IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

"PUBLIC FINANCIAL MANAGEMENT BILL"

SC (SD) No. 72/2024

Petitioners:

1. Wimal Weerawansa, MP
2. Udaya Prabath Gammanpila, MP
3. Gavindu Cumaratunga, MP
4. Prof. Channa Sudath Jayasumana, MP
5. Dilith Susantha Jayaweera
6. Ranawaka Arachchige Ratnasiri Nimal Ranawaka
7. Dr Geeganage Weerasinghe

Counsel: Dharshana Weraduwage with Dhanushi Kalupahana

SC (SD) No. 77/2024

Petitioners:

1. Transparency International Sri Lanka
2. Pulasthi Hewamanne

Counsel: Viran Corea, PC with Pramod Perera and Hiruni De Almeida

vs

Respondent: Hon. Attorney General

Counsel: Dr. Avanti Perera, Deputy Solicitor General with Manohara Jayasinghe, Deputy Solicitor General, Amasara Gajadheera, State Counsel and Tashya Gajanayake, State Counsel

BEFORE: Jayantha Jayasuriya, PC — Chief Justice
Mahinda Samayawardhena — Judge of the Supreme Court
Arjuna Obeyesekere — Judge of the Supreme Court

The Court assembled for hearing at 10.00 a.m. on 7th June 2024 and 10th June 2024.

A Bill in its short title referred to as "Public Financial Management" [the Bill] was published as a Supplement in Part II of the Government Gazette of 10th May 2024. It was presented in Parliament by the Hon. Minister of Finance, Economic Stabilisation and National Policies and was placed on the Order Paper of Parliament of 22nd May 2024.

Nine Petitioners have invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution by filing the above numbered petitions in the Registry of this Court on 4th and 5th June 2024. The Petitioners have prayed *inter alia* that this Court:

(a) declare that the Bill in its entirety is in violation of Articles 3, 4, 12(1) and 83 of the Constitution; and

(b) make a determination that in addition to being passed with not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour [the special majority], the Bill must be approved by the People at a Referendum.

Upon receipt of the said petitions, the Registrar of this Court, acting in terms of Article 134(1) of the Constitution issued notice on the Attorney General.

This Court heard the learned President's Counsel for the Petitioners in SC (SD) No. 77/2024, the learned Counsel appearing for the Petitioners in SC (SD) No. 72/2024, and the learned Deputy Solicitor General. While all parties were afforded the opportunity of filing written submissions, the learned Deputy Solicitor General submitted that amendments will be moved at the Committee Stage of Parliament to several Clauses of the Bill. These amendments will be referred to when reference is made in this Determination to the said Clauses.

Jurisdiction of Court

This Court is exercising the jurisdiction vested in it in terms of Article 120 of the Constitution which requires this Court to determine whether the Bill in its entirety is, or any of its provisions are inconsistent with the Constitution. Article 123(1) provides further that, *"The determination of the Supreme Court shall be accompanied by the reasons therefor and shall state whether the Bill or any provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution."* Once a primary determination is made in terms of Article 123(1), the consequential determinations the Court is required to make are specified in Article 123(2), which reads as follows:

> *"(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –*
>
> *(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or*
>
> *(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or*
>
> *(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,*
>
> *and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent."*

It must be noted that in terms of Article 83, the requirement for a bill or a provision thereof to be passed with the special majority of Parliament and to be approved by the People at a Referendum will arise only where such bill or a provision thereof seeks to amend, repeal or replace Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2), 62(2) or 83 itself, of the Constitution.

The need for a public financial management framework

The learned Deputy Solicitor General submitted that weak public financial management practices and mismanagement of public finances through arbitrary policy and decision making, together with pre-pandemic tax cuts and the impact of Covid-19 resulted in Sri Lanka going through a severe financial crisis in 2022. As part of the restructuring exercise, the Government has identified, in consultation with its development partners, the need to modernise the public financial management framework and provide clarity and certainty with regard to budget formulation and execution. She submitted further that it must be mandatory to have a proper and adequate legal framework in place to maintain fiscal discipline through management of public finance and public assets, and that as part of that exercise, action must be taken to ensure that public entities adopt and follow prudent fiscal management and good governance. The reforms that are currently being undertaken seek not only to address the persistent weaknesses in the public financial management framework but also to promote discipline, transparency and accountability, thereby ensuring that the goals stipulated in the Bill will be achieved.

The learned Deputy Solicitor General drew our attention to the Country Report on Sri Lanka published by the International Monetary Fund in September 2023. Section IV of its Technical Assistance Report on Governance Diagnostic Assessment has recognised that:

(a) *"good fiscal governance including* ***a sound public financial management system is an important driver of integrity, transparency, accountability and reduced vulnerabilities to corruption***;

(b) ***governance weaknesses in public financial management have created distinct corruption vulnerabilities***; and

(c) ***a strong public financial management system generally helps to reduce corruption*** *and other fiduciary risks and therefore* ***the broader public financial management reform agenda for Sri Lanka is highly relevant to reducing corruption.***" [emphasis added]

Thus, the need for a strong public financial management system pervades across all sectors of the Country and all facets of the public sector. It shall ensure accountability, better macroeconomic management, prudent control of public funds, and most importantly, assist in reducing, if not eradicating, corruption.

Referring to the provisions of the Cabinet Memorandum dated 20th February 2024 submitted by the Hon. Minister of Finance, Economic Stabilisation and National Policies, the learned Deputy Solicitor General submitted that it is in this backdrop that the Government has initiated the process of introducing several laws aimed at strengthening discipline on management of public finance, and that amongst the said legislative initiatives, **the Bill is expected to play a pivotal role as the overarching central piece of legislation on responsible and prudent public financial management**.

The learned Deputy Solicitor General submitted further that the Bill has as its primary aim the welfare of the Public and the delivery of socio-economic prosperity to the People of this Country and that the provisions of the Bill are not only a reflection of Article 27 of the Constitution but is also an expression of the Directive Principles of State Policy found across Article 27, in terms of which the State is pledged to establish in Sri Lanka a Democratic Socialist Society.

In examining this Bill, we shall bear in mind that the Directive Principles of State Policy contained in Article 27 shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

The Bill – objects and application

The long title to the Bill provides that it is a law to make provision with regard to the following:

(a) Strengthen accountability, oversight, management and control of public funds in the public financial management framework with a view to improving fiscal policy for better macroeconomic management;

(b) Clarify institutional responsibilities in respect of financial management and strengthen budgetary management;

(c) To provide for greater public scrutiny of fiscal policy and performance.

Clause 2 sets out the following as objects of the Bill:

> *"(a) to set out standards, requirements, rules, and procedures for transparency, accountability, discipline, effectiveness, efficiency, and economy in the management of the public finance including the revenues, expenditures, commitments, financing arrangements, equity, assets and liabilities;*
>
> *(b) to specify the requirements and procedures to be adhered to, in the management of public finance including the implementation of fiscal responsibility objectives and rules, planning, formulation, adoption and implementation of annual budget along with the processes of monitoring, evaluation, internal controls, accounting, and reporting; and*
>
> *(c) to specify performance and accountability requirements."*

While Clause 3(2)(b) sets out the categories of persons to whom the Bill shall apply, in terms of Clause 3(2)(a), the provisions of the Bill shall apply to the following entities, referred to as 'public entities':

(i) Budgetary entities;

(ii) Statutory Funds and Trusts to which public finances are allocated;

(iii) **State-Owned Enterprises**; and

(iv) Provincial Councils, Provincial Ministries, Provincial Departments, other Institutions functioning under the Provincial Councils, and Local Authorities in terms of the relevant written laws.

While 'budgetary entities' means Ministries, Departments, District Secretaries and special spending units, the last entity has been defined to mean an '*an entity, other than a Ministry, Department, District Secretary or Provincial Council, that has been given a Head of Expenditure in the annual budget*'. The definition of 'State Owned Enterprises' which extends to public corporations, entities established under the Companies Act where the State has direct or indirect controlling interest by virtue of its shareholding and those corporations converted under the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No.23 of 1987 or such similar acts, applies to all entities where the Government has any financial interest and attracts the provisions of the Bill. Such an extensive application of the Bill is important in view of the rationale for the introduction of the Bill and the aforementioned objects, and which in turn are reflected in the following definitions of 'public funds' and 'public finance':

Public funds – "*means moneys in the Consolidated Fund or any other Fund* ***and moneys under the control of the Government*** *excluding approved termination funds...*"

Public finance – "*includes –*

(a) *funds allocated to any public entity specified in paragraph (a) of subsection (2) of section 3 by the Appropriation Act of the relevant year;*

(b) ***funds held by any public entity*** *specified in paragraph (a) of subsection (2) of section 3 in terms of any written law excluding approved termination funds ...;*

(c) *funds vested in the Government by virtue of the provisions of any written law; and*

(d) *funds received or borrowed by any public entity specified in paragraph (a) of subsection (2) of section 3 with the approval of the Parliament;*"

Public Finance

In terms of Article 148 of the Constitution, Parliament shall have full control over public finance. Clause 3(1) of the Bill reinforces Article 148 by providing that, "*In addition to the*

provisions enshrined in Articles 148, 149, 150, 151 and 152 of the Constitution, the provisions of this Act, any regulation, and directive made thereunder, unless specifically excluded from this Act, shall apply to the management of the public finance."

A central feature of the power vested in terms of Article 148 is the power of the Legislature to impose taxes. The learned Deputy Solicitor General drew our attention to the Determination of this Court in the **Inland Revenue (Amendment) Bill** [SC (SD) Nos. 64-71/2022] where it was held *inter alia* that:

(a) One of the vital components of the control that Parliament enjoys in terms of Article 148 is the control of the sources of finance i.e. imposition of taxes, levies and rates;

(b) The Legislature enjoys a wide discretion in formulating policy on economic matters of the country, and while policy making power is left to the authorities in whom it is vested by law, the Supreme Court has always confined the scrutiny of any bill strictly in accordance with the jurisdiction conferred on it by Articles 121 and 123 of the Constitution;

(c) Decisions based on economic considerations must largely be left to the Legislature in view of the inherent complexity of fiscal adjustment of diverse elements that requires to be made.

The learned Deputy Solicitor General submitted that the above matters, *albeit* in respect of taxation, is equally applicable to the Bill.

This Court, having examined several past determinations stated in its Determination on the **Value Added Tax (Amendment) Bill** [SC (SD) Nos. 62-63/2022] that:

> *"The position therefore is clear. This Court has consistently taken the view that the latitude given to the legislature to impose taxes is wide and that any decision to tax or exclude from tax any person/s would not give rise to an issue of constitutionality, except where the Bill transgresses the fundamental principles of equality without a rational nexus to the objective of the law or where such amendments are manifestly unreasonable or manifestly discriminatory."*

However, this Court added a word of caution when it proceeded to state as follows:

> *"Before we conclude, we must state that the wide latitude given to the legislature to impose taxes on the recommendation of the executive brings with it a whole host of responsibilities and duties, both for the legislature and for the executive. The legislature, entrusted with the responsibility of being in full control over public finance must demand that the executive rationalise to its satisfaction the necessity for a particular tax and the manner in which the monies raised by such tax would be expended.* ***The executive on the other hand must, inter alia, act with great responsibility, manage all resources frugally and without wastage, and ensure that the monies generated by taxation are used to direct economic activity in such a manner that would benefit all citizens of this country.*** *In this context, a greater responsibility lies on executive and administrative institutions to act in accordance with their mandate in the performance of their duties.* ***This Court shall continue to exercise its Constitutional role as the sentinel on the qui vive over executive and administrative action****."* [emphasis added]

This being a Bill to regulate and manage the public financial framework of the Country and bearing in mind the objects set out in Clause 2 and several other provisions of the Bill which we would refer to in the course of this Determination, it is important that the Bill covers in the widest possible sense all public entities that deal with public funds and public finance and ensure that the trust reposed in those who deal with public funds and public finance is discharged in a manner that protects the sovereignty of the People enshrined in Article 3 of the Constitution.

Article 121 and policy

Fiscal issues are matters of policy and the greatest latitude is extended in that regard to the executive and the legislature. In its Determination on the **Fiscal Management (Responsibility) (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2016) Vol XIII 53 at 55] which Act is incidentally sought to be repealed by the instant Bill,

this Court, having considered whether the decision to increase the percentage of the limit placed on issuance of Government guarantees is constitutional, stated as follows:

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

A similar sentiment was expressed by this Court in its Determination on the **Foreign Exchange Bill** [Decisions of the Supreme Court on Parliamentary Bills (2017) Vol XIII 88 at 95] when this Court held as follows:

> *"The Cabinet has deliberated on the subject matter of foreign exchange which affects the economy of this country and found that a proper legal framework is needed for the management and regulation of foreign exchange and to encourage Sri Lankan citizens to remit to Sri Lanka foreign exchange they have in their possession outside Sri Lanka... The existing law has not been successful in preventing the outflow of foreign exchange out of the country through legal and non legal channels. Therefore a new law was required to provide incentives for Sri Lankans having money outside the country to remit that money to Sri Lanka without having to face with criminal penalties. The Bill in hand contains provisions to cater to the said need as well as intervention by the Government if any outflows of foreign exchange becomes a threat to the national economy. The decision to bring up this Bill is nothing but a matter of policy.*
>
> *The Legislature enjoys a wide discretion in formulating policy on economic matters of the country.* ***This Court has always confined the scrutiny of any Bill strictly in accordance with the Supreme Court jurisdiction conferred by Articles 121 and 123***

of the Constitution. *The Policy Making Power is left to the authorities in whom it is vested by law. This Court has been reluctant to intervene in matters of policy unless such policy is found to be manifestly unreasonable."*

While the above dicta make it clear that this Court shall not interfere in matters of policy, in examining this Bill, this Court shall be guided by the policy considerations that are set out in the relevant Cabinet Memoranda tendered to this Court by the learned Deputy Solicitor General.

The role of the Secretary to the Treasury

In terms of Clause 5(1) of the Bill, *"The Secretary to the Ministry of the Minister of Finance appointed by the President in terms of paragraph (1) of Article 52 of the Constitution, shall be the head of the General Treasury"*. The Secretary is thereafter referred to in the Bill as the *'Secretary to the Treasury'*. Mr. Dharshana Weraduwage, the learned Counsel appearing for the Petitioners in SC (SD) No. 72/2024 submitted that the Bill confers enormous powers on the Secretary to the Treasury, who is neither a juristic nor a natural person, leads to corruption and arbitrariness, and therefore is violative of Articles 1, 3, 4(d) and 12(1) of the Constitution.

The Secretary to the Treasury currently enjoys significant power within the existing framework and the Bill seeks to provide legislative sanction to the exercise of such powers by way of Clauses 5, 6, 37, 39 and 47(3). The holder of the post of 'Secretary to the Treasury' is a natural person and no difficulty has been encountered when the Secretary to the Treasury sues or is sued in a court of law or in engaging in any other matter in the capacity of the Secretary to the Treasury. Clause 5(1) only confers a statutory recognition to the post of Secretary to the Treasury, and does not violate any provision of the Constitution.

Clauses that are challenged

The learned Counsel for the Petitioners have challenged the following clauses of the Bill:

(1) Clause 3(2)(b)

(2) Clause 5(2)(f)
(3) Clauses 32(3) and 32(4)
(4) Clause 34(2)
(5) Clause 36
(6) Clause 38
(7) Clause 39(1)
(8) Clause 60
(9) Clause 63
(10) Clause 68
(11) Clause 69
(12) Clause 71 - interpretation

Clause 3(2)(b)

In terms of Clause 3(2)(b), the provisions of the Bill shall apply to:

(i) public officers;
(ii) public office holders;
(iii) members of the tri-forces; and
(iv) members of the judicial service.

'*Members of the judicial service*' has been defined in Clause 71 to include, "*a judge of the Supreme Court, Court of Appeal or High Court or a judicial officer, or a member of a tribunal.*" It was submitted that not all of these persons would be carrying out functions relating to public financial management under the Bill and that to include all such persons without any responsibility being assigned under any of the provisions of the Bill would not only be overbroad and arbitrary and therefore violative of Article 12(1) but would also amount to an interference with the independence of the Judiciary and would thereby violate Article 4(c) read with Article 3 of the Constitution. We are in agreement with this submission and are of the view that Clause 3(2)(b)(iv) and the definition of '*members of the judicial service*' shall be passed by the special majority of Parliament and be approved by the People at a Referendum.

The learned Deputy Solicitor General submitted that the provisions of the Bill shall only apply to persons who, in their official capacities in the public entities referred to in Clause 3(2)(a), are tasked with duties under the Bill. She admitted that this limitation is not reflected in that manner in Clause 3(2)(b) as it presently reads but that it is reflected so in Clause 64(1). The learned Deputy Solicitor General submitted that an amendment shall be moved at the Committee Stage of Parliament to:

(a) delete the definition of '*members of the judicial service*' in Clause 71;

(b) delete Clause 3(2)(b) and substitute it with the following new sub-clause:

> *"officers and employees of public entities to whom a power or duty is conferred, delegated or assigned under this Act or any regulation made thereunder, including a Chief Accounting Officer, Accounting Officer or a competent authority referred to in Part VI of this Act."*

We are of the view that the aforementioned inconsistency shall cease and Clause 3(2)(b) may be passed by a simple majority, if the definition of '*members of the judicial service*' in Clause 71 is deleted and Clause 3(2)(b) is amended, as proposed by the learned Deputy Solicitor General.

Clause 5(2)(f)

Mr. Weraduwage submitted that in terms of Article 43(1), it is the Cabinet of Ministers that has been charged with the direction and control of the Government of the Republic, and that formulating policy is a function of the Cabinet of Ministers. However, Clause 5(2)(f) of the Bill provides that the Secretary to the Treasury, who shall be the Secretary to the Ministry of Finance shall, *"formulate policies and strategies for the effective management and overall supervision of State Owned Enterprises"*. This, he submitted, is in direct violation of the provisions of Articles 43(1) and 52(2).

We are in agreement with the submission of Mr. Weraduwage, and are of the view that Clause 5(2)(f) is violative of Articles 12(1), 43(1) and 52(2) and hence, Clause 5(2)(f) shall be passed with the special majority of Parliament.

The learned Deputy Solicitor General however submitted that an amendment shall be moved at the Committee Stage of Parliament to amend Clause 5(2)(f) by the insertion of the words, *"subject to the approval of the Cabinet of Ministers"* at the beginning of Clause 5(2)(f) and that Clause 5(2)(f) shall thereafter read as follows:

> *"subject to the approval of the Cabinet of Ministers, formulate policies and strategies for the effective management and overall supervision of State-Owned Enterprises".*

We are of the view that the aforementioned inconsistency shall cease and Clause 5(2)(f) may be passed with a simple majority if Clause 5(2)(f) is amended as proposed by the learned Deputy Solicitor General.

Clause 32 – public procurement

We have already referred to the submission of the learned Deputy Solicitor General that the rationale for the introduction of the Bill is to strengthen the public financial management system with a view to ensuring accountability, better macroeconomic management and the prudent use of public funds. An effective and stringent public financial management system would no doubt ensure greater transparency in public procurement. It is perhaps no secret that lack of transparency in procurement can distort competition and lead to corruption and that the adoption of good practices in public financial management and procurement can lead to a reduction in corruption. This nexus between effective public financial management, public procurement and corruption probably explains the reason for the inclusion in the Bill of Clause 32 dealing with public procurement and Part IX [Clauses 40 – 45] dealing with Public Investment Management.

The preface to the Government Procurement Guidelines of 2006 on Goods and Works sets out that the purpose of the Guidelines is to *"**enhance the transparency of the Government procurement process** to minimise delays and to **obtain financially the most advantageous and qualitatively the best services and supplies for the nation**."* [emphasis added] In other words, all those competing to provide a good, work or service must do so on a level playing field, thus ensuring adherence with Article 12(1).

The importance of scrupulously following and adhering to the Government tender procedure has been emphasised by this Court time and again. In **Smithkline Beecham Biologicals SA and another v. State Pharmaceutical Corporation of Sri Lanka and others** [(1997) 3 Sri LR 20] it was held that, "*In order to assist it in* ***making an informed decision in the best interests of the People****, the Government has, through the Financial Regulations, Circulars, and the Guidelines of 1996, laid down procedures to be followed in the matter of Government procurements. Unless they are followed, the Government is liable to be misled in making its decisions.* ***Therefore, there must be scrupulous adherence to procedures laid down by the Government****. Part I Chapter I paragraph 2 (b) states that the tender process should ensure "adherence to prescribed standards, rules and regulations*." [emphasis added]

Before we consider the submissions of the Petitioners, it would be appropriate to refer to the United Nations Convention against Corruption [UNCAC 2004], to which Sri Lanka is a signatory. In its foreword, it is stated that:

> "*Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish.*
>
> *This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment.* ***Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development***." [emphasis added]

The link between public procurement, corruption and public financial management are captured in Article 9 of the Convention in the following manner:

"1. *Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia*:

(a) *The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;*

(b) *The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;*

(c) *The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;*

(d) *An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;*

(e) *Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.*

2. *Each State Party shall, in accordance with the fundamental principles of its legal system,* ***take appropriate measures to promote transparency and accountability in the management of public finances****. Such measures shall encompass, inter alia:*

(a) *Procedures for the adoption of the national budget;*

(b) Timely reporting on revenue and expenditure;

(c) A system of accounting and auditing standards and related oversight;

(d) Effective and efficient systems of risk management and internal control; and

(e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph."

The provisions of the Bill capture most of what has been set out in Article 9(2) of the Convention, and reinforces the clear nexus between public financial management, procurement and corruption. This nexus was considered in the Determination on the **Anti-Corruption Bill** [SC (SD) Nos. 16-21/2023], where, having noted that one of the objects of the Bill is to give effect to certain provisions of the United Nations Convention against Corruption and other internationally recognised norms, standards and best practices, this Court stated as follows:

"In 'What is Corruption and Why should we care – Knowledge tools for Academics and Professionals' published by United Nations Office on Drugs and Crime, it is said that bribery and corruption negatively impact on many areas. It undermines the attainment of the UN Sustainable Development Goals and causes economic loss and inefficiency. Under conditions of corruption, the funds identified for education, health care, poverty relief, and other social welfare measures becomes a source of personal enrichment for party officials, bureaucrats and contractors. It brings about private and public sector dysfunctionality. When the justice system is invaded by corruption, people can no longer count on prosecutors and judges to do their jobs which has a debilitating impact on the rule of law. ***Accordingly, we hold that Sovereignty in Article 3 includes the right to a Government free of bribery or corruption.****"* [page 21]

" 'Preventing Corruption in Public Procurement' published by the Organisation for Economic Cooperation and Development (OECD) in 2016, recognises that:

*"**Public procurement is one of the government activities most vulnerable to corruption**. In addition to the volume of transactions and the financial interests at stake, corruption risks are exacerbated by the complexity of the process, the close interaction between public officials and businesses, and the multitude of stakeholders.*

Various types of corrupt acts may exploit these vulnerabilities, such as embezzlement, undue influence in the needs assessment, bribery of public officials involved in the award process, or fraud in bid evaluations, invoices or contract obligations. In many OECD countries, significant corruption risks arise from conflict of interest in decision-making, which may distort the allocation of resources through public procurement (European Commission, 2014a). Moreover, bid-rigging and cartelism may further undermine the procurement process.

The OECD Foreign Bribery Report (2014) provides additional evidence that public procurement is vulnerable to corruption.

According to the "Guidebook on anti-corruption in public procurement and the management of public finances - Good practices in ensuring compliance with Article 9 of the United Nations Convention against Corruption" published by the UNODC in partnership with International Anti-Corruption Academy (2013) inter alia, 'The volume and complexity of any particular procurement play an important role when it comes to corruption. Larger procurements are often most vulnerable, as bribes are frequently demanded and paid as a percentage of the public contract's value. Experience also shows that certain sectors are particularly vulnerable to corruption. Many corruption scandals in recent years were in the field of public works contracts, such as infrastructure projects, the defence industry, the oil and gas sector, and in the health-care sector, especially in pharmaceuticals and medical devices.

Despite its enormous negative impact and the various efforts undertaken to curb corruption in the field of government contracts, public contracts have remained highly prone to corruption during the last decade; this is true both of developing and developed countries. Even in an environment where the public and private sectors

are aware of the enhanced enforcement of anti-corruption laws, corruption opportunities and challenges continue to arise through private sector contact with government officials.'

We are mindful that instances of corruption or bribery in public procurement need to be effectively prevented and combatted and falls within the objective of the Bill. *Even though Clauses 97 and 98 of the Bill does not cover the full gamut of public procurement process, examination of Clauses 99, 100 (a) (i), (vi), (vii), 104(1), 105 and 111 together with Clauses 97 and 98 demonstrate that such provisions cumulatively cover instances of bribery or corruption in such process despite the fact that such provisions do not make any specific reference to procurement process."* [pages 53-54; emphasis added]

Articles 156B – 156H, introduced by the 21st Amendment to the Constitution provides for the establishment of a National Procurement Commission, thus signifying the importance that has now been attached to the subject of public procurement and the need to have a well defined and well formulated set of rules applicable across the entire public sector. While Article 156C sets out the functions of the Commission, Article 156C(1) provides that:

*"**It shall be the function of the Commission** to formulate fair, equitable, transparent, competitive and cost effective procedures and guidelines, for the procurement of goods and services, works, consultancy services and information systems by government institutions and cause such guidelines to be published in the Gazette and within three months of such publication, to be placed before Parliament."*

Thus, it is the constitutional duty of the National Procurement Commission to make procurement guidelines for the entire public sector including State Owned Enterprises.

It is in this background that Mr. Viran Corea, PC, the learned Counsel for the Petitioners in SC (SD) No. 77/2024 invited us to consider Clause 32 of the Bill, which provides as follows:

"(1) Every public entity shall procure the goods, services, works, consultancy services and information systems in compliance with the procurement procedures specified in written laws and guidelines issued from time to time by the National Procurement Commission.

(2) (a) Every public entity specified in sub paragraph (i) of paragraph (a) of subsection (2) of section 3 shall be required to prepare and provide to the Secretary to the Treasury its annual procurement plans.

(b) Every public entity specified in sub paragraphs (ii) and (iii) of paragraph (a) of subsection (2) of section 3 shall be required to prepare and provide their annual procurement plans to the respective Chief Accounting Officer."

Clause 32(1) and (2) reflects the commitment undertaken in terms of Article 9 of the United Nations Convention against Corruption. However, the issue arises with Clauses 32(3) and (4), which are re-produced below:

"(3) The Minister of Finance may with the concurrence of the National Procurement Commission prescribe the State Owned Enterprises ***which shall be exempted*** *from complying with the procurement guidelines.*

(4) The Provincial Councils ***may follow their own guidelines*** *in respect of the procurement of goods, services, works, consultancy services, and information systems with the approval of the National Procurement Commission."*

Clause 32(3)

Mr. Corea, PC submitted that the nexus between business and politics in Sri Lanka has contributed to a lack of transparency and accountability in public procurement, contract allocation, and regulatory enforcement, and these taken together have facilitated corrupt practices, with cronyism and nepotism influencing decision-making processes and distorting market competition at almost every stage of the procurement process for goods and services for the public sector. He submitted further that exempting State Owned Enterprises from following the procurement procedures would have an adverse

impact on public financial management and perpetuate a cycle of poverty and underdevelopment in the Country. He stated that this directly impinges upon and entails serious erosion and infringement of the Sovereignty of the People enshrined in Articles 3 and 4 of the Constitution.

The importance of having in place and adhering to a well structured and well defined set of procurement rules and guidelines is extremely important for any country and certainly for Sri Lanka which, as submitted by the learned Deputy Solicitor General is taking steps to restructure its public financial management framework. The importance of demanding adherence with procurement guidelines in the public financial management legislation becomes even more significant given the fact that the Bill has been recognised as the overarching central piece of legislation on responsible and prudent public financial management. It is therefore important that each and every public entity to which the provisions of the Bill would apply are governed by the procurement rules prepared by the National Procurement Commission. It would do well to remember that Sovereignty is with the People, that all organs of Government exercise the power of the People in trust for the People, and that all funds of these State Owned Enterprises belong to the People.

The learned Deputy Solicitor General submitted that some State Owned Enterprises operates in the commercial sector in competition with private sector entities and that in order to stay competitive and profitable, it cannot be constrained by a rigid set of guidelines. Hence, she submitted that there may be a necessity to formulate different guidelines for different sectors which may specifically address issues of exemptions in certain limited situations. While that is a matter for the National Procurement Commission and is not a matter that we shall consider in this Determination, this Court sees no legal justification at all for exempting any State Owned Enterprises from following Procurement Guidelines formulated by the National Procurement Commission. As stated earlier, all public entities are dealing with public funds and the rules and rigours of public financial management governing public entities must apply with equal force to all such State Owned Enterprises.

We must also state that every State Owned Enterprise must follow, as far as may be practicable, one set of Procurement Guidelines formulated by the National Procurement

Commission. The formulation of specific guidelines must therefore be done only where the National Procurement Commission deems such a course of action necessary and only where the National Procurement Commission is satisfied that having specific guidelines shall not violate the principles of open and transparent procurement procedures.

We are therefore of the view that Clause 32(3) is violative of Article 3 and Article 12(1) of the Constitution and Clause 32(3) shall only be passed by the special majority of Parliament and approved by the People at a Referendum. The learned Deputy Solicitor General submitted that an amendment shall be moved at the Committee Stage of Parliament to delete Clause 32(3) and replace it with the following:

> *"State-Owned Enterprises may have their own guidelines formulated and published in the Gazette by the National Procurement Commission."*

We are of the view that the concerns we have expressed will only be addressed if Clause 32(3) is amended to read as follows:

> *"The National Procurement Commission may, if it deems necessary, formulate and publish in the Gazette specific guidelines for State Owned Enterprises."*

This amendment is in line with Article 156C(1) of the Constitution which specifically provides that it shall be the function of the National Procurement Commission to formulate guidelines for all Government Institutions, which as defined in Article 156H includes Provincial Councils and Public Corporations, business or other undertakings vested in the Government under any written law and Companies registered or deemed to be registered under the Companies Act, No. 7 of 2007, in which the Government, a Public Corporation or Local Authority holds more than fifty per centum of the shares of that Company.

In fact, in the Determination of this Court in the **Twenty Second Amendment to the Constitution** [SC (SD) Nos. 40 – 49/2022], this Court observed that *"Article 156H would now ensure that the meaning of the words "government institution" would have a broader ambit and as such* ***would increase transparency in procurement across institutions in which substantial public funds have been invested or expended****. The proposed clause*

includes companies registered under the Companies Act, No. 7 of 2007, in which the government or public corporations hold more than fifty per centum of the shares of that company. Naturally, subsidiaries of such companies would also be caught up within the ambit of this clause, and as such there is no necessity to make explicit reference to the subsidiaries of such companies. This provision would ensure that the procurement process in respect of institutions where substantial public funds are involved cannot avoid scrutiny through the mechanism of creating a separate legal personality." [emphasis added]

We are of the view that the aforementioned inconsistency shall cease and Clause 32(3) may thereafter be passed by a simple majority if Clause 32(3) is amended as follows:

> *"The National Procurement Commission may, if it deems necessary, formulate and publish in the Gazette specific guidelines for State Owned Enterprises."*

Clause 32(4)

According to Clause 32(4), the Provincial Councils **may follow their own guidelines** in respect of the procurement of goods, services, works, consultancy services, and information systems with the approval of the National Procurement Commission.

Clause 3(2)(a) of the Bill identifies Provincial Councils as a public entity to which the Bill will apply. Furthermore, Clause 62 of the Bill provides that:

> *"(1) Subject to the provisions of the Constitution and relevant written laws, Provincial Councils and Local Authorities* ***shall adhere to the principles of transparency and fiscal responsibility stipulated in the Act in the management of public finance****.*
>
> *(2) The Secretary to the Ministry of the Minister to whom the subject of Provincial Councils and Local Authorities are assigned shall submit reports on* ***revenues and expenditures and other financial information of the Provincial Councils*** *and Local Authorities, as may be requested by the Minister of Finance."*

Mr. Corea, PC submitted that Article 156C only empowers the National Procurement Commission to formulate guidelines and that it is not within their Constitutional mandate to grant approval for a Provincial Council to follow their own guidelines. He submitted that in any event, permitting provinces to adopt different procurement guidelines across provinces which may in turn be different to the National Procurement Guidelines will certainly destroy the level playing field that is sought to be created by the formulation of uniform procurement guidelines and therefore would violate Article 12(1). He submitted that where procurement in respect of subjects on List 3 of the Ninth Schedule (the Concurrent List) of the Constitution are concerned, with many important subjects being catered to in terms of the said Concurrent List at both Government and Provincial levels, the lack of a uniform set of rules will result in anomalies and lack of equal protection in terms of Article 12(1) and have an adverse impact on the right of bidders and potential bidders guaranteed under Article 14(1)(g). All Provincial Councils are dealing with public funds and Clause 32(4) is an open invitation to Provincial Councils to disregard and reject all forms of public financial management and regulation and engage in uncontrolled corruption.

We are therefore of the view that Clause 32(4) which permits Provincial Councils to follow their own procurement guidelines with the approval of the National Procurement Commission is inconsistent not only with Article 156C of the Constitution and Article 148 of the Constitution, but with Article 12(1) and Article 3 of the Constitution, as well. Clause 32(4) must therefore be passed by the special majority of Parliament and be approved by the People at a Referendum.

The learned Deputy Solicitor General submitted that an amendment shall be moved at the Committee Stage of Parliament to delete Clause 32(4) and replace it with the following:

> *"Provincial Councils may have their own guidelines formulated and published in the Gazette by the National Procurement Commission."*

We are of the view that the aforementioned concerns we have expressed will only be addressed if Clause 32(4) is amended to read as follows:

"The National Procurement Commission may, if it deems necessary, formulate and publish in the Gazette specific guidelines for Provincial Councils."

Furthermore, since the wording proposed for Clauses 32(3) and (4) are identical, the said clauses may be amalgamated to form one clause.

Clause 34(2)

Clause 34(2) reads as follows:

"There shall be a ***treasury single account*** *which shall be an integrated system of bank accounts, into which all Government cash including moneys received by the public entities referred to in sub-paragraphs (i) and (ii) of paragraph (a) of subsection (2) of section 3 shall be deposited and from which expenditure of the Government and such public entities shall be made to enable public funds to be managed in a consolidated manner."*

It was pointed out by the learned Counsel for the Petitioners that Clause 34(2) is violative of Article 149(1) which provides that, *"The funds of the Republic not allocated by law to specific purposes shall form one Consolidated Fund into which shall be paid the produce of all taxes, imposts, rates and duties and all other revenues and receipts of the Republic not allocated to specific purposes."*

We are in agreement with the contention of the learned Counsel for the Petitioners and are of the view that Clause 34(2) must be passed with the special majority of Parliament. The learned Deputy Solicitor General however submitted that an amendment shall be moved at the Committee Stage of Parliament to add the words, *"to maintain the revenue and expenditure of the Consolidated Fund"* and that Clause 34(2) shall thereafter read as follows:

"There shall be a treasury single account to maintain the revenue and expenditure of the Consolidated Fund which shall be an integrated system of bank accounts, into which all Government cash including moneys received by the public entities referred

to in sub-paragraphs (i) and (ii) of paragraph (a) of subsection (2) of section 3 shall be deposited and from which expenditure of the Government and such public entities shall be made to enable public funds to be managed in a consolidated manner."

We are of the view that the said inconsistency shall cease and Clause 34(2) may be passed with the simple majority of Parliament if Clause 34(2) is amended as proposed by the learned Deputy Solicitor General.

Clause 36

In terms of Clause 36 of the Bill:

"(1) There shall be developed an effective computerized systems for carrying out the functions of the General Treasury and the functions specified in this Act.

(2) The performance, security, safety and accuracy of the public entity's computerized financial management and other information systems shall be reviewed and evaluated as prescribed."

Mr. Weraduwage submitted that this clause is vague as it does not specify who shall be responsible and answerable for the performance, security, safety and accuracy of the computer systems put in place, who will review and evaluate such systems etc. He also stated that this will lead to serious national security risks. In the absence of defined security measures, the computerised systems could be vulnerable to cyberattacks, data breaches and exploitation, posing severe national security risks. However, Clause 36(2) read with Clause 67 provides that such details are to be prescribed by way of regulations, and for that reason, we see no merit in the submission of the learned Counsel for the Petitioners.

Clause 38

Clause 38(1) reads as follows:

*"(1) The management of the **non-financial assets** of the public entities referred to in sub-paragraphs (i), (ii) and (iii) of paragraph (a) of subsection (2) of section 3 including their identification, classification, valuation, utilization, and **disposal shall be governed subject to any relevant written law**.*

Clause 71 defines *'non-financial assets'* as follows:

"'non-financial assets' means produced or non-produced movable or immovable assets, including lands, buildings, structures, plant and machinery, vehicles, office equipment and furniture, and other assets declared as non-financial assets that are fully owned, assigned, possessed, vested in, utilized, or leased by a public entity."

It would thus be seen that *'non-financial assets'* can range from furniture to structures and anything beyond, due to the use of the words, *'and other assets declared as non-financial assets'*.

Clause 38(2) and Clause 38(3) reads as follows:

*"(2) The proceeds of the **sale of any movable or immovable property** or any exclusive privilege belonging to a budgetary entity shall be credited to the Consolidated Fund and shall be dealt with in the manner as may be prescribed.*

(3) For the purpose of this section –

*(a) **"disposal"** shall not include the disposal of assets for investment purpose or any other commercial purpose; and*

(b) "movable property" shall not include cash."

It is not clear if there is a nexus between Clause 38(2) which refers to *'the **sale** of any movable or immovable property or any exclusive privilege'* and Clause 38(1) which refers to the ***'disposal'*** of *'non-financial assets'*. For that reason, it is not clear if Clause 38(3) only applies to Clause 38(1). Be that as it may, Mr. Weraduwage submitted that the Bill does not, (a) define what an *'investment purpose'* or a *'commercial purpose'* might be; (b)

contain any guidelines for deciding so; (c) identify who would be deciding so; (d) identify who has the power to declare what other assets should come under the definition of *'non-financial assets'*.

Quite apart from this Clause being vague, the effect of this Clause is two-fold. The first is that the disposal of non-financial assets belonging to a public entity for an investment or commercial purpose shall be outside the purview of the Bill. This is contrary to the objects of the Bill, removes the prudential accountability that the Bill seeks to ensure in the management of public finance and deprives Parliament of its right of exercising control over public finance. The second is that there is no requirement that the proceeds of such disposal shall be credited to the Consolidated Fund and is therefore violative of Article 149 of the Constitution.

The learned Deputy Solicitor General submitted that disposal of property for investment and commercial purposes may have different processes. In the absence of details of such processes being divulged, this Court is constrained to state that Clause 38(3) is inconsistent with the provisions of Articles 12(1) and 148 of the Constitution and shall only be passed by the special majority of Parliament.

Clause 39(1)

While Clause 39(1) provides that, *"The Secretary to the Treasury shall supervise, examine, and monitor all statutory funds and may issue directives on statutory funds."*, Clause 39(3)(a) requires every statutory fund to comply with any directive issued by the Secretary to the Treasury in exercising the powers, duties, and functions under this Act and any other written law.

It was pointed out to the learned Deputy Solicitor General that laws creating such statutory funds may contain specific provisions relating to the manner in which such funds are to be managed and thus enabling the Secretary to the Treasury to give directions shall contravene the provisions of such laws. A case in point is the Companies Fund established under Section 479 of the Companies Act, No. 7 of 2007, which specifies the manner in

which the funds are to be utilised and which contains specific provision relating to the preparation of reports on the administration of the fund.

We are therefore of the view that Clause 39(1) is overbroad and is therefore violative of Article 12(1), and shall only be passed by the special majority of Parliament. The learned Deputy Solicitor General submitted that an amendment shall be moved at the Committee Stage of Parliament to add the words, '*in respect of which any other written law does not provide for such matters*' at the end of Clause 39(1). Clause 39(1) would thereafter read as follows:

> *"The Secretary to the Treasury shall supervise, examine, and monitor all statutory funds and may issue directives on statutory funds in respect of which any other written law does not provide for such matters."*

We are of the view that Clause 39 shall cease to be inconsistent with Article 12(1) of the Constitution and may be passed by the simple majority of Parliament if Clause 39(1) is amended as proposed by the learned Deputy Solicitor General.

Clause 60

Clause 60 reads as follows:

> *"(1) Where applicable, there shall be a levy and dividend policy that shall be set by the respective governing bodies of State-Owned Enterprises, in consultation with the Secretary to the Treasury. The imposition of a levy and any decision by the Minister of Finance exempting a State-Owned Enterprise from the imposition of such levy shall be published in the annual report under subsection (3) of section 53.*
>
> *(2) Dividends or other profit distribution from State-Owned Enterprises paid to Government shall be paid into the Consolidated Fund and reflected in the annual budget presented to the Parliament.*

(3) The Secretary to the Treasury shall disclose such sums collected as levy or dividend in the annual report under subsection (3) of section 53.

(4) No set-off tax relief shall be granted in respect of the amounts paid as a levy or dividend under this section."

Mr. Weraduwage submitted that as this Clause allows the Minister of Finance to impose levies and exempt certain State Owned Enterprises from it, this Clause violates Article 148 which states that Parliament shall have full control over public finance, and no tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law. He also submitted that this Clause violates Articles 3, 4(a) and 76.

The learned Deputy Solicitor General submitted that while a State Owned Enterprise with a corporate structure can remit their profits to the Consolidated Fund by way of a dividend, there may be public corporations where its enabling statute does not contain provisions to declare a dividend. She submitted that a levy shall be imposed only in respect of such Enterprises, and that whether an exemption is granted or not, Clause 60 requires full details of the dividends that are remitted, the levies that are imposed and the exemptions that are granted to be reported to Parliament in the annual report provided for in Clause 53(3). It was therefore her position that through the annual report, Parliament is apprised of any exemption granted and therefore there is no violation of the provisions of Article 148. We are in agreement with the learned Deputy Solicitor General and see no merit in the submission of the Petitioners.

Clause 63

Clause 63 reads as follows:

"(1) The Minister of Finance shall be vested with the power of cadre management of the public entities in a manner as may be prescribed that would achieve the objects of this Act.

(2) *The responsibilities of the Minister of Finance with regard to cadre management,* ***shall include the determination of the salaries and wages and other payments, to the officers and other employees of public entities****."*

This clause confers a wide power on the Minister of Finance to decide on, (a) cadre management, which phrase has not been defined, and (b) salaries, but does not contain any safeguards or guidance on the manner in which such power shall be exercised. Thus, Clause 63(2) is not only vague but the propensity for the arbitrary exercise of the power conferred by Clause 63(2) is high, and as such, Clause 63(2) is inconsistent with Article 12(1).

In terms of Article 55(1), the *"Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal."* Given the complexity in categorisation of public servants, determining the salaries that are to be paid to all employees of public entities is certainly a matter of policy that comes within Article 55(1) and within the domain of the Cabinet of Ministers. In such circumstances, empowering the Minister of Finance to determine the salaries and wages of all employees of public entities is a violation of Article 55(1). Furthermore, conferring on the Minister the power of cadre management is violative *inter alia* of Article 55(3), Article 111H(1)(b), 153C, 155G(1) and 156F. Clause 63(1) is therefore inconsistent with Article 55(1), Article 55(3), Article 111H(1)(b), 153C, 155G(1), and 156F of the Constitution.

We have stated at the outset that the definition of *'special spending unit'* in Clause 71 means an *'entity, other than a Ministry, Department, District Secretary or Provincial Council,* ***that has been given a Head of Expenditure in the annual budget***'. The Supreme Court has been given a separate head of expenditure, and includes the expenditure of the Court of Appeal. Clause 63(2) read together with the definition of *'special spending unit'* would enable the Minister of Finance to determine the salaries and wages of the Judges of the Supreme Court and the Court of Appeal.

The **Inland Revenue (Amendment) Bill** [supra] sought to increase the rate of income tax payable by individuals and was of universal application including judges. This increase was

challenged by the High Court Judges Association and the Judicial Service Association on the basis that subjecting them to taxes similar to all citizens is impermissible for the reason *inter alia* that judges are a different category and that in any event, it affects the independence of the judiciary.

This Court, in its Determination, referred to **High Court Judges Association and Others v. Lionel Fernando, Co-Chairman, National Salaries and Cadre Commission and Others** [SC (FR) Application No. 66/2008, SC Minutes of 4th May 2009] and stated that:

> *"In the High Court Judges Association case, this Court held that if there is a national wage policy, the judiciary should be classified separately. The dispute arose due to the National Salaries and Cadre Commission classifying High Court Judges and Judges of the Original Courts together with the Public Service without taking account of their duties, functions and responsibilities. We respectfully endorse that decision.* ***Taking into account the duties, functions and responsibilities of judicial officers, they cannot be classified with public officials.***" [emphasis added]

This Court, having also considered whether increase of taxes has a bearing on the independence of the judiciary, stated thus:

> *"Dr. De Silva PC next contended that the independence of the judiciary is a foundational value of the Republic which finds expression throughout the Constitution. Our attention was drawn to the preamble (SVASTI) of the Constitution which assures to all People the independence of the judiciary as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka.*
>
> *We strongly agree that the independence of the judiciary is a fundamental value of the Republic. Indeed, long before we became a Republic, the Soulbury Constitution constitutionally recognized the principle of judicial independence by creating the Judicial Service Commission. Although the 1972 Constitution made no provision for a Judicial Service Commission, its re-introduction by* ***the 1978 Constitution is evidence of the desire of the State to embed the independence of the judiciary as a functional and foundational constitutional principle****. In fact, this Court in*

Industrial Disputes (Special Provisions) Bill [S.C.(S.D.) No. 30/2022] held that Sovereignty in Article 3 of the Constitution must be interpreted to include the right to an independent judiciary.

Dr. De Silva PC argued that the independence of the judiciary is guaranteed through security of tenure, income security and non-interference. As a result, it was argued that judges' salaries cannot be reduced by an act of the executive or legislature. In particular, it was submitted that Article 108(2) of the Constitution which specifically provides that the salaries of the Judges of the Supreme Court and Court of Appeal cannot be reduced must be read as a limitation on Parliament in determining the salaries of superior court judges and not as an exclusion of the minor judiciary from the general principle that judges' salaries must not be reduced.

It was submitted that there is a general principle that the salaries of the judges shall not be reduced during their term of office which is recognized by judicial precedent and in several international declarations and guidelines. Our attention was drawn to the decision in Senadhira v. The Bribery Commissioner (63 NLR 313 at page 317) where it was held that their "full salaries are absolutely secured to them during the continuance of their commissions". Clause 31 of the Beijing Principles, August 1995 states that the remuneration and conditions of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed. In the UN Basic Principles on the Independence of the Judiciary, it is provided in Clause 11 that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law. The Latimer House Guidelines for the Commonwealth II.2. states that as a matter of principle, judicial salaries and benefits should be set by an independent commission and should be maintained.

We are of the view that Article 108(2) of the Constitution applies only to the salaries of the Judges of the Supreme Court and Court of Appeal which cannot be reduced. ***Nonetheless, we agree with the argument that it should not be interpreted as an exclusion of the minor judiciary from the general principle that judicial salaries should not be reduced.***

Indeed, ***there is a general principle that the judges salaries cannot be reduced during their tenure of office. This general principle now forms part of the constitutional guarantees for the establishment of judicial independence. The judges of the High Court, District Court and the Magistrates Court and all other Judicial Officers within the meaning of Article 111M of the Constitution is entitled to this protection.***" [emphasis added]

In the above circumstances, we are of the view that Clause 63 is inconsistent with the provisions of Article 4(c) read with Article 3, Article 12(1), Article 55(1), Article 55(3), Article 108, Article 111H(1)(b), Article 148, Article 153C, Article 155G(1) and Article 156F of the Constitution, and that Clause 63 shall only be passed by the special majority of Parliament and be approved by the People at a Referendum.

The learned Deputy Solicitor General submitted that an amendment shall be moved at the Committee Stage of Parliament by inserting the words, *'subject to the provisions of the Constitution and the approval of the Cabinet of Ministers'* at the beginning of Clause 63(2), and that Clause 63(2) shall thereafter read as follows:

> *"Subject to the provisions of the Constitution and the approval of the Cabinet of Ministers, the responsibilities of the Minister of Finance with regard to cadre management, shall include the determination of the salaries and wages and other payments, to the officers and other employees of public entities"*

We are of the view that the said inconsistency shall cease and Clause 63 may be passed by a simple majority of Parliament if Clause 63(2) is amended as proposed by the learned Deputy Solicitor General.

Clause 68

In terms of Clause 68(1), *"The Secretary to the Treasury may issue directives deemed as necessary for the purpose of implementing the provisions of this Act."* However, this Clause does not specify the persons to whom such directive may be issued and is therefore vague and inconsistent with Article 12(1). The learned Deputy Solicitor General

submitted that an amendment shall be moved at the Committee Stage of Parliament to Clause 68(1) by inserting the words, *'to the public entities and persons referred to in subsection 2 of Section 3'* after the word, 'issue', and that Clause 68(1) shall thereafter read as follows:

> *"The Secretary to the Treasury may issue to the public entities and persons referred to in subsection 2 of Section 3 directives deemed as necessary for the purpose of implementing the provisions of this Act."*

We are of the view that the said inconsistency shall cease and Clause 68 may be approved by the simple majority of Parliament if Clause 68 is amended as proposed by the learned Deputy Solicitor General.

Clause 69

Clause 69 provides as follows:

> *"(1) If any difficulty arises when implementing the provisions of this Act, or any regulation made thereunder, the Minister may, by Order published in the Gazette make such provisions not inconsistent with the provisions of this Act or any other written law, as appears to the Minister to be necessary or expedient for removing the difficulty.*
>
> *(2) Every Order made under this section shall be published in the Gazette and may be laid before Parliament not later than three months of the date of publication in the Gazette."*

Mr. Corea, PC submitted that in implementing the provisions of any Act of Parliament, difficulties may arise for a variety of reasons, and that in such an eventuality, the appropriate course of action would be to move the legislature to amend the statute as necessary to obviate such difficulties. He submitted that instead, permitting the Minister to make any Order circumventing such difficulties is likely to result in the Minister exercising legislative power over and above what is permissible in terms of Article 76 of the Constitution and has the likely potential effect of eroding Article 3 read with Article

4(a). He submitted further that Clause 69 does not contain adequate safeguards and can result in an arbitrary exercise of power. We are in agreement with the submission of Mr. Corea, PC and are of the view that Clause 69 is violative of Article 4(a) read together with Article 3 and Article 76 and hence, needs to be approved by the special majority of Parliament and by the People at a Referendum.

A similar clause but much wider in scope, was considered by this Court in its Determination on the **Sri Lanka Electricity Bill** [SC (SD) No. 42-53/2024] where it was held as follows:

> *"Quite apart from the strong propensity for the abuse of such provisions and hence the justification and the need for safeguards, its legality must be considered from the perspective of Articles 3, 4 and 76 of the Constitution. In terms of Article 3, sovereignty is in the People and is inalienable. Article 4 provides the manner in which the Sovereignty of the People shall be exercised and in Article 4(a) provides that the legislative power of the People shall be exercised by Parliament. In terms of Article 75, Parliament shall have power to make laws as stipulated therein.*
>
> *Thus, while delegated legislation is permissible in terms of Article 76, and while Parliament may empower the Minister to make subsidiary legislation, such power is subject to the limitation that the subsidiary legislation must be for a prescribed purpose, or in other words, the enabling law must prescribe the purpose for which subsidiary legislation can be made. We are of the view that Clause 48 does not contain a prescribed purpose within the contemplation of Article 76(3). The failure to prescribe the purpose leads to a situation beyond what is permissible under Article 76(3) and will result in the alienation of legislative power to the executive."*

The learned Deputy Solicitor General submitted that this Clause shall be deleted at the Committee Stage of Parliament.

Clause 71 – definition of State owned Enterprises

State Owned Enterprises play a critical role in the country's economy, and it is through such enterprises that key sectors in the Country, such as ports, power, water, banking and

insurance are managed. However, it is common knowledge that not all such State Owned Enterprises are profit making ventures. The Parliamentary Committee on Public Finance has time and again highlighted the serious irregularities that take place in such institutions, primarily with procurement and financial management.

It is in this background that Mr. Corea, PC drew our attention to a report titled, "The State of State Enterprises in Sri Lanka – 2019 (Systemic misgovernance: a discussion)" which contains the findings of a study into the activities of State Owned Enterprises in Sri Lanka carried out by a non-profit organisation registered under the Companies Act No. 7 of 2007.

The said report contains the following salient information about the status of State Owned Enterprises:

(a) There are 527 State Owned Enterprises but financial information is available only in respect of 10.4% of such State Owned Enterprises;

(b) The Ministry of Finance has classified 55 such State Owned Enterprises as strategically important, with the cumulative profit of such State Owned Enterprises for 2006 – 2017 being Rs. 964 billion while the cumulative losses for the said period being Rs. 795 billion;

(c) Weak governance has increased political and agency costs of state enterprises;

(d) Inefficiency is a common feature in all Sri Lankan State Owned Enterprises, across all organisational categories;

(e) Greater efficiency can only be expected through better governance and therefore a comprehensive system of corporate governance for state enterprises must be adopted.

The critical role performed by State Owned Enterprises and the need to improve its corporate governance structure and make such entities answerable to Parliament has received special mention in Part XII of the Bill comprising Clauses 55 – 61. These clauses

contain provisions including the procedure that should be followed in their incorporation, issuing corporate governance guidelines aimed at enhancing their performance and exercising financial oversight over such Enterprises. **Clause 57(2) also provides that it shall be the responsibility of the relevant Minister to ensure that the annual budget of State Owned Enterprises is in line with the fiscal strategy statement of the Government and that it reflects the risk factors and the strategies to mitigate those risks**. Towards achieving such objectives, Clause 58(1) empowers the Secretary to the Treasury to issue directives on policy matters for State Owned Enterprises covering accountability and governance requirements, review of their financial performance and any other matters including administration, budgeting, procurement, investment, finance and reporting, subject to relevant written laws. Thus, Part XII places significant importance on regulating State Owned Enterprises and ensuring that they fall in line with the public financial management framework of the Government.

When examining Part XII, it is clear that the Minister of Finance has significant power over these enterprises. According to Clause 57, other Ministers also can propose the establishment of State-Owned Enterprises. Clause 59(2) indicates that some of these enterprises are funded directly by the annual budget. In this backdrop, the submission of Mr. Corea PC that *"Despite being ultimately owned by citizens, State Owned Enterprises are managed by officials controlled by politicians"* is not an exaggeration.

While welcoming the provisions of Part XII, the learned Counsel for the Petitioners however submitted that in view of the definition of a State Owned Enterprise in Clause 71 set out below, the detailed provisions in Part XII and other provisions of the Bill will not apply to some State Owned Enterprises that play a critical role in the financial and insurance sector in this Country.

Clause 71 of the Bill defines a 'State Owned Enterprise' as follows:

"State-Owned Enterprise" means –

(a) a public corporation within the meaning of the Constitution;

(b) entities established and operated under the Companies Act, No.07 of 2007 in which the State has direct or indirect controlling interest by virtue of its shareholding; or

(c) State-Owned Corporations, converted in terms of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No.23 of 1987, or such other Acts in terms of which any business entity has been vested with the Government,

***with the exception of** the Central Bank of Sri Lanka and financial institutions including insurance and lending companies part or all of whose business is to lend or borrow."*

We must observe that in terms of Section 5(1) of the Central Bank Act, No. 16 of 2023, the Central Bank shall have administrative and financial autonomy. While Part XIV of the Act contains detailed provisions setting out the relationship that the Central Bank shall have with Parliament, the Government and the Public, Part XVI provides for the financial reporting framework of the Central Bank including the requirement to prepare the financial statement for each financial year and to present such statements before Parliament.

The exclusion of insurance, financial and lending institutions which are almost entirely owned by the Government effectively negates the extensive provisions that the Bill seeks to introduce in order to ensure better public financial management and corporate governance of State Owned Enterprises. The gravity of such exclusion becomes even more critical when one considers that the People's Bank has 11 subsidiaries, the Bank of Ceylon has 7 subsidiaries, the National Savings Bank has one and Sri Lanka Insurance Corporation, quite apart from having extensive shareholdings in multiple sectors has several subsidiaries including Lanka Hospitals Limited, Litro Gas Lanka Limited and Litro Gas Terminal Lanka (Pvt) Limited.

This exclusion has a significant impact on procurement carried out by such State Owned Enterprises and on Clause 17 which specifies that Government Guarantees, which in

terms of the Foreign Loans Act are given on behalf of Public Corporations and Public Enterprises as defined in such Act, shall not exceed 7.5% of the average gross domestic product of the relevant financial year and the preceding two years.

It is perhaps relevant to refer to Chapter 3 of the report titled *"Confronting corruption in sectors and functions"* published by the World Bank, where it emphasises that:

(a) *"State-owned enterprise corruption has gained prominence in recent years;*

(b) *Corruption is most rampant where State Owned Enterprises operate as monopolies or have exclusivity rights;*

(c) *Statutory loopholes and vagueness in legal and regulatory frameworks are an underlying theme to nearly all the risks."*

The exclusion is also significant when one considers the fact that Clause 70 of the Bill seeks to repeal Sections 8 and 14 of the Finance Act No. 38 of 1971, which contain detailed provisions relating to the preparation of its annual budget by State Owned Enterprises and the presentation of the annual accounts of such Enterprises to Parliament. Thus, in spite of Article 154 in terms of which the Auditor General shall audit *inter alia* all public corporations, business and other undertakings vested in the Government under any written law and companies registered or deemed to be registered under the Companies Act, No. 7 of 2007 in which the Government or a public corporation or local authority holds fifty per centum or more of the shares of that company, and the definition of 'auditee entity' in the National Audit Act, No. 23 of 2018, the exempted State Owned Enterprises shall not be directly responsible to Parliament. The result is the erosion of the control that Parliament has over such Enterprises in terms of Article 148.

We examined the Cabinet Memorandum dated 20th February 2024 to ascertain if the policy considerations for the above exclusion have been set out therein and/or have been considered by the Cabinet of Ministers. While Paragraph 3 of the said Memorandum refers to the salient features of the Bill and emphasises that the said features have been incorporated *'with a view to improving good governance practices of State Owned Enterprises.'*, the said Memorandum does not set out any basis for the said exclusion.

Although we requested the learned Deputy Solicitor General to provide us the rationale for the said exclusion or else to apprise this Court the laws that would govern such excepted Enterprises in respect of the matters set out in the Bill, no explanation or clarification on the object or purpose of this provision was provided.

In the above circumstances, we are of the view that there is no rational basis to exclude financial institutions including insurance and lending companies, part or all of whose business is to lend or borrow. Such an exclusion is arbitrary, defeats the objects of the Bill and is inconsistent with Article 12(1) and Article 148 of the Constitution. The definition of 'State Owned Enterprises' in Clause 71 shall therefore be passed with the special majority of Parliament. Such inconsistency shall however cease if the said definition is amended by deleting the words that appear after *'Central Bank of Sri Lanka'*.

Summary

(1) Clause 3(2)(b)(iv) and the definition of *'members of the judicial service'* are inconsistent with Article 4(c) read with Article 3, Article 12(1) and Article 108 and shall only be passed by the special majority of Parliament and be approved by the People at a Referendum. Such inconsistency shall however cease if, (a) the definition of *'members of the judicial service'* in Clause 71 is deleted, and (b) Clause 3(2)(b) is deleted and substituted with the following new sub-clause:

"officers and employees of public entities to whom a power or duty is conferred, delegated or assigned under this Act or any regulation made thereunder, including a Chief Accounting Officer, Accounting Officer or a competent authority referred to in Part VI of this Act."

(2) Clause 5(2)(f) is violative of Articles 12(1), 43(1) and 52(2) and hence, Clause 5(2)(f) shall only be passed with the special majority of Parliament. The said inconsistency shall however cease if Clause 5(2)(f) is amended to read as follows:

"subject to the approval of the Cabinet of Ministers, formulate policies and strategies for the effective management and overall supervision of State-Owned Enterprises".

(3) Clause 32(3) is violative of Article 3 and Article 12(1) of the Constitution and shall be passed by the special majority of Parliament and shall be approved by the People at a Referendum. The said inconsistency shall however cease if Clause 32(3) is amended to read as follows:

"The National Procurement Commission may, if it deems necessary, formulate and publish in the Gazette specific guidelines for State Owned Enterprises."

(4) Clause 32(4) is inconsistent with Articles 3, 12(1), 148 and 156C of the Constitution and shall only be passed by the special majority of Parliament and be approved by the People at a Referendum. The said inconsistency shall however cease if Clause 32(4) is amended to read as follows:

"The National Procurement Commission may, if it deems necessary, formulate and publish in the Gazette specific guidelines for Provincial Councils."

(5) Clause 34(2) is violative of Article 149 of the Constitution and shall only be passed with the special majority of Parliament. The said inconsistency shall however cease if Clause 34(2) is amended as follows:

"There shall be a treasury single account to maintain the revenue and expenditure of the Consolidated Fund which shall be an integrated system of bank accounts, into which all Government cash including moneys received by the public entities referred to in sub-paragraphs (i) and (ii) of paragraph (a) of subsection (2) of section 3 shall be deposited and from which expenditure of the Government and such public entities shall be made to enable public funds to be managed in a consolidated manner."

(6) Clause 38(3) is inconsistent with the provisions of Articles 12(1) and 148 of the Constitution and shall only be passed with the special majority of Parliament.

(7) Clause 39(1) is inconsistent with Article 12(1) and shall only be passed by the special majority of Parliament. The said inconsistency shall however cease if Clause 39(1) is amended to read as follows:

"The Secretary to the Treasury shall supervise, examine, and monitor all statutory funds and may issue directives on statutory funds in respect of which any other written law does not provide for such matters."

(8) Clause 63 is inconsistent with Article 4(c) read with Article 3, Article 12(1), Article 55(1), Article 55(3), Article 108, Article 111H(1)(b), Article 148, Article 153C, Article 155G(1) and Article 156F and of the Constitution, and shall be passed by the special majority of Parliament and shall be approved by the People at a Referendum. The said inconsistency shall however cease if Clause 63(2) is amended to read as follows:

"Subject to the provisions of the Constitution and the approval of the Cabinet of Ministers, the responsibilities of the Minister of Finance with regard to cadre management, shall include the determination of the salaries and wages and other payments, to the officers and other employees of public entities"

(9) Clause 68 is inconsistent with Article 12(1) of the Constitution and shall only be passed with the special majority of Parliament. The said inconsistency shall however cease if Clause 68(1) is amended to read as follows:

"The Secretary to the Treasury may issue to the public entities and persons referred to in subsection 2 of Section 3 directives deemed as necessary for the purpose of implementing the provisions of this Act."

(10) Clause 69 is violative of Article 4(a) read together with Articles 3 and 76 and hence, needs to be approved by the special majority of Parliament and by the People at a Referendum.

(11) The definition of 'State Owned Enterprise' is inconsistent with Article 12(1) and Article 148 of the Constitution and shall only be passed with the special majority of Parliament. Such inconsistency shall however cease if the said definition is amended to read as follows:

" 'State-Owned Enterprise' means –

(a) *a public corporation within the meaning of the Constitution;*

(b) *entities established and operated under the Companies Act, No.07 of 2007 in which the State has direct or indirect controlling interest by virtue of its shareholding; or*

(c) *State-Owned Corporations, converted in terms of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No.23 of 1987, or such other Acts in terms of which any business entity has been vested with the Government,*

with the exception of the Central Bank of Sri Lanka."

We place on record our appreciation of the assistance given by the learned Deputy Solicitor General who represented the Hon. Attorney General, the learned President's Counsel and the learned Counsel who appeared for the Petitioners.

JAYANTHA JAYASURIYA, PC
CHIEF JUSTICE

MAHINDA SAMAYAWARDHENA, J
JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J
JUDGE OF THE SUPREME COURT