development goals of the Government with regard to the Northern Province.

The Respondents submit that after 2009, much development work had been carried out in the rest of the country. Southern Province and Eastern Province have benefitted from this development initiative. Large amounts of money have been spent by the Government on developing Southern and Eastern Provinces.

The Respondents further submits that the government also had introduced the Strategic Development Projects Act in order to grant concessions to investments, over and above what was being given by the Board of Investment (BOI) in the Western Province. Money has been allocated to transform Western Province into a Megapolis show casing Colombo as a model city. The Government also has taken steps to allocate money for the development of North Western Province too.

Thus, it is very clear that much effort was being made by the government to develop the rest of the country and attractive fiscal incentives being offered to those keen to invest in those areas. It is clear the government was seeking to attract donor funding. Higher incentives must be offered to those wanting to invest in the Northern Province. Thus it is evident that special considerations are necessary to attract investment to the Northern Province.

Article 12 (2) states that no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds. It cannot be said that the decision to grant a higher depreciation allowance to those investing in the Northern Province was based on any of the grounds set out in Article 12 (2).

In the case of *East India Tobacco Co. V. State of Andhar Pradesh (1963) 1 SCR 404, 409*, it was observed that:-

" … in deciding whether the taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14. It is well settled that State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably."

Thus it is very clear that the Legislature enjoys a wide discretion in formulating policy on economic matters of the country. This Court has very rarely interfered in matters of policy and has always been reluctant to do so, and done so only when such policy is found to be manifestly unreasonable.

Therefore this Court holds that the said Clause 16 (2) be justified on the basis of any valid classification, that it would be read with Second Schedule is not inconsistent with the Article 12 (1) and 12 (2) of the Constitution.

Summary of Determination

That Clauses 97 to 98 are inconsistent with Article 12 of the Constitution and may only be passed by a special majority required under the provision of paragraph 2 of Article 84. However, if that clauses are amended as agreed by the Additional Solicitor General this inconsistency could be removed.

Clause 100 (1) (e) is inconsistent with Article 12 of the Constitution and may only be passed by a special majority required under the provision of paragraph 2 of Article 84. However, if it is amended as suggested by Court this inconsistency could be removed.

Clauses 167 is inconsistent with Articles 12, 13 and 14 (1) h & i of the Constitution and may only be passed by a special majority required under the provision of paragraph 2 of Article 84. However, if it is amended as agreed by the Additional Solicitor General this inconsistency could be removed.

The Clause 200 is inconsistent with Articles 3 and 4 of the Constitution and requires to be passed by a special majority required under the provisions of paragraph (2) of Article 84 and approved by the people at a referendum by virtue of Article 83.

We shall place on record our appreciation of the valuable assistance given by all the Learned counsel for Petitioners and Additional Solicitor General and other State Counsel in our deliberation.

Priyasath Dep
Chief Justice.

Anil Gooneratne
Judge of the Supreme Court.

Nalin Perera
Judge of the Supreme Court.

First Reading:	05. 07. 2017 (Hansard Vol. 253; No. 02; Col. 211)
Bill No:	189
Sponsor/ Relevant Minister:	Minister of Finance and Mass Media
Decision of the Supreme Court Announced in Parliament:	04. 08. 2017 (Hansard Vol. 253; No. 09; Col. 1064 - 1077)
Second Reading:	07. 09. 2017 (Hansard Vol. 254; No. 10; Col. 1275 - 1406)
Committee of the whole Parliament and Third Reading:	07. 09. 2017 (Hansard Vol. 254; No. 10; Col. 1406 - 1484)
Hon. Speaker's Certificate:	24. 10. 2017
Title:	Inland Revenue Act, No. 24 of 2017.

S. C. (SD) No. 19/2017

"PROVINCIAL COUNCILS ELECTIONS (AMENDMENT) BILL"

BEFORE :

Priyasath Dep, PC	-	Chief Justice
Anil Gooneratne	-	Judge of the Supreme Court
Vijith K. Malalgoda PC	-	Judge of the Supreme Court

S. C. (SD) No. 19/2017

Petitioner	:	Rajapaksha Gamage Ranjith
Counsel	:	Ruwantha Cooray
Respondent	:	Hon. Attorney General
Counsel	:	Ms. Indika Demuni de Silva, PC, Senior Assistant Solicitor General, with Dr. Avanti Perera, Senior State Counsel.

Court assembled for the hearing on 09.08.2017 at 10.00 am.

A Bill titled "Provincial Councils Elections (Amendment)" was published in the *Gazette* of the Republic of Sri Lanka on 7th July 2017 and placed on the Order Paper of Parliament on 28th July 2017. Petitioner Rajapaksha Gamage Ranjith challenged the constitutionality of this Bill by Petition presented to this court under the provisions of Article 120 read with Article 121 of the Constitution.

The objective of the Bill is to provide for not less than thirty per centum of the total number of candidates whose names appear in each nomination paper to consist of female candidates.

At the hearing of this Bill, Learned Counsel for the Petitioner informed court that after having filed the Petition the Petitioner came to know that Supreme Court Determinations bearing Nos. SC SD No. 02/2010, SC SD 11/2010, SC SD 3/2016 and SC SD 04/2016 which had a similar clause regarding the representations of women for nomination of Local Authorities were considered by this court previously.

As such Learned Counsel informed this court that he does not wish to proceed with the petition.

In any event on examination of the Bill we find that it is not inconsistent with the provisions of the Constitution, and support the equality provisions referred to in Article 12 (4) of the Constitution.

Priyasaath Dep
Chief Justice

Anil Gooneratne
Judge of the Supreme Court

Vijith K. Malalgoda
Judge of the Supreme Court

First Reading:	26. 07. 2017 (Hansard Vol.253; No. 06; Col. 851)
Bill No:	195
Sponsor/ Relevant Minister:	Minister of Provincial Councils and Local Government
***Decision of the Supreme Court Announced in Parliament*:**	22. 08. 2017 (Hansard Vol. 254; No. 05; Col. 573 - 574)
Second Reading:	20. 09. 2017 (Hansard Vol. 255; No. 02; Col. 240 - 378)
***Committee of the whole Parliament and Third Reading*:**	20. 09. 2017 (Hansard Vol. 255; No. 02; Col. 378 - 398)
Hon. Speaker's Certificate:	22. 09. 2017
Title:	Provincial Councils Elections (Amendment) Act, No. 17 of 2017.

S.C. (SD) No. 20/2017 to S.C. (SD) No. 32/2017

"TWENTIETH AMENDMENT TO THE CONSTITUTION BILL"

BEFORE :

Priyasath Dep, PC	-	Chief Justice
Anil Gooneratne	-	Judge of the Supreme Court
Vijith K. Malalgoda, PC	-	Judge of the Supreme Court

S.C. (SD) No. 20/2017

Petitioner	:	Professor G. L. Peiris
Counsel	:	Romesh de Silva, PC with Sugath Caldera, Niran Anketell and Harith de Mel instructed by Induni Bandara
Intervenient Petitioner	:	Thushara Wanniarachchi
Counsel	:	Suren Fernando with Maduka Perera, N. Hendahewa and K. Wickremanayake

S.C. (SD) No. 21/2017

Petitioner	:	Udaya Prabath Gammanpila
Counsel	:	Manohara de Silva, PC with Boopathy Kahathuduwa
Intervenient Petitioner	:	Hon. Kabir Hashim
Counsel	:	Faiz Musthapa, PC with Ronald Perera, PC, Pulasthi Rupasinghe, Faizer Marker, Niranjan Arulpragasam, Maduka Perera, Nimantha Satharasinghe & Keerthi Thilakaratne

S.C. (SD) No. 22/2017

Petitioners	:	People's Action for Free and Fair Elections (PAFFREL) Rohan Hettiarachchi
Counsel	:	Shantha Jayawardena with Chamara Nanayakkarawasam & Dinesh de Silva

S.C. (SD) No. 23/2017

Petitioner	:	Tissa Gamini Abeysinghe Jayawardane Yapa
Counsel	:	Canishka Witharana with Chrishmal Warnakulasuriya & H.M. Thilakarathna

S.C. (SD) No. 24/2017

Petitioners	:	Centre for Policy Alternatives (Guarantee) Limited Dr. Paikiasothy Saravanamuttu
Counsel	:	Viran Corea with Bhawani Fonseka and Luwie Ganeshathasan
Intervenient Petitioner	:	Lal Wijenaike
Counsel	:	J .C. Weliamuna, PC with Senura Abeywardena and K. Wickremanayake

S.C. (SD) No. 25/2017

Petitioner	:	Hon. Dullas Alahapperuma M.P.
Counsel	:	M.U.M. Ali Sabry, PC with Ruwantha Cooray, Shehani Alwis, Migara Cabral and S. Munzir

S.C. (SD) No. 26/2017

Petitioner	:	Ranga Dayananda
Counsel	:	Uditha Egalahewa, PC with N.K. Ashokbharan and Damitha Karunaratne

S.C. (SD) No. 27/2017

Petitioner	:	Renuka Dushyantha Perera
Counsel	:	Uditha Egalahewa, PC with Ranga Dayananda, Vishva Vimukthi and N.K. Ashokbharan

S.C. (SD) No. 28/2017

Petitioner	:	Hon. Dinesh Gunawardana
Counsel	:	Gamini Marapana, PC with Navin Marapana and Ms. Mayomi Ranawaka

S.C. (SD) No. 29/2017

Petitioner	:	Hon. Lakshman Namal Rajapakse
Counsel	:	Kushan D Alwis, PC with Ganesh Dharmawardana, Ms. Kaushalya Molligoda and Chamath Fernando

S.C. (SD) No. 30/2017

Petitioner	:	Ven. Omare Kassapa Thero
Counsel	:	Sanjeewa Jayawardana, PC with Charitha Rupasinghe and Ms. Nisansala Wijesinghe

S.C. (SD) No. 31/2017

Petitioners	:	Young Lawyers Association Manju Sri Chandrasena
Counsel	:	Nuwan Bopage with Thanuka Madawa Nandasiri, Jayantha Dehiaththage, Migara Doss, Manju Sri Chandrasena, Avindini Corea instructed by Manjula Balasuriya

S.C. (SD) No. 32/2017

Petitioners	:	Kiramba Gamaethige Kulathunga Hettiarachchige Upul Jagath
Counsel	:	Nuwan Bopage with Thanuka Madawa Nandasiri, Jayantha Dehiaththage, Migara Doss, Manju Sri Chandrasena, Avindini Corea instructed by Manjula Balasuriya
Respondent	:	Hon. Attorney General
Counsel	:	Jayantha Jayasuriya, PC, Attorney General with MS. Indika Demuni de Silva, PC, Assistant Solicitor General, Nerin Pulle, Deputy Solicitor General, Ms. Yuresha de Silva, Senior State Counsel, Dr. Avanti Perera, Senior State Counsel and Suren Gnanaraj, State Counsel

Court assembled for the hearing on 06.09. 2017, 07.09.2017 and 08.09.2017 at 10.00 a.m.

Determination

A Bill in its long title referred to as "An Act to Amend the Constitution of the Democratic Socialist Republic of Sri Lanka" was published in the Government Gazette dated 28.07.2017 and placed on the Order Paper of the Parliament on 22.08.2017. The short title of the Bill was cited as "Twentieth Amendment to the Constitution."

Thirteen Petitions numbered above were filed by citizens and associations invoking the jurisdiction of the Supreme Court in terms of under Article 121(1) to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution.

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

The Counsel representing the Petitioners, the Intervenient Petitioners and the Attorney General were heard before this bench at the sittings held on 6th, 7th and 8th of September 2017.

The Bill seeks to amend Articles 154D and 154E of the Constitution by inserting new Articles numbered 154DD and 154EE.

Clause 2 of the Bill inserted the following new Article immediately after Article 154D of the Constitution which shall have effect as Article 154DD of the Constitution:-

> **154 DD** The Election of members to all Provincial Councils shall be held on the same date and the Parliament shall determine the date on which all the Provincial Councils shall stand dissolved (in this Chapter referred to as the " specified date")
>
> Provided that, such specified date shall not be later than the expiration of the term of the last Constituted Provincial Council:"

Clause 3 of the Bill amend the Article 154E of the Constitution by the substitution for the words "as a dissolution of the Council" of the following:-

"as a dissolution of the Council :

The Article 154E of the Constitution reads as follows:

> A Provincial Council shall, unless sooner dissolved, continue for a period of five years from the date appointed for its first meeting and the expiration of the said period of five years shall operate *as a dissolution of the council.*

This amendment was effected by deleting the full stop in the last sentence of the Article and including a colon in order to include a proviso to the above Article which reads as:

> Provided, however, upon the determination of the specified date under Article 154 DD -
>
> (a) The term of office of any Provincial Council ending prior to the specified date shall be deemed to be extended up to the specified date and such Provincial Council shall stand dissolve on the specified date; or
>
> (b) The term of office of any Provincial Council which continues beyond the specified date shall end on the specified date and such Provincial Council shall stand dissolved on the specified date."

Clause 4 inserted the following new Article immediately after Article 154E of the Constitution and shall have effect as Article 154EE of the Constitution:-

> 154 EE. In the event of dissolution of any Provincial Council by reason of the operation of the provisions of sub - paragraph (c) of paragraph (8) of Article 154B or by any other reason specified in any law, the powers of such Provincial Council shall be exercised by the Parliament until the specified date and the provisions of Articles 154L and 154M shall, *mutatis mutandis* apply in relation to the exercise of powers of the Provincial Council."

Clause five states that " In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail."

A preliminary objection was taken by several Petitioners to the effect that the Bill was not properly placed before the Parliament and therefore there is no valid Bill to be determined by this Court. It is the position of the Petitioners that the mandatory provisions in Article 154 G (2) was not complied with. The Article 154 G (2) reads as follows:

> " No Bill for the amendment or repeal of the provisions of this Chapter or the Ninth Schedule 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 amendment or repeal, 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 amendment or repeal such Bill is passed by the special majority required by Article 82."

The Honourable Attorney General submitted that the President after the publication in the Gazette and before placing in the Order Paper had referred the Bill to every Provincial Council for the expression of its views. It is the position of the Petitioner who raised the preliminary objection that there is no proof that the President had referred to the Provincial Councils for the expression of its views. It is further submitted that even if the Bill was referred to every Provincial Council that it is imperative that the views of the Provincial Councils should be conveyed to the President before the Bill is placed in the Order Paper. It was submitted that this is a condition precedent and failure to comply is fatal and affect the validity of the Bill.

The Attorney General submitted that there is no requirement to await the expression of the views of the Provincial Council before the Bill is placed in the Order Paper. Mere reference of the Bill by the President to the Provincial Council for the expression of the willingness before placing it on the Order Paper is sufficient compliance with Article 154G (2).

The placing of the Bill in the Order Paper is one step in the legislative process. Bills are considered and debated in various readings and stages. Parliament could consider the expression of views by the Provincial Council during the reading and stages and if necessary to bring in amendments to the Bill. There are instances where Parliament has not proceeded with the Bills.

It was suggested that before the Bill is placed in the Order Paper the views of the Provincial Councils are required in order to find out whether every Provincial Council had agreed to the amendment. If so Bill could be passed with a simple majority as envisaged by Article 154 G (2) (a). If one or more Councils do not agree, Bill has to be passed by two third majority. However the expression of the views of the Councils are required before voting to decide the majority of votes required to pass the Bill. Therefore I am of the view that it is not required that expression of willingness of the Councils to be expressed before the Bill is placed in the Order Paper of the Parliament. However it is imperative that the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament to refer the Bill to every Provincial for the expression of its views thereon, within such period as may be specified in the reference. If the reference is not made as held in Divineguma Bill (SC SD 02/12) the Bill shall not become Law.

For the reasons stated above we overrule the preliminary objection and proceed to examine the Clauses of the Bill for Constitutionality.

According to the Article 154DD which is proposed to be introduced by the Bill, the Election of the members of the Provincial Council to he held on the same date and the Parliament shall determine the date on which all Provincial Councils shall stand dissolved which is referred to as the specified date. Under the proviso dissolution shall not be later than the expiration of the terms of office of the last Provincial Council. The last Provincial Council that was constituted is the Uva Provincial Council and its term expires in September 2019.

According to the proviso (A) introduced to Article 154E the term of office of any Provincial Council shall be deemed to be extended up to the specified date and stand dissolved on the specified date.

According to proviso (B) the term of office of any Provincial Council which continue beyond the specified date will stand dissolved on the specified date. The effect of this amendment is to hold Elections for all Provincial Councils on the same date. In order to hold elections all Provincial Councils will be dissolved on a specified date determined by Parliament. The resulting position is that on the specified date there will be Provincial Councils whose term had expired and Provincial Councils whose term will continue beyond the specified date. In other words certain terms of certain Provincial Councils will be extended whereas terms of some Provincial Councils will be curtailed. The Petitioners had given a table indicating the dates on which the Provincial Councils were constituted and the likely dates of ending of the term. The following table is produced :

Provincial Council	***Last Election***	***Estimated Expiration of Term***
North Central	8th September 2012	In or around September 2017
Sabaragamuwa	8th September 2012	In or around September 2017
Eastern	8th September 2012	In or around September 2017
North Western	21st September 2013	In or around September 2018
Northern	21st September 2013	In or around September 2018
Central	21st September 2013	In or around September 2018
Southern	29th March 2014	In or around April 2019
Western	29th March 2014	In or around April 2019
Uva	20th September 2014	In or around September 2019

If this Amendment is passed the Parliament can decide the date of dissolution of all Provincial Councils contrary to the existing Articles in chapter XVII (A) dealing with Provincial Council. The Provincial Council could be dissolved under three circumstances.

(1) The Provincial Council shall be dissolved under Article 154E by operation of law due to the expiration of 5 years after the appointed date.

(2) The Governor can dissolve a Provincial Council Under Article 154B (8) (c) (d) which reads as follows:

(c) The Governor may dissolve the Provincial Council.

(d) The Governor shall exercise his powers under this paragraph in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Provincial Council.

(3) Under 5 (a) of the Provincial Councils (Amendment) Act No. 27 of 1989 which reads as:

" Where the Governor of a Province communicates to the President that:

(a) More than one half of the total membership of such Provincial Council has, on or about the date specified in that communication, expressly repudiated or manifestly disavowed obedience to the Constitution or otherwise acted in contravention of the oath or affirmation taken and subscribed or made and subscribed; by such members under section 4; or

(*b*) That such Provincial Council has for all intents and purposes ceased to function with effect from any date,

The Provincial Council shall stand dissolved with effect from the date specified in such communication"

Under the proposed amendment, for the first time Parliament could determine the date of dissolution of all Provincial Councils. Under the existing law the Provincial Councils could be dissolved by operation of law due to the expiry of the term under Article 154 E, The Governor could dissolve under Article 154 B (8) (c) or under Section 5 (a) of the Provincial Councils (Amendment) Act No. 27 of 1989. In such circumstances, the Commissioner of Elections under Section 10 of the Provincial Councils Election Act No. 2 of 1988 within one week publish a notice to hold elections and call for nominations.

Under the proposed amendment by inserting Article 154EE, terms of some Provincial Councils will be extended until the specified date without calling for election.

The Petitioners are challenging the Bill on the basis that it violates Articles 3,4,10,12,14, of the Constitution. The Petitioner in S.C.S.D. 20/2017 state that the Bill violates Articles 1 & 2 also.

This Bill in the long title referred to as an Act to amend the Constitution.

It is appropriate to consider jurisdiction of the Supreme Court and the function of the Supreme Court under Article 120 which is reproduced below:

The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution:

Provided that -

(a) In the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the people at a Referendum by virtue of the provisions of Article 83;

Article 83 which is reproduced below refers to certain Bills which requires an approval at a referendum.

83. Notwithstanding anything to the contrary in the provisions of Article 82 –

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

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

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

Therefore, Court will have to examine whether the amending Bill is inconsistent with Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11 of the Constitution.

This court will proceed to examine whether the clauses of the Bill is inconsistent with Articles referred to in Article 83 which attracts a special majority and the approval by the people at a referendum.

It was submitted on behalf of the Intervenient - Petitioners that this amendment relates to amendment under Chapter XVII A which relates to the Provincial Councils and the applicable Article is 154G which reads thus:

154 G. (1) Every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which it is established, with respect to any matter set out in List I of the Ninth Schedule (hereinafter referred to as "the Provincial Council List").

(2) No Bill for the amendment or repeal of the provisions of this Chapter or the Ninth Schedule 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 amendment or repeal, 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 amendment or repeal, such Bill is passed by the special majority required by Article 82.

The Constitution should be considered as a whole. As this Bill is seeking to amend the Constitution it attracts Articles 82 and 83 which overrides 154G of the Constitution which deals with Statutes of the Provincial Council.

The Bill seeks to dissolve all Provincial Councils and hold elections on the same day in all nine Provincial Councils. Though desirable it is not essential to hold elections to all nine Provinces on the same date. The Article 154A (1) and (2) dealing with the establishment of the Provincial Councils did not require the establishment of the nine Provincial Councils on the same date. It could be establish on different dates.

The Article 154A (1) and (2) reads thus:

154 A. (1) Subject to the provisions of the Constitution, a Provincial Council shall be established for every Province specified in the Eighth Schedule with effect from such date or dates as the President may appoint by Order published in the Gazette. Different dates may be appointed in respect of different Provinces.

(2) Every Provincial Council established under paragraph (1) shall be constituted upon the election of the members of such Council in accordance with the law relating to Provincial Council Elections.

Unlike Parliamentary elections which is conducted to elect members to the Parliament (One legislature) or the Presidential Elections which is held to elect the President for the whole island there is no compelling reasons to hold Provincial Council Elections for all nine

provinces on the same date. Election of a Provincial Council is restricted to the Province and does not affect the other provinces. Although it may be desirable, the Bill does not provide the valid reasons for the proposed amendment.

The Learned Attorney General submits that by having elections on the same date for all nine Provincial Councils will prevent abuse of state resources, undue political influence and election related violence. If the elections are held on a staggered basis large number of politicians, supporters of various parties from other provinces and even criminal elements will get involved in the political campaign which would lead to violence or event disruption of the elections. If the elections are held on the same day for all nine Provinces it will minimize violence and election related offences. Howerer, the Petitioners take a different view and according to them the proposed amendment is motivated by political expediency and mala fide considerations.

According to the Petitioners the proposed amendments affects the franchise of the voters of the affected provinces. If the amendment is passed in some Provincial Councils term will extend beyond five years and in some Provincial Councils term will be reduced.

The Petitioners challenge the Bill on the basis that it violates Articles 3, 4, 10, 12, 14, of the Constitution. The Petitioner in S.C.S.D. 20/2017 state that the Bill violates Article 1 & 2 also. It is appropriate at this stage to reproduce the Articles relevant to this case. The relevant Articles are:

The State

1. Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.

Unitary State

2. The Republic of Sri Lanka is a Unitary State.

Sovereignty of the People

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

Exercise of Sovereignty

4. The Sovereignty of the People shall be exercise and enjoyed in the following manner:

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

   (*b*) The executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

   (*c*) The Judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercise directly by Parliament according to law;

(*d*) The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

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

FUNDAMENTAL RIGHTS

Freedom of thought, conscience and religion

10. Every person is entitled to freedom of thought , conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

12 . (1) All persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds:

Freedom from speech, assembly, association, occupation, movement

14. (1) Every citizen is entitled to-

(*a*) the Freedom of speech and expression including publication;

Romesh De Silva, President's Counsel for the petitioner in SC/SD 20/2017 submitted that the proposed amendments violates Article l and 2 also. As the Sri Lanka is free, sovereign and Independent and Democratic Socialist Republic every organ of the government should promote democratic principles such as rule of law, fundamental rights and franchise. He submits that proposed amendments is inconsistent with Article 1.It affects franchise which is a fundamental principle in a representative democracy. He refers to the preamble to the Constitution.(SVASTI).

It was submitted by the Learned Counsel for the Petitioners that this proposed amendment violates Article 3 as it affects the sovereignty of the people. Sovereignty includes powers of government, fundamental rights and franchise. Dissolution of nine provinces on a specified date which is not mentioned prejudicially affects the fundamental rights of the people. The Petitioners contention is that Article 3 is linked to Article 4 and that both Articles to be read together though Article 4 is not mentioned in Article 83. The Intervenient Petitioners submit that election of members of the Provincial Council is not included in Article 4 and therefore is does not fall within Article 3. It was submitted that Provincial Council is a subsidiary body and does not enjoy the status similar to the Parliament.

In SC SD 12/2003 it was held that Article 3 of the Constitution provides that in the Republic sovereignty is in the people and is inalienable. Sovereignty includes the powers of the government, fundamental rights, and the franchise. Article 4 is an elaboration of the exercise of sovereignty in relation to legislative power, executive power, judicial power fundamental rights and the franchise. The mere fact that in Article 4 (e) there is no reference to elections to Local Authorities does not mean that franchise as contemplated in Article 3 would not extent to that to elections to Local authorities. Local authorities have acquired constitutions status, in particular after the enactment of the 13th Amendment, which specifically deals with Local Government as item 4 in list 1 of the 9th Schedule. Item 4:3 reads as follows..

Similar views were expressed in judgement of Wijesekera vs. Attorney General (2007) I SRI LR page 38 and Mediwaka vs. Dayananda Dissanayake (2001) SRI LR 377

Manoharan De Silva, PC, for the Petitioner in SCSD 21/2017 submitted that Provincial Council enjoy a constitutional status as it is included in chapter XVII of the Constitution. According to Article 154 (g) (1) Provincial Council can make statutes with respect to any matter set out in list 1 of the 9th Schedule referred to as the " Provincial List". This includes several subjects in respect of which Parliament had the power to legislate before the establishment of the Provincial Council. Similarly, the Provincial Council can make statutes in respect of matters in the concurrent list after consultation with the Parliament. Similarly, Governor of the Provincial Council appointed by the President exercise executive powers in respect of matters to which the Provincial Council has the power to make Statute either directly or through the Board of Ministers or through officers subordinate to him. Therefore, it is abundantly clear that the Provincial Council within the Province exercise legislative as well as executive powers under the 13th Amendment. Therefore, the exercise of franchise at the election of Members of the Provincial Council comes under Article 4 (E). We agree that the Provincial Council has a constitutional status exercising legislative and executive powers pertaining to the subjects devolved on the Provincial Councils.

The Petitioners submit that the proposed amendment violates Article 10 and 14 (1) of the Constitution. Right to vote is recognized as a fundamental right and denial or restriction of exercising the franchise amounts not only to violation of Article 10 and 14 (1) of the Constitution but also attracts Article 3 of the Constitution. In the proposed amendment Parliament is given the power to dissolve of all nine Provincial Council on a specified date which is not mentioned in the Bill. However it is stated that the specified date shall not be later than expiration of the term of last constituted Provincial Council. The last constituted Council is the Uva Provincial Council whose term will end in September 2019. It is the contention of the Learned Counsel of most of other Petitioners that in the absence of a specified date the Parliament with a simple majority could decide on any date which will be suitable to the ruling party.

In view of this proposed amendment in respect of certain Provincial Council the terms will be extended beyond 5 years and in respect of some Provincial Councils the term will be curtailed. In both ways it was submitted that franchise will be affected.

It was held in several determinations that advancing the election date will not violate the Constitution as it will not deprive the voter of his franchise as he will be also to exercise the vote in advance or before the expiry of the term. On the other hand delay in exercising the franchise will affect the fundamental rights of voters.

The majority of this Court is of the view that Clauses 2, 3 and 4 of the Bill is inconsistent with Articles 3, 4, 12 (1) and 14 (1) of the Constitution and under Article 83 shall become law if number of votes cast in favour thereof amounts to not less than two - thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

One member of this Court is not in agreement with the above view.

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

Priyasath Dep
Chief Justice.

Anil Gooneratne
Judge of the Supreme Court.

Vijith K. Malalgoda
Judge of the Supreme Court.

First Reading:	23. 08. 2017 (Hansard Vol. 254; No. 06; Col. 781)
Bill No:	201
Sponsor/ Relevant Minister:	Prime Minister and Minister of National Policies and Economic Affairs
Decision of the Supreme Court Announced in Parliament:	19. 09. 2017 (Hansard Vol. 255; No. 01; Col. 1 – 30)
Second Reading:	Listed on the Order Paper for Second Reading.

S. C. (SD) No. 34/2017

" PROVINCIAL COUNCILS ELECTIONS (AMENDMENT) BILL"

BEFORE :

Priyasath Dep, PC	-	Chief Justice
H.N.J. Perera	-	Judge of the Supreme Court
Vijith K. Malalgoda, PC	-	Judge of the Supreme Court

S.C. (SD) No. 34/2017

Petitioner	:	Jayakodi Arachchige Sisira Jayakodi
Counsel	:	Manohara de Silva, PC with Canishka Witharana and H.M. Thillakarathne
Respondent	:	Hon. Attorney General
Counsel	:	Nerin Pulle, Deputy Solicitor General

Court assembled for hearing on 03.10.2017

A Bill to amend the Provincial Councils Elections Act No. 2 of 1988 was published in the Government Gazette dated 3rd August 2017 and placed on the Order Paper of the Parliament on 19th September 2017. The short title of the Bill was cited as "the Provincial Councils Elections (Amendment) Act, No. of 2017."

The Petitioner by his Petition dated 26th September 2017 invoked the jurisdiction of the Supreme Court in terms of Article 121(1) to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution.

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

The Learned Counsel representing the Petitioner and the Learned Deputy Solicitor General representing the Attorney General were heard before this bench at the sitting held on 3rd of October 2017.

The Petitioner by his petition seeks a declaration and determination to the effect that Clause 2 of the Bill is inconsistent with Article 1, 2, 3, 4, 12(1), 75 and 83 and Chapter XVII of the Constitution, and seeks a declaration that it has to be passed by not less that 2/3 of the whole number of Members of the Parliament and approved by the people at a referendum in order to become law.

Clause 2 reads as follows:

> Section 10 of the Provincial Councils Elections Act, No. 2 of 1988 is hereby amended in subsection (1) of that section, by the substitution for the words and figures from "Within one week" to "an election to such Council", of the words and figures "Within one week from date specified in terms of Article 154 DD of the Constitution, the Commissioner shall publish a notice of his intention to hold an election to all Provincial Councils".

In the Bill titled Twentieth Amendment to the Constitution, it was sought to insert Article 155DD. However, Supreme Court held that the Bill is required to be passed by 2/3 of the

whole number of Members of Parliament and be approved by a referendum by People. However, the Parliament did not proceed with the Bill titled Twentieth Amendment to the Constitution. Therefore there is no Article 154 DD in the Constitution. It is non existent. It is not practically possible to effect an amendment as envisaged in Clause 2. In view of this deficiency, the Learned Deputy Solicitor General representing the Attorney General informed Court that on the next sittings of the Parliament, that is on 09th October 2017 steps will be taken to remove the draft Bill from the Order Paper. The Learned Deputy Solicitor General tabled a letter dated 2nd October 2017 addressed to Attorney General by the Leader of the House of Parliament to this effect. The Letter is annexed herewith marked 'A'.

In the circumstances, we make no determination under Article 121 of the Constitution.

We wish to place on record our appreciation of the assistance given of the Learned Deputy Solicitor General representing the Hon. Attorney General and the Learned President's Counsel who appeared for the Petitioner.

Priyasath Dep
Chief Justice.

Nalin Perera
Judge of the Supreme Court.

Vijith K. Malalgoda
Judge of the Supreme Court.

First Reading:	19. 09. 2017 (Hansard Vol.255; No. 01; Col. 94)
Bill No:	204
Sponsor/ Relevant Minister:	Prime Minister and Minister of National Policies and Economic Affairs
Decision of the Supreme Court in Announced Parliament:	19. 10. 2017 (Hansard Vol. 255; No. 09; Col. 1137)
Remarks:	Withdrawn on 09.10.2017 (Hansard Vol.255; No. 07; Col.926)