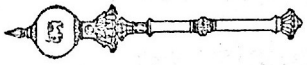

DECISIONS OF THE SUPREME COURT ON PARLIAMENTARY BILLS

2010 - 2012

VOLUME X

Published by the Parliament Secretariat,
Sri Jayewardenepura Kotte

September - 2013

PRINTED AT THE DEPARTMENT OF GOVERNMENT PRINTING, SRI LANKA.

Price : Rs. 292.00 Postage : Rs. 70.00

DECISIONS OF THE SUPREME COURT OF THE REPUBLIC OF SRI LANKA UNDER ARTICLES 120, 121 AND 122 OF THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA FOR THE YEARS 2010, 2011 AND 2012

2-PL 006841 - 300 (2013/01)

CONTENTS

DECISIONS
OF
THE SUPREME COURT
ON
PARLIAMENTARY BILLS

2010

D I G E S T

S.C. (SD) No. 01/2010

"EIGHTEENTH AMENDMENT TO THE CONSTITUTION"

BEFORE :

Dr. S. A. Bandaranayake	-	Judge of the Supreme Court
K. Sripavan	-	Judge of the Supreme Court
P. A. Ratnayake	-	Judge of the Supreme Court
S. I. Imam	-	Judge of the Supreme Court
R. K. S. Suresh Chandra	-	Judge of the Supreme Court

COUNSEL :

Mohan Peiris, P. C., Attorney - General with Sanjay Rajaratnam, D. S. G., A. H. M. D. Nawaz, D. S. G., and Nerin Pulle, S. S. C.

Dr. Jayampathy Wickramaratne, P. C., with Ms. Pubudini Wickramaratne and Ms. Chandrika Silva for Chandra Jayaratne and Lal Wijenayake.

J. C. Weliamuna with Maduranga Ratnayake, Pasindu Silva, Pulasthi Hewamanna and Sanjeewa Ranaweera for Janatha Vimukthi Peramuna. Saliya Peiris with Asthika Devendra, Thanuka Nandasiri for K. W. Janaranjana.

Viran Corea for the Centre for Policy Alternatives.

Chrishmal Warnasuriya with Revan Weerasinghe, Pulasthi Hewamanna and Dulhantha Kularatne for Sunil Hadunneththi and Vijitha Herath.

Rohan Edrisinha appears in person.

Court assembled for hearing on 31st August, 2010 at 10.30 a.m.

His Excellency The President has made a reference in terms of Article 122 (1) (*b*) of the Constitution with regard to the Bill described in its long title as "an Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka", which is the 18th Amendment to the Constitution. The Bill bears the endorsement of the Secretary to the Cabinet of Ministers made in terms of Article 122 (1) of the Constitution that the Bill is urgent in the national interest.

Upon receipt of the Bill the Court issued notice on the **Hon. The Attorney - General** as required in terms of Article 134 (1) of the Constitution.

Hon. The Attorney - General, the Counsel representing the Petitioners, and the Petitioner, who appeared in person were heard before this Bench at the sittings held on 31.08.2010.

The Bill proposes, *Inter alia*, to amend the following specific provisions of the Constitution.

A. Clause 2 :

Amendment to Article 31 (2) and Article 31 (3A) (*a*) (i) of the Constitution, which refers to the election and the term of office of the President of the Republic.

B. Clause 3 :

Amendment to Article 32 (3) to make it a requirement for the President to be present in Parliament once in every three (3) months.

C. Clauses 4 and 5 :

Redefining the composition and functions of the Constitutional Council referred to in Chapter VII A of the Constitution which would be hereinafter known as the Parliamentary Council.

D. Clause 6 :

Amendment to Chapter IX of the Constitution with reference to the powers and functions of the Cabinet of Ministers and of the Public Service Commission.

E. Clauses 7 8, 9, 10, 11, 22 and 23 :

Amendment to Chapters X and XVIII A of the Constitution to classify the Police officers including the Inspector General of Police within the ambit of Public Officers and to redefine the powers of the National Police Commission.

F. Clauses 13 and 14 :

Amendment to Chapter XIV A of the Constitution redefines the composition, powers and functions of the Election Commission.

G. Transitional provisions which are necessary and consequential in view of the aforementioned amendments.

The main contention of the Learned Counsel for the Petitioners was that the proposed amendments referred to above were inconsistent with Articles 3 and/or 4 of the Constitution requiring the Amendment to be passed by the People at a Referendum in terms of Article 83 of the Constitution and specific reference was made to clauses 2, 3, 5, 7, 8, 9, 13 and 14 of the Bill.

Clause 2 :

Clause 2 of the Bill seeks to Amend Article 31 (3A) (*a*) (i) of the Constitution, which is in the following terms:-

"The Constitution of the Democratic Socialist Republic of Sri lanka (hereinafter referred to as the "Constitution")" is hereby amended in Article 31 thereof, as follows:-

(1) By the repeal of paragraph (2) of that Article; and

(2) In paragraph (3A) (*a*) (i) of that Article.

(a) by the substitution for the words "at any time after the expiration of four years from the commencement of his first term of office" of the words "at any time after the expiration of four years from the commencement of his current term of office"; and

(b) by the substitution for the words "by election, for a further term" of the following :-

"by election, for a further term :

Provided that, where the President is elected in terms of this Article for a further term of office, the provisions of this Article shall *mutatis mutandis* apply in respect of any subsequent term of office to which he may be so elected".

Article 83 of the Constitution refers to the approval of certain Bills at a Referendum. This Article reads as follows:-

"Notwithstanding anything to the contrary in the provisions of Article 82-

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

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

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

It is not disputed that Article 83 makes no reference to proposed Article 31 of the Constitution. However, the contention of the Learned Counsel for the Petitioners was that although the aforesaid Article is not referred to in Article 83, the provisions in the proposed amendments are inconsistent with Article 3 read with Article 4 of the Constitution which is specifically mentioned in Article 83 of the Constitution.

Learned Counsel for the Petitioners contended that the removal of the limit on the president's term of office would affect the manner in which the executive power of the People is exercised and would therefore violate the provisions contained in Article 3 of the Constitution.

Article 3 of the Constitution deals with the sovereignty of the People and reads as follows:-

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

The exercise of the sovereignty referred to in the said Article 3 is clearly stated in Article 4 of the Constitution. In the Supreme Court Determination on the 18th Amendment to the Constitution (SD No. 12/2002), this Court, referring to a series of previous Determinations (SD No. 5/80, 1/82, 2/83, 1/84 and 7/87) had stated that Article 3 is linked up with Article 4 of the Constitution and therefore these two Articles must be read together. Article 4 of the Constitution reads thus:

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

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

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

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

It is to be noted that the aforesaid Article 4 (*e*) of the Constitution refers to the exercise of the franchise of the People and the amendment to Article 31(2) of the Constitution by no means would restrict the said franchise. In fact, in a sense, the amendment would enhance the franchise of the people granted to them in terms of Article 4 (*e*) of the Constitution since the Voters would be given a wide choice of candidates including a President who had been elected twice by them. It is not disputed that the President is directly elected by the People for a fixed tenure of office. The constitutional requirement of the election of their President by the People of the Republic, strengthens the franchise given to them under Article 4 of the Constitution.

In such circumstances the said amendment does not restrict or curtail the provisions contained in Article 4 of the Constitution and accordingly there is no inconsistency either with Articles 3 and /or 4 of the Constitution.

Clause 3

Clause 3 of the Bill deals with Article 32 of the Constitution, which is to be amended in the following manner:-

(1) by the repeal of paragraph (3) thereof and the substitution therefore of the following:-

"(3) The President shall by virtue of his office attend Parliament once in every three months. In the discharge of this function the President shall be entitled to all the privileges, immunities and powers of a Member of Parliament, other than the entitlement to vote, and shall not be liable for any breach of the privileges of Parliament or of its members"; and

(2) by the addition immediately after paragraph (3) thereof, of the following new paragraph:-

(4) "The President shall by virtue of his office, also have the right to address and send messages to parliament."

It was the contention on behalf of the Petitioners that this provision the immunity granted to the President under Article 35 of the Constitution is being extended. Accordingly, it was submitted that this amendment would give rise to the divisibility of the legislative power of the People in terms of Article 3 and/or 4 of the Constitution. Learned Counsel referred to the Determination regarding the Third Amendment to the Constitution (S.D. No. 5/1980).

In that Determination, the Supreme Court had to consider the provisions which sought to seat two members for one electorate - one nominated and the other re-elected. In considering the said provision, the Supreme Court had decided that the effect of that Bill was to seat two (2) members for one and the same electorate, which contravenes the provisions of Article 161(*a*) of the Constitution, in that it increases the composition of the first Parliament and thereby affects the franchise referred to in Article 4 of the Constitution and also infringes the sovereignty of the People entrenched in Article 3 of the Constitution.

However, in the present Bill the specific provisions that are being introduced under the amendment do not contravene any of the Articles dealing with the Parliament. In fact the provisions related to President being present in Parliament on a periodically stipulated basis read with Article 42 of the Constitution would clearly ensure that the President be answerable to People in a more meaningful manner which would enhance the provisions contemplated in Articles 3 and 4 of the Constitution.

Accordingly, this clause has no inconsistency either with Articles 3 and/or 4 of the Constitution.

Clauses 4 and 5

It is to be noted that clause 4 of the Bill makes provision in repealing Chapter VII A of the Constitution, which consisted of Articles 41A to 41H. The said Chapter VII A of the Constitution refers to the Constitutional Council which was introduced under the

17th Amendment to the Constitution. clause 5 of the Bill, introduces a new heading, the Parliamentary Council, and an Article having the effect as Article 41A of the Constitution.

Learned Counsel for the Petitioners contended that the provisions contained in clause 5 have the effect of diluting the independence of the judiciary and therefore has a direct impact on Article 4(*c*) regarding the exercise of the judicial power of the People and the sovereignty of the People in terms of Article 3 and therefore requires to be approved by the People at a Referendum in terms of Article 83 of the Constitution.

The said amendment referred to in clause 5 is in effect to amend the provisions brought in by the 17th Amendment to the Constitution. The Constitutional Council which is proposed to be replaced by the Parliamentary Council, came into being as a result of the 17th Amendment in 2001.

Considering the Bill brought in for the establishment of the Constitutional Council under the 17th Amendment, this Court had noted that the establishment and functions of the Constitutional Council was the core of the 17th Amendment.

The question at that time this Court had to consider was as to whether the subjection of the discretion of the President to the recommendation and approval of the Constitutional Council as envisaged by that Bill, would amount to an effective removal of the President's executive power in that regard. Considering the said question, this Court had noted the submissions made by the Hon. The Attorney-General that although there was no removal of the executive power of the President, that it was a restriction on the exercise of the discretion by the President. On a consideration of the totality of the provisions in the said Amendment, the Supreme Court had determined that the said Bill required to be passed by a special majority specified in Article 82(5) of the Constitution, but that there was no provision in the Bill, which required approval of the people at a Referendum in terms of the provisions of Article 83.

The contention of the Learned Counsel for the Petitioners was that the Constitutional Council was established with the intention of safeguarding the independence of the judiciary and the purpose and the objective of the said introduction was to place a restriction on the discretion of the President in appointing judges.

As stated earlier, the 17th Amendment was brought into effect only in 2001 and from 1978 up to the 17th Amendment came into effect, for a period of over 13 years, judges were appointed in terms of the provisions laid down under the 1978 Constitution. This position in fact was considered in **Silva V Bandaranayake** ([1997] 1 Sri L. R. 92), by a 7 judge Bench of this Court. In that matter consideration was given to the appointment of judges to the Supreme Court by HE the President of the Republic under Article 107 of the Constitution. At that time, as could be clearly seen, the 17th Amendment had not come into effect and the Supreme Court had considered the matter under Article 107 of the 1978 Constitution. In that decision, the Supreme Court had clearly held thus:

> "The President in exercising the power conferred by Article 107 of the Constitution has a sole discretion. The power is discretionary and not absolute. It is neither untrammeled nor unrestrained and ought to be exercised within limits.

> Article 107 does not expressly specify any qualifications or restrictions, However, in exercising the power to make appointments to the Supreme Court there should be co-operation between the Executive and the judiciary, in order to fulfill the object of Article 107."

Prior to the decision in **Silva V Bandaranayake** (supra) this Court had examined the powers of the Executive with regard to appointments. In **Premachandra V Jayawickrama** ([1994] 2 Sri L.R. 90), this Court had stated that,

> "There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted."

It is therefore quite apparent that even prior to the introduction of the Constitutional Council in terms of the 17th Amendment to the Constitution, there were necessary safeguards which restricted the discretion of appointing authorities since no one possessed any unfettered discretion. The relevant provisions contained in the 1978 Constitution had not violated Article 3 and/or 4 of the Constitution and similarly the introduction of the Constitutional Council also had not violated any of the said provisions.

The present amendment refers to the introduction of the Parliamentary Council in place of the Constitutional Council, which consists of a Prime Minister, the Speaker, the Leader of the opposition, a nominee of the Prime Minister, who shall be a Member of Parliament; and a nominee of the Leader of the Opposition, who shall be a Member of Parliament. The persons appointed as nominees of the Prime Minister and the Leader of the Opposition should be nominated in such manner as would ensure that the nominees would belong to communities which are communities other than those to which the Prime Minister, the Speaker and the Leader of the Opposition would belong.

On a consideration of the totality of the provision dealing with the establishment of the Parliamentary Council, it is abundantly clear for the reasons aforesaid that the proposed amendment is only a process of redefining the restrictions that was placed on the President by the Constitutional Council under the 17th Amendment in the exercise of the executive power vested in the President, which is inalienable.

Accordingly, these clauses have no inconsistency either with Articles 3 and/or 4 of the Constitution.

Clauses 6, 7, 8 and 9

Clauses 7, 8 and 9 of the Bill deal with the powers and functions of the Cabinet of Ministers and of the Public Service Commission. By these amendments, Article 55 of the Constitution is to be repealed in order to transfer the powers which were earlier vested with the Public Service Commission to the Cabinet of Ministers. Clause 6 clearly refers to the fact that the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers. Clauses 8 and 9 also refer to the authority which was exercised by the Public Service Commission, being given to the Cabinet of Ministers.

Articles 55, 56 and 57 of the Constitution do not attract, Article 3 and/or 4 of the Constitution and therefore there is no inconsistency which would need the approval of the People at a Referendum.

Clauses 13 and 14

Clause 13 refers to the Amendment of Article 103 and 104B of the Constitution. These amendments deal with the redefinition of the composition, powers and functions of the Election Commission.

Learned Counsel for the Petitioners contended that clause 14, which deals with the amendment to Article 104B is inconsistent with Article 3 of the Constitution as it curtails the power of the Commission.

The said clause 14 is in the following term:-

"Article 104B of the Constitution is hereby amended as follows:-

(1) by the insertion immediately after paragraph (4) thereof, of the following new paragraph:-

4 (*a*) For the avoidance of doubt it is stated that any guideline issued by the Commission during the period commencing with the making of an order for the holding of an election or the making of a Proclamation requiring the conduct of a Referendum, as the case may be, shall-

a) be limited to matters which are directly connected with the holding of the respective election or the conduct of a respective Referendum as the case may be; and

b) not be connected directly with any matter relating to the public service or any matter within the ambit of administration of the Public Service Commission or the Judicial Service Commission as the case may be, appointed under the Constitution; and

(2) in paragraph (5) by the repeal of sub-paragraph (*b*), (*c*) and (*d*) thereof and the substitution therefore the following paragraph:-

"(b) It shall be the duty of any broadcasting or telecasting operator or any proprietor or publisher of a newspaper as the case may be, to take all necessary steps to ensure compliance with any guidelines as are issued to them under paragraph (a)."

As could be seen, the amendments are in addition to the present powers, functions and duties of the Election Commission. A careful perusal of the proposed amendments, indicate that they are for the purpose of ensuring that other organizations of the Government are not stifled in their functions during the pendency of Elections. It is to be borne in mind that Commissions such as the Public Service Commission and the Judicial Service Commission are also independent Commissions established under the Constitution, whose functions should not be curtailed at any time. As stated by **Mark Fernando, J., in Karunathilake and Another V Dayananda Dissanayake, Commissioner of Elections and Others** ([1999] 1 Sri L. R. 157) in reference to Article 104 of the Constitution,

> "Article 104 refers to the powers, duties and functions of the Commissioner of Elections. But that is not exhaustive of his powers and duties. Article 93 of the Constitution requires that voting be free, equal and secret and it follows that the Commissioner of Elections has such implied powers and duties as are necessary to ensure that voting is free, equal and secret."

It is therefore apparent that the said amendments in terms of Article 104B of the Constitution do not in any way curtail the powers of the Election Commission, but only brings a safeguard in terms of the functions of the other Commissions.

There are few other matters we wish to make note in this Determination.

In terms of clause 10 of the Bill, an amendment is brought to Article 61F of the Constitution to bring the police officers within the ambit of public officer and subject them to the same legal regime as the other public officers. Accordingly, the police officers would be treated as any other public officer and the Inspector-General of Police would be a Head of a Department appointed by the Cabinet of Ministers.

None of these provisions would be inconsistent with Articles 3 and/or 4 of the Constitution.

Mr. Saliya Peiris submitted that clause 21 of the Bill has the effect of amending Chapter XVII A of the Constitution. Accordingly, Learned Counsel contended that it is necessary to give effect to Article 154G(2) of the Constitution and therefore the Bill has to be first Gazetted and referred to the Provincial Councils. Accordingly, at the conclusion of the submissions by all parties, we sought for a clarification on this point from the Hon. The Attorney-General who had appeared on notice.

Clause 21 of the Bill which deals with Article 154R of the Constitution is as follows:-

> "Article 154R of the Constitution is hereby amended in sub-paragraph (*c*) of paragraph (1) thereof, by the substitution for the words "three other members who are appointed by the President on the recommendation of the Constitutional Council, to represent" of the words "three other members appointed by the President, to represent."

Hon. The Attorney-General had submitted that the objective of the aforementioned amendment is to make consequential amendments brought about by the change of the terminology to the body known as the Constitutional Council for the terms "Parliamentary Council" referred to in the proposed amendment. It is an amendment to amend the provisions, which were originally contained in the 17th Amendment to the Constitution. In the Bill pertaining to the 17th Amendment of the Constitution the specific provision had been introduced as clause 19. The said clause was considered by this Court in that Determination as a consequential amendment, which did not require any other procedure to follow such as being Gazetted and referred to the Provincial Councils.

Accordingly, it is pertinent that the said amendment does not attract the provision of Article 154 (G) (2) of the Constitution.

We have examined the remaining provisions of the Bill and we do not see in any of them any issue that would require consideration by this Court in terms of Article 83 of the Constitution.

We have noted the following inconsistency between the English and Sinhala version:-

> "Clause 41A (6) of the English version refers to the word "Committee" which should read as "Council."

It is also observed that in view of the repeal of Article 31 (2) of the Constitution, which provides for the qualification required to enable a person to qualify to stand for election as President, it is necessary that a consequential amendment be made to Article 92 of the Constitution that refers to disqualification for election as President by the **Repeal of Article 92 (*c*) of the Constitution.**

Accordingly this Court determines that the Bill entitled "the Eighteenth Amendment to the Constitution" -

(1) complies with the provisions of Article 82(1) of the Constitution;

(2) requires to be passed by a special majority specified in Article 82(5) of the Constitution;

(3) that there is no provision in the Bill which requires approval of the People at a Referendum in terms of the provision of Article 83 of the Constitution.

We shall place on record our deep appreciation of the assistance given by Hon. The Attorney-General, Learned Counsel who appeared for the Petitioners and the Petitioner who appeared in person and made submissions in this matter.

Dr. S. A. Bandaranayake,
Judge of the Supreme Court

K. Sripavan,
Judge of the Supreme Court

P. A. Ratnayake
Judge of the Supreme Court

S. I. Imam
Judge of the Supreme Court

R. K. S. Suresh Chandra
Judge of the Supreme Court

First Reading :	07.09.2010 (Hansard Vol. 193, No. 01, Col. 74)
Bill No :	39
Sponsor/Relevant Minister :	The Prime Minister & Minister of Buddha Sasana and Religious Affairs
Decision of the Supreme Court Announced in Parliament :	07.09.2010 (Hansard Vol. 193, No. 01, Col. 3-13)
Second Reading :	08.09.2010 (Hansard Vol. 193, No.02, Col. 185-361)
Committee of the whole Parliament and Third Reading :	08.09.2010 (Hansard Vol. 193, No.02, Col. 361-384)
Hon. Speaker's Certificate :	09.09.2010
Title :	Eighteenth Amendment to the Constitution

S.C. (S.D.) Nos. 02/2010 - 11/2010

"LOCAL AUTHORITIES (SPECIAL PROVISIONS) BILL" and "LOCAL AUTHORITIES ELECTIONS (AMENDMENT) BILL"

BEFORE :

Dr. Shirani. A. Bandaranayake	-	Judge of the Supreme Court
P. A. Ratnayake P C	-	Judge of the Supreme Court
S. I. Imam	-	Judge of the Supreme Court

S.C. (S.D.) No. 02/2010

Petitioners : Prof. Ranjith Amarasinghe
Prof. Navaratne Bandara

Counsel : Dr. Jayampathy Wickramaratne, P. C., Pubudini Wickramaratne

Intervenient Petitioner : Udaya P. Gammanpila

Counsel : Sanjeeva Jayawardene with Rajeev Amarasuriya, Lakmini Balasuriya, Saman de Silva

N. Pulle, Senior State Counsel for Attorney-General

S.C. (S.D.) No. 03/2010

Petitioners : Women and Media Collective
Centre for Women's Research
Kantha Shakthi
Women's Resource Centre
Women's Development Centre

Counsel : Ruwan Rajapakse

Intervenient Petitioner : Liyanage Savithri Chaturika Wijesinghe

Counsel : Chandana Liyanapatabendi with Saman Bandara, Mary Dickman and Mangalika Munasinghe

N. Pulle, Senior State Counsel for Attorney-General

S.C. (S.D.) No. 04/2010

Petitioners : Women In Need
Women's Development Centre

Counsel : Chamantha Weerakoon Unamboowe with Kumudini Keerawela

Intervenient Petitioner : Mary Dickman

Counsel : Manohara de Silva, P. C., with Mangalika Munasinghe.

N. Pulle, Senior State Counsel for Attorney-General

S.C. (S.D.) No. 05/2010

Petitioners : Centre for Policy Alternatives
Paikiasothy Saravanamuttu

Counsel : Viran Corea with Bhavani Fonseka

Intervenient Petitioner : Champani Padmasekara

Counsel : D. P. Mendis, P. C., with Saliya Mathew

Y. J. W. Wijethillake, P C, ASG , with N. Pulle, Senior State Counsel for Attorney-General

S.C. (S.D.) No. 06/2010

Petitioner : Stefan Andi Schubert

Counsel : Suren Fernando with Juanita Arulanantham

Intervenient Petitioner : Mohamed Fuvard Mohomed Muzammil

Counsel : Kushan de Alwis with Ayendra Wickramasekara
Kanchana Ratwatte, Kapila Gamage and Divyandi Abeysena

Y. J. W. Wijethillake, P C, ASG , with N. Pulle, Senior State Counsel for Attorney-General

S.C. (S.D.) No. 07/2010

Petitioner : Stefan Andi Schubert

Counsel : Suren Fernando with Juanita Arulanantham

Intervenient Petitioner : Sripanee Jayarathna Ranasinghe

Counsel : Canishka Witharana with Sumudu de Silva

Y. J. W. Wijethillake, P C, ASG , with N. Pulle, Senior State Counsel, for Attorney-General

S.C. (S.D.) No. 08/2010

Petitioner : Mavai Somasunderam Senathirajah

Counsel : M. A. Sumanthiran with Niran Anketell

Intervenient Petitioner : J. P. Gamage

Counsel : Manohara de Silva, P C, with Dushani Priyadarshani

N. Pulle, Senior State Counsel, for Attorney - General

S.C. (S.D.) No. 09/2010

Petitioner : Mavai Senathirajah

Counsel : M. A. Sumanthiran with Niran Anketell

Intervenient Petitioner : Prof. Mendis Rohanadeera

Counsel : D. S. Wijesinghe, P C, with Kaushalya Molligoda, Chamila Talagala and Isuru Somadasa

N. Pulle, Senior State Counsel, for Attorney General

S.C. (S.D.) No. 10/2010

Petitioner : M. M. Abdul Rahuman

Counsel : Nizam Kariapper with A. M. Faaiz

Intervenient Petitioner : Renuka Perera

Counsel : Kuvera de Zoysa with Senaka de Saram

A. Gnanathasan, P C, ASG , with M. Gopallawa, Senior State Counsel for Attorney General

S. C. (S. D.) No. 11/2010

Petitioner : Vijitha Herath

Counsel : Chrishmal Warnasuriya with Dushantha Kularatne and Sonali Wanigabaduge

Intervenient Petitioner : Maithripala Sirisena

Counsel : Nihal Jayamanne, P C with Mokshini Jayamanne and Shamika Seneviratne

Intervenient Petitioner : E. V. P. Rasanga Harischandra

Counsel : Priyantha Jayawardena with Manjula Balasooriya

A. Gnathasan, P C, ASG., with M. Gopallawa, Senior State Counsel for Attorney General

Court asssembled for hearing on 2nd November, 2010 at 10.00 a. m.

Two Bills bearing the titles Local Authorities Elections (Amendment) and the Local Authorities (Special Provisions) were placed on the Order Paper of Parliament on 21.10.2010 . Eight (8) petitions (S.C S.D. 02/10, 03/10, 04/10, 05/10, 06/10, 08/10, 10/10 and 11/10) have been presented on the basis of the Bill on Local Authorities Elections (Amendment) and two (2) petitions (S.C. S.D. 07/10 and 09/10) on the basis of the Local Authorities (Special Provisions), invoking the jurisdiction of this Court in terms of Article 121(1) for a determination in terms of Article 123 of the Constitution in respect of the Bills.

Upon receipt of the petitions the Court had issued notice on the Hon. The Attorney-General as required by Article 134(1) of the Constitution. At the time, the petitions were taken for consideration, several Learned Counsel informed Court that there were Petitioners, who wished to intervene in the petitions filed before this Court. At the same time, there were Learned Counsel who indicated that, there were petitions that had been filed before this Court, which had not complied with the basic Supreme Court Rules and therefore should be dismissed in *limine*.

Having considered the submissions made by all Learned Counsel, it was agreed to allow all Learned Counsel who appeared for Petitioners to make submissions on behalf of the Petitioners and also to allow all the interventions. It was also decided to take all petitions together.

Thereafter the Learned Counsel representing the Petitioners, the Learned Counsel representing the Intervenient Petitioners and the Learned Counsel, who appeared on behalf of the Hon. The Attorney-General were heard before this Bench at the sittings held on 02.11.2010.

The Petitioners in S.C. (S.D.) 02/10, 03/10, 04/10, 05/10, 06/10, 08/10, 10/10 and 11/10 contended that clauses 3A, 22, 23, 45, 46, 48 are violation of Article 3, 4 and 12(1) of the Constitution. It was also contended that since there are certain clauses, which deal with matters set out in the Provincial Council List, the Bills attract the provisions laid down in Article 154G (3) of the Constitution and therefore should have followed the procedure laid down in the relevant Articles of the Constitution.

The Petitioners in S.C. (S.D.) 07/10 and 09/10 contended that several clauses included in the Local Authorities (Special Provisions) Bill are inconsistent, especially with Articles 3, 4 and 12 (1) of the Constitution.

The Petitioners in the 10 petitions referred to above therefore contended that since there are several inconsistencies with the provisions of the Constitution, the Bills require to be passed by the special majority, which is necessary under Article 84(2) of the Constitution and be approved by the People at a Referendum.

Since extensive submissions were made by some of the Learned Counsel on behalf of their Petitioners regarding both Local Authorities Elections (Amendment) Bill and the Local Authorities (Special Provisions) Bill, stating that the procedure laid down in terms of Article 154G (3) has not been followed, this would be considered first.

Compliance with Article 154G (3) of the Constitution

Some of the Petitioners contended that clause 48 of the Local Authorities Elections (Amendment) Bill and clauses 4, 5, 8, 9 and 13 of the Local Authorities (Special Provisions) Bill purport to legislate on matters referred to in the Provincial Council List in Schedule 9 of the Constitution. It was contended that any Bill that deals with any matter, which comes within the subjects enumerated in the Provincial Council List must be referred to every Provincial Council for the expression of its views and that the two Bills under review have not been referred to the Northern Provincial Council and therefore they are incapable of becoming law. It was further contended that the non-constitution of the Northern Provincial Council does not cure the defect in the process adopted in passing the Bill, since Article 154 (G) 3 of the Constitution refers to a consultative legislature process involving Parliament and all Provincial Councils.

While the Local Authorities Elections (Amendment) Bill clearly deals with the subjects of Local Authority Elections clauses 4, 5, 8, 9 and 13 of the Local Authorities (Special Provisions) Bill seek to amend certain sections of the Municipal Councils Ordinance, the Urban Councils Ordinance and the Pradesheeya Sabha Act. clauses 4 and 8 refer to the procedure that should be followed where there is a vacancy in the office of the Mayor and a Deputy Mayor of a Municipal Council or an Urban Council, respectively. Clauses 5, 9 and 13 refer to Municipal Councils, Urban Councils and Pradesheeya Sabhas respectively and deal with the effect of not passing the budget by the respective Councils.

Article 154 G, which was introduced under the 13th Amendment to the Constitution deals with statutes of the Provincial Councils. Article 154 (G)3 is 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 its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference, and -

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

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

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

The provisions contained in Article 154 (G) 3 clearly indicate that the consultation process referred in the said Article applies only to Bills in respect of any matter set out in the Provincial Council List.

The Ninth Schedule to the Constitution, introduced under the 13th Amendment to the Constitution deals with three lists known as List I (Provincial Council List), List II (Reserved List) and List III (Concurrent List). List III, (Concurrent List) has no reference to the subject of Local Government. However both List I (Provincial Councils List) and List II (Reserved List) refer to the subject of Local Government and Local Authorities respectively, and deal with specific and separate subject areas.

Item No. 4 of List I (Provincial Council List) deals with the subject of Local Government and reads as follows :

" 4. Local Government -

4:1 Local authorities for the purpose of local government and village administration, such as Municipal Councils, Urban Councils and Pradeshiya Sabhas except that, the Constitution, form and structure of local authorities shall be determined by law;

4:2 Supervision and administration of local authorities established by law, including the power of dissolution.....

4:3 Local authorities will have the powers vested in them under existing law. Municipal Councils and Urban Councils will have the powers vested in them under the Municipal Councils Ordinance and the Urban Councils Ordinance. Pradeshiya Sabhas will have the powers vested in them under existing law. It will be opened to a Provincial Council to confer additional powers on local authorities but not to take away their powers;

4:4 Gramodaya Mandalayas will have the powers vested in Gramodaya Mandalayas under existing law. It will be open to a Provincial Council to confer additional powers on Gramodaya Mandalayas."

List II (Reserved List) refers to elections and is in the following terms:-

> "Elections including Presidential, Parliamentary, Provincial Councils and Local Authorities.
>
> This would include-
>
> Elections to Parliament, Provincial Councils, Local Authorities and to the Office of President; the Department of Elections."

Learned Counsel for the Petitioners referred to the Determinations of this court in respect of the Local authorities (Special Provisions) Bill (SC SD No. 6 and 7/2008) where this court had determined that the said Bill relates to certain matters set out in the Provincial Council List and shall not become law unless it is referred by HE the President to every Provincial Council as required by Article 154G (3) of the Constitution. Since that Bill had been placed on the Order Paper of Parliament without compliance with the provisions of Article 154G (3) of the Constitution, the Court had decided not to make any determination as to the other grounds of challenge urged by Learned Counsel.

The said Bill on Local Authorities (Special Provisions) was to deal with the creation of Wards in the local authorities and this Court had determined that although the creation of Wards in the local authorities would amend the structure of the local authorities, granting various powers to the Ward Committees were matters falling within the Provincial Council List.

The provisions contained in Article 154 G (3), referred to above refers to the need to follow the procedure laid down therein. It is however necessary to be borne in mind that the said provisions have to be followed, only on matters set out in the Provincial Council List. Hence, it is a prerequisite firstly to consider whether the Bill in question deals with a subject which falls within the subjects listed in the Provincial Council List.

Item No. 4 of List I, which is known as the Provincial List, deals with **Local Government.** The word local government, according to Tony Byrne (Local Government in Britain, 1985, pg. 17), is self-government involving the administration of public affairs in each locality by a body of representations in the local community. Thus item 4.1 of Provincial Council List refers to the Municipal Councils, Urban Councils and Pradeshiya Sabhas for the purpose of local government and village administration. Such administration however would not extend to the Constitution, form and structure of local authorities as it is stated clearly that those **shall be determined by law.**

The subject of local government and whether it has been devolved to Provincial Councils in its entirety was considered by this Court SC SD 1/92. In that Determination the Bill titled An Act to amend the Greater Colombo Economic Commission Law, No. 4 of 1978 came up for consideration and the Petitioner had alleged that clauses 7 and 8 of that Bill were inconsistent with the provisions of Article 154 (G) with list I of the Ninth

Schedule and Article 12 and with Articles 3 and 4 of the Constitution. Whilst determining that none of the provisions of the Bill are inconsistent with the Constitution or any provision thereof , it is important to note what the Court had stated on the subject of local government:

> The Petitioner relies on the heading "Local Government" in Item 4 as proof of devolution of that entire subject on the Provincial Councils..... "Local Government" is not devolved in its entirety."

Item 4.1 in the Provincial Council List also cannot be examined in isolation since there is reference to local government in the Reserved List, which refers to the elections to local authorities.

The Bill on Local Authorities Elections (Amendment) deals with amending provisions regarding elections to local authorities and the Bill on Local Authorities (Special Provisions) is a consequential Bill arising from those amendments.

It was correctly contended by the Learned Presidents Counsel for Intervenient Petitioners that the term **Constitution, form and structure** referred to in Item 4.1 of the Provincial Council List includes not only the legal framework, which creates local authorities, but also the appointment of constituent members to such established bodies.

Local authorities, which consist of Municipal Councils, Urban Councils and Pradeshiya Sabhas, are creatures of statute. Provision has been made under each of the Municipal Councils, Urban Councils and the Pradeshiya Sabhas to have general elections in accordance with the provisions of the Local Authorities Elections Ordinance for the purpose of electing the constituent members of the local authority. Thus the creation of the Local authority and appointing the constituent members are matters which would clearly fall within the phrase **constitution, form and structure** that is referred to as an exception in term 4.1 of the Provincial Council List. Moreover, It is to be noted, as referred to earlier, that local authority elections is a subject that clearly comes within the purview of the Reserved List, which is accordingly within the ambit and powers of the Central Government. The Provincial Councils have no authority to legislate on matters which are within the powers of the Central Government. A careful scrutiny of the contents of the two Bills, referred to above, clearly indicate that the said Bills do not seek to legislate on subjects set out in the Provincial Council List, but that the endeavour is to legislate on matters specifically excluded from the scope and ambit of the Provincial Council List and which are clearly set out in the Reserved List.

Accordingly, in so far as these two Bills are concerned, the procedure laid down in Article 154G (3) has no applicability as they do not come within the purview of the Provincial Council List.

Local Government Elections, Articles 3 and 4 of the Constitution and Franchise

Learned Presidents Counsel and Learned Counsel for the Petitioners contended that the contents of the Bills as a whole or specific provision thereof restricted the free exercise of the franchise by the People. It was accordingly contended that the entrenched provisions of Article 3 and Article 4 of the Constitution were infringed and that a special majority and a referendum were required to pass the Bills.

The original Local Authority Elections Ordinance came into being in 1946 and has been amended over 17 times. At the time of its Original enactment, provision was made for the election of members to local authorities on the basis of first past the post system. This system was changed by amending law, No. 24 of 1977 with the introduction of the proportional representative system. The present Bill, which could be introduced as a hybrid system, provides for a mix of first past the post and the proportional representative systems.

Article 3 of the Constitution refers to the sovereignty of the People whereas Article 4 of the Constitution deals with the exercise of such sovereignty.

In the Supreme Court Determination on the Bill titled, Eighteenth Amendment to the Constitution, which came up for consideration in 2002 (No.12/2002), it was considered that Article 4 is complementary to Article 3 of the Constitution. In that Determination, reference was made to Special Determinations in 5/80, 1/82, 2/83, 1/84 and 7/87 to show that Article 3 is linked with Article 4 and that the two Articles must be read together. The said Article 3 and 4 are as follows:-

> **"Article 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.
>
> **Article 4**
>
> The sovereignty of the People shall be exercised and enjoyed in the following manner:-
>
> *a*) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;
>
> *b*) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;
>
> *c*) the judicial power of the People shall be exercised by Parliament through Courts, tribunals and institutions created and established or recognized by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

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

As it could be clearly seen, Article 4(*e*) of the Constitution deals with the franchise and a plain reading of the said Article 4(*e*) shows that there is no reference to the elections pertaining to local authorities. This position is further strengthened when reference is made to Article 88 of the Constitution, which states that-

> "every person shall, unless disqualified as hereinafter provided, be qualified to be an elector at the election of the President and of the Members of Parliament or to vote at any Referendum".

Article 88 is in Chapter XIV of the Constitution, which deals with the franchise and elections. Article 4 (*e*), read with Article 88 therefore clearly show that local authority elections are not included in any of the relevant Articles contained in the Constitution, as the Constitution has expressly limited the entrenched right of the franchise only in relation to the election of the President of the Republic, of the Members of the Parliament and at every Referendum. Therefore it is evident that the franchise would not extend to local authority elections.

The Petitioners relied on the Determination of this Court in the Local Authorities (Special Provisions) Bill, No. 12/2003 and submitted that the right to vote at elections to local authorities is in the concept of franchise guaranteed by Articles 3 and 4 of the Constitution. Learned Counsel referred to the following paragraph in the said Determination:-

> "It is thus seen that the powers vested in local authorities have now acquired constitutional recognition. Furthermore, as contended by counsel for the Petitioners, Article 104B of the Constitution as amended by the 17th Amendment, provides for the exercise of the power in relation to election to local authorities by the Commission established in terms of the Constitution. In the light of these provisions we cannot agree with the submission of the Learned Additional Solicitor General that the franchise in relation to local authorities does not come within the purview of Article 3 of the Constitution. The Constitution has to be looked as an organic whole and its terms cannot be fixed to meanings they may have had at the time of enactment.".

The said Determination No. 12/2003 was on the basis of Local Authorities (Special Provisions) Bill. In that, as correctly contended by Learned Counsel for the Intervenient Petitioner in SC SD 2/2010, there was a bold attack on the right of the People to be elected and the Bill had brought in provisions to the effect that the nomination papers

in respect of certain Municipal Councils, Urban Councils and Pradeshiya Sabhas in the Northern and Eastern Provinces deemed to be of no force and effect, revocation of the notices published, return of the deposits that were placed by candidates together with interests. It is also to be noted that the said Bill had the effect of disqualifying youth candidates under the mandatory quota on youth candidates, at a time when resubmission of nominations took place.

More importantly in that Determination, although consideration was given to Articles 3 and 4 (*e*) and the nexus between franchise and sovereignty, the Court did not hold that there was a violation of the provisions of Article 4 (*e*) of the Constitution. **Instead the Court made a Determination that the Bill was inconsistent with Article 12(1) of the Constitution and could be validly passed by the special majority required in terms of Article 84 (2) of the Constitution.**

It is also to be noted that the aforementioned Determination is not the only one which has considered the applicability of Articles 3 and 4 to the concept of franchise. In **Atukorala V Attorney-General** (SC SD No. 2/95), whilst considering the amendments to the Pradeshiya Sabhas Act, had examined the relationship between Articles 3 and 4 of the Constitution and the concept of franchise. Having considered the provisions contained in Articles 3 and 4 of the Constitution, the Supreme Court had determined in SC SD No. 2/95 that,

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

In SC SD 2/95, reference was made to the Determination **In Re The Thirteenth Amendment to the Constitution** ([1987] 2 Sri L. R. 312) and had stated thus:

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

On a careful consideration of both Determinations in the Bill to amend the Pradeshiya Sabhas Act (SC SD 2/95) and the Local Authorities (Special Provisions) Bill (SC SD 12/03), it is evident that in SC SD 2/95, this Court has expressly provided that local government elections have not been included in Articles 3 and 4 of the Constitution. Although the Determination in SC SD 12/03 had stated that franchise could extend to elections to local authorities, this Court had not made a Determination that the provisions of the Bill in question were inconsistent with Articles 3 and / or 4 of the Constitution. In SC SD 12/03, it is to be noted that none of the provisions referred to in the Reserved List of the Ninth Schedule to the Constitution were considered by Court.

In such circumstances, considering the Determinations in SC SD 2/95 and SC SD 12/03 in the light of the provisions contained in the present Bill and the provisions referred to in Articles 3, 4 and 88 of the Constitution, 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.

Establishment of Delimitation Committee

The Petitioner especially the Petitioner in SC SD 2/2010 contended that there were no guidelines with regard to the selection of members to be appointed to the National Delimitation Committee and that the absence of such safeguards is arbitrary, capricious, unreasonable and violative of Article 12(1) of the Constitution.

Article 12(1) of the Constitution deals with the right to equality and state that all persons are equal before the law and are entitled to the equal protection of the law. What it postulates is equal treatment in equal circumstances and what it forbids is discrimination between persons who are similarly circumstanced.

Clause 3A of the Bill makes provision for the establishment of a National Delimitation Committee and the members would be appointed by the Minister. The Minister is not given an unfettered discretion in the delimitation of the Wards, as clause 3C clearly refers to a procedure that should be followed by the Minister in such delimitation of Wards. Further, Delimitation Committees would be appointed at district level and when making its recommendations for the division of a local authority area into Wards, the National Delimitation Committee shall take into consideration many aspects such as the ratio of ethnic composition of the local authority, the geographical area and its physical features, the population and the level of economic development of the local authority.

It is thus clear that there is a process which is transparent and describes the basis on which recommendations are made that would guarantee the equal protection and in such circumstances there cannot be any violation of Article 12(1) of the Constitution.

Nominations for youth and women

Several Petitioners made submissions against clause 22 of the Bill, which makes provision to amend section 28 of the Local Authorities Elections Ordinance. The main objection was with regard to clause 22(4) of the Bill, which provides that 25% of the total number of candidates and additional persons whose names appear in the nomination paper may consist of women and youth. Several Learned Counsel contended that -

A. two unequal categories, & viz., women and youth had been clubbed together;

B. the introduction of the said clause fall short of Sri Lanka's international obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and

C. on the basis of the declaration made in the Women's Charter, the said clause is vague,

and therefore the said provision is arbitrary and is inconsistent with Article 12(1) of the Constitution. Learned Counsel for the petitioners' further contended that the allocation of a special quota for women could be justified on the basis of Article 12(4) of the Constitution.

As referred to earlier, Article 12 (1) of the Constitution has clearly laid down the principle that all persons are equal before the law and are entitled to the equal protection of the law. It is true that Article 12 (4) of the Constitution has stated that nothing in Article 12 would prevent special provisions being made by law for the advancement of women, children or disabled persons.

Article 12 (4) cannot be used as a weapon in order to depart from the basic principle laid down in Article 12(1) of the Constitution. The right to equality, which is one of the most important fundamental rights guaranteed by our Constitution, has clearly laid down the concept that all are equal before the law and are entitled to the equal protection of the law. This would be applicable equally to **all persons** and should be regarded as of paramount importance.

Article 12 (4) of the Constitution is not a weapon, but only a shield for the State in order to justify any kind of departure from the main stream purely to encourage the advancement of women, children or disabled persons. Accordingly, Article 12 (4) cannot be used to authorize affirmative action on behalf of women, children and disabled persons. In **Ramuppillai** v **Festus Perera** ([1991] 1 Sri L. R. 11), a Divisional Bench of seven (7) judges of this Court had held that any differentiation made on ethnic grounds *per se* would be abhorrent and violative of the fundamental right to equality. It is important to note the reference made by Fernando, J., in **Ramuppillai** (supra) in regard to Article 12 as a whole and Article 12 (4) of the Constitution in particular, in this regard:

> "Paragraph (2), (3) and (4) of Article 12 are essentially explanatory and declaratory of the principle of equality and do not add to or detract from that principle. Article 12 (4) in particular does not authorize 'affirmative action' for women, children and disabled persons, but out of an abundance of caution, declares that nothing in Article 12 shall prevent affirmative action; apart from proved 'inequality', Artice 12(4) would not permit, for example a quota of 60% being stipulated for women in any sphere".

Equality does not object to classifications or clubbing together provided that there be some rational nexus between such classification/clubbing and their respective objectives. In **Ram Krishna Dalmia** V **Justice Tendolkar** (AIR 1958 SC 538), it has been clearly laid down that the guarantee on equality does not forbid classifications which are reasonable.

In order to ensure equal treatment in elections, especially for the voter to choose the most suitable candidate, it would be essential to remove any unnecessary restrictions in order to have a meaningful exercise of franchise. Introduction of restrictive quotas would not be a meaningful step in the light of ensuring such franchise and also would not be a step taken to guarantee the right to equal protection in terms of Article 12 of the Constitution.

In the light of the above, it is evident, that the said clause 22 (4) is not inconsistent with Article 12 of the Constitution.

Increase in deposits for nominations

Several Petitioners contended that the Independent Groups are required to deposit Rs. 20,000/- each for a candidate whereas a recognized political party would have to deposit only Rs. 5,000/- per candidate. Accordingly, it was contended that clause 23 of the Bill was inconsistent with Articles 3, 4 and 12 (1) of the Constitution.

The requirement of a deposit is not a novel feature and even the distinction in the amounts that has to be deposited by recognized political parties and independent groups had been maintained in all National, Provincial, Local and Presidential elections.

Learned Senior State Counsel submitted correctly that the rationale for the maintenance of difference between the deposits made by recognized political parties and independent groups is to discourage frivolous candidates, considering the enormous costs in conducting elections expended out of public funds.

The main contention of the Petitioners was that there is a classification between the candidates who belong to the main political parties and independent groups with regard to payment on deposits. As stated earlier, Article 12(1) of the Constitution does not prohibit classifications, if such classifications are not arbitrary and have been founded upon intelligible differentia. As clearly stated in **Ram Krishna Dalmia V Justice Tendolkar** (supra), for a classification to be valid, there are two conditions to be satisfied:

A. that the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

B. that the differentia must bear a reasonable or a rational to the objects and effects sought to be achieved.

On the basis of the general principle laid down in terms of Article 12(1) of the Constitution, careful consideration should be given neither to treat unequals as equals nor equals unequally. As could be clearly seen, the two groups of candidates could be distinguished from each other and a rational reason for the difference has been offered on the basis of the high expenditure that has to be borne by the State and the avoidance of frivolous applications.

Considering the submissions made by the Learned Counsel for the Petitioners, Intervenient Petitioners and for the State, it is apparent that no constitutional issue could arise on the basis of fixing amounts as deposits for nominations.

By - Elections

Several Learned Counsel contended that by virtue of clause 48 of the Bill, vacancies in Wards are not filled through by-elections, but by nomination made by the Secretary of the Party or the group leader so concerned. It was contended that an essential feature in the first past the post system is that any vacancy would be filled through by-elections and accordingly it was argued that since the voters are not given the opportunity to elect their members, the said clause 48 violates Article 3, 4 and 12(1) of the Constitution.

It is to be noted that the system that is to be introduced on the basis of the new Bill is not exclusively a first past the post system, but a hybrid system which contains features of the first past the post system as well as the preferential representative system.

The contention of the Learned Counsel for the Petitioners would be valid if the new system that would be introduced under the present Bill was totally based on the first past the post system which would function entirely on Ward representation. When the introduction is on a hybrid system, which has features of both first past the post and preferential representation, it would not be feasible to hold by-elections as in addition to the members elected to Wards, there are also members nominated on the basis of preferential representative system. It is also to be borne in mind that by this scheme, there cannot be a violation of Article 12 (1) of the Constitution, as it will not affect persons discriminately, but would apply to the entire national electorate equally.

5% cut-off point

Several Petitioners contended that the imposition of a 5% cut-off point set out in clause 46 of the Bill in determining the candidates to be returned on the basis of proportional representation is detrimental to the rights of smaller political parties and independent groups and thereby is inconsistent with Article 12 (1) of the Constitution.

Learned Senior State Counsel correctly contended that a similar cut-off point is found in the Provincial Council elections as well as in the Parliamentary elections. The said cut-off point in Parliamentary elections has been specifically included as an exercise of the franchise in terms of Article 4 (*e*) of the Constitution.

Considering such circumstances, it is apparent that the 5% cut-off point is not limited to local authority elections, but is incorporated in to Provincial Council and Parliamentary elections. In such circumstances, it is evident that there cannot be any inconsistency with Article 12 (1) of the Constitution.

For the aforesaid reasons, we make a determination that in terms of Article 123(1) of the Constitution that neither the Bills nor any provision thereof are inconsistent with the Constitution.

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

Dr. Shirani A. Bandaranayake
Judge of the Supreme Court

P. A. Ratnayake, PC
Judge of the Supreme Court

S. I. Imam
Judge of the Supreme Court

First Reading :	21.10.2010 (Hansard Vol. 194; No. 07; Col. 897)
Bill No :	53 & 54
Sponsor/Relevant Minister :	Minister of Local Authorities & Provincial Councils
Decision of the Supreme Court Announced in Parliament :	16.11.2010 (Hansard Vol. 194; No. 11; Col. 1316-1332)
Second Reading :	04.01.2011 -Local Authorities (Special Provisions) (Hansard Vol. 197; No. 1; Col. 73-150) -Local Authorities Elections (Amendment) (Hansard Vol. 197; No. 1; Col. 150) 05.04.2011 -Local Authorities (Special Provisions)) (Hansard Vol. 198; No. 7; Col. 968-1033) -Local Authorities Elections (Amendment) (Hansard Vol. 198; No. 7; Col. 1033-1034)
Committee of the whole Parliament and Third Reading :	10.10.2012 -Local Authorities (Special Provisions) (Hansard Vol. 211; No.2; Col. 231-240 10.10.2012 -Local Authorities Elections (Amendment) (Hansard Vol. 211; No.2; Col. 240-283)
Hon. Speaker's Certificate:	15.11.2012
Title:	-Local Authorities (Special Provisions) Act, No. 21 of 2012 -Local Authorities Elections (Amendment) Act, No. 22 of 2012

DECISIONS
OF
THE SUPREME COURT
ON
PARLIAMENTARY BILLS

2011

D I G E S T

S.C. (SD) No. 01/2011

"EMPLOYEES' PENSION BENEFITS FUND BILL"

BEFORE :

Dr. Shirani A. Bandaranayake	-	Judge of the Supreme Court
N. G. Amaratunga	-	Judge of the Supreme Court
R. K. S. Suresh Chandra	-	Judge of the Supreme Court

Petitioner : Ekeshwara Kottegoda Vithana,

Respondent : Hon. The Attorney General

Counsel : *Ronald C. Perera with S. H. A. Mohamed and Nalin Amarajeewa for the Petitioner.*

W. P. G. Dep, P. C., S., G., with Indika Demuni de Silva D. S. G., and Viveka S. de Silva, S. S. C., for the Hon. The Attorney-General.

Court assembled for hearing on 02nd May, 2011 at 10.45 a.m.

A Bill bearing the title Employees' Pension Benefits Fund was placed on the Order Paper of Parliament on 08.04.2011. A petition has been filed invoking the jurisdiction of this Court in terms of Article 121 (1) for a determination in terms of Article 123 of the Constitution as to whether the Bill or any provision thereof is inconsistent with the Constitution.

Upon receipt of the petition, the Court has issued notice on the Hon. The Attorney-General as required by Article 134 (1) of the Constitution.

Learned Counsel representing the Petitioner, and the Solicitor-General, representing the Hon. The Attorney-General, were heard before this Bench at the sittings held on 02.05.2011.

Learned Counsel for the Petitioner contended that clauses 2, 3, 5 (3) and clause 10 are in violation of Article 12 (1) of the Constitution. Learned Counsel for the Petitioner also contended that clauses 13, 25 (2) and 26(1) are violative of Article 14 (1) (g) of the Constitution.

The long title of the Bill indicates that the objective of the Bill is to establish an Employees' Pension Benefits Fund in order to provide for a pension benefit scheme to pensioners, who are not entitled to any pension benefits.

Learned Solicitor-General, while making his submissions, informed Court that according to the statistics provided by the Department of Census and Statistics, it is clearly evident that in Sri Lanka only less than 20% of retired employees enjoy some form of retirement benefits from Government Pension Schemes and other pension funds. He also submitted that as a result, employees have to face many hardships after retirement or when they reach a non-working age. It was accordingly submitted that this Bill has made provision to introduce a modest and a meaningful pension scheme to benefit employees of certain categories after their retirement.

Learned Counsel for the Petitioner submitted that the objectives of the said Bill are laudable.

Clause 2

The Bill consists of 51 clauses under 5 Parts. Clause 2 is listed under Part I, which deals with the establishment and administration of the Act. The said clause 2 is to provide for the establishment of Employees' Pension Benefits Fund and reads as follows:-

> "2 (1) For the purpose of this Act there shall be established a fund called the Employees' Pension Benefits Fund (hereinafter in this Act referred to as "the Fund")
>
> (2) There shall be paid into the Fund -
>
> *a*) ten *percentum* of the annual profit of the Employees' Trust Fund;
>
> *b*) the money lying in inactive accounts of members of the Employees' Provident Fund, where such members have passed the age of seventy years; and
>
> *c*) a Government Bond for rupees one thousand million having long terms maturity period."

The contention of the Learned Counsel for the Petitioner was that clause 2 (2) (*a*) of the Bill stands to deprive the members of the Employees' Trust Fund of their due entitlements to the dividends realized from the investment of the monies of the Trust Fund. His position was that in terms of the last Annual Report and Accounts published for the year 2009 by the Employees' Trust Fund (ETF) it had provided additional benefits for its members and monies had been released for such purposes. For instance, it was submitted that Rs. 199 Million was released to the NDB Bank on behalf of "*Viyaňa*" Housing Long Programme to facilitate 217 members to obtain housing loans during the year.

Accordingly Learned Counsel for the Petitioner contended that the said provision in clause 2(2)(*a*), which provides for 10% of the annual profit of the "Employees' Trust Fund" to be paid into the "Fund", is inconsistent with Article 12 (1) of the Constitution.

Article 12(1) of the Constitution, that deals with the right to equality, is in line with Article 7 of the Universal Declaration of Human Rights (1948), which states that, "all are equal before the law and are entitled without any discrimination, to equal protection of the law." The said Article 12(1) clearly postulates that there should be equal treatment in equal circumstances and that there should not be any discrimination between persons, who are similarly circumstanced.

It is quite evident that the dividends of the Employees' Trust Fund are being utilized for the benefit of its members. It is also evident that the objective of the Bill is to provide for a pension scheme for those in certain employments who are also members of the Employees' Trust Fund. Accordingly as was contended by the Learned Solicitor-General, the monies for the Employees' Trust Fund are finally to be utilized to provide benefits to the members of the said Fund during their life time. It would also not be correct to state that there is no provision in the Employees' Trust Fund Act, for the deduction of the aforesaid 10% from the annual profit of the Employees' Trust Fund, as provision has already been made for such deductions and moreover as such amendments could be brought to the Employees' Trust Fund Act, by way of subsequent legislation.

Considering the aforementioned circumstances, it would not be correct to state that there is unequal treatment by the transfer of the 10% of the annual profit of the Employees' Trust Fund into the Employees' Pension Benefit Fund. In such circumstances, there cannot be any violation of Article 12 (1) of the Constitution.

Learned Counsel for the Petitioner contended that clause 2 (2) (*b*) of the Bill, which provides for the monies lying in inactive accounts of members of the Employees' Provident Fund, where such members have passed the age of seventy years to be paid into the Fund is inconsistent with Article 12 (1) of the Constitution.

Learned Solicitor-General submitted that the Government has already decided to amend the said sub-clause by adding a proviso thereto permitting the payment of any claim in respect of such accounts.

Leaned Counsel for the Petitioner submitted that it is a concern and inquired as to whether the Government Bond for rupees One Thousand Million having long term maturity period which would be another source to the Employees' Pension Benefits Fund would be taken as a loan. Learned Solicitor-General quite categorically stated that the Treasury Bonds cannot be regarded as a loan, but a grant given by the State as its contribution to the said Employees' Pension Benefits Fund, which would have a long term maturity period. It was also submitted that the said Treasury Bonds would generate interest and if the Manager of the said Fund so decides could be discounted at any given time.

Clause 3

Learned Counsel for the Petitioner submitted that clauses 3 (1) and 3 (2) are in violation of Article 12 (1) of the Constitution. Objection was taken in terms of clause 3 (1) on the basis of the continuation of the membership of the Fund being limited 'for so long as there remains to his credit, any sum of money in his individual account in the Fund'.

Learned Solicitor-General submitted that the provisions of clauses 3 (1) and 3 (2) are identical to section 3 (1) of the Employees' Provident Fund, Act No. 15 of 1958, but considering the nature of the Employees' Pension Benefits Fund, the Government has decided to extend the membership of the employee during his life time. The proposed amendment is as follows:-

> "An employee shall become a member of the Fund at the time such employee first becomes liable under section 12 and section 13 to pay contributions to the Fund and shall continue to be a member during his life time".

Learned Counsel for the Petitioner contended that clause 3 (2) deprives the members and heirs from claiming entitlements, which are lawfully due to them and therefore is in violation of Article 12 (1) of the Constitution.

Learned Solicitor-General submitted that section 3 (2) of the Employees' Provident Fund Act, No. 15 of 1958 and section 15 (2) of the Employees' Trust Fund Act, No. 46 of 1980 are also in similar terms. When there are similar provisions contained in two of the statutes which provide benefits for employees, it would not be correct to contend that clause 3 (2), which is being drafted on the same terms as in Employees' Provident

Fund Act and the Employees' Trust Fund Act is in violation of Article 12 (1) of the Constitution. Such a violation could arise only if there is unequal treatment under similar circumstances. When all are being treated similarly under equal terms there cannot be any unequal treatment and in such circumstances clause 3 (2) is not in violation of Article 12 (1) of the Constitution.

Clause 5 (3)

Learned Counsel for the Petitioner submitted that, clause 5 (3) of the Bill is inconsistent with Article 12 (1) of the Constitution. The said clause reads as follows:-

> "For the purposes of paragraph (m) of sub-section (1) 'expenses' shall include -
>
> (i) any loss of moneys on account of theft, misappropriation or overpayment;
>
> (ii) any loss of articles, being furniture, office equipment or stationery used in or purchased for the administration of the Fund, the cost of which cannot be recovered from the persons responsible for such loss; and
>
> (iii) the value of any Article being stationery, furniture or office equipment which are not usable or which are not functioning and are incapable of being repaired."
>
> Clause 5 (1) (m) states that the-
>
> "Monetary Board.....
>
> shall, deduct from the income from the investment of moneys of the fund, the expense incurred by the Board and the Commissioner in carrying out their respective functions under this Act."

Referring to the aforementioned clauses, Learned Counsel for the Petitioner contended that legal recognition of protection for criminal acts, which are under normal circumstances considered as offences have been given and therefore the said clause 5 (3) is inconsistent with Article 12 (1) of the Constitution.

Learned Solicitor-General for the Respondent contended that the purpose of the provision laid down in clause 5 (3) was not to circumvent any criminal proceedings against any type of perpetrators of an offence in respect of the Fund. He further contended that what is intended is that to set off any loss on account of the matters, where the recovery would not be feasible.

It is to be noted that a provision similar to clause 5 (3) of the Bill under review is contained in section 5 (3) of the Employees' Provident Fund Act. The said section in the Employees' Provident Fund Act is as follows:-

> "For the purposes of paragraph (*k*) of sub-section (1), 'expenses' shall include -
>
> (i) any loss of moneys on account of theft, misappropriation or over-payment;
>
> (ii) any loss of articles of furniture, office equipment or stationery used in or purchased for the administration of the Fund the cost of which cannot be recovered from the persons responsible for such loss;and
>
> (iii) the value of any Article of furniture, office equipment or stationery written off on grounds of unserviceability.

It is therefore abundantly clear that Clause 5 (3) of the Bill is not introduced for the first time to give legal recognition of protection for criminal acts, which are under normal circumstances considered as offences.

Moreover, it is to be borne in mind that, the Bill itself provides sufficient safeguards with regard to the security of the monies in the Employees' Pension Benefits Fund. For instance, clause 4 of the Bill clearly states that, the Commissioner-General of Labour shall be in charge of the general administration. Also in terms of clause 5 of the Bill the monies lying to the credit of the Fund would be in the custody of the Monetary Board. Clause 7 clearly states that the accounts of the Fund in respect of each year shall be audited by the Auditor-General. Learned Solicitor-General submitted that the activities of the Fund would be scrutinized by the Parliament and thereby the accountability of the officers concerned is ensured.

Considering all the aforementioned, it is quite obvious that there are several measures provided by the Act itself in order to safeguard the Fund and in such circumstances there is no violation of Article 12 (1) of the Constitution.

Clause 10

Clause 10 of the Bill, which is contained in Part II the Bill deals with employees to whom the Act applies and contribution. Learned Counsel for the Petitioner contended that there is a contradiction in Clause 10, which results in the discretion of those who are identified as being in covered employment. The contention of the Learned Counsel for the Petitioner was that although in terms of clause 10 (1) of the Bill all persons other than those exempted are deemed to be members of the Fund, Clause 10 (2) (i) brings in a further qualification, wherein an employee should be of an age where he would have more than 10 years to become a member of the Fund and to be entitled to receive a pension under the said Fund.

Learned Solicitor-General for the Respondent submitted that the restriction stipulated in the Bill under review that 10 years of contribution to the Fund, being mandatory has not been limited to the Bill on Employees' Pension Benefits Fund. Learned Solicitor-General drew our attention to section 2 of the Minutes on Pension, where the mandatory requirement of a minimum period of 10 years of contribution has been clearly laid down. In fact under the present Bill a concession has been given to persons, who would not have 10 years as regards to become members of the Fund in terms of Clause 10 (2) (ii) of the Bill. According to the said clause a person, who is of an age where such person, has less than 10 years in which to become entitled to receive a pension in terms of the Bill, would be entitled to apply to the Commissioner-General if he so desires to become a member of the Fund and in terms of clause 25(3) to make the balance payment with regard to the remaining years in installments that may be approved by the Fund.

As stated earlier, Article 12 (1) of the Constitution deals with equality among equals and the objective of the said Article is to protect persons similarly placed, against discriminatory treatment. However, it is to be noted that Article 12 (1) of the Constitution does not operate against rational classifications. It is therefore to be noted that in terms

of Article 12 (1) of the Constitution same rules of law would not be applicable to all persons throughout the Democracy. What it postulates is that all persons similarly circumstanced shall be treated alike in privileges conferred and liabilities imposed. As stated by Sharvananda, J. (as he then was) in **Palihawadana V Attorney- General** (F. R. D.) Vol. I pg. 1)

> "The principle underlying the guarantee in Article 12 is not that same rules of law should be applicable to all persons within the Democratic Socialist Republic of Sri Lanka, or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in respect of privileges conferred and liabilities imposed."

Considering the clauses referred to above, it is quite apparent that there has been no unequal treatment with regard to any of the said clauses and in such circumstances there is no violation of Article 12 (1) of the Constitution.

Learned Counsel for the Petitioner contended that clauses 13, 25 (2) and 26 (1) are in violation of Article 14 (1) (*g*) of the Constitution.

Article 14 (1) (*g*) of the Constitution is as follows:-

> "Every citizen is entitled to -
> the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise".

Clause 13

Clause 13 of the Bill refers to the contributions in relation to employees in institutions that does not extend pension benefits to its employees after 01.01.1996. Learned Counsel for the Petitioner contended that the requirement in clause 13 (*c*) that the total amount due as gratuity and payable to an employee in terms of Gratuity Act, No. 12 of 1983 shall be paid to the Fund by the employer in one installment on the day the employee becomes a member of the Fund, is in violation of Article 14 (1) (*g*) of the Constitution.

Learned Solicitor-General contended that prior to 01.01.1996, the People's Bank and the Bank of Ceylon had a pension scheme for its employees and the National Savings Bank also had a similar scheme prior to 01.06.1995. At the time these Banks had such a scheme, gratuity was not paid in view of the benefit of the pension scheme that was in place. Later the payment of gratuity was introduced to Bank employees only after the said schemes were changed. Accordingly the submission of the Learned Solicitor-General was that it has never been consistent to pay a pension and gratuity to an employee at the same time.

It is to be noted that the right guaranteed in terms of Article 14 (1) (*g*) deals with the freedom to engage in a lawful occupation, profession, trade, business or enterprise and the exercise and operation of the said fundamental right is subject to such restrictions as may be prescribed by law provided under and in terms of Article 15 (5) of the Constitution. Accordingly, the right guaranteed in terms of Article 14 (1) *(g)* cannot be taken as a right which is unrestricted in its application as there cannot be absolute or unrestricted rights existing in any modern State. The rights must be reasonably exercised

without any conflicts. The applicability of the provisions of the Gratuity Act and the modes of payment are governed under the said Act and cannot be linked to the freedom of occupation, profession, trade, business or enterprise and in such circumstances there cannot be a violation of Article 14 (1) (*g*) of the Constitution.

Clause 25 (2)

Learned Counsel for the Petitioner contended that in terms of clause 25 (2) (i) only those members who have not less than 20 years of service would be entitled to the pension.

Learned Solicitor-General submitted that the Government has already taken a decision to provide a basis of computation for these members, who have contributed for a minimum period of 10 years, but less than 20 years by amending clause 25 (2) of the Bill by inserting a new sub-clause numbered as 25 (2) (iii), which would read as follows:-

> "If such member has a lesser period of service, he will be entitled to an amount calculated with a deduction of 2% for every year of such period of lesser service".

Clause 26 (1)

Learned Counsel for the Petitioner submitted that the said clause has excluded the spouse from the persons identified as being eligible to receive the lump sum payment referred to in clause 26 (1) and the said exclusion is in violation of Article 14 (1) (*g*) of the Constitution.

It is to be noted that the pension scheme introduced under the Employees' Pension Benefits Fund is different to the scheme stipulated under the Widowers' and Orphans' Pension Fund and does not have a component similar to the said Fund. Accordingly the present Bill deals only with a pension scheme payable to the member, who makes the relevant contribution. A child below the age of 18 years or a child, who is certified by a registered medical practitioner to be physically or mentally disabled was to be considered under and in terms of Clauses 26 (1) (*a*) and 26 (1) (*b*) as an exception.

When the said Clause 26 (1) was taken for consideration, Learned Solicitor-General informed Court that the Government had decided to include the surviving spouse of a member of the Fund to the category of persons identified in Clause 26 (1) of the Bill.

Accordingly, the Learned Solicitor-General for the Respondent informed Court that the Government had decided to take steps with regard to the following:-

1. Clause 2 (2) (*b*)-	to amend the said sub-clause by adding a proviso thereto permitting the payment of any claim in respect of such accounts.
2. Clause 3 (1)-	to delete the words 'for so long as there remains to his credit any sum of money in his individual account in the Fund' and to substitute the words 'during his life time'
3. Clause 25 (2)-	to amend sub-clause 25 (2) (ii) and to insert a new sub-clause 25 (2) (iii) to bring in a minimum period of 10 years
4. Clause 26 (1)-	to include the surving spouse of a member to the category of person identified in Clause 26 (1)

There were typographical errors in clause 17 (1) and clause 25 (3) of the Bill.

Clause 17 (1) refers to section 11(1) and section 11 (2) which should read as clause 12 and clause 13, respectively. Clause 25 (3), where there is a reference to section 12, should be amended by replacing it with section 10.

For the reasons aforementioned, we make a determination that in terms of Article 123 (1) of the Constitution that neither the Bill nor any provision thereof is inconsistent with the Constitution.

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

Dr. Shirani A. Bandaranayake,
Judge of the Supreme Court.

N. G. Amaratunga,
Judge of the Supreme Court.

R. K. S. Suresh Chandra,
Judge of the Supreme Court.

***First Reading*:**	08.04.2011 (Hansard Vol. 198; No. 10; Col. 1432)
***Bill No*:**	98
***Sponsor /Relevant Minister*:**	Prime Minister and Minister of Buddha Sasana & Religious Affairs.
***Petition announced in Parliament*:**	27.04.2011 (Hansard Vol. 198; No. 11; Col. 1527)
***Decision of the Supreme Court*:**	05.05.2011 (Hansard Vol. 199; No. 3; Col. 271-279)
***Remarks*:**	Withdrawn by the Minister on 18.01.2012 (Hansard Vol. 206; No 2; Col. 215)
***Title*:**	Employees' Pension Benefits Fund Bill

S.C. (SD) No. 02/2011

"REVIVAL OF UNDERPERFORMING ENTERPRISES AND UNDERUTILIZED ASSETS BILL"

BEFORE :

Dr. Shirani A. Bandaranayake	-	Chief Justice
P. A. Ratnayake, PC	-	Judge of the Supreme Court
Chandra Ekanayake	-	Judge of the Supreme Court

COUNSEL :

Janak de Silva DSG with Nerin Pulle SSC for Attorney-General.

Court assembled for hearing on 24th October, 2011 at 11.30 a.m.

A Bill bearing the title "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets" was referred to this Court by His Excellency the President, in terms of Article 122 (1) (*b*) of the Constitution for a special determination as to whether the Bill or any Provision thereof is inconsistent with the Constitution. The Bill bears an endorsement of the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers it is urgent in the national interest.

The objective of the Bill is to vest in the State identified Underperforming Enterprises and Underutilized Assets in order to ensure their effective administration, management or their revival through alternate methods of utilization. This is carried out in the national interest and the intention is to utilize the said assets through restructuring and entering into management contracts.

The Government had been of the view that it is an inherent obligation on its part to ensure its People maximum benefits from the limited resources that are available by securing and protecting as effectively as possible the social order in which social, economic and political justice would prevail. Having the basic welfare of the people in the country in mind, the Government had divested land and granted extensive concessions to promote economic activities with the objective of ensuring maximum benefits to the People. This has been carried out in the national interest. However, it has been identified that there are Underutilized Assets and Underperforming Enterprises that would not permit to perform the said obligation on the part of the Government to ensure its People the maximum benefits from its limited resources that are available.

Accordingly the Bill in question would make provision for the vesting in the State, two types of assets known as Underutilized Assets or Underperforming Enterprises. This would be in conformity of the Directive Principles of State Policy, referred to in Article 27 and specifically in Article 27(2) (*b*) and 27 (2) (*d*) of the Constitution. These two Articles refer to the following objectives of the State, based on the Directive Principles of State Policy.

"27(2) (*b*) : the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life.

27(2) (*d*) : the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and co-ordinating such public and private economic activity towards social objectives and the public weal."

On an examination of the objectives of the Bill, it is clearly seen that the said Bill deals with Underutilized Assets as well as Underperforming Enterprises.

The Underutilized Assets deal with two categories of land.

The first category refers to State land alienated within a period of twenty years (20) prior to the date of the coming into operation of this Act, to a person for the purpose of generating employment, foreign exchange earnings or savings or economic activities beneficial to the public, but where such benefits have not accrued and therefore being prejudiced to the national economy and public interest.

The second category deals with land owned by a person who had been granted within a period of twenty years (20) prior to the date of coming into operation of this Act, either tax incentives under any tax related law, incentives under the Board of Investment law or regulations framed thereunder or any Government Guarantees on the basis that the related operations proposed to be carried out by such person will result in generating employment, foreign exchange earnings or savings or economic activities benefitted to the public, but where such benefits as aforesaid have not accrued and therefore being prejudicial to the national economy and public interest.

An Underperforming Enterprises on the other hand would mean a legal entity such as a company, institution or body established by or under any written law for the time being in force, in which the Government owns shares and where the Government has paid contingent liabilities of such Enterprise and is engaged in protracted litigation regarding such Enterprise, which is prejudicial to the national economy and public interest.

The above description shows that for the purpose of this Bill, Assets and Enterprises had been classified and a question arose as to whether such classification would make the said provisions inconsistent with Article 12 (1) of the Constitution.

Article 12 (1) of the Constitution, which refers to the right to equality, clearly states that all persons are equal before the law and are entitled to the equal protection of the law.

Equality, which is a concept based on the firm foundation of the Rule of Law, does not forbid reasonable classification. A classification, which is not arbitrary, could be regarded as valid and permissible and for this purpose it would be necessary for such

classification to be founded upon reasonable differentia. As has been stated in the well known decision of **Ram Krishna Dalmia V Justice Tendolkar (AIR (1958) SC 538)** for a classification to be valid, there are two conditions that should be satisfied, which could be stipulated as follows:-

1. that the classification must be founded on an intelligible differentia which distinguish persons or things that are grouped together from others who are left out of that group; and

2. that the differentia must bear a reasonable, or a rational relation to the objects and effects sought to be achieved by the Statute in question.

Considering the aforementioned conditions, it is abundantly clear as stated in **Budhan Chowdhary V State of Bihar (AIR (1955) SC 191)** what is necessary is that there should be a nexus between the basis of classification and the object of the enactment that carries such classification.

In the context of the present Bill the classification is based on the differentiation made with regard to the type of land that would come into question. Such land is either State land which had been given with a particular objective to be achieved, which has not been realized or is private land and certain exemptions from tax and other incentives under written law has been given with an objective to be achieved, which had failed.

In **K. Thimmappa V Chairman, Central Board of Directors (AIR (2001) SC 467)** discussing the concept of classification in terms of the right to equality, the Indian Supreme Court had observed that,

> "When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection of differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislature has in view."

In **Union of India V M. V. Valliappan (AIR (1999) SC 2526**, the Indian Supreme Court had specifically stated thus:

> "It is settled law that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution."

Considering all the aforementioned it is evident that there is a clear rational nexus between the object sought to be achieved by the Bill in question and the differentiation it has made, and in such instance there cannot be a violation of the provisions contained in Article 12 (1) of the Constitution.

Learned Deputy Solicitor General submitted that the classification specified in the Bill is permissible in terms of Article 12 (1) of the Constitution. He further contended that even if there had been any inconsistency, the restriction placed in by the Provisions of the Bill would be permitted in terms of Article 15 (7) of the Constitution.

Article 15 of the Constitution refers to the restrictions on fundamental rights and Article 15 (7) specifically deals with such restrictions regarding the exercise and operation of fundamental rights which fall within Articles 12, 13 (1), 13 (2) and 14 of the Constitution. The said Article 15 (7) of the Constitution is as follows:-

> "The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13 (1), 13 (2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the **just requirements of the general welfare of a democratic society**" ..... (emphasis added).

Since the present Bill contains provisions in meeting the 'just requirements of the general welfare of a democratic society', the restrictions, if any, envisaged by the Bill could easily come within the provisions of the said Article 15 (7) of the Constitution. However there is no necessity to go into the applicability of Article 15 (7) as there is no inconsistency with Article 12 (1) of the Constitution.

Learned Deputy Solicitor General stated that Underperforming Enterprises encompass situations where the Government is engaged in protracted litigation. It was submitted that having such litigation does not mean that judicial power would be exercised through the Bill, or there would be interference in the exercise of judicial power.

Learned Deputy Solicitor General drew our attention to the view expressed by **Sirimane, J** in **Tuckers Ltd V The Ceylon Mercantile Union ((1970) 73 NLR 313)** where it was stated that,

> "The first question that arises therefore is whether in the provisions of the impugned Act....., there is a usurpation of judicial power by the legislature. In dealing with this question one must bear in mind that a Court should be slow to strike down an Act of Parliament unless there is a clear encroachment on the judicial sphere.
>
> In order to ascertain whether there has been such an encroachment one should I think look at the Act, as a whole and not at a particular section isolated from other provisions of the Act. I am also of the view that in determining this question it is permissible to look at the object and the true purpose of the legislature in passing the Act."

Learned Deputy Solicitor General referred to the test which drew attention on the ability to enforce the decision, as at that time, judicial power was based on the enforcement of the rights and liabilities of the parties (**Senadheera V The Bribery Commissioner ((1961) 63 NLR 313)**. This test was later rejected in **Piyadasa v The Bribery Commissioner ((1962) 64 NLR 385)** and **Jailabdeen v Danina Umma ((1962) 54 NLR 419)** where it had been held that the power of enforcement was not essential to judicial power.

It was also submitted that in **Queen V Liyanage ((1962) 64 NLR 313), Jailabdeen V Danina Umma (Supra) and Piyadasa V The Bribery Commissioner (Supra)** that our Courts had followed the approach taken by Griffith CJ in **Huddart Parker and Co. V Moorehead ((1909) 8 CLR 330)** where the judicial power had been interpreted as follows:-

> "..... the words "judicial power" as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property."

This position changed in **Kariapper V Wijesinghe ((1967) 70 NLR 49),** where referring to the Griffith CJ's observations, the Privy Council had been of the view that,

> "It is unwise in the sphere of constitutional law to go beyond what is necessary for the determination of the case in hand and because the Board is of the opinion that the character of the Act is not that of an act of attainder or a bill of pains and penalties it is not necessary here to attribute a particular character to what has, as has already been seen, been described an "exercise of the judicial power of Parliament in a legislative form."

On the basis of the aforesaid it is apparent that the present Bill contains no provisions which would provide for the exercise of judicial power or the interference in the exercise of judicial power in relation to Underperforming Enterprises.

Learned Deputy Solicitor General submitted that the Bill deals with National Policy which is a matter within the Reserved List introduced by the Thirteenth Amendment to the Constitution.

The Thirteenth Amendment to the Constitution, which made provision for the establishment of Provincial Councils that were empowered to make statutes applicable to the Province, had clearly stipulated that such Councils would have no power to make statutes on any matter set out in the Reserved List. Accordingly, the legislative power with regard to the National Policy on all subjects and functions are vested with the Central Government.

Since the present Bill deals with National Policy, which is a matter within the Reserved List, the Parliament has the authority and, is competent to legislate.

On a consideration of the totality of the aforementioned, it is apparent that no provision of the Bill is inconsistent with any provisions of the Constitution.

Learned Deputy Solicitor General referred to several drafting errors in the Bill under consideration and accordingly such errors are referred to below under the relevant clause.

Clause 1 : This clause refers to the short title of the Bill. Learned Deputy Solicitor General at the hearing submitted that the word **and** after the word Enterprises should be replaced with the word **or.**

Clause 2 : This clause deals with the vesting of underperforming or underutilized Assets in the Secretary to the Treasury for and on behalf of the Government of Sri Lanka. In SC (SD) No. 3/2002, this Court had determined that if there are no provisions in a Bill to pay compensation where provision has been made for the purpose of requisition of movable property, such a provision would be inconsistent with Article 12 (1) of the Constitution. The said Determination further stated that the Hon. The Attorney General had submitted that an appropriate provision would be included for the payment of compensation to persons whose property is requisitioned and it was determined that with the suggested amendment, the said Bill would not be inconsistent with any provisions of the Constitution.

In the present Bill Clauses 4 (2) and 4 (3) states that 'prompt, adequate and effective' compensation is payable and in such instances the said clause is not inconsistent with Article 12 (1) of the Constitution.

Learned Deputy Solicitor General at the hearing submitted that the words **Government of Sri Lanka** in clause 2 (1) should be replaced with the word **State** as the preamble to the Bill states that the intention is to vest the Enterprises and Assets in the State.

Learned Deputy Solicitor General also submitted that the words **in writing** would have to be added at the end of clause 2 (3) to ensure that there is no ambiguity as to whether any authorization has been given.

Clause 3 : Clause 3 deals with the appointment of a Competent Authority by the Cabinet of Ministers. This is for the purpose of controlling, administering and managing or ensuring the revival of Underperforming Enterprises or Underutilized Assets vested in the Secretary to the Treasury.

Learned Deputy Solicitor General submitted that the words **section 3** in clause 3 (1) should be replaced with the words **section 2 (1),** since the vesting takes place in terms of clause 2 (1) and not clause 3.

The Competent Authority so appointed is subject to general or special directions of the Government issued from time to time.

Learned Deputy Solicitor General submitted that the word **Government** in clause 3 (3) should be replaced with the word **Cabinet** since the use of word Government in relation to giving special or general direction is ambiguous.

Learned Deputy Solicitor General also submitted that the words **in writing** should be inserted after the words **as may be issued** in clause 3 (3) to ensure that there is no ambiguity as to any such direction was given or not.

Learned Deputy Solicitor General also submitted that the words **identified** in clause 3 (4) be deleted as it is redundant. It was also submitted that the word **or Asset** in clause 3 (4) (*a*) be deleted in order to avoid any ambiguity.

Clause 4 : In terms of this clause, the shares held by all Shareholders (except for those already held by the Secretary to the Treasury) of any Underperforming Asset or Underutilized Enterprise are vested in the Secretary to the Treasury. The said clause, as stated earlier, also provides for prompt, adequate and effective compensation for shares and assets that are vested.

Article 157 of the Constitution refers to International Treaties and Agents and such Treaties and Agents shall have the force of law in Sri Lanka and otherwise than in the interests of national security, no written law should be enacted or made and no executive or administrative action should be taken in contravention of the provisions of such Treaty of Agreement.

In the event if there are any Treaties or Agreements that had been passed by the Parliament, the Bill is not in contravention of such Treaties or Agreements as it provides for prompt, adequate and effective compensation. It is also to be noted that the vesting would take place for a public purpose.

Learned Deputy Solicitor General submitted that the Bill is introduced for the purpose of vesting in the State Underutilized Assets, which would include two classes of land, defined earlier. Since land is being vested in the State there cannot be any question with regard to any shares. Accordingly, the word **or an Underutilized Asset** in clause 4 (1) should be deleted. Learned Deputy Solicitor General also submitted that the word **Government** in clause 4 (1) should be replaced with the word **State.**

Learned Deputy Solicitor General also submitted that the word **section 2** in clause 4 (2) (*a*) be replaced with the words **section 4,** since the shares of 'Underperforming Enterprises' get vested with the Secretary to the Treasury in terms of clause 4 (1) and not in terms of clause 2 (1).

Clause 6 : This clause deals with the determination of compensation by the Tribunal and appeals there from and provision has been made to make its Award within 6 months from the date of the receipt of the claim after such inquiry. The said clause does not specify the time frame within which a claim for compensation should be made. Learned Deputy Solicitor General submitted that a time frame of 2 years from the date of vesting be given in making a claim.

Learned Deputy Solicitor General also submitted that although an aggrieved person has the right to appeal against an Award to the Court of Appeal on a question of law with the leave of the Court of Appeal that such an appeal should not be limited only to a question of law and therefore to delete the words **on a question of law.**

Accordingly, the drafting errors, which Learned Deputy Solicitor General submitted that should be corrected are as follows :-

1.	Clause 1	The word **and** should be replaced with the word **or**.
2.	Clause 2 (1)	The words **Government of Sri Lanka** should be replaced with the word **State.**
3.	Clause 2 (3)	the words **in writing** be added at the end of said clause 2 (3).
4.	Clause 3 (1)	the words **section 3** be replaced with the words **section 2(1).**
5.	Clause 3 (3)	the words **Government** be replaced with the word **Cabinet.**
6.	Clause 3 (3)	the words **in writing** be inserted after the words as may be issued.
7.	Clause 3 (4)	the word **identified** to be deleted.
8.	Clause 3 (4)(*a*)	the words **or Assets** to be deleted.
9.	Clause 4 (1)	the words **or an Underutilized Assets** to be deleted.
10.	Clause 4 (1)	the word **Government** be replaced with the word **State.**
11.	Clause 4 (2)	the words **section 2** be replaced with the words **section 4.**
12.	Clause 6	to be amended by specifying a time frame of 2 years from the date of vesting to make a claim.
13.	Clause 6	to delete the words **on a question of law**

The Hon. The Attorney - General informed Court that the aforementioned drafting errors would be corrected at the sittings of the Committee Stage in Parliament.

For the reasons aforementioned we make a determination that in terms of Article 123 (1) of the Constitution that neither the Bill nor any provision thereof is inconsistent with the Constitution.

We shall place on record our deep appreciation of the assistance given by the Learned Deputy Solicitor General and Learned Senior State Counsel, who appeared on behalf of the Hon. Attorney - General.

Dr. Shirani A. Bandaranayake,
Chief Justice

P. A. Ratnayake PC,
Judge of the Supreme Court

Chandra Ekanayake,
Judge of the Supreme Court

***First Reading*:**	08.11.2011 (Hansard Vol. 203; No. 06; Col. 844)
***Bill No.*:**	135
***Sponsor/ Relevant Minister*:**	Prime Minister & Minister of Buddha Sasana & Religious Affairs
***Decision of the Supreme Court Announced in Parliament*:**	08.11.2011 (Hansard Vol. 203; No. 06; Col. 764 - 772)
***Second Reading*:**	09.11.2011 (Hansard Vol. 203; No. 7; Col. 1010 - 1080)
***Committee of the whole Parliament and Third meeting*:**	09.11.2011 (Hansard Vol. 203; No. 7; Col. 1081-1095)
***Hon. Speaker's Certificate*:**	11.11.2011
***Title*:**	Revival of Underperforming Enterprises or Underutilized Assets Act, No. 43 of 2011

S.C. (SD) No. 03/2011

"TOWN AND COUNTRY PLANNING (AMENDMENT) BILL".

BEFORE :

Dr. Shirani A. Bandaranayake	-	Chief Justice
K. Sripavan	-	Judge of the Supreme Court
Chandra Ekanayake	-	Judge of the Supreme Court

Petitioners: Centre for Policy Alternatives (Guarantee) Limited

Dr. Paikiasothy Saravanamuttu

Counsel : M. A. Sumanthiran with Niran Anketell, Bhavani Fonseka and Jerusha Crosette Thambiah.

Intervenient Petitioner : Sudharshana Gunawardana,

Counsel : J. C. Weliamuna with Maduranga Rathnayake, Pulasthi Hewamanne, Sudharshana Gunawardane and Senura Abeywardane.

Shavindra Fernando DSG with Sanjay Rajaratnam DSG, Nerin Pulle SSC, Yuresha de Silva SC and Suren Gnanaraj SC For Attorney-General

Court assembled for hearing on 21st November, 2011at 10.30 a.m.

A Bill bearing the title "Town and Country Planning (Amendment)" was published in the Gazette of the Republic of Sri Lanka on 14.10.2011 and placed on the Order Paper of Parliament on 08.11.2011. Two Petitioners and an Intervenient Petitioner have challenged the Constitutionality of this Bill by their petitions presented to this Court and have thereby invoked the jurisdiction of this Court in terms of Article 121 (1) of the Constitution.

The Hon. Attorney General has been given due notice of the petitions.

Learned Counsel representing the Petitioners and the Intervenient Petitioner (hereinafter referred to as the Petitioners) and the Learned Deputy Solicitor General on behalf of the Hon. The Attorney General were heard before this Bench at the sittings held on 21.11.2011.

The Bill according to it's long title is to provide for the "formulation and implementation of a National Physical Planning Policy with the objectives of promoting, preserving, conserving and regulating a system of integrated planning in relation to the economic, social, historic, environmental, physical and religious aspects of land in Sri Lanka; for the preparation of national physical plan for the purpose of giving effect to the stated objectives; to facilitate the acquisition of land for the purpose of giving effect to the objectives; and to provide for matters connected therewith or incidental thereto."

It is to be noted that the long title in the present Bill referred to above is to replace the long title to the Town and Country Planning Ordinance.

Learned Counsel for the Petitioners contended that the Bill cannot become law due to the failure to comply with the procedure laid down in Article 154 (G) (3) of the Constitution. It was also contended that the provisions contained in the Bill are violative of Articles 9 and 10 of the Constitution as the Bill is seeking to vest in the Minister of Buddha Sasana the power to declare (private) lands as 'Sacred Areas' without statutory guidelines violating Articles 9 and 10 of the Constitution which, if carried out, would have a *Chilling effect* on religious rights.

Submissions were also made to the effect that the contents of the Bill lead to uncertainly and vagueness, which would be violative of Article 12 (1) of the Constitution.

The main contention of the Petitioners was that the subject matter of the Bill comes within Item 18 of the Provincial Council List and therefore it is necessary to follow the procedure laid down in terms of Article 154 (G) (3) of the Constitution. It was accordingly decided first to consider the ground of challenge on the basis of the requirement to comply with Article 154 (G) (3) of the Constitution.

On behalf of the Hon. The Attorney General, Learned Deputy Solicitor General contended that there is no necessity to adhere to the provisions stipulated in Article 154 (G) (3) of the Constitution, as the subject matter of the Bill relates to matters connected with the formulation and implementation of a 'National Physical Planning Policy' and a 'National Physical Plan'. It was further submitted that such formulation and implementation of a 'National Physical Planning Policy' and a 'National Physical Plan' was in order to promote, preserve, conserve and regulate a system of integrated planning in relation to economic, social, historic, environmental, physical and religious aspects of land in Sri Lanka. It was therefore submitted that "National Physical Planning Policy" or "National Physical Planning" amounts to dealing with "National Policy" and therefore would not fall within the subjects enumerated either in the Provincial Councils List or the Concurrent List and therefore would not attract Article 154 (G) (3) of the Constitution.

It is therefore apparent that the main question that has to be determined in terms of the provisions of this Bill is the question as to whether the provisions contained in the Bill deal with national policy.

Provincial Councils came into being in the Sri Lankan Island Republic as a result of the introduction of the 13th Amendment to the Constitution in 1987. Article 154 (A) (1) of the Constitution accordingly made provision for a Provincial Council to be established for every Province. The purpose for such introduction was chiefly to devolve power which was vested hitherto in the Central Government to Provincial Councils.

In the Supreme Court Determination in **Re Thirteenth Amendment to the Constitution Bill and the Provincial Councils Bill (SC SD Nos. 7-48/87)** it was clearly stated that the introduction of the Provincial Councils was for the purpose of devolution of authority, which included, *inter alia*, legislative devolution. This position was emphasized by the Supreme Court in **Madduma Bandara V Assistant Commissioner of Agrarian Services ([2003] 2 Sri LR 80)** where it was stated thus:

> "The 13th Amendment to the Constitution, which came into effect in November 1987, was chiefly introduced for the purpose of devolving power from the Central Government to the Provincial Councils."

For the said devolution, it was stated that the Provincial Councils would have legislative power in respect of matters enumerated in the Provincial Councils List (List I) and the Concurrent List (List III) of the Ninth Schedule to the Constitution.

In fact clear provision has been made in the Constitution to this effect. Article 154 (G) (1) refers to the making of Statutes by the Provincial Councils and states as follows:-

> "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")."

Provision has been made with regard to the making of Statutes under List II of the Ninth Schedule, which is known as the Reserved List and under the Concurrent List. Articles 154 (G) (7) and 154 (G) (5) (*a*) deal with the Reserved List and the Concurrent List respectively, and are as follows:

> **"Article 154 (G) (7) -**
>
> A Provincial Council shall have no power to make Statutes on any matter set out in List II of the Ninth Schedule (hereinafter referred to as "the Reserved List").
>
> **Article 154 (G) (5) (*a*) -**
>
> Parliament may make laws with respect to any matter set out in List III of the Ninth Schedule (hereinafter referred to as "the Concurrent List") after such consultation with all Provincial Councils as Parliament may consider appropriate in the circumstances of each case."

It is therefore significant to note that when there are amendments to legislation, it would first be necessary to be satisfied as to the classification of the subject matter, in terms of the Provincial Council, Reserved and Concurrent Lists, specified in the Ninth Schedule to the Constitution.

The contention of the Learned Deputy Solicitor General for the Respondent was that the Reserved List of the Ninth Schedule to the Constitution refers to National Policy and such reference clearly states that the said National Policy is on all subjects and functions. The contention therefore is that the National Policy on any subject or function would come within the ambit of the Reserved List in the Ninth Schedule. Accordingly it was submitted that the National Policy on all subjects and functions are within the framework of the Reserved List, and since it has an extremely wide ambit that it should not be interpreted narrowly.

It was not disputed that the Bill had used the terms " National Physical Planning Policy" and "National and physical Planning" on its long title as well as in other clauses. It was also not disputed that the said phrases has not been used in any one of the three lists contained in the Ninth Schedule to the Constitution.

In such circumstances, the question arises as to how the determination should be made as to whether the subject in question would be placed within the ambit of "National Policy" of the relevant subject.

Learned Counsel for the Petitioners submitted that the test that should be used for such determination should be a functional test whereas the Learned Deputy Solicitor General for the Respondent submitted that regard should be given to the purpose and object of the Bill as a whole and not to particular words that are used in a clause of the Bill.

The functional test which was referred to in the matter concerning the **Water Services Reform Bill** (SC SD 24 and 25/2003), where this court had stated that,

> "On the whole the Bill is pervasive in its content in eroding the functions of local authorities in providing water services to consumers in each area. It seeks to give legislative recognition to local authorities in abdicating their duty to provide an essential public utility service to residents in its area. The provisions of the Bill are functional in nature with specific application to the matters contained in the Bill. Therefore the Bill cannot be considered as laying down national policy so as to come within List II (Reserved List)"

It is to be noted that in the said Determination although the functional test was used, to arrive at the conclusion, the contents of the Bill had been examined and as correctly stated by the Learned Deputy Solicitor General, such examination would have to be based on the purpose and object of the Bill as a whole. In referring to the examination of the purpose and object of the Bill as a whole and not of particular words or phrases, Learned Deputy Solicitor General referred to the Determination of this Court in the Bill titled "**An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets** (SC SD 02/2011) where it was stated as follows:-

> "The Thirteenth Amendment to the Constitution, which made provision for the establishment of Provincial Councils that were empowered to make Statutes applicable to the Province, had clearly stipulated that such Councils would have no power to make Statutes on any matter set out in the Reserved List, Accordingly the legislative power with regard to the National Policy on all subjects and Functions are vested with the Central Government."

In determining the question as to whether a subject matter is dealing with the National Policy or not, it would therefore be necessary to consider the nature of the provisions contained in the Bill, its purpose and object in the light of the provisions contained in the Thirteenth Amendment to the Constitution and the three Lists enumerated in the Ninth Schedule to the Constitution.

The present Bill is for the purpose of amending the Town and Country Planning Ordinance. Clause 1 of the Bill referred to the short title and states that:-

"This Act may be cited as the Town and Country Planning (Amendment) Act....."

There are Eight clauses in the draft Bill, and a statement of the legal effect of all these clauses are given in the Bill. According to the said Statement of legal effect, the purpose of the amendment is to widen the scope of the activities under the Town and Country Planning, which can be implemented in terms of the Act. In clause 3, reference is made to the establishment of a National Physical (Planning) Council in order to prepare a National Physical

Policy and a National Physical Plan to give effect to the objectives of the Bill. The said clause 3 is to repeal section 2 of the Town and Country Planning Ordinance and the marginal note of the amendment, clearly states that the new section is for the "Preparation of the National Physical Plan and its scope and objective of the Act." It is therefore apparent that the purpose and the objective of the Bill is to establish a National Physical (Planning) Council in order to prepare the National Physical Plan and as it would be clearly seen, there is no mention regarding a National Policy for the subject of Town and Country Planning.

It is relevant to note that the Town and Country Planning Ordinance had come into being in 1946 and this Ordinance was amended in the year 2000 by Act, No. 49 of 2000. Neither the 1946 Ordinance nor the 2000 Act referred to a National Policy.

As stated earlier the long Title to the Town and Country Planning Ordinance is to be repealed and replaced by clause 2 of the Bill. The said replacement, referred to earlier, clearly shows that the Bill would be dealing with the subject of land.

List I of the Ninth Schedule to the Constitution refers to the subjects that fall within the purview of the Provincial Councils. Item 18 of the Provincial Councils List (List I) refers to Land and states thus:

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

Appendix II refers to Land and Land Settlement. It also specifies that State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33 (*d*) and written law governing the matter. The said Appendix has also specified that, subject to the aforesaid, land shall be a subject of the Provincial Councils, that would be subject to the conditions laid down under the special provisions specified in Appendix II on different headings. The said headings include State Land, Inter-Provincial Irrigation and Land Development Projects and the National Land Commission.

All these provisions clearly indicate that the basic distribution of authority over the subject of land is based on the fact as to whether the land in question belonged to the State or not. State land would continue to vest in the Republic and Provisions would have authority over such land only subject to the special provisions laid down in terms of the Constitution stipulated under Appendix II.

Accordingly, where reference is made to item 18 of the Provincial Council List and Appendix II of that List, it is clear that under Appendix II directions are given chiefly with regard to State land.

The Bill under review, as stated earlier, deals with integrated planning in relation to the economic, social, historic, environmental, physical and religious aspects of land in Sri Lanka which come within the purview of the subject of land that is referred to in Item 18 of the Provincial Council List which includes rights in or over land, land tenure ,transfer and alienation of land, land use and land improvement.

It is therefore evident that the subject matter referred to in the Bill deals with an item that comes within the purview of Provincial Councils.

Article 154 (G) (3) provides for the making of statutes on any subject, which come within the ambit of the Provincial Councils and reads thus:

> "No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the *Gazette* and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference....."

After such reference in terms of Article 154 (G) (3) where every Provincial Council agree to the passing of the Bill, it may be passed by a simple majority in Parliament and in terms of Article 154 (G) (3) (*b*), where one or two Provincial Councils do not agree to the passing of the Bill, the said Bill has to be passed by the special majority required by Article 82 of the Constitution.

There was no submissions made by the Learned Deputy Solicitor General to the effect that the Bill under reference has been referred by His Excellency the President to the Provincial Councils, as stipulated in Article 154 (G) (3) of the Constitution.

Since such procedure has not been complied with, we make a Determination in terms of Article 120 read with Article 123 of the Constitution that the Bill in question is in respect of a matter set out in the Provincial Council List and shall not become law unless it has been referred by His Excellency the President to every Provincial Council as required by Article 154 (G) (3) of the Constitution.

As the Bill has been placed in the Order Paper of Parliament without compliance with provisions of Article 154 (G) (3) of the Constitution no Determination would be made at this stage on the other grounds of challenge, which were referred to earlier.

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

Dr. Shirani A. Bandaranayake,
Chief Justice

K. Sripavan,
Judge of the Supreme Court

Chandra Ekanayake,
Judge of the Supreme Court

First Reading :	08.11.2011 (Hansard Vol. 203; No. 06; Col. 845)
Bill No. :	136
Sponsor/Relevant Minister :	Prime Minister and Minister of Buddha Sasana & Religious Affairs
The petition announced in Parliament :	29.11.2011 (Hansard Vol. 204; No. 7; Col. 1163)
Decision of the Supreme Court Announced in Parliament :	03.12.2011 (Hansard Vol. 205; No. 3; Col. 423-430)
Remarks :	Withdrawn by the Minister on 07.12.2011 (Hansard Vol. 205; No. 6; Col. 1034)
Title :	Town and Country Planning (Amendment) Bill

DECISIONS
OF
THE SUPREME COURT
ON
PARLIAMENTARY BILLS

2012

D I G E S T

Subject

coordinating network at the district level and national level; to establish Divineguma Community Based Banks and Divineguma Community based Banking Societies; to repeal Samurdhi Authority of Sri Lanka Act, No. 30 of 1995, Southern Development Authority of Sri Lanka Act, No. 18 of 1996 and Udarata Development Authority of Sri Lanka Act, No. 26 of 2005 and to provide for matters connected therewith or incidental thereto.

-Challenged before the Supreme Court under Article 121 (1) determined as follows:-

1. *The Supereme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon, the Constitutionality of a Bill and its procedural compliance, before such Bill placed on the Order Paper of Parliament.*

2. *Since the views cannot be obtained from one Provincial Council due to it being not constituted, the Bill could only be passed by the special majority required by Article 82 of the Constitution taking into consideration the provisions stipulated in Article 154 G (3) (b) of the Constitution;*

3. *Clause 5 (d) - this clause is inconsistent with Article 12 (1) of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;*

4. *Clause 7 & 42 - these two clauses are violative of Article 52 (2) and 55 (1) of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution.*

5. *Clause 8 (2) - this clause is contrary to Article 3 of the Constitution which would require the approval by People at a Referendum; If the Zonal Heads of Department are to be appointed by Cabinet of Ministers such appointments would not be contrary to Article 3 of the Constitution and therefore would not require the approval by the People at a Referendum;*

6. *Clause 11 and 18 - these two clause are inconsistent with Article 12 of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution.*

Subject	*Determination No.*	*Page No.*
7. *Clause 14 - this clause is inconsistent with Article 12 (1) of the Constitution. The inconsistency with the Article 12 could be avoided if the Director - General is to act in consultation with the Divineguma Regional Organization, which has the power in terms of clause 17 (g) of the Bill to monitor and regulate all Divineguma community based organizations;*		
8. *Clause 17 (m) - this clause is inconsistent with Article 12 (1) of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;*		
9. *Clause 19 - this clause is inconsistent with Article 12 of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;*		
10. *Clause 25 (4) and 29 (4) - these clauses are inconsistent with Article 12 (1) of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;*		
11. *Clause 35 (1) (b), (c) and (d) read with clause 5 (d) dealt with above - clauses 35 (1) (b), (c) and (d) are inconsistent with Article 3 of the Constitution.* *This inconsistency will cease if the monies and assets referred to in clauses 35 (1) (b), (c) and (d) are deposited in the Consolidated Fund and made available to the Divineguma Fund with the approval of the Parliament.*		
APPROPRIATION 2013 to provide for the service of the financial year 2013; to authorize the raising of loans in or outside Sri Lanka, for the purpose of such service; to make financial provision in respect of certain activities of the Government during that financial year; to enable the payment by way of advances out of the consolidated Fund or any other fund or moneys, of or at the disposal of the Government, of moneys required during that financial year for expenditure on such activities; to provide for the refund of such moneys to the Consolidated Fund and to make provisions for matters connected therewith or incidental thereto.	**15/2012**	**109-115**

Subject	*Determination No.*	*Page No.*
- challenged before the Supreme Court under Article 121 (1) *-determined that clause 2 (1) (b) of the Bill contravenes Article 148 of the Constitution and is therefore inconsistent with the Constitution. However the Court has further held that this anomaly could be rectified if the impugned clause is amended to read that prior to the obtaining of the loan must be approved by the Parliament.* *Clause 7 (b) of the Bill contravenes Article 148 of the Constitution and is therefore inconsistent with the Constitution.* *The Court has further held that this could be cured if amended to read that it could only be done with Parliamentary approval.*		
CODE OF CRIMINAL PROCEDURE (SPECIAL PROVISIONS) to provide for the extension for the period of detention of persons arrested without a warrant in order to facilitate the conduct of investigations; for dispensing with the conduct of the non-summary inquiry in certain cases; to provide for the taking of disposition of witnesses for the prosecution; and to make provision for matters connected therewith or incidental thereto. *- challenged before the Supreme Court under Article 121 (1)* *-determined that clause 8 of the Bill is inconsistent with Article 13 (2) of the Constitution and is required to be passed with the special majority prescribed by Article 84 (2) of the Constitution.* *The inconsistency stated above would cease if clause 2 is amended by adding a provision at the end of clause 8 of the Bill on following lines-* *"Provided that the aforesaid provisions of this section shall not affect any decision or order made by any Court in respect of any detention made during the period within which the said Act is deemed to have been in operation."* *Subject to above none of the other clauses of the Bill or any provision therefore is inconsistent with the Constitution.*	**16/2012 to 17/2012**	**117-122**

S.C. (S.D.) No. 01/2012 to S.C. (S.D.) No. 03/2012

"DIVINEGUMA BILL"

BEFORE :

Dr. Shirani A. Bandaranayake - Chief Justice
Priyasath Dep. PC. - Judge of the Supreme Court
Eva Wanasundara - Judge of the Supreme Court

S.C. (S.D.) No. 01/2012

Petitioners : Chamara Madduma Kaluge

Counsel : J. C. Weliamuna with Shantha Jayawardane Senura Abeywardena and Mevan Kiriella Bandara

Respondent : Hon. Attorney General

Counsel : Y. J. W. Wijayatilake, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath PC., ASG., Indika Demuni de Silva, DSG., Nerin Pulle, SSC., Suharshani Herath SC., Yuresha Fernando, SC., and Avanthi Perera, S.C., for Attorney General

Intervenient Respondent : Nikulasge Renuka Kusum Priyanthi

Counsel : Ikram Mohamed, PC., with M. S. A. Wadood, Nilantha Udalagama, Nadeeka Galhena and Mihan Mohamed

Intervenient Respondent : Dr. Nanayakkarawasam

Counsel : Manohara de Silva, PC., with Pubudini Wickramaratne and Palitha Gamage

Intervenient Respondent : Sri Lanka Nidahas Samurdhi Kalamanakaruwange Ha Sambandikarana Niladaringe Sangamaya

Counsel : Kushan D' Alwis with Kaushalya Navaratne and Chamath Fernando

Intervenient Respondent : Edirisinghe Vithanage Prasad Rasanga Harischandra

Counsel : Ikram Mohomed, PC., With M. S. A. Wadood, Nilantha Udalagama, Nadeeka Galhena and Mihan Mohamed

Intervenient Respondent : Singamkutti Arachchige Chandrakanthi Sandalatha

Counsel : Dr. Jayatissa de Costa, PC., with Dr. Codlin Waidyaratna and Palitha Gamage

Intervenient Respondent : Dimi Adurage Padma Silva

Counsel : Sagara Kariyawasam

Intervenient Respondent : Sumithra Arachchige Don Jagath Kumara

Counsel : Faisz Musthapha, PC., with Sanjeeva Jayawardana, Faiszer Musthapha and Niranjan Arulpragasam

Intervenient Respondent : Solanga Arachchige Sunil Wickramasinghe

Counsel : M. U. M. Ali Sabry with Ruwanthi Cooray

Intervenient Respondent : Mohoppu Thanthilage Rupasinghe

Counsel : Priyantha Jayawardena

Intervenient Respondent : Bogodage Prajith Rohana Karunaratne

Counsel : Chandana Liyanapatabendy with Hejjaz Hizbuliah

S.C. (S.D.) No. 02/2012

Petitioners : P. B. D. J. W. Nanayakkara

Counsel : Senany Dayaratne with Eshanthi Mendis

Respondents : Hon. Basil Rajapakse MP
Hon. Attorney General

Counsel : Manohara de Silva, PC., with Pubudini Wickramaratne and Palitha Gamage for 1st Respondent

Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath PC., ASG., Indika Demuni de Silva, DSG., Nerin Pulle, SSC., Sudarshani Herath, SC., Yuresha Fernando, SC., and Avanthi Perera, SC. for Attorney General

Intervenient Respondent : Sri Lanka Nidahas Samurdhi Kalamanakaruwange Ha Sambandikarana Niladaringe Sangamaya

Counsel : Kushan D' Alwis with Kaushalya Navaratne and Chamath Fernando

Intervenient Respondent : Solanga Archchige Sunil Wickramasinghe

Counsel : M. U. M. Ali Sabry with Ruwanthi Cooray

Intervenient Respondent : Ranasinghe Arachchige Chathurika Dinushi

Counsel : Faisz Mausthapa PC., with Sanjeeva Jayawardane, Faiser Musthapha and Niranjan Arulpragasam

S. C. (S. D.) No. 03/2012

Petitioners : Centre for Policy Alternatives (Guarantee) Limited
Dr. Paikiasothy Saravanamuttu

Counsel : M. A. Sumanthiran with Bhavani Fonseka and G. D. Gunatillake

Respondent : Hon. Attorney General

Counsel : Y. J. W. Wijayatilake, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath, PC., ASG., Indika Demuni De Silva, DSG., Nerin Pulle, SSC., Suharashani Herath, SC., Yuresha Fernando, SC., and Avanthi Perera, SC., for Attorney General

Intervenient Respondent : Malani Hettiarachchi

Counsel : Faisz Mausthapa PC., with Sanjeeva, Jayawardane, Faiser Musthapha and Niranjan Arulpragasam

Court asssembled for hearing on 27.08.2012 at 10.45 a.m. and on 29.08.1012 at 11.30 a.m.

A Bill bearing the title "Divineguma" was published on the *Gazette* of the Republic of Sri Lanka on 27.07.2012 and placed on the Order Paper of Parliament on 10.08.2012. Four Petitioners have challenged the Constitutionality of this Bill by three separate petitions presented to this Court and have thereby invoked the jurisdiction of this court in terms of Article 121(1) of the Constitution.

Hon. The Attorney General was given due notice of the petitions.

At the time the petitions were taken into consideration, several Learned Counsel sought permission to be added as intervenients, on whose behalf papers have been filed as a party to these proceedings. Although relevant papers were filed late and no copies had reached the Petitioners, on inquiry Learned Counsel for the Petitioners submitted that they have no objection to the said requests been granted, if the Court so desires. Accordingly all interventions were allowed and they were added as Intervenient Respondents.

Learned Counsel representing the Petitioners, Learned President's Counsel representing the 1st Respondent in 02/2012, Learned President's Counsel and Learned Counsel representing Intervenient Respondents and the Learned Solicitor General on behalf of the Hon. The Attorney General were heard before this Bench at the sittings held on 27.08.2012 and 29.08.2012.

Before the Bill was taken into consideration, Learned Solicitor General took up a preliminary objection stating that the two petitions, namely SC SD 02/2012 and SC SD 03/2012, 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 Solicitor General was that in terms of Article 121 (1) of the Constitution it is necessary to deliver copies to the Hon. Speaker within the specified time period, in order to duly invoke the jurisdiction of this Court. The Bill, having been placed on the Order Paper of Parliament on 10.08.2012, the period of one week would elapse on 17.08.2012 and therefore the Petitioners should have presented the petition to the Supreme Court and the delivery of the copies to the Hon. Speaker should have been done on or before 17.08.2012.

Learned Solicitor General submitted that the petition in SC SD 02/2012 had been delivered only on 20.08.2012. It was also submitted that the petition in SC SD 03/2012, although had been sent on or before 17.08.2012 it had been delivered not to the Hon. Speaker, but to the Secretary-General of Parliament. The contention of the Learned Solicitor General in this regard was that the provisions contained in Article 121(1) of the Constitution are mandatory and relied on the determinations of this Court in **Sri Lanka Telecommunication Bill** (SC SD Nos. 5/91, 6/91 and 7/91), **Social Security Benefits Bill** (SC SD No. 13/91) and **Agrarian Development Bill** (SC SD 6/2000).

In **Sri Lanka Telecommunications Bill** (Supra) reference was made to the provisions contained in Article 121(1) of the Constitution and this Court had determined that the provisions in that Article as to the manner in which the jurisdiction of the Court could be invoked are mandatory. Article 121 of the Constitution deals with the ordinary exercise of Constitutional jurisdiction in respect of Bills. Article 121(1), which is the relevant Article in regard to the objection raised by the Learned Solicitor General, reads as follows:

> "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. Since 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 provisions contained in the aforementioned Article, sets out the procedure that has to be followed in order to ordinarily exercise the Constitutional jurisdiction of the Supreme Court in regard to Bills. In that it is necessary firstly to bring the relevant Bill to the attention of the Supreme Court within a specified time duration of one week. Whilst bringing it to the attention of the Supreme Court, it would also be necessary to deliver a copy of the petition to the Hon. Speaker. As determined by this Court in **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.

In the instant applications, viz. in 02/2012, as stated earlier, the petition had been delivered to the Hon. Speaker only on 20.08.2012 whereas in 03/2012, it had been delivered on 17.08.2012, not to the Hon. Speaker, but to the Secretary-General of the Parliament.

In terms of the provisions contained in 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 and a copy there of **shall at the same time be delivered to the Speaker**. This Court has considered one week to be a period of 7 days **(Sri Lanka Telecommunications Bill** (Supra). Since the Bill had been placed on the Order Paper of the Parliament on 10.08.2012 the petition had to be filed before this Court in terms of the Article 121 (1) of the Constitution on or before 17.08.2012.

Learned Counsel for the Petitioners in SC SD 03/2012 submitted that the Petitioner has filed the petition before the Supreme Court on 17.08.2012 and copy of the said documents had been served on the Hon. Speaker in terms of Article 121 (1) of the Constitution. In fact in Registered Attorneys for the Petitioners in their motion has stated thus:

> "..... AND WHEREAS in terms of Article 121 (1) and 134 (1) of the Constitution, a copy of this motion together with the Petition, Documents marked "P1" to "P3c" and the Affidavit thereto has been served on the Honourable Speaker of Parliament and the Honourable Attorney General by Registered Post and the relevant Registered Postal Article Receipts are annexed hereto in proof of same....."

On the Receipt of the aforesaid documents, the Registar of the Supreme Court, had made entry in the Docket, which reads thus:

> "Sinnadurai, Sundaralingam & Balendra, Attorney-at-Law file Proxy, Petition, Affidavit and Documents marked P1 to P3c and the receipt No. 22 I 730418 of 17.08.2012 for Rs. 200.".

The date stamp of Supreme Court Registry on the petition reads as 17 August, 2012.

Thus it is apparent that the petition had been filed before the Supreme Court on 17.08.2012 and the the same time a copy of the said set of documents were sent under Registered Post to the Hon. Speaker in Parliament. The Petitioners have also submitted copies of the postal Receipt Article to this Court. The date stamp of the said Postal Receipt Article indicates that is had been sent under Registered Post on 17.08.2012.

Learned Solicitor General had submitted that the petition of the Petitioners in SC SD 03/2012 had been delivered to the Hon. Speaker only on 20.08.2012.

The question that arises at this point is as to the meaning that should be given to the word **delivered** in terms of Article 121 (1) of the Constitution. The said meaning has to be considered in the light of the provisions contained in Article 121(1) of the Constitution with regard to the filing of the petition in the Supreme Court to invoke the Constitutional jurisdiction in respect of Bill by a citizen. The relevant sentence in the provision, referred to earlier, is repeated henceforth:

> "..... Such reference shall be made, or **such petition shall be field, 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.".

It is therefore necessary for the Petitioners to take steps firstly to file the petition in the Supreme Court within a period of one week of the Bill being placed on the Order Paper of the Parliament. Thereafter, a copy has to be delivered to the Hon. Speaker **at the same time.** This means that Petitioner, in order to comply with the provisions stipulated in Article 121 (1) of the Constitution will have act simultaneously to see that the petition is filed in the Supreme Court and to be delivered to the Hon. Speaker.

The petition in SC SD 02/2012 was filed on 17.08.2012 and had sent the same to Hon. Speaker on the same day by Registered Post. The meaning of the word "delivery" could be defined as mailed or dispatched. The Oxford English Dictionary [2nd Edition (Volume IV), Page 362] defines the word delivery as the action of handing over or conveying into the hands of another, especially the action of a carrier in delivering letters or goods entrusted to him for a conveyance to a person at a distance. Such could be easily carried out by way of posting in the present matter the documents had been sent by Registered Post on the same day it was field in the Supreme Court. In the determination of this Court in **Sri Lanka Telecommunications Bill** (Supra) the relevant Bill had been placed on the Order Paper of Parliament on 05.03.1991 and the period of one week came to an end on 12.03.1991. The petition to the Supreme Court had been submitted within one week on 12.03.1991, the copy to the Hon. Speaker had been posted only on 13.03.1991. This Court referring to the above stated thus:

> "Although the petition to the Supreme Court has been presented within one week (on 12.03.1991) the copy to the Speaker has however been posted on 13.03.1991. The Court considered one week to be a period of 7 days".

Having said that, the Court went on to determine that,

> "In the instant case, as the copy of the petition had not been delivered to the Hon. Speaker at the same time as the petition was presented to the Supreme Court there had been no proper invocation of the jurisdiction of the Supreme Court to hear and determine the matters in the petitions.".

Therefore it is apparent that in terms of Article 121 (1) of the Constitution a petition has to be filed within the stipulated 7 days period after the relavant Bill is placed on

the Order Paper of the Parliament and at the same time the said documents should be sent to the Hon. Speaker. In the process what matters is the filing and the posting of the petitions to be simultaneous and carried out within the stipulated period of 7 days.

In such circumstances, it is clearly evident that the Petitioners had properly invoked the jurisdiction of the Supreme Court to hear and determine the matters in the petition in terms of Article 121 (1) of the Constitution.

The Second objection, as stated earlier, was on the basis that the petition had been sent to the Secretary-General of the Parliament instead of addressing it to the Hon. Speaker.

Learned Counsel for the Petitioner contended that the said objection is analogous to a submission that pleadings delivered to the Register of this Court not reaching the Chief Justice. It was also said that the objection is utterly frivolous and contrary to the spirit and purpose of Article 121 (1) of the Constitution.

The purpose of the provisions contained in Article 121 (1) regarding the delivery of a copy of the petition, which had been submitted to the Supreme Court is quite clear and is sated in Article 121 (2) of the Constitution. This provision is as follows:-

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

The objective and the purpose therefore is to ensure that parliamentary proceedings in respect of the Bill in question are suspended during the pendency of the inquiry before the Supreme Court. Whilst, that process of sending the petition filed in the Supreme Court within the specified period to the Hon. Speaker is mandatory, it cannot be said that the documents being sent to the Secretary-General of the Parliament within the stipulated time frame is not in compliance with Article 121(1) of the Constitution.

For the reasons aforesaid the preliminary objections raised by the Learned Solicitor General are overruled.

The Bill, according to its long title is to provide for the "establishment of a Department to be called and known as the Department Divineguma Development by amalgamating the Samurdhi Authority of Sri Lanka established by Act, No. 30 of 1995, Southern Development Authority of Sri Lanka established by Act, No. 18 of 1996, the Udarata Development Authority of Sri Lanka established by Act, No. 26 of 2005; to establish Divineguma Community Based Organizations at rural level and to provide for a co-ordinating network at the district level and national level; to establish Divineguma Community Based Banks and Divineguma Community Based Banking Societies, to repeal Samurdhi Authority of Sri Lanka, Act, No. 30 of 1995, Southern Development Authority of Sri Lanka, Act, No. 18 of 1996 and Udarata Development Authority of Sri Lanka, Act, No. 26 of 2005 and to provide for matters connected therewith or incidental thereto.".

When the three Petitions were taken for consideration all Learned Counsel for the Petitioners agreed that all petitions could be taken together.

Learned Counsel for the Petitioners contended that the Bill in question intends to repeal the Samurdhi Authority of Sri Lanka Act, No. 30 of 1995, Southern Development Authority Act, No. 18 of 1996, and the Udarata Development Authority Act, No. 26 of 2005 in order to form one Department known as the Divineguma Development Department. Several submissions were made by the Learned Counsel for the Petitioners regarding to inconsistencies with the provisions of the Constitution.

Learned Counsel for the Petitioners further submitted that the Bill has been placed on the Order Paper of the Parliament contrary to Article 154 (G) (3) of the Constitution, as the Bill deals with several subject matters that are referred to in the Provincial Council List of the Ninth Schedule to the Constitution. Therefore it was decided, first to consider the ground of challenge on the basis of the requirement to comply with Article 154 (G) (3) of the Constitution:

Article 154 (G) which was introduced along with the 13th Amendment to the Constitution, deals with the statutes of Provincial Councils and Article 154 (G) (3) read 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 its publication in the *Gazette* and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference, and -
>
> (*a*) where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting; or
>
> (*b*) where one or more Councils do not agree to the passing of the Bill, such Bill is passed by the special majority required by Article 82:
>
> Provided that where on such reference, some but not all the Provincial Councils agree to the passing of a Bill, such Bill shall become law applicable only to the provinces for which the Provincial Councils agreeing to the Bill have been established, upon such Bill being passed by a majority of the Members of Parliament present and voting."

The submission of all Learned Counsel for the Petitioners was briefly that several clauses of the Bill in question were dealing with several subjects contained in the Provincial Council List in the Ninth Schedule to the Constitution. Learned Counsel for the Petitioners in SC SD 03/2012 had tabulized the subjects in the Bill that have a co-relation to the items in the Provincial Council List. The said Table is given below:

Table I

Clause in the Bill	*Related item in Ninth Schedule to the Constitution* (List I Provincial Council List)
Clause 4 (a) - Carrying out development activities as may be required to alleviate poverty and to bring about a society guaranteeing Social equity (Divineguma Development Department)	Item 2 - Planning - Implementation of provincial economic plans Item 10 - Rural Development
Clause 4 (c) - Food security for each individual and family (Divineguma Development Department)	Item 16 - Food supply and Distribution within the Province
Clause 4 (f) - Physical and Social infrastructure facilities for development of livelihoods (Divineguma Development Department)	Item 5:3 Construction activity in respect of any subject in the Provincial Council List Item 6 - Roads and bridges and ferries within the Province
Clause 4 (i) - Social security network for those in need social security (Divineguma Development Department)	Item 7:2 The Rehabilitation of destitute persons and families Item 7:3 - Rehabilitation and welfare of physically, mentally and socially handicapped persons. Item 7:4 Relief of the disabled and unemployable
Clause 5(c) - Centres for storage marketing and processing products of Divineguma beneficiaries and to make available physical and financial resources for the said purpose (Divineguma Development Department)	Item 15 - Market fairs
Clause 5(k) - Implement and operate programes which will economically and socially uplift living standards of people and to develop infrastructure facilities (Divineguma Development Department)	Item 2 - Planning - Implementation of Provincial economic plans Item 5:3 - Construction activity in respect of any subject in the Provincial Council List. Item 6 - Roads and bridges and ferries thereon within the Province

Clause in the Bill	*Related item in Ninth Schedule to the Constitution* (List I Provincial Council List)
Clause 9 - Community Based Organizations	Item 10 - Rural Development Item 17:1 Co-operative undertakings and the organization, registration supervision and audit of co-operative Societies within the Province Item 17:2- Co-operative Development within the Province Item 28 - Regulation of unincorporated trading, literary, scientific, religious and other societies and associations
Clause 11 (K) - to undertake and implement development programmes launched with the labour contribution of the community (Community Based Organizations)	Item 2 - Planning - Implementation of provincial economic plans Item 10 - Rural Development
Clause 15(1) - Divineguma Regional Organizations	Item 17:1- Co-operative undertakings and the organization, registration, supervision and audit of co-operative societies within the Province Item 17:2- Co-operative development within the Province Item 28- Regulation of unincorporated trading, literary, scientific, religious and other societies and associations
Clause 16(e) - Provide technical assistance and other services for the development of agricultural or any other product of its beneficiaries in the region (Divineguma Regional Organizations)	Item 9:1 - Agriculture, including agricultural extension, promotion and education for provincial purposes and agricultural services
Clause 16 (f) - maintain centres for the purchase, storage and marketing of products and raw material and organize trading centres and shopping centres (Divineguma Regional Organizations)	Item 15 - Market fairs

Clause in the Bill	*Related item in Ninth Schedule to the Constitution* **(List I Provincial Council List)**
Clause 18(e) - Provide raw-material, technology and other related services for the development of products at regional level and provide facilities for marketing of the same (Divineguma Regional Organization)	Item 10 - Rural Development Item 15 - Market fairs Item 21 - Subject to the formulation and implementation of National Policy in regard to development and planning the power to promote, establish and engage in agricultural, industrial, commercial and trading enterprises and other income generating projects within the Province
Clause 18 (f) - Provide assistance for the social security programme being implemented by the Divineguma Community Based Organizations (Divineguma Regional Organizations)	Item 7:3 Rehabilitation and Welfare of physically, mentally and socially handicapped persons Item 7:4 Relief of the disabled and unemployable
Clause 26 (d) - Provide credit facilities to Divineguma beneficiaries (Divineguma Community Based Banks)	Item 35 - The borrowing of money to the extent permitted by or under any law made by Parliament
Clause 31 (b) - Invest its funds, grant credit facilities and disburse profits (Divineguma Community Based Banking Societies)	Item 35 - The borrowing of money to the extent permitted by or under any law made by Parliament.

Learned Solicitor General submitted that the Bill in its entirety does not impinge on the powers and functions of the Provincial Councils or any other matters stipulated in the Provincial Councils List. In support of this contention Learned Solicitor General relied on the majority determination in **In Re the Thirteenth Amendment to the Constitution, Bill and the Provincial Council Bill** (SC SD Nos. 7-48/87) where it was stated that Provincial Councils do not exercise sovereign legislative power and are only subsidiary bodies exercising limited legislative powers. It was also submitted that in terms of Article 76(1) of the Constitution, the Parliament shall not abdicate or in any manner alienate it's legislative power and shall not set up any authority with any legislative power.

It is correct that in the determination regarding the Thirteenth Amendment to the Constitution, the majority judgment had clearly referred to the aforementioned position In that in the majority decision the Supreme Court had held that delegated legislation is legal and permitted and does not involve any abandonment or abdication of legislative power in favour of any newly created legislative authority. It further said that no new legislative body armed with general legislative authority is created when a new body is empowered to make subordinate legislation.

However, the question which has arisen here is not with regard to the authority that has been given to the Provincial Councils. Provincial Councils were empowered to make statutes and what had been submitted by the Learned Solicitor General referring to the majority judgment in the determination regarding the 13th Amendment was based on the said power for the Provincial Councils to enact statutes. The question before this Court is with regard to the authority of the Central Government to pass legislation on subjects stipulated in the Provincial Council List of the Ninth Schedule to the Constitution.

The main purpose of the 13th Amendment to the Constitution was to introduce Provincial Councils in the country. Article 154 (A) (1) of the Constitution had made provision for a Provincial Council to be established for every province. The purpose of the introduction of Provincial Councils in 1987, was to devolve power which was hitherto vested in the Central Government to Provincial Councils.

As referred to in the determination in **Town and Country Planning (Amendment) Bill** (SC SD 03/2011), in the Supreme Court determination in **In Re Thirteenth Amendment to the Constitution Bill and the Provincial Councils Bill** (Supra), it was clearly stated that the introduction of the Provincial Councils was for the purpose of devolution of authority, which included, *inter alia,* legislative devolution. This position was emphasized by the Supreme Court in **Madduma Bandara V Assistant Commissioner of Agrarian Services** ([2003] 2 Sri L. R. 80), where it was stated thus:

> "The 13th Amendment to the Constitution, which came into effect in November 1987, was chiefly introduced for the purpose of devolving power from the Central Government to the Provincial Councils".

In devolving such power, the Provincial Councils were empowered to make Statutes. Article 154 (G) of the Constitution, which deals with the Statutes of Provincial Councils, refer to the applicability of the three lists enumerated in the 9th Schedule to the Constitution where Provincial Councils are exercising their power to make such Statues. At the same time Article 154 (G) refers to instances where His Excellency the President of the Republic has to refer certain Bills to the Provincial Councils for the expression of the views of the Provincial Councils. For instance, Article 154 (G) (2) clearly states that a Bill for the purpose of amendment or repeal of the provisions of Chapter XVII A of the Constitution has to be referred to the Provincial Council for the expression of its views after its publication in the *Gazette* and before it is placed on the Order Paper of Parliament. Whilst Article 154 (G) (2) refer to the Chapter containing Articles 154 A to 154 V, Article 154 (G) (3) refer to a Bill in respect of matters set out in the Provincial Council List. The said Article 154 (G) (3), which was referred to earlier, clearly provided for the procedure that has to be followed by the Central Government when it become necessary to legislate on a subject which is contained in the Provincial Council List of the Ninth Schedule to the Constitution. In that, if the Bill in question deals with a subject matter set out in the Provincial Council List, soon after its publication in the *Gazette* and before it is placed on the Order Paper of Parliament, it is necessary for His Excellency the President to refer it to every Provincial Council for the expression of its views.

Considering the purpose on which the 13th Amendment was introduced, and the establishment of the Provincial Councils, this procedure laid down in Article 154 (G) (3) has to be regarded as mandatory since otherwise the object of the said Article would be defeated. Moreover it is to be noted that this has been the intention of the legislature and the word **shall** has been repeatedly used in the Article 154 (G) (3) of the Constitution.

In fact in the determination of **In Re Thirteenth Amendment to the Constitution and the Provincial Councils Bill** (Supra), the majority decision has referred to the steps that were taken in the direction of devolving authority to Provincial Councils. Referring to this position it was stated thus:

> "Healthy democracy must develop and adapt itself to changing circumstances. The activities of Central Government now include substantial powers and functions that should be exercised at a level closer to the people. Article 27(4) has in mind the aspirations of the local people to participate in the governance of their regions. The Bills envisage a handing-over of responsibility for the domestic affairs of each province, within the framework of a united Sri Lanka. They give new scope for meeting the particular needs and desires of the people of each province. Decentralization is a useful means of ensuring that administration in the provinces is founded on an understanding of the needs and wishes of the respective provinces. The creation of elected and administrative institutions with respect to each province - that is what devolution means - gives shape to the devolutionary principle".

It is therefore evident that in terms of Article 154 (G) (3) of the Constitution, with regard to the subject matters referred to in the Provincial Council List, it is mandatory for the Central Government to consult the Provincial Councils before placing such type of a Bill on the Order Paper of Parliament. When such authority has been attributed to the Provincial Councils, by way of provisions contained in the Constitution, that cannot be taken away unless by way of following the procedure laid down in order to amend such constitutional provisions. Where the intention and the language of a piece of legislation are clear and when there are no ambiguities, there should not be any necessity for any type of construction or interpretation of such provisions.

As shown earlier in Table I, the Bill in question deals with several matters that come directly under the Provincial Council List. In the circumstances, in terms of Article, 154(G) (3), it is mandatory that before placing the Bill on the Order Paper of the Parliament, for it to be referred to the Provincial Councils for the expression of their views. Learned Solicitor General, submitted that the Provincial Councils have no power or authority on the subjects stated in List II of the Ninth Schedule to the Constitution. He further contended that the first item in the said list is the **National Policy on all subjects and functions**. Learned Solicitor General relied on the enactment of the National Transport Commission Act, No. 37 of 1991 and stated that some of the provisions of that Act are in conflict with Item 8 of the Provincial Council List, but as the Act relates to National Policy its constitutional validity was upheld by the Supreme Court and it had passed by a simple majority. Reference was also made to the determination of this Court is **In Re Agrarian Services (Amendment) Bill,** (SC SD 02/91 and 04/91) and stated that all matters dealt with in that Bill were matters of National Policy and therefore it fell within List II of the Ninth Schedule to the Constitution. The contention of the Learned Solicitor General was that since the Bill deals with National Policy on all subjects it a matter only for the Central Government, the Bill in question does not come within the purview of Article 154 (G) (3) of the Constitution.

Learned President's Counsel for the 1st Respondent in SC SD No. 02/2012, contended that the Directive Principles of State Policy stipulated in Chapter VI of the Constitution is the National Policy framework of the State.

Chapter VI of the Constitution as stated by the Learned President's Counsel deals with the Directive Principles of State Policy. As clearly stated in Article 27 (1) of the Constitution, the said directive principles set out in Article 27 (2) are to guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and governance of the country. Article 27 (2) of the Constitution gives a general outlook of several areas on which a democratic socialist society would be established as pledged by the State.

It is not disputed that national policy on all subjects and functions is a matter within the scope of the Central Government and the Provincial Councils have no power legislate on national policy nor is there a requirement for the Central Government to consult the Provincial Councils if the Centre has decided to legislate on a matter based on national policy.

However, the national policy within a country cannot be equated to the directive principles of the state policy, as it would vary from one subject area to another.

It is not feasible to categorise a subject or subject areas as dealing with national policy merely because it has been referred to in Chapter VI of the Constitution. There have been various methods adopted to decide as to whether a subject area referred to in a Bill deals with national policy . In the determination in **Water Services Reference Bill** (SC SD 24/2003 and 25/2003) the functional test was applied to decide whether the matter contained in the Bill referred to National Policy. In **Kamalawathie and Others V The Provincial Public Service Commission, North Western Province** ([2001] 1 Sri L. R. 1), the Supreme Court referring to teacher transfers stated that Circular No. 95/11 sets out the national policy on teacher transfers, which is an important aspect of education.

These instances clearly show that national policy has to be carefully considered and duly formulated prior to its promulgation, in respect of different subject areas.

The question which arises at this juncture is whether the Bill is on national policy.

In the determination on **Water Services Reference Bill** (Supra), this Court has laid down that the test to be used to determine on the question of national policy would be the functional test. This test was referred to in the determination on **Town and Country Planning Amendment Bill** (Supra), and this Court had stated thus:

> "In determining the question as to whether a subject matter is dealing with the National Policy or not, it would therefore be necessary to consider the nature of the provisions contained in the Bill, its purpose and object in the light of the provisions contained in the Thirteenth Amendment to the Constitution and the three Lists enumerated in the Ninth Schedule to the Constitution."

It would therefore be necessary to consider the purpose and the object of the Bill in deciding the question as to whether the Bill deals with the national policy of the relevant subject.

The long title of the Bill, stated earlier, refer to the establishment of a Department known as the Department of Divineguma Development. This would be established by the amalgamation of three Authorities which are currently functional. These three Authorities would be the Samurdhi Authority, Southern Development Authority and Udarata

Development Authority. The Bill also provides for the establishment of Divineguma Community Based Organizations at rural level with a network at the district level and national level. It is also intended to establish Divineguma Community Based Banks and Divineguma Community Based Banking Societies. In the process, provision is to be made to repeal the Samurdhi Authority, Southern Development Authority and Udarata Development Authority.

It was contended that in the Preamble reference has been made to national policy. The Preamble reads as follows:

> "WHEREAS, in furtherance of the economic development process and in giving effect to the national policy of alleviating poverty and ensuring social equity, it has become necessary to improve the individual, family and group centered livelihood development activities."

This clearly demonstrates that except for the word national policy the rest of the items are functional and includes several subject areas which are referred to in the Provincial Council List. For instance, when the long title and the preamble are considered together they refer to the development at grassroot level of the society. This is undoubtedly based on rural development. Item 10 of the List I deals with rural development and the entire subject is therefore devolved. It is also to be noted that in item 21 of List I, the functional aspects of the power to promote, establish and engage in agricultural, industrial, commercial and trading enterprises and other income generating projects within the Province is vested in the Provincial Councils.

Learned Solicitor General contended that the Bill is based on the *Mahinda Chinthanaya* that was approved by the Cabinet and that it was in respect of national policy, which is an area reserved for the Central Government. Learned Counsel for the Petitioners submitted that the said *Mahinda Chinthanaya* or any other documents by the Government should not override and contradict the Constitution of Sri Lanka.

It is to be borne in mind that the Constitution is the basic and fundamental law of the land, which reigns supreme and all other documents are subject to provisions contained in the Constitution. It is also relevant to note that in terms of Article 120 of the Constitution, the Supreme Court has the sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.

As Clearly examined earlier several subjects contained in the Bill come within the Provincial Council List in the Ninth Schedule to the Constitution. The subjects were compared with the relative items in the Ninth Schedule in Table I. It is also quite clear that the provisions of the Bill are functional in nature, which are closely linked to the matters contained in the Bill. Accordingly the Bill cannot be considered as setting out

national policy and therefore does not come within the purview of List II of the Ninth Schedule to the Constitution. It is not disputed that the Provincial Councils came into being as a result of the introduction of the Thirteenth Amendment to the Constitution in 1987. The object was to achieve a more democratic constitutional regime on the basis of the power which was hitherto vested with the Central Government, being devolved to the Provincial Centres. By this process, in terms of Article 154 (G), certain restrictions have been placed with regard to enacting laws by the Centre over the subjects which are specifically devolved to the Provincial Councils. When there are such restrictions, those cannot be overcome by a mere reference of national policy. Such actions would only negate the whole purpose of the introduction of Provincial Councils on order to devolve power. As Bindra (Interpretation of Statute, 7th edition, 80) has correctly pointed out and as has been referred to in **Maithripala Senanayake V Mahindasoma** ([1998] 2 Sri L. R. 333),

> "Unless the words are clear, the Courts should not so construe the proviso as to attribute to the Legislature **to give with one hand and take away with another"** (emphasis added).

Learned Solicitor General submitted that the Bill under reference had not been referred by His Excellency the President to the Provincial Councils as stipulated in Article 154 (G) (3) of the Constitution.

Since such procedure has not been complied with, we make a determination in terms of Article 120 read with Article 123 of the Constitution that the Bill in question is in respect of matters set out in the Provincial Council List and shall not become law unless it has been referred by His Excellency the President to every Provincial Council as required by Article 154 (G) (3) of the Constitution.

As the Bill has been placed in the Order Paper of Parliament without compliance with provisions of Article 154 (G) (3) of the Constitution, no determination would be made at this stage on the other grounds of challenge.

We shall place on record our deep appreciation of the valuable assistance given by all Learned Counsel for the Petitioners, Learned President's Counsel for the 1st Respondent in 02/2012, all Learned President's Counsel and Learned Counsel for the Intervenient Respondents and the Learned Solicitor General who appeared on behalf of the Attorney General.

Dr. Shirani A. Bandaranayake
Chief Justice

Priyasath Dep, PC.,
Judge of the Supreme Court

Eva Wanasundara, PC.,
Judge of the Supreme Court

First Reading:	2012.08.10 (Hansard Vol. 210; No. 07; Col. 935)
Bill No.	178
Sponsor/Relevant Minister:	Minister of Economic Development
The petition announced in Parliament:	21.08.2012 (Hansard Vol. 210; No. 08; Col. 1019)
Decision of the Supreme Court Announced in Parliament:	18.09.2012 (Hansard Vol.210; No. 10; Col. 1367-1384)
Remarks:	Withdrawn by the Minister on 21.09.2012 (Hansard Vol. 210; No. 13; Col. 1892)
Title:	Divineguma Bill

S. C. (SD) No. 04/2012 to S. C. (SD) No. 14/2012

"DIVINEGUMA BILL"

BEFORE :

Dr. Shirani A. Bandaranayake	-	Chief Justice
N. G. Amaratunga	-	Judge of the Supreme Court
K. Sripavan	-	Judge of the Supreme Court

S. C. (SD) No. 04/2012

Petitioner	Chamara Madduma Kaluge
Counsel	J. C. Weliamuna with Mevan Kiriella Bandara
Respondent	Hon. Attorney General
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe, Tillekaratne PC., ASG., Suhada Gamlath, PC., ASG, Indika Demuni de Silva, DSG., Suharshi Herath, SC., Yuresha Fernando SC., and Dr. Avanti Perera, SC., for Attorney General
Intervenient Respondent	Dr. Nanayakkarawasam
Counsel	Ikram Mohamed, PC., with J. P. Gamage, M. S. A. Wadood, Nadeeka Galhena and Milhan Mohammed
Intervenient Respondent	Edirisinghe Vithanage Prasad Rasanga Harischandra
Counsel	S. L. Gunasekara with Laknath Seneviratne and Chinthaka Mendis
Intervenient Respondent	Chandrika Silva
Counsel	Dr. Jayatissa de Costa, PC., with Chula Boange, Dr. Codlin Waidyaratne, Mahesh Katulanda and E. L. Thirimanne
Intervenient Respondent	Mallika Appuhamilage Don Yamuna Samanthi
Counsel	Ikaram Mohamed, PC., with J. P. Gamage, M. S. A. Wadood, Nadeeka Galhena and Milhan Mohamed
Intervenient Respondent	Malani Hettiarachchei
Counsel	Canishka G. Witharana
Intervenient Respondent	Dimi Adurage Padma Silva
Counsel	Rasika Dissanayake

Intervenient Respondent	Sri Lanka Nidahas Samurdhi Kalamanakaruwange Ha Sambandikarana Niladaringe Sangamaya
Counsel	Kushan D' Alwis with Kaushalya Navaratne and Chamath Fernando
Intervenient Respondent	Ven. Omalpe Sobitha Thero
Counsel	Manohara de Silva, PC., with Pubudini Wickramaratne and J.P. Gamage
Intervenient Respondent	Solanga Arachchige Sunil Wickramasinghe
Counsel	M. U. M. Ali Sabry with Ruwantha Cooray
Intervenient Respondent	Sumithra Arachchige Don Jagath Kumara
Counsel	Faisz Musthapha. PC., with Sanjeeva Jayawardane, Faiszer Musthapha, Kuvera De Zoysa and Niranjan Arulpragasam
Intervenient Respondent	Kahatgahagedera Neel Shyamantha
Counsel	Chandana Liyanapatabendy with Harshana Ranasinghe

S. C. (SD) No. 05/2012

Petitioner	Somasundaram Senathirajah
Counsel	M. A. Sumanthiran with Niran Anketell
Respondent	Hon. Attorney General
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath, PC., ASG., Indika Demuni de Silva, DSG., Suharshi Herath, PC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC. for Attorney General
Intervenient Respondent	Nekathgedara Wijesekara Mudiyanselage Jayantha Wijesekara
Counsel	S. L. Gunasekara with Laknath Seneviratne and Chinthaka Mendis

S. C. (SD) No. 06/2012

Petitioners	Centre for Policy Alternatives (Guarantee) Limited Dr. Paikiasothy Saravanamuttu
Counsel	Viran Corea with Ermiza Tegal
Respondent	Hon. Attorney General

Counsel	Y. J .W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath, PC., A.S.G. Indika Demuni de Silva, DSG., Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for Attorney General
Intervenient Respondent	Nallaiah Vinasithamby
Counsel	Romesh de Silva, PC., with Manjuka Fernandopulle & Eraj de Silva
Intervenient Respondent	Gunapalage Dharmadasa
Counsel	Manohara de Silva, PC.,with Pubudini Wickramaratne and J. P. Gamage

S. C. (SD) No. 07/2012

Petitioners	Sirithunga Jayasuriya Sirimasiri Happuarachi
Counsel	J. C. Weliamuna with Mevan Kiriella Bandara
Respondent	Hon. Attorney General
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath, PC., ASG., Indika Demuni de Silva DSG., Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for the Attorney General
Intervenient Respondent	Arumugam Ragunathan
Counsel	Faisz Musthafa, PC., with Sanjeeva Jayawardane, Faiszer Musthapha, Kuvera De Zoysa and Niranjan Arulpragasam

S. C. (SD) No. 08/2012

Petitioners	Mohammed Azath Sannon Salley Manoharan Ganesan
Counsel	Pulasthi Hewamanne with Senura Abeywardane
Respondent	Hon. Attorney General
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath, PC., ASG., Indika Demuni de Silva DSG., Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for Attorney General
Intervenient Respondent	Shamugan Prabaharan
Counsel	Ikram Mohamed, PC., with J. P. Gamage, M. S. A. Wadood, Nadeeka Galhena and Milhan Mohamed

S. C. (SD) No. 09/2012

Petitioners	Dr. Vickramabahu Karunarathne Sarath Manamendra
Counsel	Pulasthi Hewamanne
Respondent	Hon. Attorney General
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath, PC., ASG., Indika Demuni de Silva DSG., Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for Attorney General
Intervenient Respondent	Sekkali Jaleeth
Counsel	Canishka G. Witharana with Dushani Priyadarshani and J. P. Gamage

S. C. (SD) No. 10/2012

Petitioner	Murugan Chandrakala
Counsel	Sagara Kariyawasam
Respondents	Hon. Attorney General Hon. Basil Rajapakse
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath, PC., ASG., Indika Demuni de Silva DSG., Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for Attorney General Manohara De Silva, PC., with Pubudini Wickramaratne and J. P. Gamage for 2nd Respondent

S. C. (SD) No. 11/2012

Petitioner	Uruthurakumar Jeya
Counsel	Sagara Kariyawasam
Respondent	Hon. Attorney General
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG., Suhada Gamlath, PC., ASG., Indika Demuni de Silva DSG., Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for Attorney General

S. C. (SD) No. 12/2012

Petitioners	Antonyz Jegajeevan Jacob
Counsel	Sagara Kariyawasam

Respondent	Hon. Attorney General
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG, Suhada Gamlath, PC., ASG, Indika Demuni de Silva DSG, Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for Attorney General

S. C. (SD) No. 13/2012

Petitioner	Karuppaiah Yogeshwari
Counsel	Sagara Kariyawasam
Respondents	Hon. Attorney General Hon. Basil Rajapakse
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG, Suhada Gamlath, PC., ASG, Indika Demuni de Silva DSG, Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for Attorney General Manohara De Silva, PC., with Pubudini Wickramaratne and J. P. Gamage for 2nd Respondent

S. C. (SD) No. 14/2012

Petitioner	P. B. D. J. W. Nanayakkara
Counsel	Senany Dayaratne with Eshanthi Mendis
Respondent	Hon. Attorney General
Counsel	Y. J. W. Wijayatilaka, PC., Solicitor General with Bimba Jayasinghe Tillekaratne, PC., ASG, Suhada Gamlath, PC., ASG, Indika Demuni de Silva DSG, Suharshi Herath, SC., Yuresha Fernando, SC., and Dr. Avanti Perera, SC., for Attorney General
Intervenient Respondents	Seyyadu Cassim Nazoordeen
Counsel	Kushan D' Alwis with Kaushalya Navaratne and Chamath Fernando
Intervenient Respondents	Nugegoda Abeysinghe Mudiyanselage Indrajith Bandara Abeysinghe
Counsel	Manohara de Silva, PC., with Pubudini Wickramaratne and J. P. Gamage

Court assembled for hearing on 18.10.2012 at 10.45 a.m. on 22.10.2012, 10.30 a.m. and on 23.10.2012 at 10.30 a.m.

A Bill bearing the title "Divineguma" was published on the *Gazette* of the Republic of Sri Lanka on 27.07.2012 and placed on the Order Paper of Parliament on 10.08. 2012. Four (4) Petitioners had challenged the constitutionality of the said Bill by three (3) separate petitions presented to this Court. This Court had determined that the said Bill was in respect of matters set out in the Provincial Council List and shall not become law unless it has been referred by His Excellency the President to every Provincial Council as required by Article 154 G (3) of the Constitution. It had also been determined that as the Bill had been placed in the Order Paper of Parliament without compliance with the provisions of Article 154 G (3) of the Constitution, no Determination would be made at that stage on the other grounds of challenge.

Thereafter the Bill had been placed on the Order Paper of Parliament on 09th October 2012. Eleven (11) petitions, bearing Nos. SD 04-14/2012 were filed challenging the constitutionality of this Bill thereby seeking to invoke the jurisdiction of this Court in terms of Article 121 (1) of the Constitution.

Hon. The Attorney General was given due notice of the petitions.

When the aforesaid petitions were taken for consideration, several Learned Counsel sought permission to be added as intervenients, on whose behalf papers were filed as parties to these proceedings.

Learned Counsel for the Petitioners informed Court that they have no objection for allowing such interventions, if the Court so desires. Accordingly all interventions were allowed and they were added as Intervenient Respondents.

Learned Counsel representing the Petitioner, Learned President's Counsel representing the 2nd Respondent in SC SD No. 10 of 2012 and SC SD No. 13 of 2012, Learned President's Counsel and Learned Counsel representing Intervenient Respondents and the Learned Solicitor General on behalf of the Hon. The Attorney General were heard before this Bench at the sittings held on 18.10.2012, 22.10.2012 and 23.10.2012.

Several Learned President's Counsel for the Intervenient Respondents, the Learned President's Counsel for the 2nd Respondent in SC SD No. 10 of 2012 and SC SD No. 13 of 2012, the Learned Solicitor General contended that this Court has no jurisdiction to decide on the question of compliance with Article 154 G (3) of the Constitution. It was submitted that Article 154 G (3) is a procedural step that has to be taken by His Excellency the President and that once a Bill has been placed before Parliament the legislative process commences, and thereafter such cannot be inquired into in terms of Article 124 of the Constitution.

Since extensive submissions were made on this preliminary issue as to the scope of constitutional jurisdiction of the Supreme Court, it would be necessary to examine the said question in detail.

As stated earlier, the Bill on Divineguma was *Gazetted* on 10.08.2012 and was placed on the Order Paper of Parliament. It was not disputed that following the Determination of this Court in respect of that Bill, that it was withdrawn from the Order Paper of Parliament on 21.09.2012. Thereafter on 09.10.2012, the Bill had been once again placed

on the Order Paper of Parliament and on that day the communication of His Excellency the President to the Hon. Speaker in respect of the Bill on Divineguma had been communicated by the Hon. Speaker to Parliament. At the stage of hearing on this Bill Learned Solicitor General brought to the notice of this Court stating that judicial notice could be taken on the fact that the Bill had been sent to eight (8) Provincial Councils where they have granted approval and to the Governor of the Northern Province where the Governor had granted his consent.

Learned President's Counsel appearing for Intervenient Respondents contended that the jurisdiction of the Supreme Court, which is set out in Articles 118 (*a*), 120, 123(1), 123(2), the Supreme Court has no power whatsoever to determine any question except whether a Bill or any provision thereof is inconsistent with the Constitution. Referring to the provisions in the aforesaid Articles of the Constitution, it was vigorously contended that the Supreme Court has no jurisdiction to enter into the issue as to whether there has been compliance with the requirement set out in Article 154 G (3) of the Constitution that a Bill in respect of any matter set out in the Provincial Council List stipulated in the Ninth Schedule to the Constitution had been referred to every Provincial Council.

Learned Solicitor General, whilst submitting that the Supreme Court has no jurisdiction to determine compliance with Article 154 G (3), stated that the said submission is based on alternate positions, viz,

(*a*) The first paragraph of Article 154 G (3) is a procedural step to be taken by the President (who is conferred with immunity from suit by virtue of Article 35(1) of the Constitution) and;

(*b*) Without prejudice to the first objection, once a Bill has been placed before Parliament after the procedural steps under Article 154 G (3) are taken, the legislative process cannot be inquired into as per the ouster contained in Article 124 of the Constitution.

With reference to the first alternative, Learned Solicitor General contended that his submission is based on the provisions contained in Article 154 G (3) of the Constitution. Referring to the said provisions, Learned Solicitor General submitted that the said Article stipulated a condition precedent to a Bill in respect of any matter set out in Provincial Council List, before it is placed on the Order Paper of Parliament. Learned Solicitor General submitted that it cannot be construed that the mere publication of a Bill in the *Gazette* is a legislative process as it is simply a procedural step. According to the Learned Solicitor General all acts prior to the placing of a Bill in the Order Paper are mere initiation of legislation only and His Excellency the President's act of referring the Bill to the Provincial Councils in terms of Article 154 G (3) is part of the said initiation of legislation and not a step in the legislative process itself. Since these are executive acts exercised by His Excellency the President in his discretion, Learned Solicitor General submitted that in terms of Article 35 (1) of the Constitution, such acts are conferred with immunity.

Several Learned Counsels for the Intervenient Respondents submitted correctly that legislative process commences upon the publication of a Bill in the *Gazette* in terms of the Constitution. Learned President's Counsel Mr. Musthapha for the Intervenient Respondent in SC SD No. 04/2012 contended that in terms of Article 78 (1) of the Constitution, there is a mandatory requirement that every Bill shall be published in the *Gazette* at least seven (7) days before it is placed on the Order Paper of Parliament.

The contention of the Learned Counsel for the Intervenient Respondents was that this Court has no jurisdiction to decide whether there has been compliance with the requirements of Article 154 G (3) of the Constitution.

Having said that, it would be necessary to examine the scope of the jurisdiction of the Supreme Court *Vis a Vis* the Constitutional issues.

As stated earlier, in terms of Article 78 (1) of the Constitution, every Bill shall be published in the *Gazette* at least seven days before it is placed on the Order Paper of Parliament. Article 78 (2), states that the passing of a Bill by Parliament shall be in accordance with the Constitution and the Standing Orders of Parliament. Thereafter such Bill would become law in terms of Article 80 of the Constitution with the certification either by the Hon. Speaker or His Excellency the President as the case may be. In terms of Articles 80 (3) of the Constitution once the Bill is passed and becomes law upon the certification of His Excellency the President or the Hon. Speaker, as the case may be, no Court or Tribunal shall inquire into, pronounced upon or in any manner call in question, the validity of such an Act on any grounds whatsoever.

As stipulated in Article 78 (1) after the publication of a Bill it should be placed in the Order Paper of Parliament. When a Bill is placed on the Order Paper of Parliament, His Excellency the President could invoke the jurisdiction of the Supreme Court by way of a reference or any citizen, by way of a petition in writing, could invoke such jurisdiction in terms of Article 121 (1) of the Constitution. When the said jurisdiction is so invoked, no proceedings shall be had in the Parliament in relation to such Bill until the Determination of the Supreme Court has been made or the expiration of a period of three (3) weeks from the date of such reference or petition, whichever occurs first.

An examination of the aforesaid procedure and the provisions contained in Chapter XVI of the Constitution clearly indicates that Articles 118 (*a*), 120, 121, 122 and 124 refer to the sole and exclusive jurisdiction of the Supreme Court with regard to the Bills that are to be enacted.

Article 118 of the Constitution refers to the general jurisdiction of the Supreme Court, which states as follows :-

> "The Supreme Court of the Republic of Sri Lanka shall be the highest and final Superior Court of record in the Republic and shall subject to the provisions of the Constitutions exercise- ....."

Article 118 (*a*) clearly states that the Supreme Court could thus exercise the Jurisdiction in respect of Constitutional matters. Article 120 of the Constitution which refers to the Constitutional jurisdiction of the Supreme Court specifies that,

> "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 : ....."

Whilst Article 118 deals with the general jurisdiction of the Supreme Court, Articles 120, 121 and 122 refer to the Constitutional jurisdiction and the ordinary and the special exercise of Constitutional jurisdiction in respect of Bills. It is important to consider the provisions contained in Article 124 of the Constitution in this regard.

The said Article is as follows :

> "Save as otherwise provided in Articles 120, 121 and 122, 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."

It was submitted by the Learned Counsel for the Intervenient Respondents that in terms of Article 124 of the Constitution the Constitutionality of a Bill or its due compliance with the legislative process, cannot be considered on any ground whatsoever by any Court or tribunal save as otherwise provided in Articles 120, 121 and 122 of the Constitution. However, a simple reading of the said provision shows that the Constitutionality of a Bill, including whether there had been due compliance with the legislative process could be inquired into and pronounced upon by the Supreme Court, subject to the provisions laid down in Articles 120, 121 and 122 of the Constitution. Reference has been made earlier to the provisions in the said Articles and in terms of Article 120 of the Constitution 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. This process thus permits the Supreme Court to examine and inquire into the substantive provisions of a Bill in order to determine that there is no inconsistency with the Constitution. If so the first limb referred to in Article 120 with regard to the pharse **constitutionality of such Bill** would be within the parameters referred to in Article 120 of the Constitution.

It is also to be noted that Article 154 G (3) of the Constitution, refers to a process where a Bill, which deals with subjects that come within the Provincial Council List contained in the Ninth schedule to the Constitution, to be referred to every Provincial Council before such Bill is placed on the Order Paper of Parliament. The said procedure, which is a legislative process, that contains a prohibitive condition precedent to a Bill being placed on the Order Paper of the Parliament, has been inquired into and pronounced upon by this Court in several Determinations (SC SD No. 24/2003, SC SD No. 25/2003, SC SD Nos. 26- 36/2003, SC SD No. 03/2011, SC SD Nos. 01-03/2012). This in effect includes the second limb referred to in Article 124, which refers to the **due compliance with the legislative process.**

Considering the submissions of the Learned Solicitor General in terms of Article 35 of the Constitution, it is to be borne in mind that the matter that has to be determined arises out of legislative process based on constitutional jurisdiction and not of an executive act, which would come within the purview of the said Article. More importantly Article 35 deals with immunity of His Excellency the President from instituting proceedings in any Court or tribunal in respect of anything done or omitted to be done either in his official or private capacity.

Mark Fernando, J., referring to the applicability of Article 35 of the Constitution in **Karunathilaka and Another V Dayananda Dissanayake** (1999) 1 Sri L. R. page 157) had stated that,

> "..... immunity is a shield for the doer, not for the act."

Article 154 G (3) is couched in such a manner that **no Bill shall become law,** unless such Bill is referred by His Excellency the President to every Provincial Council for the expression of its views thereon.

The obligatory nature of the requirement that a particular step shall be taken by His Excellency the President before the Bill is placed on the Order Paper is a procedural step prescribed by law.

It has to be borne in mind that this Court does not inquire into the due compliance of the legislative process of the Bill in Parliament. The Court is only concerned with the due process that has to be observed by His Excellency the President before the Bill is placed on the Order Paper. Constitutional Provisions are required to be understood and interpreted with an object-oriented approach. The words used has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. The successful working of the Constitution depends upon the democratic spirit underlying it being respected in letter and in spirit.

This position is consistent with the previous Determinations of this Court, which had to inquire into and pronounce upon, not only the Constitutionality of the Bill in question, but also its due compliance with the legislative process (SC SD Nos. 24-25/2003, SC SD Nos. 26-36/2003, SC SD No. 3/2011, SC SD Nos. 01-03/2012).

Referring to the jurisdiction of Superior Courts, it is clearly stated in Broom's Legal Maxims (10th Edition, Pg. 647) that,

> "The old rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which specifically appears to be so; nothing is intended to be within the jurisdiction of as inferior Court, but that which is expressly alleged."

In such circumstances, we determine that the Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon, the Constitutionality of a Bill and its procedural compliance, before such Bill is placed on the Order Paper of Parliament.

Learned Counsel for the Petitioners strenuously contended that Article 154 G (3) of the Constitution is a mandatory provision in the legislative process and in terms of the said Article it is necessary to refer a Bill which deals with subjects enumerated in the Provincial Council List to every Provincial Council and the said requirement is a prohibitive conditional precedence which is mandatory and should be complied with for the purposes of legislative process.

Article 154 G of the Constitution deals with Statutes of Provincial Councils and Article 154 G (3) refers to Bills in respect of any matter set out in the Provincial Council List. The said Article 154 G (3) is 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 its publication in the *Gazette* and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference, and-
>
> (*a*) where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting; or

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

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

Learned Counsel for the Petitioners submitted that the Provincial Council referred to above is a Council, which consists of members elected according to law. Our attention was drawn to Article 154 A (2), which states thus:

"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".

It is therefore quite clear that a functional Provincial Council, in terms of the provisions of Article 154A, would be a Council which is established and constituted. It was submitted that although the Northern Provincial Council is established that it is not yet been constituted and that the consent given by the Governor cannot be taken as the expression of the views of the Provincial Council. In terms of Article 154 B (1), there shall be a Governor in respect of each Province for which a Provincial Council has been established and it is to be noted that the Governor of a Province is appointed by warrant under his hand and he shall hold office during the pleasure of the President. The Provincial Councils on the other hand consist of elected members in terms of Article 154 A (2) of the Constitution. It is therefore apparent that the Governor cannot be regarded as part of the Provincial Council within its membership. The Governor's powers and functions are stipulated in Article 154 B of the Constitution and Article 154 C clearly lays down the exercise of the executive power by the Governor. Article 154 G (3) as stated earlier, refers to the need of a Bill that deals with matters set out in the Provincial Council List to be referred to 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.**

The Provincial Councils in the country came into being as a result of the introduction of the 13th Amendment to the Constitution in 1987. The objective of such an introduction and the establishment of Provincial Councils were to devolve power/authority to the provinces. The majority decision in the **Determination on the Thirteenth Amendment to the Constitution Bill and Provincial Councils Bill** had stated that Article 154 G (2) and (3) impose procedural restraints. These restraints, according to the majority decision in the said Determination, however, do not involve in any abandonment or abdication of legislative authority which, hitherto belonged to the centre. It is in this backdrop that this Court would have to consider the meaning of the pharse **every Provincial Council** contained in Article 154 G (3) of the Constitution.

The said phrase is undoubtedly, a constitutional provision that should be interpreted in terms of the accepted concepts and norms. Referring to such interpretations, Bindra (Interpretation of Statutes, 9th Edition, pg. 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. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable."

Accordingly, what is said is that in interpreting the Constitution, the simplest method of interpretation is to give effect to the sensible meaning of the phrase. As stated by Bindra (supra, pg. 1169) there is no war between Constitution and common sense. Referring to the statement made by Krishna Iyer, J., in **Fatehchand Himatlal V State of Maharashtra** (1977 Mah LJ 205), Bindra (supra), had stated that,

> "A Constitution is a documentation of the founding fathers of a nation and the fundamental directions for their fulfillment. So much so, an organic, not pedantic, approach to interpretation, must guide the judicial process. The healing art of harmonious construction not the tempting game of hair splitting promotes the rhythm of the law:"

In regard to the phrase, "every Provincial Council", contained in Article 154 G (3) of the Constitution that has to be interpreted, there is no doubt that the phrase does not include the views of the Governor of that Province. The question at issue is at a time where one Provincial Council has been established, but not constituted, whether the phrase "every Provincial Council" would include the said non-constituted Provincial Council, along with all the Provincial Councils which are established and constituted.

In a situation as that has arisen before us, it would be necessary to give a purposeful and a harmonious interpretation that would be workable under a Unitary Constitution, which had devolved power to the provinces. The expressions made by the Indian Supreme Court in **Atam Prakash V State of Haryana** (AIR 1986 SC 859) gives meaning and explanation to the need to adopt the principle of harmonious construction in constitutional interpretation. Considering the said purpose, it was stated that,

> "Whatever Article of the Constitution it is that the Court seeks to interpret, whatever statute it is whose constitutional validity is sought to be questioned."

A careful examination of the provisions contained in Article 154 A of the Constitution reveals that, the intention of the framers of the Constitution was to establish and constitute Provincial Councils throughout the Country. Accordingly, there should be nine (9) Provincial Councils, which are established and constituted and thereby functional

within this Unitary Island Republic. However, the factual position is different to the above as there are only eight (8) functional Provincial Councils in the country. The Bill in question has been referred by His Excellency the President to every such Provincial Council for the expression of its views. The question is whether the said process could be regarded as sufficient compliance with Article 154 G (3) of the Constitution.

As demonstrated earlier, when interpreting the constitutional provisions, a purposive and a workable interpretation should be given to its meaning. When one considers the situation prevalent in the Northern Province where the Provincial Council has not been constituted, it could be clearly seen and therefore said that there is an impossibility of performing the obligation stipulated in Article 154 G (3) of the Constitution. The non constitution of the established Provincial Council in the Northern Province thus attracts the applicability of the *maxim lex non cogit ad impossibilia or impotentia excusat legem,* which means that the law does not compel a man to do that which he cannot possibly perform. The maxim is based on common sense and natural equity and could apply at a time where there is unconquerable disability to perform the obligation.

Considering the above, what is referred to in Article 154 G (3) as **every Provincial Council** would have to be interpreted as every Provincial Council that has been established and constituted.

A similar view was expressed, though *obiter* in SC SD Nos. 2 and 4 of 1991, where Mark Fernando, J., stated that "every Council" may well mean every Council in existence. It was also said that reference to a dissolved Council is unnecessary unless such dissolution is being challenged as being a nullity. However, Mark Fernando, J., did not express a definite opinion as it was not necessary for that Determination.

In such circumstances, the question arises as to the position with regard to the Provincial Council, which has not been constituted. The question as to the applicability of the Bill on Divineguma to the Northern Province, in the event a purposive interpretation is given to the phrase **every Provincial Council** in terms of Article 154 G (3) was put to the Learned Solicitor General, for which no submission was made.

Learned President's Counsel for the Intervenient Respondent in SC SD No. 06/2012, submitted that in terms of Articles 154 D and 154 G (3) of the Constitution, a Provincial Council means a constituted Provincial Council. The said Article 154 G (3) refers to the need to obtain the **expression of its views**, which means that the views of the Provincial Council and not that of the Governor of the Province for which a Provincial Council has been established in accordance with Article 154 A. In that light it is apparent that since there is no Provincial Council constituted for the Northern Province, there is no possibility of such Provincial Council expressing its views on the Divineguma Bill. In fact Learned President's Counsel for the Intervenient Respondent in SC SD No. 06/ 2012, correctly submitted that one cannot obtain the views of an unconstituted Provincial Council.

In these circumstances, there is only one remaining question that has to be answered. In a situation where eight (8) Provincial Councils have expressed their views on the proposed Bill, and there is one Provincial Council which is not in existence as it is not

constituted, how would the Bill become applicable to the Provincial Councils. Article 154 G (3) referred to earlier, does not make provision for a situation such as the present question. The said Article only refers to the following situations:-

1. When 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

2. When 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.

The proviso to Article 154 G (3), refers to a third situation which is as follows:-

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

This clearly reveals that no provision has been made for a situation where the Provincial Council is not in a position to express its views on such a reference being made by His Excellency the President. The only argument that was raised was that the Governor of the Northern Province has granted his consent to the Bill in question.

There is no doubt that there is no role that had been given to the Governor of a Province in terms of Article 154 G (3) of the Constitution. On the other hand, Article 154 H, which refers to the Statutes made by Provincial Councils, clearly defines the role that is being carried out by the Governor of a Province.

Moreover, it is necessary to consider the scope and purpose of Article 154 G (3) and the object sought to be secured by such requirement. The use of the words **shall become law, unless such Bill has been referred by the President.... to every Provincial Council for the expression of its views**, makes it mandatory that it shall be sent to **every Provincial Council** and not to any other person.

In the light of the above, obtaining the views of the Governor cannot be considered as the views of the Provincial Council of the Northern Province. The framers of the Constitution thought it fit to obtain the views of the elected Provincial Councils and not that of the Governor of that Province who is not elected, but only an appointee who holds office during the pleasure of His Excellency the President. It is of utmost importance and duty of this Court to ensure that the power given to His Excellency the President under Article 154 G (3) is exercised in good faith without affecting the basic rights of any individual.

The gravamen of Article 12 of the Constitution is equality of treatment. When His Excellency the President obtains the views of eight (8) Provincial Councils and sought to obtain the views of the Governor of the Northern Province, Article 154 G (3) is administered in such a way so as to result in discrimination. This not only creates the danger of discrimination, but also amounts to denial of equality among all the citizens in Sri Lanka who have the right to elect their respective representatives to Provincial Councils.

It is also imperative to refer to the observations made by Sarath N. Silva, CJ., in **Patrick Lowe & Sons V Commercial Bank of Ceylon Limited** ([2001] 1 Sri L. R. 280) where it was stated thus;

> "It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The ultra-vires doctrine, now recognized universally, evolved in England on this premise, (vide, Ashbury) **Railway Carraige and Iron & Co. Ltd. V. Hector Riche** and the Attorney General V the Great Eastern Railway. It follows that **what is not permitted by the provisions of the enabling statute should be taken as forbidden and struck down by Court as being in excess of authority"** (emphasis added).

As could be seen clearly, Article 154 G (3) has not made provision for a situation where a reference by His Excellency the President for the expression of its views by the Provincial Councils cannot be considered by such Council due to that being not constituted. Considering the position in the Northern Provincial Council, Mr. Romesh de Silva, Learned President's Counsel for the Intervenient Respondent in SC SD No. 06/2012 contended that one cannot obtain the views of an unconstituted Provincial Council. It was further submitted that in as much as the Parliament can pass the Bill by simple majority if all Provincial Councils agree as to the passing of the Bill, the Parliament could nevertheless pass the Bill with a two-thirds majority, even if all Provincial Councils disagree with the Bill. This is based on the provisions stipulated in Article 154 G (3) (b) of the Constitution.

It is therefore the duty if the Court to interpret Article 154 G (3) which do not deny to the people or a section thereof, the full benefit to foster, develop and enrich democratic institutions. No Court should construe any provision of the Constitution so as to defeat its obvious ends. A harmonious and workable interpretation is always preferred in order to achieve the objects and to obviate a conflicting situation. The worst possible inference that could be drawn is that the Provincial Council of the Northern Province, if constituted, could refuse to give its consent to the passing of the Bill.

In such circumstances the only workable interpretation that could be given is that since the views cannot be obtained from one Provincial Council due to it being not constituted, the Bill could be passed by the special majority required by Article 82 of the Constitution taking into consideration the provisions stipulated in Article 154 G (3) (*b*) of the Constitution.

The main contention of all the Petitioners was that the provisions in its entirety of the Bill are inconsistent with the Constitution. The Intervenient Respondents submitted that many of the provisions contained in the Bill are found in various existing laws including the Samurdhi Authority Act, No. 30 of 1995 and therefore the provisions of the Bill are consistent with the Constitution.

The Bill in question is for the purpose of establishment of a Department to be known as the Department of Divineguma Development by amalgamating the Samurdhi Authority

of Sri Lanka, Southern Development Authority of Sri Lanka and the Udarata Development Authority of Sri Lanka. It is also intended to establish Divineguma Community based organizations, Banks and Banking societies within the country.

The said Department of Divineguma Development is for the fulfillment of the objects referred to in clause 4 of the Bill. A Divineguma National Council is created for the purpose of assisting the Department in terms of clause 7. We would like to express our views on some of the important clauses of the Bill, which are inconsistent with provisions of the Constitution.

Clause 5 (*d*)

We are of the view that no Government Department be allowed to maintain funds of thier own. In order to ensure transparency and accountability the monies received must be deposited in the Consolidated Fund in terms of Article 148 and all withdrawals from such fund could only be permitted in terms of Article 150.

If the Department is allowed to maintain the funds referred to in clauses 35 and 36, it may amount to a violation of the basic and fundamental values articulated and encapsulated in Chapter XVII of the Constitution especially Articles 148, 149 and 150 thereof. The structural balance of equality of handling public funds in Government Departments should not be disturbed and be a allowed to remain with Parliament, unless this process would be inconsistent with Article 12 (1) of the Constitution.

Clauses 7 and 42

Cabinet of Ministers are collectively responsible to Parliament. All matters of policy therefore be decided by the Cabinet of Ministers. Since Divineguma Development Department is a Government Department, the Secretary to the Ministry should exercise supervision and management over the Department in terms of Article 52 (2). Matters relating to policy be decided by the Cabinet of Ministers in terms of Article 55 (1). Permitting any others to decide on matters of policy and the management of the Department would violate Articles 52 (2) and 55 (1) of the Constitution.

Clauses 8 (2)

We do not see any necessity of appointing Zonal Heads of Department. If the Zonal Heads have a similar standing to that of a Head of Department, one does not know whether they will be subject to the direction and control of the Director General or will they function independently? The powers, functions and duties of the Zonal Heads are not stipulated in the Bill.

The Minister could create administrative zones in terms of clause 8(1). Whether such appointments as Zonal Heads are necessary or not, is a matter for the Cabinet of Ministers and falls within the ambit of Article 55(3). Therefore, this clause violates the authority of the Cabinet of Ministers and contrary to Article 3, which would require the approval by the People at a referendum.

If the Zonal Heads of Department are to be appointed by the Cabinet of Ministers, such appointments would not be contrary to Article 3, of the Constitution and therefore would not require the approval by the People at a Referendum.

Clauses 11 and 18

One does not know how the Department will supervise and give directions to community based organizations and Divineguma Regional Organizations. If these clauses are allowed to stand, any officer or servant of the Department can give directions and exercise supervision which may lead to conflicting directions being issued by different officers. It is implicit that there won't be uniformity in issuing directions, since it could be issued by any officer of the Department. Article 12 strikes at arbitrariness in State actions and ensures fairness and equality of treatment. The "power" to give directions without any limitations by any officer of the Department is incompatible with Article 12.

Clause 14

No guidelines were given with regard to the manner in which the Director-General satisfies himself that a community based organization is not functional. Failure to prescribe the procedure by which the Director-General satisfies himself may lead to a take over of a community based organization arbitrarily and without adequate material. Article 12 provides that safeguards be provided based on the rule of law against are arbitrary and unreasonable exercise of discretionary power.

The inconsistency with Article 12 (1) of the Constitution could be avoided if the Director-General is to act in consultation with the Divineguma Regional Organizations, which has the power in terms of clause 17 (g) of the Bill to monitor and regulate all Divineguma community based organizations.

Clause 17 (*m*)

This clause empowers the Minister to issue directions in respect of depositing moneys of the Divineguma Regional Organizations in a community based banking society. The consequence of granting such a wide power to the Minister is that there is no constitutional control over such directions. This unlimited power does not provide a mechanism for testing the validity of such directions and leads to arbitrariness. This may lead to the violation of equal protection, stipulated in terms of Article 12 (1) of the Constitution.

Clause 19

This clause deals with the establishment of Divineguma District Committees. These District Committees will functions within their respective districts. Are these Committees autonomous bodies or will they function subject to the control of the Director General is not provided for in the Bill. If the Director General has no power or control over the District Committees, they can act in an unchecked and rampant exercise of thier powers. The absence of governmental control over them violates equality and the principle of reasonableness. The basic principle underlying in Article 12 is that the law must operate equal to all persons under like circumstances. Therefore this clause is inconsistent with Article 12 of the Constitution.

Clauses 25(4) and 29(4)

"Banking" is a specialized subject and giving directions to Banks and Banking Societies established under this Bill cannot be allowed to be within the purview of the Minister to whom the subject of Divineguma is assigned. Every legal power must have legal limits. Where discretion is absolute man has suffered. Thus an arbitrary and unfettered discretion should not be allowed to be exercised by the Minister.

The Banking Societies are compelled to comply with the directions issued by the Minister. Failure to comply with the directions, attracts penal sanction in terms of clause 40. Unless specific guidelines and criteria are prescribed by way of Regulations, issuing directions will give unfettered discretion to the Minister and thereby deprive a citizen one of the common law protections which Article 12 (1) guarantees.

Clauses 35 (1) (*b*), (c) and (*d*) read with Clause 5 (*d*) dealt with above

Clause 35(1) provides for the establishment of a fund called Divineguma Development Fund for the purpose of the Act. In terms of clause 35 (1) the following shall be credited to the Fund :-

(*a*) all such sums of money as may be provided from time to time by the Government;

(*b*) all grants and donations received by the Department;

(*c*) all gifts and contributions made by the banks and banking societies established under the Act; and

(*d*) such percentage of money as may be prescribed by the Minister of the profit of the banks and banking societies established under the Act.

This fund will be maintained by the Department, (clause 5 (*d*)). The money lying to the credit of the fund may be utilized for such purposes and in such manner as may be prescribed by the Minister. The Department is empowered to utilize the monies of the fund for the purpose of the Act.

'Monies provided by the Government' in clause 35 (1) (*a*) means the money provided by the Cabinet of Ministers which necessarily come from funds voted or provided by the Parliament. The monies and assets referred to in Sub-clauses 35 (1) (*b*), 35 (1) (*C*) and 35 (1) (*d*) are directly credited to the fund. All monies and assets coming into a fund of a Government department constitute public finance which comes under Parliamentary control. Control of public finance through the elected representatives is an attribute of the sovereignly of the people set out in Article 3 of the Constitution.

As clause 35 (1) presently stands, once the monies and assets referred to in Sub-clauses (*b*), (*c*) and (*d*) of clause 35, the Minister is empowered to prescribe the purposes and the manner in which the monies of the fund may be utilized and the Department is empowered under clause 5 (c) to utilize the money in the fund for the purpose of the Act. Thus there is no control by the Parliament over the monies and assets credited to the fund in terms of clauses 35 (1) (*b*), (*c*) and (*d*), which then form a part of the

public finance. As held in Statutory Determination "Appropriation Bill 2008", SC (SD) 3 and 4 of 2008 Parliament is the custodian of the legislative 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.**

The provisions of clauses 35 (1) (*b*), (*c*) and (*d*) as they presently stand are contrary to Article 148 of the Constitution and amounts to an abdiction of the powers of Parliament set out in Articles 148, 149 and 150 in respect of public finance.

The relationship between the provisions contained in Article 148 of the Constitution and the legislative power was considered by this Court in the Determination on the 2008 Appropriation Bill (SC SD Nos. 3-4/2008). In that the Supreme Court had stated thus;

> "Parliament is the custodian of legislative 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 fiance 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 the government."

It is important to note that in the Determination on the Appropriation Bill of 1996 this Court had again determined to the effect that,

> "It would be anomalous for Parliament which has to exercise financial control over expenditure by the Executive to delegate that power to the very authority that it has to supervise without devising suitable checks to control the use of that power. In our view some amount of direct and actual control, however nominal has to be retained by Parliament in this matter. The effect of our Determination is to restore to Parliament the right to exercise a power which rightly belongs to it."

Considering the provisions contained in clause 35 (1), referred to above, we are of the opinion that the said clause of the Bill is in derogation of the control of public finance that should be exercised by Parliament and accordingly inconsistent with Articles 148 and 150 of the Constitution.

Articles 148 and 150 of the Constitution deal with Public Finance which is part of the sovereignty of the People that is entrenched in Article 3 of the Constitution.

This inconsistency will cease if the monies and assets referred to in clause 35 (1), (*b*), (*c*) and (*d*) are deposited in the Consolidated Fund and made available to the Divineguma Fund with the approval of the Parliament.

Clause 5 (*g*) of the Bill empowers the Department to arrange for the conduct of lotteries with the assistance of the National Lotteries Board to raise funds for the Divineguma Development Fund. However, the profits of a lottery conducted as envisaged in clause 5 (*g*) is not included in clause 35 (1) as a sum to be credited to the Divineguma Development Fund. For the reasons already stated, such profits also shall be credited to the Consolidated Fund to be obtained with the approval of the Parliament.

Part II of the Bill provides for the establishment of Divineguma community based organizations with the voluntary participation of Divineguma beneficiaries. This organization is the nucleus around which Divineguma community based banks are to be established, which in turn join in forming Divineguma community banking societies. Divineguma community based organization is not a corporate body. But it has the power to possess and hold movable and immovable property which may become vested in it by the methods set out in clause 2. It also has the power to receive assistance such as grants and loans as may be provided by the government, non governmental and private institutions. The Bill does not set out the administrative structure of the organization which is responsible for performing its functions and exercising its powers under the Act. There is no provision in the Bill which specifically empowers the Minister to prescribe the manner of constituting the administrative body of this organization. Clause 41 of the Bill does not cover this aspect.

The provisions of clause 34 of the Bill which excludes the application of the provisions of the Banking Act, No. 30 of 1988 and the Finance Business Act, No. 42 of 2011 in respect of banks and banking societies came under criticism from those who challenged the constitutionality of the Divineguma Bill.

It was submitted on behalf of the Intervenient Respondents who supported the Bill that although the term bank and banking societies has been used those institutions cannot be equated to the commercial banks contemplated by the Banking Act but are bodies which provide a type of banking service which provides micro-finance to employed or low-income individuals or groups who would otherwise have no means of gaining financial assistance. It was also submitted that these banks and banking societies cater not to the public at large but to a section of the public.

However in terms of the provisions of the Bill, banks and banking societies established under the Bill have the power to accept deposits from Divineguma beneficiaries, issue passbooks, maintain and close membership accounts, provide credit facilities, provide loans and invest their funds. It was also pointed out that in terms of clause 5(f) of the Bill the Department is vested with the power to supervise, manage, monitor and audit Divineguma community banks and banking societies and as banking societies established under the Bill have the primary responsibility of protecting and properly managing the savings of the Divineguma beneficiaries and the members of the banks. This Court cannot see any disadvantage arising from the application of the provisions of the Banking Act, No. 30 of 1988 to the banks and banking societies established under the Divineguma Act. However this is a matter to be decided by the Legislature in its wisdom.

For the aforementioned reasons, we make the following Determinations:-

(1) The Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon, the constitutionality of a Bill and its procedural compliance, before such Bill is placed on the Order Paper of Parliament;

(2) Since the views cannot be obtained from one Provincial Council due to it being not constituted, the Bill could only be passed by the special majority required by Article 82 of the Constitution taking into consideration the provisions stipulated in Article 154 G (3) (*b*) of the Constitution;

(3) Clause 5 (*d*) - this clause is inconsistent with Article 12 (1) of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;

(4) **Clauses 7 and 42 - these two clauses are violative of Article 52 (2) and 55 (1) of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;**

(5) **Clause 8 (2) - this clause is contrary to Article 3 of the Constitution which would require the approval by People at a Referendum,**

If the Zonal Heads of Department are to be appointed by Cabinet of Ministers such appointments would not be contrary to Article 3 of the Constitution and therefore would not require the approval by the People at a Referendum;

(6) **Clauses 11 and 18 - these two clauses are inconsistent with Article 12 of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;**

(7) **Clause 14 - this clause in inconsistent with Article 12 (1) of the Constitution.**

The inconsistency with the Article 12 could be avoided if the Director-General is to act in constitution with the Divineguma Regional Organization, which has the power in terms of clause 17 (g) of the Bill to monitor and regulate all Divineguma community based organizations;

(8) **Clause 17(m) - this clause is inconsistent with Article 12 (1) of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;**

(9) **Clause 19 - this clause is inconsistent with Article 12 of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the Constitution;**

(10) **Clauses 25 (4) and 29 (4) - these clauses are inconsistent with Article 12 (1) of the Constitution and may only be passed with the special majority prescribed by Article 84 (2) of the constitution;**

(11) **Clauses 35 (1) (*b*), (*c*) and (*d*) read with clause 5 (*d*) dealt with above - clauses 35 (1) (*b*), (*c*) and (*d*) are inconsistent with Article 3 of the Constitution.**

This inconsistency will cease if the monies and assets referred to in clauses 35 (1) (*b*), (*c*) and (*d*) are deposited in the Consolidated Fund and made available to the Divineguma Fund with the approval of the Parliament.

We shall place on record our deep appreciation of the valuable assistance given by all Learned Counsel for the Petitioners, Learned President's Counsel for the 2nd Respondent in SC SD No. 10/2012 and SC SD No. 13/2012, all Learned President's Counsel and Learned Counsel for the Intervenient Respondents and the Learned Solicitor General who appeared on behalf of the Hon. Attorney General.

Dr. Shirani A. Bandaranayake,
Chief Justice.

N. G. Amaratunga,
Judge of the Supreme Court.

K. Sripavan,
Judge of the Supreme Court.

First Reading :	09.10.2012 (Hansard Vol. 21; No. 01; Col .99 - 100)
Bill No. :	184
Sponsor/Relevant Minister :	Minister of Economic Development
The petition announced in Parliament :	12.10.2012 (Hansard Vol. 211; No. 04; Col. 486)
Decision of the Supreme Court Announced in Parliament :	06.11.2012 (Hansard Vol. 211; No. 08; Col. 1045 - 1069)
Second Reading :	06.11.2012 (Hansard Vol. 211; No. 08; Col. 1122 - 1153) 08.01.2013 (Hansard Vol. 214; No. 01; Col. 64 - 176)
Committee of the whole : Parliament and Third Reading	08.01.2013 (Hansard Vol. 214; No. 01; Col. 177 - 211)
Hon. Speaker's Certificate :	11.01.2013
Title :	Divineguma Act, No. 01 of 2013

S. C. (SD) 15/2012

"APPROPRIATION BILL"

BEFORE:

Shiranee Tilakawardane	Judge of the Supreme Court
Priyasath Dep.	Judge of the Supreme Court
S. Eva Wanasundera	Judge of the Supreme Court

COUNSEL:

Suren Fernando, Attorney-at Law for the Petitioner
Mr. J. C. Welliamuna, Attorney-at Law for the Intervenient Petitioner
Ms. Indika Demuni de Silva, Deputy Solicitor General, with Mr. Nerrin Pulle Senior State Counsel and Suren Gnanaraj State Counsel for the Attorney General

Court assembled for the hearing on 22nd October, 2012 at 10.00 am.

Determinations and reasons of the Supreme Court:

This Application was preferred to the Supreme Court for a determination in terms of Article 121 of the Constitution to determine any question as to whether the Bill referred to above as the Appropriation Bill or any provision thereof is inconsistent with the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Petitions of the Petitioner and Intervenient Petitioner were taken up for hearing together without objection. It was agreed at the outset of the arguments that it is of paramount importance that the inalienable sovereignty of the people must be exercised by Parliament under the doctrine of public trust in terms of Article 4(a) of the Constitution. In particular, due and proper fiscal accountability must be viewed as the bedrock of good governance by any Government, and must at all times be balanced and viewed through the lens of intra and intergenerational responsibility and equity.

The overall concern of the Petitioners regarding the Appropriation Bill which was placed on the Order Paper on 9th October, 2012 (hereinafter referred to as 'the Bill') was that certain provisions of it vested draconian and/or unlimited powers in certain public officers, such as the Secretary to the Treasury, of the Executive, without the functional control of the Parliament and in dereliction of the duty cast upon Parliament in terms of Article 148 of the Constitution, that Parliament and only Parliament should have full control over Public Finance.

In her submissions the position of the Learned Deputy Solicitor General was that these provisions were introduced for purely functional and practical reasons and to avoid delay but was never meant to be contrary to the doctrine of public trust. We have also perused the earlier Special Determinations on analogous Appropriation Bills that have come to this Court, where the Court whilst recognizing the weakness and the possibility of abuse of these powers in the wrong hands has considered the practical or the functional approach due to "volatile times" (time of hardship and economic difficulty.) The Learned Counsel for Petitioners countered that with the cessation of active conflict and end of the war all 'volatility' and the majority of defense concerns about the war no longer exist. This Court however holds the view that the mere cessation of war and or hostilities cannot be viewed in that manner, as peace is not an event but a journey where much has to be undertaken, especially in the North

and the East Provinces, through transitional governance and transitional justice, a journey where Government, whoever they are, urgently have to rebuild, repair and restore lives, livelihoods, and infrastructure, and therefore the submission of the Petitioners that we are not in times of 'volatility' including hardship and economic challenge, do not resound with the Court which feels that at least for a few years economic challenges would exist and funds would be needed especially in the North and East.

The Court agrees however with submissions of Learned Counsel for the Petitioners, that there has to be very careful scrutiny of any powers which are vested in public officers, without and beyond direct Parliamentary control at a macro level, the full control envisaged by Article 148 of the Constitution, as it could potentially be abused or used irresponsibly and in extreme situations even used for self gain through corrupt practices, in total negation of the safeguards guaranteed by the Constitution that all acts of Parliament would accord with the doctrine of public trust which binds Parliament when it exercises the sovereign power of the people. The doctrine of public trust assures each and every citizen that their best interest, and the nation's best interests are paramount and pivotal and the only and central concern would be the safeguarding of the people's interest in all the decisions taken by Parliament in the exercise of its Parliamentary powers, including fiscal accountability. This must necessarily be both a revered duty and an individual and collective responsibility of Parliament, which in exercising its powers as trustees should focus only on the benefits for the people in whom sovereign power reposes.

This Court also agrees with the submissions that this Court would not be bound by earlier decisions on the several Appropriations Bills that have come from 1987, on similar provisions of law, but such would certainly have a persuasive value in interpretations made by this Court and perhaps differed to only in situations where the Court feels that a matter has not been duly considered or where such could be distinguished in fact and law.

In recent times there have been much debate on the powers vested in the Head of the Executive and the Cabinet of Ministers, but it is appropriate to mention that the framers of the Constitution have aptly safeguarded these powers, as for instance in terms of Article 43(1) of the Constitution, they shall all be "collectively responsible and answerable to Parliament". Another perhaps less explicit but dominant control is enshrined in Article 148 of the Constitution, which mandates that all 'public finance', including the control of the 'spring' or source of the finance whether it be through taxes etc, and the control of the allocation of public finance passes through and only through the "eye" of Parliament, which is expected and invested with powers to act in good faith and to act in accord with the public trust doctrine by monitoring through its directions and maintaining checks and balances through its audits and verifications, to assure the people that there is the highest degree of fiscal accountability on the executive. In practice, fiscal accountability can only be assured by a process where Parliamentary control is exercised in full in a transparent manner where matters are placed in the public domain, enhancing the credibility of the process through patent disclosures and public debate on its implications. It is in this backdrop that this Court analyses the Bill and considers whether any of its provisions alienates or circumvents the control of public finance by Parliament as envisaged by Article 148 of the Constitution, especially in view of the fact that the Appropriation Act is the principal legislation concerning public finance.

Learned Counsel for the Petitioners raised grave concerns with regard to clause 2 (1) (*b*) of the Bill, which dealt with the power to raise loans and submitted that the process envisaged and its direct implications were inconsistent with the provisions of Articles 148, 4

(*a*) and 3 of the Constitution. In terms of clause 2 (1), the Bill, recognizes expenditure estimated at Rs. 1,335 Billion. Clause 2 (1) (*b*) authorizes the raising of loans, whether in or outside Sri Lanka, not exceeding Rs. 1,295 Billion. Counsel for the Petitioners submitted that in raising the loans up to Rs. 1,295 Billion, there appears to be an abdication of all controls or checks by Parliament as it does not require the prior review of the terms and conditions on which the loans are obtained, including the rates of interest paid in raising these foreign loans. In their written submissions Counsel for the Petitioners adverted to the mismanagement of public finance concerning the "Petrol hedging Saga.....", and claimed that the alleged "misuse of the powers by public officers, "left the people of Sri Lanka to foot the Bill." Counsel also drew the attention of Court to the clear distinction that exists between mere authorization after a loan had been finalized, and the real intention of the Constitution that Parliament should exercise full control and scrutinize the terms and conditions of loans, prior to the finalization of the loan, up to the envisaged ceiling of Rs. 1,295 Billion.

Counsel contended further that Article 76(1) of the Constitution mandates that:

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

Counsel for Petitioners also contended that clause 2 (1) (*b*) attempts to grant a "blanket authorization to raise Rs. 1,295 Billion as loans "from within or outside Sri Lanka during the year 2013, in a sum which is over 97% of the First Schedule expenditure of Rs. 1,335 Billion. The serious domino implication is compounded by the fact that under the Head 249 "Department of Treasury operations", (Vide page 39 of the Bill) the above figure would be in addition to the loan repayment already been paid in respect of loans that have been obtained in a sum of Rs. 1,154 Billion, equal to 86.5% of the First Schedule expenses.

This Court finds that the use of the term "hereby authorized", appears to be limited only to prescribing a ceiling of Rs. 1,295 Billion for the raising of loans, and does not contemplate Parliamentary supervision, scrutiny or control of either the terms of the loans, the interest payable or the period of repayment. We find therefore that clause 2 (1) (*b*) constitutes an abdication of the power of control by Parliament over fiscal matters, especially the control over the source of the finances which creates a debt of the Republic, as envisaged under the terms of Article 148 of the Constitution. The State in its submission, referred to several legislation including reporting requirements under the Financial Management (Responsibility) Act, No.3 of 2003 (hereinafter referred to as the Act). However upon careful perusal of reports submitted to this Court which have already been submitted under the Act, it does not appear that these reports provide adequate information about the terms on which such loans are obtained including interest rates, from whom they are obtained, terms of repayment or other details to disclose transparency. Only if such adequate information is provided prior to obtaining these loans, would there be a comprehensive opportunity to Parliament to scrutinize and exercise full control over public finance. This anomaly could be recified if the impugned clause is amended to read, that prior to the obtaining of the loan, the terms of such loan must be approved by Parliament. If not this Court is of the view that clause 2 (1) (*b*) would be unconstitutional as under its scheme, Parliament would fail the exercise the due and full financial control envisioned under Article 148. This is particularly required as such loans have not just the intra-generational but also the inter generational impact and is contrary to the doctrine of public trust which assures the people of a nation, both a measure of transparency and strong fiscal accountability.

The Counsel for the Petitioner also submitted that the provisions contained in clause 5(1) of the Bill manifested a tinkering of the allocations approved by Parliament, as it permitted a

relocation of the funds at the discretion of the Executive. Clause 5 permits the transfer of funds allocated to the Recurrent Expenditure of any Programme under any Head in the First Schedule of the Bill, that have not been expended or are not likely to be expended, to the Capital Expenditure under that Programme or Capital or Recurrent Expenditure under any other Programme under the same Head by order of the Secretary to the Treasury, Deputy Secretary to the Treasury, or the Director General of the National Budget, who may be authorized by the Secretary to the Treasury.

Counsel for the Petitioners, especially Learned Counsel of the Intervenient Petitioner suggested that this provision permitted a deliberate manipulation in the transfer of the funds to the capital expenditure from the recurrent expenditure, with a concomitant loss to the former. Concern was also raised that by this process, funds which should legitimately be expended on raising salaries etc. would be spent on narrow subjective considerations such as purchase of luxury vehicles and unnecessary trips abroad to a favored few. They contended that this was done outside the control of Parliament and could lead to the funds been expended on matters that were not a priority to the majority of the people.

In considering these submissions it is relevant for this Court to limit its findings within the mandate given to it concerning its jurisdiction under Article 121 of the Constitution, which is to consider whether the provisions of the Bill contravene or violate the Constitution. Approaching the submissions of Counsel within the purview of this mandate, this Court notes that this provision deals with the transfer of funds. Whilst Parliament must control revenue at a macro-level, ultimately the authorized allocations made by Parliament must be spent to further the policy and priorities of the executive and Government and leverage has to be given to Government to implement policies that they consider important. Parliament is not expected to micro manage the finances of Government. This is not the spirit of the Constitution. Consecutive Governments with their individual policies must not be deterred from their commitment to the road map that determines the implementation of policy and strategy that they sincerely believe would develop the nation and which affects the Government's fiscal performance, of course always mindful of the framework of the doctrine of public trust, which requires that accountability must be assured at all times. The budgetary innovations contemplated under clause 5 of the Bill, may sometimes be needed for sustainable development. Similar analogous provisions have been passed in previous Appropriation Bills.

Additionally, by the painstaking submissions of many documents the Learned Deputy Solicitor General, Court was assured that all movement of money under clause 5(1) of the Bill is governed by the Financial Regulations, especially those contained in FR 66. In particular the transfer of funds is pursuant to a written request from the Head of Department to the National Budget Department. In particular it must be mentioned that it is prudent for funds to be transferred only if there are stated reasonable grounds for such transfer as envisaged in ordinary administrative procedure, as assured by the treasury officers present in Court, and such procedure would regulate any arbitrary or capricious transfers and ensure transparency when such transfers are made between the Recurrent Expenditure and Capital Expenditure, and obviate any personal and perhaps unjustified criticism. This Court finds that such a mechanism would ensure and safeguard a quantum of transparency required under the doctrine of Public Trust under which all powers must be exercised.

Counsel for the Petitioners also challenged the validity of clause 6 (1) of the Bill which permits the transfer of money allocated under the 'Development Activities' programme under the Head 'Department of National Budget' in the First Schedule of the Bill, to any other

Program under any other Head under the First Schedule by order of the Secretary to the Treasury, Deputy Secretary to the Treasury, or the Director General of the National Budget. Clause 6 provides that the monies so transferred shall be deemed to be a supplementary allocation made to the particular Ministry. The provisions of clause 6 require that a report on the amount and reasons for the transfer shall be mandatorily submitted to Parliament within two months of the transfer. This Court is of the view that the requirement of mandatory reporting to Parliament, required under clause 6, accords with the recommendation of this Court and therefore the Court does not find the same to be unconstitutional. Such transfers would additionally be included in the Reports submitted in terms of the Fiscal Management (Responsibility) Act, No. 3 of 2003.

Strong submissions were made by the Counsel for the Petitioners with regard to the unfettered powers granted in terms of clause 7 of the said Bill. It alleged that the impugned clause 7 (*b*) will permit the Minister to withdraw sums allocated for a specific purpose and/or from the Consolidated Fund, at his will with no controls whatsoever. As an example he argued that the Rs. 561,740,000 allocated in the First Schedule of the Bill, Head No. 126, Ministry of Education, as Recurrent expenses under the Occupational Activities programme, which had been approved by Parliament, could be withdrawn at the discretion of the Minister of Finance on the basis that he "is satisfied" that it is required to meet any authorized expenditure.

This clause does not give any limits, or conditions, such as urgent need or national crisis which may to some extent warrant such actions; nor does it require the prior sanction of Parliament.

This Court finds that clause 7 of the Bill, presents a direct challenge to the onus on Parliament to have "full control" over public finance as protected by Article 148 of the Constitution. This was recognized and set out very clearly in the Determination related to the Bill titled "the 19th Amendment to the Constitution" (SC SD Nos. 11-40/2002) and set out in the Determination related to the Appropriation Bill 2008 (SC SD 3 & 4 of 2008) at page 3, which recognized that full control includes "Control by way of allocation of a public finances to the respective departments and agencies of Government and setting of limits of such expenditure". To permit the clause to be enacted as it is, would obstruct the exercise of full Parliamentary fiscal control at the macro-level, as mandated by Article 148, and would clearly result in "delegation" and/or abdication of Parliamentary control, relegating to the Minister of Finance the ability to override the dictates of Parliament without its approval. It places an unfettered power in the hands of such Finance Minister which does not accord with the spirit and letter of the Constitution which assures full control of public finance with Parliament. The scope and ambit of this clause contrasts strongly with clauses 8 and 9 of the Bill, which mandates that Parliamentary prior approval was needed even for a relatively lesser and smaller category, namely that of advances to public officers in the Third Schedule of the Bill, bringing this provision to accord with the fundamental tenet that Parliament is mandated to be in full control of public finance.

Accordingly, this Court finds no justification whatsoever to warrant a unilateral decision by a Minister of Finance over public finance outside Parliamentary control. A principle enunciated in the 1986 Determination (page 35) states;

"it would be anomalous for Parliament which has to exercise financial control over expenditure by the Executive to delegate that power to the very authority which it has to supervise without devising suitable checks to control the use of that power. In our view

some amount of direct and actual control however nominal has to be retained by Parliament in this matter."

This has direct relevance to this determination with regard to clause 7 (*b*) of the Bill. Additionally this provision permits the Minister of Finance to have unfettered power to vary details in the Appropriation Act and its Schedules, which tantamount to amending the Appropriation Act by an executive decision, sans any Parliamentary control, and the abrogation of powers over public finance in contravention of Article 148 of the Constitution. This could be cured if amended to read that it could only be done with Parliamentary approval.

This Court therefore determines that clause 7 (*b*) of said Bill in effect, contravenes the full control of public finance which belongs rightfully to Parliament in terms of Article 148, and only Parliament, and no single member of the executive should be permitted to traipse within the boundaries of that power. Therefore this Court finds that the provisions contained in clauses 2 (1) (*b*) and 7 (*b*) of the said Appropriation Bill contravenes Article 148 of the Constitution and is therefore inconsistent with the Constitution.

Shiranee Tilakawardana J.
Judge of the Supreme Court

Priyasath Dep J.
Judge of the Supreme Court

Eva Wanasundara J.
Judge of the Supreme Court

First Reading :	09.10.2012 (Hansard Vol. 211;No. 1; Col. 99)
Bill No. :	183
Sponsor/Relevant Minister :	Prime Minister and Minister of Buddha Sasana & Religious Affairs
Decision of the Supreme Court Announced in Parliament :	06.11.2012 (Hansard Vol. 211; No. 8; Col. 1075 -1079)
The petition announced in Parliament :	23.10.2012 (Hansard Vol 211; No. 5; Col. 570)
Second Reading :	08.11.2012 (Hansard Vol 212; No. 1 ; Col. 3-272) 09.11.2012 (Hansard Vol 212; No. 2 ; Col. 317-474) 10.11.2012 (Hansard Vol 212; No. 3 ; Col. 523-672) 12.11.2012 (Hansard Vol 212; No. 4 ; Col. 712-848) 14.11.2012 (Hansard Vol 212; No. 5 ; Col. 906-1032) 15.11.2012 (Hansard Vol 212; No. 6 ; Col. 1071-1214) 16.11.2012 (Hansard Vol 212; No. 7 ; Col. 1288-1407) 17.11.2012 (Hansard Vol 212; No. 8 ; Col. 1487-1620)
Committee stage:	19.11.2012 (Hansard Vol. 213; No. 1 ; Col. 20-189) 20.11.2012 (Hansard Vol. 213; No. 2 ; Col. 241-394) 21.11.2012 (Hansard Vol. 213; No. 3 ; Col. 427-578) 22.11.2012 (Hansard Vol. 213; No. 4 ; Col. 607-764) 23.11.2012 (Hansard Vol. 213; No. 5 ; Col. 801-979) 24.11.2012 (Hansard Vol. 213; No. 6 ; Col. 1014 -1195) 26.11.2012 (Hansard Vol. 213; No. 7; Col. 1236 -1393) 28.11.2012 ((Hansard Vol. 213; No. 8 ; Col. 1415 -1590) 29.11.2012 (Hansard Vol. 213; No. 9 ; Col. 1649 -1833) 30.11.2012 (Hansard Vol. 213; No. 10 ; Col. 1862 -2009) 03.12.2012 (Hansard Vol. 213; No. 11; Col. 2035 -2196) 04.12.2012 (Hansard Vol. 213; No. 12; Col. 2236 -2400) 05.12.2012 (Hansard Vol. 213; No. 13 ; Col. 2443 -2637) 06.12.2012 (Hansard Vol. 213; No. 14 ; Col. 2698 -2879) 07.12.2012 (Hansard Vol. 213; No. 15 ; Col. 2932 -3089) 08.12.2012 (Hansard Vol. 213; No. 16 ; Col. 3151 -3347)
Committee of the whole Parliament and Third meeting:	08.12.2012 (Hansard Vol. 213; No. 16 ; Col. 3347 -3363)
Hon. Speaker's Certificate:	08.12.2012
Title:	Appropriation Act, No. 23 of 2012

S. C. (SD) 16/2012 & 17/2012

"CODE OF CRIMINAL PROCEDURE (SPECIAL PROVISIONS) BILL"

BEFORE :

P. A. Ratnayake, PC - Judge of the Supreme Court
C. Ekanayake, - Judge of the Supreme Court
S. I. Imam - Judge of the Supreme Court

S. C. (SD) No. 16/2012

Petitioner : G. H. Ajith Kumara

Counsel : Parakrama Agalawatte with Achala Kumarasiri for the Petitioner.

S. C. (SD) No. 17/2012

Petitioner : Supun Wickramaratne

Counsel : Niran Anketel with Nuwan Bopage for the Petitioner.

Suhada Gamlath, PC ASG with Sarath Jayamanna, DSG and Shanaka Wijesinghe, SSC. for Attorney General.

Court assembled for hearing on 24th October 2012 at 11.00 a. m.

A Bill titled "Code of Criminal Procedure (Special Provisions)" has been presented to Parliament and was placed on the Order Paper of the Parliament on 11th October 2012.

The jurisdiction of this Court for the determination of the constitutionality of the said Bill has been invoked in terms of Article 121(1) of the Constitution by the petitions presented to this Court by the Petitioners.

Hon. Attorney General was given due notice of the two Petitions and Mr. Suhada Gamlath, PC. Additional Solicitor General assisted Court in considering the constitutionality of the Bill and its Provisions.

The Bill seeks to provide for the extension of the period of detention of persons arrested without a warrant in order to facilitate the conduct of investigations, for dispensing with the conduct of the non-summary inquiry in respect of certain cases, for the taking of depositions of witnesses for the prosecution and for making incidental provisions in respect of above matters.

Similar provisions were contained in the Code of Criminal Procedure (Special Provisions) Act, No. 15 of 2005 and the Code of Criminal Procedure (Special Provisions) Act, No. 42 of 2007. Act No. 15 of 2005 was enacted on 31st May 2005 and remained in operation for a period of two years from the date of coming into operation as laid down in section 7. Act, No. 42 of 2007 came into operation on 9th October 2007 for a period of 2 years commencing from 31st May 2007 as laid down in section 7 thereof. This Act

provides in section 7 (2) and (3) as follows:-

> 7 (2) "The Minister may, at any time within one month prior to the expiration of the period of operation of this Act, by Order published in the Gazette, extend for a further period the operation of the Act, so however that the aggregate period of any one extension shall not exceed 2 years from the date of such extension, as is specified in the Gazette.
>
> 7 (3) The Order published in the Gazette under Sub section 1 shall be placed before the Parliament for its approval"

The Hansard of the Parliament dated 8th September 2011 shows that the relevant Minister has made an effort to extend the period of operation of the Act for a further period of 2 years by Order published in the *Gazette*. However, this has been done after the expiration of the period of operation of the Act. Accordingly the said Gazette has not received the approval from Parliament.

Due to the above circumstances, the Bill which is before this Court has been placed on the Order Paper of Parliament for the purpose of enacting a fresh law containing provisions which are mostly identical to the provisions in the previous two enactments.

There appears to be two important additions in clauses 6 (13) and 8 of the Bill that was referred to during the hearing. clause 6 (13) which deals with the protection of witnesses provides that every witness produced against the accused at the inquiry referred to in clause 6 shall be entitled to be represented by an Attorney-at-Law. All Counsel agreed that this is a salutary provision. Clause 8 validates action taken from 31st May 2009 which is the day the Code of Criminal Procedure (Special Provisions) Act, No. 42 of 2007 ceased to be in operation up to the date of coming into operation of this Act. This clause states as follows:-

> **Clause 8**
>
> "Where during the period commencing on May 31, 2009 and ending on the date of the coming into operation of this Act, any power, duty or function was exercised, performed or discharged by any person to whom such power, duty or function was assigned by or under Criminal Procedure (Special Provisions) Act, No. 42 of 2007, such power, duty or function which was so exercised, performed or discharged, as the case may be, shall, not withstanding that the provisions of the said Criminal Procedure (Special Provisions) Act, No. 42 of 2007 was not in operation during the aforementioned period, be deemed to have been validly exercised, performed or discharged, as the case may be, as if the said Act, was in operation during such aforementioned period."

The above clause seeks to "deem" that any exercise of a power, duty or function provided by the Criminal Procedure (Special Provisions) Act, 42 of 2007 but exercised after 31st May 2009 when the said provisions were not in operation was validly exercised. The Counsel for the Petitioners took up the position that this provision retroactively deems illegal acts committed between 31st May 2009 and up to the time of coming into operation of the present Act to be valid. Accordingly it was contended that this would amount to;

(1) A usurpation of judicial power by the Legislature,

(2) Violation of Article 13 (2) of the Constitution.

We have decided to consider these two contentions separately. Firstly we will deal with the contention of usurpation of judicial power. Article 4 of the Constitution envisage a separation of powers between the different organs exercising the sovereignty of the people when it states that the legislative power of the people shall be exercised by Parliament, the executive power of the people shall be exercised by the President of the Republic and the judicial power of the people shall be exercised by Parliament through Courts. In the determination in respect of the 19th Amendment to the Constitution 2002 (3) SLR. 85, a Bench of 7 Judges of this Court emphasized the inalienability of these powers when it stated as follows:-

> "Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution in one organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution, to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government, and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution. It necessarily follows that the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained."

Accordingly, a contravention of Article 4 would also contravene Article 3 of the Constitution, which is an entrenched provision as laid down in Article 83 of the Constitution. It was contended mainly by the Counsel for the Petitioner in SC SD 17/2012 that "this retroactive bestowing of a garb of legality on illegal acts is a legislative judgement, and not within the power of Parliament of enact." He further contended that it is a usurpation of judicial power by the Legislature, in that it interferes with the judicial function and therefore the exercise of judicial power is appropriated by the Legislature. In the case of **Kariapper Vs. Wijesingha** (decision of the Privy Council appeal No. 38 of 1966.) 70 NLR page 49 at page 53 has cited a definition given by Griffith C.J. in Huddart Parker & Co. Vs. Moorehead 8 C. L. R. 330 at pg. 357 where he says, "I am of the opinion that the words "judicial power" as used in section 71 of the Constitution means the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property".

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. The Counsel for the Petitioners never contended that clause 8 of the Bill would violate Article 13 (6) and quite rightly so since it neither creates an offence nor enhances a penalty. 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 as contended by Counsel for Petitioner.

In the case of **Tuckers Ltd. Vs. The Ceylon Mercantile Union** 73 NLR 313 at page 317 Sirimanne J. states as follows "in order to ascertain whether there has been such an encroachment one should, I think, look at the Act, as a whole and not at a particular section isolated from other provisions of the Act. I am also of the view that in determining this question it is permissible to look at the object and the true purpose of the Legislature in passing the Act." At page 332 of the same judgment Weeramantry, J. states as follows "in considering whether a particular piece of legislation is within the permitted field it is, I think the duty of the Courts to look at the substance of what has been done and not merely at the form which particular sub-sections have taken". The substance of the Bill before us and the objective of clause 8 is to cover a lacuna that arose due to the provisions of Act, No. 42 of 2007 not being extended from 31st May 2009 up to the period of the enactment of the Bill in question as a law. When taken as a whole the objective of the provisions of this Bill is to give validity to the functions performed and powers and duties exercised in the belief that the previsions of the Act, No. 42 of 2007 were in operation and taken in that context we are unable to agree with the Counsel for the Petitioners that the provisions of clause 8 of the Bill amount to usurpation of judicial power.

The other contention of the Counsel for the two Petitioners were that the provisions of the proviso to clause 2 read with clause 8 of the Bill violates Article 13 (2) of the Constitution. Article 13 (2) of the Constitution states "every person held in custody, detained or otherwise deprived of personal liberty shall be brought before a judge of the nearest competent Court according to procedure established by Law, and shall not be further held in custody detained or deprived of personal liberty except upon and in terms of the Order of such judge made in accordance with procedure established by law." During the period from 31st May 2009 up to the present moment the procedure dealing with custody and detention of persons was the procedure contained in section 37 of the Criminal Procedure Code which states as follows:-

> "Any Peace Officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate."

The first proviso to clause 2 of the Bill states as follows:-

> "Provided that, where the arrest is in relation to an offence as is specified in the Schedule to this Act, such period of detention in police custody may, on production before him of the person arrested and on a certificate filed by a police officer not below the rank of the Assistant Superintendent of Police submitted prior to the expiration of the said period of twenty-four hours, to the effect that it is necessary to detain such person for the purpose of further investigations, be extended upon an Order made in that behalf by the Magistrate for a further period not exceeding twenty-four hours, so however that the aggregate period of detention shall not exceed forty-eight hours."

Accordingly, the above provision of the Bill permits a Magistrate to extend the period of detention of a person for a further period of 24 hours in police custody based on a certificate filed by a Police Officer not below the rank of an Assistant Superintendent of Police. It is common ground that this provision was not in operation from 31st May 2009 up to now. During this period if an Order was made by a Magistrate exceeding a period of detention more than 24 hours such Order could be challenged in a Court. It may very well be that such Orders cannot be challenged based on a violation of a fundamental right of the Constitution as they are based on orders made by judicial officers and do not fall within executive or administrative action as contemplated by Article 17 of the Constitution which factor was emphasized by this Court in the case of **Peter Leo Fernando Vs. The Attorney General & Two Others** 1985 2 SLR pg. 341. Nevertheless such Orders can be challenged in Courts by way of appeals and revision applications. Petitioners contend that clause 8 of the Bill seeks to revalidate such unlawful Orders of the Magistrates and would accordingly violate Article 13 (2) of the Constitution. Article 13 (2) envisages to ensure that detentions are made in accordance with the procedure established by law at the relevant time. In respect of detentions made during the period in violation of the applicable procedures laid down by law the persons affected have a right to seek redress of Court. The success in such cases will be inhibited due to the provisions of clause 8 of the Bill which seeks to validate the invalid action that has been done during the specified period. Laws in operation in respect of detentions need to be certain as they deal with the deprivation of personal liberty of a person. Liberty should be restricted strictly in accordance with the law and only for the purposes permitted by law. Therefore in our view a law which seeks to change the legal provisions in respect of detentions that were applicable with retrospective effect would violate the provisions in Article 13 (2) of the Constitution. In the circumstances it would be necessary for the Bill to be passed with the special majority prescribed by Article 84(2) of the Constitution.

The Hon. Attorney General in his written submissions has submitted that clause 8 of the Bill would be amended by adding a proviso at the end of clause 8 of the Bill on the following lines:-

> "provided that the aforesaid provisions of this section shall not affect any decision or Order made by any Court in respect of any detention made during the period within which the said Act is deemed to have been in operation."

In addition to the above contentions dealing with the provisions of retroactive operation of the Bill the Learned Counsel for the Petitioners also contended that clause 2 of the Bill violates Article 13(5) of the Constitution which deals with the Presumption of Innocence. It was submitted that a deprivation of a person's liberty for no fault of his would violate the Presumption of Innocence. It was also contended that the Presumption of Innocence militates against the detention of a subject longer than is absolutely necessary and that the provisions contained in this clause would permit such detentions. It is observed that a further detention for 24 hours as provided in clause 2 of the Bill is not automatic and could be permitted only in respect of the crimes specified in the Schedule to the Bill which appear to be serious in nature, after the detainee is produced before a magistrate and by an Order given by the Magistrate at his discretion. Accordingly there is no possibility of a violation of Article 13 (5) of the Constitution.

We have examined the other provisions of the Bill as well and are of the view that the said provisions are not inconsistent with the Constitution.

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

1. That clause 8 of the Bill is inconsistent with Article 13 (2) of the Constitution and is required to be passed with the special majority prescribed by Article 84(2) of the Constitution.

2. The inconsistency stated above would cease if clause 2 is amended by adding a proviso at the end of clause 8 of the Bill on the following lines:

   "provided that the aforesaid provisions of this section shall not affect any decision or Order made by any Court in respect of any detention made during the period within which the said Act, is deemed to have been in operation."

3. Subject to the above none of the other clauses of the Bill or any provision thereof is inconsistent with the Constitution.

We wish to place on record our appreciation of the assistance rendered to Court by the Learned Additional Solicitor General and the Learned Counsel for the Petitioners.

P. A. Ratnayeke,
Judge of the Supreme Court.

C. Ekanayake,
Judge of the Supreme Court.

S. L. Imam,
Judge of the Supreme Court.

First Reading :	11.10.2012 (Hansard Vol. 211; No. 3; Col. 356)
Bill No. :	186
Sponsor/Relevant Minister :	Minister of Justice
Decision of the Supreme Court :	06.11.2012 (Hansard Vol. 211; No. 8; Col. 1070-1075)
Second Reading :	22.01.2013 (Hansard Vol. 214; No. 5; Col. 701-787)
Committee of the whole Parliament and Third Reading :	22.01.2013 (Hansard Vol. 214; No. 5; Col. 787-789)
Hon. Speaker's Certificate :	06.02.2013
Title :	Code of Criminal Procedure (Special Provision) Act, No. 02 of 2013