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

"AYURVEDA (AMENDMENT) BILL"

S.C.S.D. No. 22/2023	**Petitioner:**	Dr. B. A. Rathnapala, Ropa Ayurvedic Hospital, No. 115/8, Kottawa Road, Mattegoda.
	Counsel:	Suren Gnanaraj with Pasan Weerasinghe, Rashmi Dias and Sakuni Weeraratne
S.C.S.D. No. 23/2023	**Petitioner:**	Alawattage Upali Chandrasiri, 9/E, Angamuwa Road, Arukwatta, Padukka.
	Counsel:	Petitioner in person
S.C.S.D. No. 24/2023	**Petitioner:**	Dodamgoda Kumara Gamage Manjula Chathuranga Kumara, "Gilana Upasthana Sevaya", No. 210, Wewalthalawa, Yatiyanthota.
	Counsel:	Amila Perera with Sanduni Poornima
S.C.S.D. No. 34/2023	**Petitioner:**	1. Sampath Kosala Sri Hewage, 169/1C, Panaluwa, Watareka, Padukka. 2. Hangili Gedara Tharanga Roshan Lakmal, No. 410, Beddagederamulla, Meegoda. 3. Walimunige Tharanga Siri Priyankara, No. 139, Horawela, Walasmulla. 4. Illandarige Vidhura Bashitha, No. 219/R, Anuragoda, Getakanda, Papiliyawala.

5. Mahapathunegi Asiri Pathum Perera, No. 815, Ganemulla Road, Thunpaliya, Jaela.

Counsel: Pulasthi Hewamanne with Harini Jayawardhana, Fadhila Fairoze and Githmi Wijenarayana

S.C.S.D. No. 35/2023

Petitioner:

1. 'Sri Lanka Swadeshiya Vaidya Sabawa', No. B 15/A, Wedagedara, Arakotawella, Dewanagala.
2. Samarasinghe Arachchilage Mayura Priyantha, 'Isiwara Sewana', Dhammemanana, Wembiyagoda, Kalawana.
3. Herath Rajapakse Mudiyanselage Saminda, No. B15A, Wedagedara, Arakotawella, Dewanagala.
4. Dediyawalage Neil Pushpakumara, No. 211/55, Old Kottawa Road, Mirihana, Nugegoda.
5. Wanasinghe Mudiyanselage Indrajeeva Sarath Kumara, 'Pulasthi Wedamedura', Agulgamuwa, Pansiyagama, Melsiripura.
6. Sandhareka Dilani Liyanamana, No. 62/17B, Old Kottawa Road, Mirihana, Nugegoda.

	Counsel:	Nilshantha Sirimanne with Deshara Goonetilleke
S.C. S. D. No. 52/23	**Petitioner:**	1. Dr. Kamal Weerapperuma, Ayurma Medical Office, Bogaha Junction, Kiribban Ara, Sevanagala. 2. Dr. Washington Galhenage Nanayakkara, No. 160, Delgahawatta Road, New Town, Mulleriyawa.
	Counsel:	Aruna Laksiri Unawatuna
S.C. S. D. No. 55/23	**Petitioner:**	Hewa Amarathunga Parakrama Vijaya Nayaga Amarathunga, No. 1, Aluth Mawatha, Siddamula, Piliyandala.
	Counsel:	Canishka G. Vitharana
S.C. S. D. No. 57/23	**Petitioner:**	Y. D. Umesh Isuru Dissanayaka, No. 118/B, Nadurana Road, Dandeniya, Eheliyagoda.
	Counsel:	K. G. Nissanka with T. Padmasiri and R. Dabare
Respondents	1.	Hon. Attorney General, Attorney General's Department, Colombo 12.
(In S.C. S. D. No. 35/23)	2.	Keheliya Rambukwella, MP, Hon. Minister of Health, Ministry of Health, 'Suwasiripaya', No. 385, Rev. Badeegama Wamalawansa Thero Mawatha, Colombo 10.

Counsel for the State	Viveka Siriwardena, PC, ASG with Nayomi Kahawita, SSC, Medhaka Fernando, SC and Ishara Madarasinghe, SC

BEFORE:	**S. Thurairaja, PC**	Judge of the Supreme Court
	Yasantha Kodagoda, PC	Judge of the Supreme Court
	Janak De Silva	Judge of the Supreme Court

The Court assembled for hearings at 10.00 a.m. on 24th, 25th, 26th and 27th of July 2023.

A Bill in its short title referred to as the "Ayurveda (Amendment) Bill" [Bill] was published in the Government Gazette of 9th June 2023. It was placed on the Order Paper of Parliament on 5th July 2023.

Eight petitions bearing Nos. S.C.S.D. 22/2023, S.C.S.D. 23/2023, S.C.S.D. 24/2023, S.C.S.D. 34/2023, S.C.S.D. 35/2023, S.C.S.D. 52/2023, S.C.S.D. 55/2023 and S.C.S.D. 57/2023 were filed, challenging the constitutionality of the Bill. In addition, a Petitioner also filed papers seeking to intervene in S.C.S.D. 22/2023 in support of the Bill.

Upon receipt of the said petitions, the Registrar of this Court issued notice on the Hon. Attorney General as required by Article 134(1) of the Constitution. The Petitioners, Intervenient Petitioner and the Hon. Attorney-General were extensively heard.

Preliminary Objection

There was one preliminary objection raised by the learned ASG to S.C.S.D. 57/2023. It was submitted that the Petitioner had not properly invoked the jurisdiction of the Court in terms of Article 121 (1) of the Constitution which reads:

> *"(1) The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such* ***petition shall be filed, within fourteen days 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."* (Emphasis added)

It was contended that the Petitioner had failed to duly deliver a copy of the petition to the Speaker.

The impugned Bill was placed on the Order Paper of Parliament on 5th July 2023. Therefore, the petition should have been filed in the Supreme Court and a copy of it should have been delivered to the Speaker on or before 19th July 2023. There was no contest regarding compliance with the first part of this requirement. As regards the second part, the Secretary General of Parliament has confirmed in writing to the Attorney General by letter dated 20th July 2023 that the petition in S.C.S.D. 57/2023 was received in the Office of the Speaker of Parliament at 11.10 a.m. on 20th July 2023. In the circumstances, learned ASG submitted that the Petitioner had failed to submit to the Speaker a copy of the petition within the timeframe provided in Article 121(1).

The learned Counsel for the Petitioner contended that he had sent a copy of the petition to the Speaker by registered post on 19th July 2023. The registered postal article indicates that it has been posted at 3 p.m. on that day. It was submitted by learned counsel for the Petitioner that this satisfies the requirement of "delivery".

We are of the view that the Petitioner has failed to comply with the mandatory provision of the Constitution in failing to deliver a copy to the Speaker as required by Article 121(1). The purpose of such requirement is reflected in Article 121(2) of the Constitution, which requires the proceedings of Parliament in regard to such a Bill be suspended for a period of three weeks when the jurisdiction of Court is invoked as provided in Article 121(1) of the Constitution. The notice on the Speaker facilitates the legislature to take cognizance that a citizen has challenged a Bill and, therefore, to await the Determination of the Supreme Court on the constitutionality of the Bill. Hence *delivery* means, in fact, delivering a copy of the petition on the Speaker. The term "delivery" denotes receipt by the intended recipient as opposed to the meaning of the term "dispatch". Merely dispatching it by registered post or other mode does not satisfy the requirement in Article 121(1) of the Constitution.

This view has been adopted by Court in ***Sri Lanka Telecommunications Bill*** **[Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, p. 21]**, ***Divineguma Bill*** **[Decisions of the Supreme Court on Parliamentary Bills, (2010-2012) Vol. X, p. 69]**, ***Homeopathy Bill*** **[Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, p. 51]** and ***Poisons, Opium and Dangerous Drugs (Amendment) Bill*** **(S.C.S.D. 53/2022)**.

We see no reason to differ from the reasons enumerated therein. For the foregoing reasons, we uphold the objection raised by the learned ASG and dismiss the petition in S.C.S.D. 57/2023.

Jurisdiction of Court

This Court is exercising the jurisdiction vested in it in terms of Article 120 of the Constitution which reads:

> **"***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…"***

The scope of our jurisdiction is dealt with in Article 123(1) of the Constitution which requires the determination of the Court to 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. When a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is required to make are specified in Article 123(2) which reads:

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

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

Therefore, the jurisdiction of the Supreme Court is limited to determining whether the ***Bill or any provision thereof is inconsistent with the Constitution***. Court does not have jurisdiction to determine the constitutionality of any proposed Committee Stage Amendments without determining whether the ***Bill or any provision thereof is inconsistent with the Constitution***. Where the Court so determines and in *specifying the nature of the amendments which would make the Bill or such provision cease to be inconsistent,* it is possible for the Court to consider any changes proposed by the Hon. Attorney General or any party to the proceedings. Further, notwithstanding proposals which the Attorney General submits to this Court as being proposed amendments to be introduced during the Committee Stage in Parliament, this Court must determine the constitutionality of the respective clauses of the Bill which has been gazetted.

Particularly in view of certain submissions that were made by learned counsel for some of the petitioners, it is necessary to repeat what has been stated in several previous determinations, that is, the Supreme Court does not have jurisdiction to comment upon the suitability or desirability of underlying policy based upon which the Bill has been developed. The jurisdiction of this Court is restricted to the consideration of the constitutional implications of the Bill as a whole or clauses thereof. Moreover, Articles 16 and 80(3) do not enable Court to call into question any existing provisions of the law. Therefore, it would not be within our remit to redress possible constitutional inconsistencies that may exist in existing law which is sought to be addressed by the Bill.

Outline of the Bill

The Bill seeks to amend several provisions in the Ayurveda Act No. 31 of 1961 as amended (Main Act). The provisions which have evoked objections are as follows:

1. Clauses 2, 3, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40 and 41 of the Bill use the terms *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙසජ්ජක) and *Bhaisajjaka* (භෙසජ්ජක).
2. Clause 10 of the Bill seeks to amend Section 10 of the Main Act by introducing *'herbal cultivation'*.
3. Clause 11 of the Bill is sought to be amended to increase the membership of the Ayurveda Medical Council from 18 to 25.
4. Clause 13 of the Bill seeks to amend Section 13 of the Main Act. The said Clause has the effect of, *inter alia*, repealing subsections (c), (d), (e), (f), and (g) of Section 13(1) of the Main Act.
5. Clause 24 of the Bill amends, *inter alia*, Section 51(1)(a) of the Main Act and requires the Ayurveda Medical Council to maintain an additional register, i.e., a 'Consultant Physician register'.
6. Clause 25 of the Bill amends Section 52 of the Main Act and seeks to regulate the registration of such consultants.
7. Clause 46 of the Bill seeks to amend Section 89 of the Main Act setting out the interpretation of defined terms. Clause 46(1) seeks to amend the definition of *Ayurveda* to bring '*Yoga'* within its ambit.

Article 9

The Petitioners in S.C.S.D. 23/2023, 24/2023 and 35/2023 contended that the provisions of the Bill as a whole are inconsistent with Article 9 of the Constitution which seeks to give *Buddhism* the foremost place and imposes a duty on the State to protect and foster the *Buddha Sasana*. This contention was based on the use of the words *Ayurveda Bhaisajjaka* (ආයුර්වේද ෛභෂජ්ජක) and *Bhaisajjaka* (ෛභෂජ්ජක) in multiple clauses of the Bill. We have given careful consideration to the submissions made in that regard.

By way of introduction to Article 9 of the Constitution, we wish to observe that, it is pertinent to note that certain religions have received Constitutional recognition in many countries around the world, and in some such Constitutions, a certain degree of preferential recognition and or treatment has been accorded to certain religions. By some estimates, approximately 40 per cent of all Constitutions explicitly recognises a particular religion and confers on the State a Constitutional duty to recognise, protect and foster such religion, while also constitutionally guaranteeing general religious rights. As much as half of the world's population live under constitutional arrangements of this sort. [See Benjamin Schonthal, *Securing the Sasana through Law: Buddhist constitutionalism and Buddhist-interest litigation in Sri Lanka*, Modern Asian Studies, Cambridge University Press, 2006, p. 1966 at 1969].

Buddhism has received the constitutional status in many south and southeastern states as well. Article 361 of the Constitution of Myanmar acknowledges 'the special position of Buddhism as the faith professed by the great majority of the citizens'. Articles 43 and 68 of the 2008 Constitution of Cambodia professes Buddhism to be 'the state religion' and requires the state to 'disseminate and develop the Pali schools and Buddhist institutes' and further recognises the rights to freedom of worship and belief. The 2017 Constitution of Thailand by Section 7 requires that the head of State, the King, to be a Buddhist and Upholder of religions. Section 67 provides that the State should support and protect

Buddhism and other religions. In supporting and protecting Buddhism, which is the religion observed by the majority of Thai people for a long period of time, the State should promote and support education and dissemination of dharmic principles of Theravada Buddhism for the development of the mind and the development of wisdom, and shall have measures and mechanisms to prevent Buddhism from being undermined in any form. The State should also encourage Buddhists to participate in implementing such measures or mechanisms.

Article 3 of the Constitution of Bhutan states that Buddhism is the spiritual heritage of Bhutan, which promotes the principles and values of peace, non-violence, compassion and tolerance. Article 9 therein states that the State shall strive to create conditions that will enable the true and sustainable development of a good and compassionate society rooted in Buddhist ethos and universal human values.

Reference to religion in the Constitution and the according to special or preferential status to a particular religion is not confined to the Constitutions of Asian countries. According to the constitutional norms of the United Kingdom, the Church of England and the Church of Scotland have been vested with special recognition respectively in England and Wales and in Scotland through its relationship with the State. The monarch of the United Kingdom is the head (also referred to as the 'Supreme Governor') of the Church of England and the Church has statutory representation in the House of Lords.

Catholicism is given constitutional status in many countries. Article 2 of the Constitution of Argentina states that the Federal Government supports the Roman Catholic Apostolic religion. The Constitution of Norway declares that the Church of Norway, an Evangelical-Lutheran church, will remain the Established Church of Norway and will as such be supported by the State. Section 4 in Part I of the Danish Constitution recognises that the Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State. The role of Christianity in preserving nationhood is

acknowledged in the preamble of the Hungarian Constitution. Section 2 of the Constitution of Malta declares that the religion of Malta is the Roman Catholic Apostolic Religion. Similarly, Article 9 of the Constitution of Monaco states that the Catholic, Apostolic and Roman religion is the religion of the State.

Similarly, Islam has been recognised as the State religion by Article 2 of the Constitution of Egypt. Article 1 of the Tunisian Constitution declares Islam as the religion of the country. The Constitution of Malaysia in Article 3 declares that Islam is the religion of the Federation. The Constitution of Pakistan states that all laws are to conform with the injunctions of Islam as laid down in the Quran and Sunnah. Many middle eastern countries also accord preferential legal placement to Islam.

The constitutional justification for granting special status and a preeminent duty on the state to protect a particular religion appears to be founded upon the origins and historical evolution of such religions in those countries and the faith of the disciples of such primary religion being inextricably interwoven with the evolution of the culture, societal norms, and the civilization.

Whether the provisions of Constitutions which confers special recognition and preferential placement to certain religions cause such States to be non-secular is debatable and is to be determined necessarily on a case-by-case basis. A deep study of each Constitution and other applicable laws must be undertaken to arrive at a determination on such a matter. However, it is pertinent to note that by preferential recognition being accorded to one religion alone, a constitution does not necessarily become non-secular, as constitutional recognition has been accorded to other religions and rights-based protection vested in disciples of such other religions and the State has been separated in its functions and powers with the primary religion.

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

As with regard to the interpretation of any Article in the Constitution, Article 9 also cannot and should not be viewed in isolation. Doing so, would not give rise to the true meaning and implications of the Article. Particularly given the multi-ethnic and multi-religious character of the People of Sri Lanka, fundamental human rights of the People including, in particular, the right to equality guaranteed by Article 12, it is necessary that all people of the country and the different communities enjoy an absolute and unconditional parity of status, independent of the language, religion, culture and other factors that may differentiate them. From the perspective of religion, this parity of status is protected and guaranteed by Article 10 which provides that *"Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice."*, Article 12(1) - *"All persons are equal before the law and are entitled to the equal protection of the law."*, Article 12(2) – *"No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds."*, Article 12(3) – *"No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion."*, Article 14(1)(a), (b) and (c) - *"Every citizen is entitled to – the freedom of speech and expression including publication; the freedom of peaceful assembly; and the freedom of association."*, and Article 14(1)(e) – *"Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching."*.

Therefore, Article 9 of the Constitution should be read and understood side-by-side the afore-stated Articles of the Constitution. All people of Sri Lanka must be able to enjoy the full benefits of Articles 9, 10, 12 and 14 of the Constitution, independent of their religion, faith and beliefs. The application of one Article cannot in any way infringe the rights of the people of this country recognised by the Constitution or restrict any person from enjoying the full benefits of the other Articles referred to above. No interpretation of these Articles of the Constitution which adversely affects enjoying the pride of being an equal citizen of this country, the dignity of being born a Sri Lankan, equality, parity of status of all People of Sri Lanka, and the peaceful coexistence between the different communities, can be accepted.

In view of the above constitutional provisions, there cannot be any debate on whether Sri Lanka is a secular State. In fact, this position has been accepted in a number of decisions.

In ***Azhar Ghouse v. Mohamed Ghouse and Others*** **[(1986) 1 Sri. L. R. 48 at 55]** the secular nature of the State was acknowledged.

In ***Ashik v. Bandula and Others (noise pollution case)*** **[(2007) 1 Sri. L. R. 191 at 196 - 197]** S.N. Silva C.J. held:

> "*This, in our view puts the matter back to square one. It has to be firmly borne in mind that* ***Sri Lanka is a secular State****. In terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race religion language and the like.*" (Emphasis added)

Moreover, as held by Thilakawardane J. in ***Nineteenth Amendment to the Constitution Bill*** **(2004) [Decisions of the Supreme Court on Parliamentary Bills (2004-2006), Volume VIII, 58 at page 65]**:

> *"The essence of being a secular State, as Sri Lanka is the recognition and preservation of the different types of people, with diverse language and different belief, and placing them together so as to form a whole and united nation.*
>
> *[…]*
>
> *A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one, which aims at equality with respect to the enjoyment of fundamental freedoms, and such freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person."*

This was quoted with approval in ***Penal Code (Amendment) Bill*** **[S.C.S.D. 13/2023]**.

The Petitioner in S.C.S.D. 23/2023 appeared in person. It was his contention that the Bill as a whole is inconsistent with Articles 3, 9 and 10 of the Constitution.

Mr. Amila Perera appearing for the Petitioner in S.C.S.D. 24/2023 formulated a similar argument, but in a more detailed and coherent manner supported by supplementary submissions made in that regard by Mr. Pulasthi Hewamanna for the Petitioner in S.C.S.D. 34/2023 and Mr. Nilshantha Sirimanna appearing for the Petitioner in S.C.S.D. 35/2023. They contended that the use of the terms *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙෂජ්ජක) and *Bhaisajjaka* (භෙෂජ්ජක) in the Bill violated Article 9 of the Constitution. It was submitted that the use of these terms in the Bill denotes an attempt by the State to derogate itself from its constitutional duty to protect and foster the *Buddha Sasana* and the use of those terms in the Bill was an insult to *Buddhism* and the *Buddha Sasana* and infringed the rights of the Sangha and the disciples of Lord Buddha.

In a refreshing and thought-provoking submission reflecting an in-depth study of the subject, Mr. Amila Perera submitted that "හෙසජ්ජක" is a colloquial term identifying certain individuals who practice the teachings of Lord Buddha contained in the chapter *Bhesajjakkhandhakaya* (භේසජ්ජක්ඛන්ධකය) of Mahawaggapaliya (මහාවග්ගපාළිය) in the Vinaya Piṭaka (විනය පිටකය) which is the first of the three divisions of the definitive canonical collection of scriptures of Theravada Buddhism.

Mr. Perera contended that the accepted dictionaries relating to Indo-Aryan languages do not contain the word "හෙසජ්ජක" since the said word is merely a colloquial term used to identify Buddhists who are actively practicing the teachings of *Bhesajjakkhandhakaya* (භේසජ්ජක්ඛන්ධකය) in Vinaya Piṭakaya. However, the word "භේසජ්ජ" or "හෙෂජ්‍ය" (as opposed to හෙසජ්ජක) can be traced to old forms of Indo-Aryan languages (such as Sanskrit and Pali). He submitted that these terms referred to a set of Buddhist religious principles pertaining to preventive and curative health care and medicine, which were essentially components of Buddhist doctrines.

The attention of the Court was drawn to the use of those terms in different languages and the context in which they are used in the Bill, and it was submitted that:

(a) compelling (though not necessarily) individuals following and practicing the teachings of *Bhesajjakkhandhakaya* "හෙසජ්ජක්ඛන්ධකය" in Vinaya Piṭaka (widely recognised in Buddhist culture as "හෙසජ්ජකයන්" and/or "ආයුර්වේද හෙසජ්ජකයන්") to register under the Ayurveda Act or regulate them under the Ayurveda Act is in violation of the Constitutional Rights under Articles 9, 10, 12(1), 14(1)(e), and 14(1)(g) [*vide* clause 2 etc.];

(b) the creation of bodies to regulate *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙසජ්ජක) without suitably qualified members to regulate *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙසජ්ජක) violates Articles 9, 10, 12(1), 14(1)(e) of the Constitution [*vide* clause 11];

(c) the establishment and/or creation of bodies to regulate education concerning *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙසජ්ජක) without members suitable to regulate *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙසජ්ජක) violates Articles 9, 10, 12(1), 14(1)(e) of the Constitution [*vide* clause 16 / clause 20];

(d) granting of power to regulate traditional Buddhist teaching methods (e.g. Pirivena) to persons who are not suitably qualified to do so (vis-à-vis Sangha community and Mahanayakas) is in violation of Articles 9, 10, 12(1), 14(1)(e) of the Constitution [*vide* clause 16 / clause 20];

(e) directing members of the Council who are not required to possess sufficient knowledge on Vinaya Piṭaka to decide on matters that should reasonably and otherwise be decided by the leaders of the Buddhist Community or Sangha violates Articles 9, 10, 12(1), 14(1)(e) of the Constitution [*vide* clause 29];

(f) restricting the ability of Buddhist devotees to follow *Bhesajjakkhandhakaya* (භෙසජ්ජක්ඛන්ධකය) in Vinaya Piṭaka by imposing various fetters and/or limitations is in violation of Articles 9, 10, 12(1), 14(1)(e) of the Constitution [*vide* clauses 30, 31, 32].

(g) requiring individuals who wish to follow the teachings of Lord Buddha (more specifically those in *Bhesajjakkhandhakaya* "භෙසජ්ජක්ඛන්ධකය" in Vinaya Piṭaka) to pay a prescribed fee determined by the Council is in violation of Articles 9, 10, 12(1), 14(1)(e) of the Constitution [*vide* clause 33];

(h) imposing/permitting to impose financial restrictions on following of teachings of Lord Buddha is in violation of Articles 9, 10, 12(1), 14(1)(e) of the Constitution [*vide* clause 35];

(i) restricting Buddhist devotees' rights to follow teachings under *Bhesajjakkhandhakaya* (භෙසජ්ජක්ඛන්ධකය) in Vinaya Piṭaka is contrary to Articles 9, 10, 12(1), 14(1)(e) of the Constitution [*vide* clauses 39, 41];

In examining these contentions, we are called upon to interpret the scope of Article 9 of the Constitution. In particular, we must ascertain what is meant by the statement "*The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana...*".

In this interpretative process, it is useful and indeed necessary to examine the historical development of Article 9 of the Constitution and in particular the historical status given to Buddhism in Sri Lanka. A divisional bench of 7 judges of this Court acknowledged in ***Attorney-General and Others v. Sumathipala*** **[(2006) 2 Sri.L.R. 126 at 132]** that it is well-settled law that the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation.

Historical chronicles establish that Buddhism was recognised as the state religion from the day of its introduction into the island during the reign of King Devānampiya-Tissa. He requested Arahat Mahinda to establish the sīmā so as to include the city in order that the King could live "within the Buddha's command" (Mahawansha xv, 182-183). According to Venerable Dr. Walpola Rahula, *History of Buddhism in Ceylon*, *The Anuradhapura period 3rd Century BC – 10th Century AC*, Buddhist Cultural Centre, (2014) 4th Ed., page 62, from that day in the third century B.C. to the end of the Sinhalese rule in the 19th century A.C., only a Buddhist had the legitimate right to be King of Ceylon. The author goes on to enumerate several historical facts in support of his thesis. The constitutional position of

Buddhism was so strong that to act against the *Sāsana* was regarded as high treason (supra. 71).

The King was considered to be the secular head of Buddhism who protected the *Sāsana* (supra. 66). One of his primary duties was to look after the well-being of the *Sāsana* (supra. 67). In fact, the *Sāsana* constituted a fully-fledged state department. The King was the principal lay disciple of the *Buddha Sasana*. Safeguarding the purity and well-being of the *Sāsana* and maintaining the Sangha and monasteries were primary duties incumbent mainly on the State, although private individuals and the public collectively established and maintained arāmās on a smaller scale (supra. 72). Often Kings engaged in the "purification of the *Sāsana*" whenever they found it to be disorganised or corrupt. It was the duty of the State to suppress, by law or expulsion, undesirable heretical elements that stained the purity of the *Sāsana* (supra. 67).

This historical place accorded to *Buddhism* in Sri Lanka was recognised by the high contracting parties in Article 5 of the Kandyan Convention (1815 A.C.) which resulted in the ceding of the Kandyan kingdom and the British colonizers gaining colonial dominance over the entire island of Ceylon (as Sri Lanka was called then) and the ensuing suppression of the sovereignty and power of the King of the Kandyan kingdom and the monarch of England gaining sovereignty over the entire island of Ceylon.

Article 5 of the Kandyan Convention reads:

> *"5. The religion of Boodho, professed by the chiefs and inhabitants of these provinces, is declared inviolable, and its rites, ministers, and places of worship are to be maintained and protected."*
>
> (Source: The Legislative Enactments of Ceylon, 1956 Revised Edition, Vol. XI, page 877)

The challenges of the implementation of this obligation are succinctly set out by Seneviratne J. in ***Rev. Pallegama Gnanarathana v. Rev. Galkiriyagama Soratha*** **[(1988) 1 Sri.L.R. 99 at 136]** as follows:

> *"The Constitutional result of this convention was that the Sovereign of England, a Christian took over the obligations of the Kandyan King in respect of the Buddha Sasana. The Dalada Maligawa was placed in the custody of an agent of the Government; and the appointments and dismissals of monks and the control of domestic matters of the Buddhist temples was vested in the Governor. "The principal Bhikkus were appointed by the Governor as were the Basnayake Nilames and some Kapuralas to principal Devalas". (Ceylon Historical Journal - Volume X - Buddhism under the British in Ceylon (1840-1855) Dr. K. M. de Silva). There was opposition by the Christian clergy to a Christian monarch - a Christian Government - concerning itself with the internal affairs of the Buddha Sasana which they considered as an "idolatrous and immoral faith". The leader of this movement was Jingoist Wesleyan clergyman Rev. Spence Hardy. Dr. K. M. de Silva in the article referred to above states as follows: "In 1839 Rev. Spence - Hardy a Wesleyan Missionary issued a pamphlet calling upon the Government to sever its connection with Buddhism. This connection of the British Government with Buddhism was described as between a Christian Government and a idolatrous religious system". As a result of this agitation the British Government in the United Kingdom considered the effect of the said Clause 5 of the Kandyan Convention and gave it various interpretations. Due to this agitation the British Government in Ceylon sought to pass the Ordinance No. 2 of 1846 the preamble to which was as follows: - "Whereas it is expedient for the British to relinquish the charge of the Dalada or tooth, of Budhu, and to withdraw from the direct interference in the appointment of the priests and chiefs of Vihares and Dewalas, and to enable the professors of the Buddhist religion to provide for the commandment of their Vihares and Dewales*

and of the revenue appertaining thereto." This was the first attempt to overcome the effect of Clause 5 of the Kandyan Convention, but the then Queen of England Queen Victoria refused to assent to this legislation. Further representations continued from the Christian community in the Island taking offence that a Christian King was concerned with the appointments of priests for Buddhist temples. The result of these memorials and petitions addressed to Her Majesty was a Despatch dated 4.12.1852 by Sir John Pakington Her Majesty's Secretary of State for Colonies. This Despatch which is a landmark in the history of Buddhism under British Rule had as its object to put an end to the previously existing practice of appointments made by the British Government to the officers of the Buddhist Chief Priesthood and other temples and Dewales. The Despatch directed that the elective bodies consisting of the monks and any other officers, Chiefs should elect or nominate persons for office and submit the same to the Governor for approbation, upon which the Governor will issue his diploma or/recognition of appointment. After this Despatch the practice of appointments by the Governor ceased in respect of such appointments and the Governor continued to issue what was described as the "diploma of appointment" - or the "recognition of appointment". By this Despatch the Governor was authorised to issue "an instrument, which while avoiding altogether the form of an appointment, productive as it is of false notions, should simply profess to be a recognition by government of the title of the party". (G. W. Wood House - The Ceylon Antiquary - Volume 111, Part III, 1918).”

Nevertheless, when Ceylon gained independence from the British Empire, the Soulbury Constitution did not accord to *Buddhism* any special constitutional status.

In the run-up to the General Elections of 1970, the election manifesto of the United Front contained the following commitment:

> *"Buddhism, the religion of the majority of the people, will be ensured its rightful place. The adherents of all faiths will be guaranteed freedom of religious worship and the right to practice their religion."*
>
> (Source: Benjamin Schonthal and Asanga Welikala, Buddhism and the regulation of religion in the new constitution: Past debates, present challenges, and future options, CPA Working Papers on Constitutional Reform, No. 3, July 2016, page 9)

When drafting of the 1972 Constitution (the first Republican Constitution of Sri Lanka) commenced in the Constituent Assembly, the Minister of Constitutional Affairs, presented several Draft Basic Resolutions to the Steering and Subjects Committee. Draft Basic Resolution 3 reads:

> *"In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be given its rightful place, and accordingly, it shall be the duty of the State to protect and foster Buddhism, while assuring to all religions the rights granted by Basic Resolution 5 (iv)."*
>
> (Source: Some Comments on the Constituent Assembly and The Draft Basic Resolutions, S. Nadesan, Lake House Printers & Publishers Ltd. (1971), page 121)

Basic Resolution 5(iv) dealt with the right of every citizen to enjoy the freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

However, it is observed that there has been a slight change when Section 6 of the 1972 Republican Constitution was enacted. The term *'rightful place'* has been replaced by *'foremost place'*.

Hence, Section 6 of the 1972 Constitution reads:

> *"The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18(1)(d)."*

Consequently, it is necessary to recognise that the status granted to Buddhism in the 1972 Constitution is rooted in the mandate theory.

In The matter of an application by Rev. Sumana Thero to be admitted and enrolled as an Attorney-at-Law **[(2005) 3 Sri.L.R. 365 at 396]**, Wanasundera J. sought to explain this constitutional transformation and the purpose of section 6 of the 1972 Constitution as follows:

> "*This provision has had a noble and ancient ancestry. For over two thousand years the State in this country had undertaken the protection of Buddhism, which was at that time the State religion. It was so even in times of foreign domination and when alien rulers occupied the throne. At the time the Kandyan Kingdom was ceded to the British, the Chiefs and the High Priest insisted that a clause guaranteeing protection of the religion of the Buddha be embodied in it. But a foreign Government, with an established Church and Missionary activities found its Treaty Commitments in conflict with its colonial policy and Christian ideals. Thus, this clause in the Convention was quietly ignored during this period, though it remained on our statutes book, virtually a dead letter, till the present provision superseded it in 1972. The protection of Buddhism, whether by the courts or other instrumentalities of the Government, during that period was minimal and therefore*

those who point to the absence of any cases or precedent on this matter have merely searched for something which was not there to be found. This present provision in our Constitution may well be said to embody the aspirations of the great Buddhist majority of this country, who, after we regained independence, once again wanted this guarantee written into the Constitution so that the state and the people could re-dedicate themselves to it."

The Report of the Select Committee of the National State Assembly appointed to consider the revision of the 1972 Constitution (Parliamentary Series No. 14 at page 146) read as follows:

"12. Buddhism: the draft Constitution preserves unchanged the preeminent position accorded to Buddhism in the 1972 Constitution (Article 9). However, this position is now made inviolable in that there can be no change in regard to the place accorded to Buddhism except with the express consent of the People (Article 82)."

Article 9 of the Draft Constitution annexed to the said Report reads as follows:

"9. The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism, while assuring to all religions the rights granted by Articles 10 and 14(d)."

Hence, the duty to protect *Buddhism*, as included in the 1972 Constitution was proposed to be adopted under the revised constitution. Nevertheless, following the 1978 General Elections, it is observed that this was changed in the Bill to repeal and replace the 1972 Constitution presented by the Prime Minister and Minister of Local Government, Housing and Construction on July 15, 1978 and published in the Gazette on July 17, 1978. There, the word *Buddha Sasana* was substituted for *Buddhism* when it was sought to explain the

duty of the State. Thus, the 1978 Constitution (the present Constitution) as enacted reads as follows:

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

In Re Thirteenth Amendment to the Constitution and the Provincial Councils Bill **[(1987) 2 Sri.L.R. 312 at 364]**, Wanasundera J. in his dissenting judgment sought to define what is meant by the term *Buddha Sasana* as follows:

> *"The new expression is a compendious term encompassing all ancient, historic and sacred objects and places which have from ancient times been or are associated with the religious practices and worship of Sinhala Buddhists."*

This interpretation was adopted in the ***Antiquities (Amendment) Bill*** **[Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, p. 53 at 57]**, where it was held that *the expression Buddha Sasana is wider than Buddhism and includes the entire establishment together with objects and places of religious practices and worship of Buddhists*.

Benjamin Schonthal (supra. pages 1991-1992) in analysing the change of word *"Buddhism"* to "*Buddha Sasana"* states:

> *"Choosing 'Buddha Sasana' rather than Buddhism (Sinhala: buddhāgama) highlighted the distinctiveness of the Buddha's dispensation; everything else was simply 'religion'. Choosing 'Buddha Sasana' also supported those who favoured a territorialized definition of Buddhism because buddha sasanāya implicated not only*

the Buddha's teachings but his entire legacy, which included properties, shrines, statutes, temples, other material objects, and geographic spaces."

We must proceed to interpret Article 9 of the Constitution on the basis that this change was intentional on the part of the legislature. It was meant to cover an area wider than the word *Buddhism*. While retaining the word *Buddhism* to denote the religion to which foremost place has been accorded in the Republic, the word *Buddha Sasana* was used to impose a duty on the State to protect and foster the entire establishment of *Buddhism*.

We hold that *Buddha Sasana* in Article 9 of the Constitution ***includes*** the Dhamma (principles and teachings of Buddhism including in particular recognized and undisputed codifications of the teachings of Lord Buddha), the Sangha (ordained disciples of Buddha), the preachings, rituals, and practices recognised by *Buddhism*, codifications of the teachings of Lord Buddha and associated preachings, the institutional mechanisms such as Piriven, Temples, and Sanghadhikarana, and organisational mechanisms and structures such as Nikaya, and other systems such as ordainment to priesthood and Upasampada, positions such as Viharadhipathi and Viharaadhikari, Buddhist lay organisations such as Dayaka Sabha of Temples, and the property of the sasana such as Sangika Depala, all of which are collectively called the *Buddha Sasana* which are in place in *Buddhism* to preach, practice, retain, maintain, promote, foster and protect that Buddhism. In fact, it is necessary to observe that *Buddhism* and the *Buddha Sasana* are interdependent and inextricably interwoven.

We, therefore, determine that the word *"Buddha Sasana"* in Article 9 is a compendious term and ***includes*** the entire establishment of Buddhism as defined above. Thus, we conclude that the Thripiṭaka consisting of the Vinaya Piṭaka, Sutta Piṭaka and Abhidamma Piṭaka falls within the word *"Buddha Sasana"*. Hence, the State has a duty, *inter alia,* to protect and foster the Thripiṭaka.

Wanasundera J. ***In The matter of an application by Rev. Sumana Thero to be admitted and enrolled as an Attorney-at-Law*** **(supra. page 403)** sought to give meaning to the words *"protect"* and *"foster"* in section 6 of the 1972 Constitution as follows:

> *"The next matter that arises for consideration is the extent of the protection afforded by section 6. The operative words are "protect" and "foster". They are ordinary words understood by everybody. "Protect" means keep safe, defend, guard against damages or injury. "Foster" means promote growth or, encourage tend. For the purpose of interpreting the provisions of section 6, it would be sufficient if I were to regard the year 1972 as the material date this being the date of the introduction of that provision. When it is said that Buddhism should be protected, does this envisage a restoration of the religion to its original purity or merely its preservation from further degeneracy and depredation? The issue becomes further complicated by the fact that, as stated earlier, it is still possible to see in this country the Dhamma Vinaya in its pure form, not only preserved as theory or text but also in practice as living example. Side by side with this, we also see in certain quarters the spectacle of a departure from those high ideals where laxity and degeneracy prevail. Let me again, for the present purpose, take as it were the lowest common denominator, namely the present state of the religion and the general standards now prevailing among the majority of the Buddhists. I find that it is unnecessary to express a wider opinion, since this case can be resolved on that basis. There is another way of looking at the same matter. One may pose the question whether the provisions of section 6 should be regarded as a sword or as a shield. That is to say, should section 6 be applied in a positive sense so as to undo even earlier transgressions and transactions, or only negatively in a defensive way, to prevent and ward off threatened dangers. Following what I have said earlier, let me again assume that* ***we are concerned with prospective transgressions and the duty of preventing them****.* ***Even transactions, if any, between 1972 and today are***

not before us for determination and in any case if there had been any such transgression, they will have to be tested in the light of the over-riding provisions of section 6. They too have no bearing on this matter*."* (Emphasis added)

Having considered the nature and the scope of *Buddhism* and *Buddha Sasana*, it is now necessary to consider the nature of the duty conferred on the State by Article 9 with regard to *Buddhism* and the *Buddha Sasana*.

What is the nature of the constitutional duty imposed? Does it contain both a positive and negative elements?

In our view the constitutional duty to *protect* the *Buddha Sasana* includes both these elements. The positive element requires the State, *inter alia,* to take active steps to keep safe, defend and guard the *Buddha Sasana* against any harm, damages or injury from any source and take active steps to prevent its erosion from within and without.

In this context, it is apposite to refer to the Mahāparinibbānasutta (*The Discourse about the Great Emancipation*) and in particular to Satta Saṅgha-Aparihāniyā Dhammā (*Seven Things which Prevent Decline in the Community*).

In ***Sumanadasa and Others v. Attorney General*** **[(2006) 3 Sri.L.R. 202 at 212]**, Court in interpreting the words "for the protection of fundamental rights" in Article 118(b) of the Constitution held that "protection" is wider than the word "enforcement". It was held that it is incumbent on the Court to make such orders as are necessary to ensure that the fundamental rights guaranteed by the Constitution are adequately protected and safeguarded.

A practical example of the fulfilment of this positive duty was brought to our attention by one of the Petitioners. By virtue of an order made in terms of Article 33(2)(h) and published in Gazette Extraordinary bearing no. 2109/13 dated 7th February 2019, President Maithripala Sirisena declared both the Sinhala and Pali texts of the Thripiṭakas a national heritage.

The negative element requires the State to abstain from doing any act which will cause any damages or injury to the *Buddha Sasana*.

Similarly, the constitutional duty to foster the *Buddha Sasana* includes both positive and negative elements.

The positive element requires the State to take active steps to promote growth or, encourage tend of the *Buddha Sasana*. The negative element requires the State to abstain from doing any act which will violate this positive duty.

In this context, it is pertinent to note that the State includes the executive, legislature and the judiciary. In the fulfillment of their constitutional duties and the exercise of their respective powers, these three organs of the State must comply with the afore-stated positive and negative elements of the constitutional duty arising out of Article 9. This determination may be seen as *inter-alia* an instance whether the judiciary is fulfilling that duty cast on the judiciary by Article 9 of the Constitution.

Courts have sought to give practical utility to the duty imposed on the State to protect and foster the *Buddha Sasana*.

In ***Provincial of the Teaching Sisters of the Holy Cross of the Third order of Saint Francis in Menzingen of Sri Lanka (Incorporation) Bill*** **[Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 409]** Court held that when there is no fundamental right to propagate, if efforts are taken to convert another person to one's

own religion, such conduct could hinder the very existence of the *Buddha Sasana* and spreading of another religion would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana*.

In ***Venerable Dr. Paragoda Wimalawansa Thero v. B. Wijerathna, Commissioner of Motor Traffic and Others*** **[C.A. 1978/2004, C.A. 1458/2006 (Writ) and C.A. 1459/2006 (Writ), C.A.M. 31.03.2014]** Gooneratne J. refused to direct the competent authority issue of a driving license to a Buddhist monk as it would offend the Buddhist way of life and the Buddhist culture in our country. Court referred to Article 9 and held that judiciary being one arm of the State, is bound to give effect to that constitutional provision.

The negative duty imposed on the State in relation to protecting the *Buddha Sasana* includes not enacting laws which will cause any damage or injury to the *Buddha Sasana*.

This narration of the duties of the State under Article 9 of the Constitution would not be complete, unless reference is made to the following: Article 9 of the Constitution not only confers a constitutional duty on the State to give *Buddhism* the foremost place and protect and foster the *Buddha Sasana*. It also confers the constitutional duty on the State to assure to all religions the rights granted by Articles 10 and 14(1)(e). The State must comply with all duties conferred on it by Article 9 of the Constitution, and not merely respect and discharge the first set of duties towards *Buddhism* and the *Buddha Sasana*, while neglecting or at the expense of the second set relating to all religions, which in Sri Lanka's context would mean to include Buddhism, Hinduism, Christianity and Islam.

If this Court were to revert to the position advanced on behalf of the Petitioners, their arguments were based on the use of the words *Ayurveda Bhaisajjaka* (ආයුර්වේද ෛභෙසජ්ජක) and *Bhaisajjaka* (ෛභෙසජ්ජක) in the Bill. They submitted that the use of these two terms violated in particular Article 9, and also violated Articles 10, 12(1) and 14(1)(e) of the Constitution. We need not proceed to examine the wider arguments, particularly

due to the position taken by learned Additional Solicitor General (ASG), which is referred to later in this Determination. Nevertheless, it is necessary to place on record the fact that the learned Additional Solicitor General in no way attempted to (we would think rightfully so, and in accordance with the quasi-judicial recognition accorded to the Attorney General by Courts of Sri Lanka) justify the inclusion of these terms as nomenclature in the Bill by the Legal Draftsman. Learned ASG also did not submit that the State was seeking by the proposed amendment to regulate the practice of Bhaisajjaka. In fact, her submissions in that regard were deferential to the duty conferred on the State by Article 9 of the Constitution towards *Buddhism* and the *Buddha Sasana*. Indeed, the relevant Cabinet Memorandums too did not seek to enact a legal regime to regulate the practice of Bhaisajjaka.

The word "හෙසජ්ජක" is a colloquial term referring to the devotees and monks practicing the teachings of Lord Buddha contained in the chapter *Bhesajjakkhandhakaya* (භේසජ්ජක්ඛන්ධකය) of Mahawaggapaliya (මහාවග්ගපාළිය) in the Vinaya Piṭaka (විනය පිටකය).

Following a careful consideration of the submissions made on behalf of the several Petitioners in this regard and the non-contest of those submissions by the learned ASG and our own findings, we conclude that the use of the words *Ayurveda Bhaisajjaka* (ආයුර්වේද හෙසජ්ජක) and Bhaisajjaka (හෙසජ්ජක) in the Bill distorts the teachings of Lord Buddha and in particular the *Bhesajjakkhandhakaya* (හෙසජ්ජක්ඛන්ධකය) of Mahawaggapaliya (මහාවග්ගපාළිය) in the Vinaya Piṭaka ("විනය පිටකය") and seek to provide a legislative regulatory framework for the practice and the application of the said stream of medicine embedded in the teachings of Lord Buddha and restricts it. This conflicts with the duty on the State to protect and foster the *Buddha Sasana* as provided in Article 9.

Accordingly, we hold that the references to *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙසජ්ජක) and *Bhaisajjaka* (භෙසජ්ජක) in Clauses 2, 3, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40 and 41 of the Bill are inconsistent with Article 9 of the Constitution. Thus, should the Parliament choose to enact those clauses in the manner contained in the Bill, they can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of Article 83. The inconsistency will cease if Clauses 2, 3, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40 and 41 of the Bill are amended by deleting the words *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙසජ්ජක) and *Bhaisajjaka* (භෙසජ්ජක).

Sri Lankan Indigenous Traditional Medicine / Deshiya Chikithsa

Mr. Pulasthi Hewamanna appearing for the Petitioner in S.C.S.D. 34/2023 submitted that the Bill fails to understand and/or distinguish, *Sri Lankan Indigenous Traditional Medicine/Deshiya Chikithsa,* clumps various different traditional medical traditions who have no similarities together and purport to regulate them based on a formalised testing mechanism rooted in foreign traditional medical practices. By conflating *Sri Lankan Indigenous Traditional Medicine,* with *other* foreign traditional medicine such as Ayurveda (indigenous to India), or Unani from the Arabic-Islamic traditions or Siddha (indigenous to South India), the Bill treats those who are unequal, equally.

It was submitted that such is further exacerbated by several provisions in the Bill, which, *inter alia*;

i. fails to recognise that *Sri Lankan Indigenous Traditional Medicine/Deshiya Chikithsa,* has a long oral history of being passed down from parent to child and mentor to student, and that such traditions themselves are varied between different geographical locations and different lineages/bloodlines;

ii. fails to provide for any self-regulation of *Sri Lankan Indigenous Traditional Medicine/ Deshiya Chikithsa,* but instead, purporting to test such practitioners and evaluate them by those trained in foreign indigenous medicine, which then determines whether they can be registered under the Bill or not;

iii. purports to then to appear to criminalise such non-registration;

iv. purports to further criminalise their beliefs and even *private* family life including their right to teach and train their children their beliefs by imparting sacred *knowledge, skills & practices,* and even requires registration of their own private herb cultivations, which is an intrinsic part of their way of life and affects the strong bond between man and the land and its eco-system. This criminalises the 'individual' instead of 'an act' and also criminalises the inter-generational transfer of *Deshiya Chikithsa* knowledge;

v. fails to recognise and protect the communal intellectual property of the *Sri Lankan Indigenous Traditional Medical Practitioners,* which is a part of Sri Lanka's cultural heritage, and instead criminalises those who hold those beliefs.

Mr. Sirimanna on behalf of the Petitioner in S.C.S.D. 35/2023 made submissions supporting this position. Both Mr. Hewamanna and Mr. Sirimanna have placed much material to establish that *Sri Lankan Indigenous Medicine* or *Deshiya Chikithsa* is the oldest practiced within Sri Lanka. They contended that such *Sri Lankan Indigenous Medicine* dates back to prehistoric times of *Ravana,* as well as to mediaeval times, where the *Mahavedana* (Chief Medical Officer) was one of the principal officers of the King's Court. In fact, Mr. Sirimanna drew our attention to the Hansard of Parliament in 1961 (at page 6631 thereof) to establish that, even at the time the Main Act was debated in Parliament, indigenous systems of medicine practiced in the country were recognised and that such systems existed from pre-Vijayan times, and certain speeches made during the said

debate go on to describe the origins of Ayurveda, Siddha and Unani systems as well and the virtues of the Sinhala Wedakama (the practice of traditional indigenous medicine in Sri Lanka).

The extracts quoted from the *Mahavamsa* and *Cūḷavaṃsa* and other historical chronicles evidences the creation of 'lying-in homes' and hospitals by *King Pandukabhaya* as early as 394 B.C. and that the oldest hospital in the world is said to be the hospital uncovered among the ruins of Mihintale. Moreover, King Buddhadasa, known as the physician king, treated both people and animals. He is also said to have established refuges for the sick in every village with physicians in them. Many other Sinhalese Kings performed similar services.

There is much merit in the submission of the learned counsel on the heritage and value of *Deshiya Chikithsa*. Nevertheless, the Bill seeks to make certain amendments to parts of the overall framework of the Main Act which seeks, *inter alia,* regulates Ayurveda as defined therein. The Main Act already identifies *Deshiya Chikithsa* as part of ayurveda. Thus, the practice of the *Deshiya Chikithsa* is already regulated by the existing law. It is not sought to be introduced for the first time through the proposed amendment.

The practice of ayurveda has been permitted by law. Any form of ayurveda can impact public health. The State is therefore under a duty to establish a regulatory scheme to safeguard public health from any of the different forms of ayurveda. Similar regulation is seen in the practice of western medicine. In ***Vincent Panikurlangara v. Union of India and Others*** **(1987 AIR 990 at 995)** it was held:

> *"…maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution*

makers envisaged. Attending to public, in our opinion, therefore, is of high priority – perhaps the one at the top."

So long as the regulatory scheme does not discriminate between different forms of ayurveda no inconsistency with the Constitution arises. No such allegation has been made in the instant matter except when it comes to the representation in the Ayurveda medical Council which is dealt separately.

Moreover, we are mindful of Article 80(3) of the Constitution which reads:

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

Thus, Court has concluded in a series of decisions that the validity of any provision of an Act cannot be called into question directly or indirectly **[*New Wine Harvest Ministries (Incorporation) Bill* (Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, at p. 361); *Swasthika Textile Industries Ltd. v Thantrige Dayaratne* (1993) 2 Sri.L.R. 348 at 353; *Re the Thirteenth Amendment to the Constitution* (1987) 2 Sri.L.R. 312 at 331; *Active Liability Management Bill* (Decisions of the Supreme Court on Parliamentary Bills (2018) Vol. XIV, at p. 5); *Medical (Amendment) Bill* (Decisions of the Supreme Court on Parliamentary Bills (2018) Vol. XIV, at p. 60); *Counter-Terrorism Bill* (Decisions of the Supreme Court on Parliamentary Bills (2018), Vol. XIV, at p.)]**.

Mr. Sirimanna sought to overcome this prohibition by drawing our attention to the determination in ***Recovery of Loans by Banks (Special Provisions) (Amendment) Bill*** **[Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, at p. 425]** and contended that we can in certain instances have recourse to or consider the provisions of the Principal Enactment when exercising jurisdiction under Article 121 of the

Constitution. However, we are of the view that the determination in ***Recovery of Loans by Banks (Special Provisions) (Amendment) Bill*** (supra) is distinguishable. The amendment there sought to strengthen the provisions of the existing Act to the detriment of certain classes of persons, denying them equal protection before the law guaranteed as a fundamental right under Article 12(1) of the Constitution. The determination there was only in respect of the provisions contained in the proposed amendment. In the instant matter, the challenge is to the definition of ayurveda contained in the Main Act by which *Deshiya Chikithsa* is already part of the definition of *ayurveda*.

As was held in ***Petroleum Products (Special Provisions) (Amendment) Bill*** **[S.C.S.D. 50/2022]:**

> *"No doubt Court must consider the provisions of the Petroleum Products Act in order to consider the constitutionality of any amendment sought to be made to it.*
>
> *Nevertheless, such an examination cannot directly or indirectly inquire into, pronounce upon or in any manner call in question, the validity of any provisions of the Petroleum Products Act on any ground whatsoever as it would violate Article 80(3).*
>
> *There is a general rule in the construction of Statutes that what a Court or person is prohibited from doing directly, it may not do indirectly or in a circuitous manner. [Bandaranaike v. Weeraratne and Others (1981) 1 Sri.L.R. 10 at page 16]."*

Mr. Hewanna sought to overcome the constitutional prohibition in Article 80(3) by contending that as such provisions are repealed and replaced by the Bill, Court must now test them afresh in light of the 1978 Constitution, as though a new provision has been formulated for the first time. We are not inclined to agree with this approach. Until the Bill is enacted into law, the provisions in the Main Act which are sought to be amended

remain law and caught up within the prohibition in Article 80(3) of the Constitution.

Clause 10 - Herbal Cultivation

Section 10(1) of the Main Act precludes any premises from being used for the purpose of an *ayurveda* hospital, *ayurveda pharmacy, ayurveda dispensary or ayurveda store, unless such premises are for the time being registered by the Commissioner and the person carrying on such hospital, pharmacy, dispensary or store, in such premises is for the time being registered by the Commissioner as the proprietor thereof.*

In terms of Section 10(3) of the Main Act, where any premises are used in contravention of the provisions of Section 10(1), the person in charge of such premises, shall be guilty of an offence.

Clause 10 of the Bill seeks to amend Section 10 of the Main Act by introducing *'herbal cultivation'* as a new category which would require registration in terms of Section 10(1) of the Main Act.

Clause 46(4) of the Bill reads:

> 'Herbal Cultivation' *means an act of growing herbs in a large scale and shall include crop, harvest or residual of such growth which has a commercial value;*

Mr. Suren Gnanaraj appearing on behalf of the Petitioner in S.C.S.D. 22/2023 submitted that the words *'herbs'*, *'large scale'* and *'a commercial value'* are vague and are not defined in the Bill. He further submitted that the words *'any plant', 'organs', 'substances', 'can be used for therapeutic purposes'* and *'precursors for the synthesis of useful drugs'* are vague and overbroad which could lead to manifestly arbitrary and absurd interpretations being given. Therefore, it was submitted that Clause 10 of the Bill read with Clause 46 of the Bill is violative of Article 12 (1) read with Articles 3 and 4(d) of the

Constitution. Mr. Hewamanna and Mr. Sirimanna also associated themselves with this objection and made extensive submissions.

It is trite law that vagueness in any provision of a bill is by itself sufficient to hold it inconsistent with Article 12(1) of the Constitution.

The learned ASG in response drew our attention to the relevant portion in the Sinhala version of the Bill which reads:

> "ඔසු වගාව" යන්නෙන්, මහා පරිමාණයෙන් ඖෂධ වගා කරන ක්‍රියාව අදහස් කරන අතර, වාණිජමය වටිනාකමකින් යුතු එවැනි වගාවක ඵලදාව අස්වැන්න හෝ අවශේෂ ද අයත් වේ.

It was submitted that contrary to the assertion of the above Petitioners, the Bill only sought to regulate Herbal Cultivation for ayurveda purposes. However, in our view the Sinhala version does not convey this meaning. Clause 46(1) is vague and overbroad.

Accordingly, we hold that Clause 46(4) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the definition of *Herbal Cultivation* in Clause 46(4) of the Bill will be amended as follows:

> *"Herbal Cultivation" means any cultivation of any medicinal plants for ayurveda purposes as prescribed in the Ayurveda Code and shall include crop, harvest or residual of such growth used for a commercial purpose;*

The learned ASG submitted that in view of the above, a consequential amendment is proposed to Section 77 of the Main Act as follows:

> *(j) the declaration of any medicinal plant which requires a license or permit for cultivation*'

We are of the view that the inconsistency identified above will cease if Clause 46(4) and Clause 77 are amended as above.

In doing so we have taken note of the submission made by Mr. Gnanaraj that "commercial value" is a vague term. This term is already part of our law. Section 160(6)(c)(ii) of the Intellectual Property Act, No. 36 of 2003 uses this term. Our Courts have not had any difficulty in the use of this term. [See ***De Silva v. Lever*** **(28 N.L.R. 435),** ***Wijayapala Mendis v. P.R.P. Perera and Others*** **[1999] 2 Sri. L. R. 110,** ***Gunasekera v. Tissera and Others*** **[1994] 3 Sri. L. R. 245,** ***Associated Newspapers of Ceylon Ltd. v. Chandragupta Amerasinghe*** **[2013] 1 Sri. L. R. 290].** Therefore, we are not inclined to agree that "commercial value" is a vague term. Similarly, commercial purpose is also not vague.

Hence, upon the proposed amendments been made, the scope of the *Herbal Cultivation* contemplated in the Bill in actuality is restricted to the growth or cultivation of medicinal plants which requires a license under the Main Act which is, as prescribed in the Ayurveda Code for ayurveda purpose. These herbal cultivations are required to be registered and the crops namely the medical plants to be cultivated or grown are to be subject to a licensing and/or permitting regulatory procedure. In turn both the premises of the herbal cultivation and the act of herbal cultivation would be regulated by the Commissioner General of Ayurveda under Section 10 of the Main Act.

Clause 11 - Composition of the Ayurvedic Medical Council

In terms of the Main Act, the Ayurvedic Medical Council is, *inter alia*, responsible for recommending to the Minister whether any ayurveda teaching institution should be approved by him for the purposes of this Act, the registration of persons as ayurveda practitioners, ayurveda pharmacists, ayurvedic nurses and the cancellation or suspension of such registration.

The Petitioners in S.C.S.D. 22/2023, 24/2024, 34/2023, 35/2023 and 55/2023 assailed the constitutionality of Clause 11.

Mr. Gnanaraj submitted that although no objection is made to the additions sought to be made in terms of Clause 11 of the Bill to the composition of the Ayurveda Medical Council, such additions without proportionately increasing the number of registered ayurveda practitioners in effect dilutes the representation of such practitioners on the Council. It was submitted that greater representation of practitioners, especially those who practice indigenous and traditional forms of medicine would ensure that there is equitable representation of all stakeholders. It was contended that this was particularly necessary in view of Section 55(1)(e) of the Main Act, which requires the Ayurvedic Medical Council to register an ayurveda practitioner upon being satisfied that the person has sufficient knowledge, experience, and skill for the efficient practice of ayurveda.

Our attention was drawn to the determination in ***Petroleum Products (Special Provisions) (Amendment) Bill*** **[S.C.S.D. 50 - 52/2022]**, where it was observed (at page 17) that the composition of the Committee in the Bill did not adequately represent the relevant stakeholders and made suggestions as to how the composition of the Committee could be changed to reflect a more representative body as follows:

> *"Court agrees that the composition of the Committee must be such that all relevant criteria in the Petroleum Products Act will be considered in making recommendations or giving advice to the Minister. The composition of the Committee as presently envisaged in the Bill does not do so. Hence Clause 3(2) of the Bill is inconsistent with Article 12(1) of the Constitution and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84.*
>
> *The inconsistency will cease if the composition of the Committee is changed to include the following: … "*

Accordingly, it was submitted that the amendment sought to be introduced by Clause 11 of the Bill to the composition of the Ayurvedic Medical Council is not sufficiently representative of Ayurveda practitioners and is, therefore, violative of Article 12(1) read with Articles 3 and 4(d) of the Constitution.

In ***Engineering Council Bill*** **[Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, p. 69]** and ***Petroleum Resources Bill*** **[S.C.S.D. Nos. 50-52/2022]**, Court recommended amendments to the composition of entities which were found to be incompatible with the objectives of the Bill.

Similarly, in the ***Anti-Corruption Bill*** **[S.C.S.D. 16-21/2023]** it was held that the composition of the Commission to Investigate Allegations of Bribery or Corruption was incompatible with its objectives.

The learned ASG responded that the Main Act already provides in Section 11(e) and Section 11(f)(iii) for a minimum number of 'registered ayurveda practitioners' in the membership of the Ayurvedic Medical Council, i.e., at least five 'registered ayurveda practitioners'. These provisions are not amended.

We agree with the submission of the learned ASG that if we were to determine that there is insufficient representation of 'registered ayurveda practitioners', Court would be indirectly pronouncing upon the validity/constitutionality of Section 11(e) and Section 11(f)(iii) of the Main Act, that the Court cannot do **[*Medical (Amendment) Bill* (Decision of the Supreme Court on Parliamentary Bills (2018) Vol. XIV, at p. 60); *Petroleum Products (Special Provisions) (Amendment) Bill* (S.C.S.D. 50/2022)].**

Mr. Hewamanna and Mr. Sirimanna who were appearing for unregistered practitioners practicing a traditional or indigenous system of medication submitted that there was insufficient representation of their membership within the Ayurvedic Medical Council thus denying them equal protection of the law as guaranteed by Article 12(1) of the Constitution.

Section 11(f)(i) of the Main Act, as it presently stands provides for the appointment of not more than three persons who are not registered ayurveda practitioners as members of the Ayurvedic Medical Council. However, Clause 11(3) of the Bill which amends Section 11(f)(i) of the Main Act, wipes out the ability of unregistered practitioners practicing a traditional/indigenous system of medication in Sri Lanka to sit on the Ayurvedic Medical Council.

We are of the view that this is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

Learned ASG submitted that a Committee Stage Amendment will be made to Clause 11(3) of the Bill which retains Section 11(f)(i) of the Main Act. We are of the view that the inconsistency identified above will cease if the Bill is so amended.

Clause 13

Mr. Gnanaraj submitted that Clause 13 of the Bill which seeks to amend the Main Act by, *inter alia*, repealing subsections (c), (d), (e), (f), and (g) of Section 13(1) of the Main Act is irrational in as much:

c) a member elected under Section 11(c) and (d) of the Act would be permitted to continue as an Ayurvedic Medical Council member even on ceasing to hold the post / office by virtue of which he was qualified for election as a member of the Council;

e) an ayurveda practitioner whose registration has been suspended or cancelled would be permitted to continue as a Council member;

f) a person convicted of any offence under the Penal Code would be permitted to continue as a member of the Council; and,

g) an *ex officio* member would be permitted to continue as a Council member even on the expiry of his term of office.

Therefore, it was contended that Clause 13 of the Bill is inconsistent with Article 12(1) read with Articles 3 and 4(d) of the Constitution.

We are of the view that there is much merit in the contention that an ayurveda practitioner whose registration has been suspended or cancelled should not be permitted to continue as a member of the Ayurvedic Medical Council. We are of the same view on permitting a person convicted of any offence under the Penal Code. Both these instances run contrary to notions of good governance which are fostered by the rule of law. Any breach in good governance is a breach of the rule of law on which Article 12(1) of the Constitution is founded upon.

We accordingly hold that Clause 13 of the Bill which seeks to amend the Main Act by, *inter alia*, repealing subsections (e) and (f) of Section 13(1) of the Main Act is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if subsections (e) and (f) of Section 13(1) of the Main Act are retained.

Clause 24 read with Clause 25

Clause 24 of the Bill amends, *inter alia*, Section 51(1)(a) of the Main Act which requires the Ayurveda Medical Council to keep and maintain a general register and a special register for the registration of ayurveda practitioners. Clause 24 of the Bill requires the

Ayurveda Medical Council to maintain an additional register 'Consultant Physician register'.

In terms of Clause 46 of the Bill which amends Section 89 of the Main Act, *"Ayurveda Consultant Physician" means a person registered as an Ayurveda Consultant Physician under this Act.*

Clause 25 of the Bill amends Section 52 of the Main Act by, *inter alia*, adding subsection (3A) which reads as follows;

> *"(3A) An application for the registration as a Consultant Physician in the Consultant Physician register shall not be refused by the Council except-*
>
> *(a) on the ground that the applicant is not entitled to such registration under sub section (1) of section 55, or*
>
> *(b) on any other ground specified in sub section (1) of section 57.";*

The Petitioners in S.C.S.D. 22/2023 and 55/2023 have assailed the constitutionality of these provisions.

Mr. Gnanaraj submitted that Section 55(1) of the Main Act provides for *general* qualifications for registration as an ayurveda practitioner and Section 57(1) of the Main Act provides for grounds on which registration as an ayurveda practitioner may be refused, cancelled, or suspended. He contended that Clause 24 read with Clause 25 of the Bill is vague, ambiguous, arbitrary, discriminatory, and irrational in as much as a) no qualification, criteria or guidance has been provided to determine a practitioner's eligibility to be registered as a *Consultant Ayurveda Physician* and b) no provision has been made to register other ayurveda specializations such as Orthopedics and Neurology as Ayurveda Consultants. It was also submitted that the registration of other Specialists as Consultant Physicians could also mislead the public.

Mr. Gnanaraj drew our attention to the determination in ***Special Goods and Services Tax Bill Determination*** **(S.C.S.D. 01 - 09/2022),** where (at page 39) it was held:

> "*The Bill does not require an Order made vacating an exemption Order being placed before Parliament. This example exemplifies the opportunity being created by the scheme contained in the Bill for arbitrary exercise of power, abuse of power and corruption. As observed by the Supreme Court in Re Sri Lanka Broadcasting Authority Bill, [SC SD 1 - 15 /1997] these things may not happen, but they might happen because they are permitted. The evils to be prevented are those that might happen."*

Therefore, it was submitted that Clause 24 read with Clause 25 of the Bill is inconsistent with Article 12 read with Articles 3 and 4(d) of the Constitution.

The learned ASG submitted that Committee Stage Amendments will be made to the Bill:

(1) by the substitution for the words "Consultant Physician" wherever those words appear in the Bill, of the words "Ayurveda Consultant";

(2) by the substitution for the words "Ayurveda Consultant Physician" wherever those words appear in the Bill, of the words "Ayurveda Consultant";

(3) by the substitution for the words "Consultant Physician Register" wherever those words appear in the Bill, of the words "Ayurveda Consultant Register".

Mr. Gnanaraj nevertheless contended that no qualification, criteria or guidance has been provided to determine a practitioner's eligibility to be registered as an *Ayurveda Consultant*.

There is much merit in this submission. Section 55 of the Main Act specifies the qualifications required to be registered as an ayurveda practitioner. No such qualification is prescribed in the Bill for an ayurveda practitioner to be registered in the *Consultant Physician register* as an Ayurveda *Consultant Physician*. We note that Section 57 of the Main Act which sets out the grounds on which such registration may be refused, cancelled or suspended. Nevertheless, the Bill fails to specify the qualifications to be obtained which entitles an ayurveda practitioner to be registered in the *Consultant Physician register* as an Ayurveda *Consultant Physician*.

Where power is conferred on a person or body in vague and uncertain terms, without adequate guidelines regulating the exercise of that power, it is inconsistent with Article 12(1) of the Constitution. We hold that Clauses 24(1)(a), 25 and 46(2) of the Bill are inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if those Clauses are removed.

Clause 39(1) read with Clause 29, Clause 40(2) and Clause 45

Mr. Gnanaraj submitted that the Bill seeks to change the role and function of an Ayurveda Pharmacist. In terms of Section 70(1) of the Main Act, a registered Ayurveda Pharmacist is entitled to practise ayurveda pharmacy which includes but is not limited to the manufacturing of medicine. However, Clause 39(1) of the Bill seeks to limit the role of the Ayurveda Pharmacist to manufacturing medicine.

It was submitted that the change in the scope and role of the Ayurveda Pharmacist is further reflected in Clause 29 of the Bill which amends Section 56 of the Main Act.

In terms of Section 56 of the Main Act, no person shall be entitled to be registered as an ayurveda pharmacist unless he, *inter alia,* satisfies the Council that he possesses sufficient knowledge, experience, and skill for the efficient practice of ayurvedic pharmacy.

Clause 29 of the Bill seeks to change the *skill* required to be demonstrated by an Ayurveda Pharmacist by providing that no person shall be entitled to be registered as an Ayurveda pharmacist unless he, *inter alia*, satisfies the Council that he possesses sufficient knowledge, experience, and skill in the science of manufacturing Ayurveda medicines efficiently.

However, as the learned ASG submitted, this argument is misconceived when one considers the definition of 'ayurvedic pharmacy' that has been preserved in Section 89 of the Main Act which reads:

> *" ayurvedic pharmacy " includes any place where ayurvedic drugs or medicines are manufactured, prepared or compounded;*

Since the aforesaid definition of 'ayurvedic pharmacy' remains intact, the Petitioner's argument that the Bill has the effect of restricting a 'registered ayurveda pharmacist' to the 'manufacture of medicines' is misconceived.

Mr. Gnanaraj went on to submit that in view of Clauses 40, the presence of an Ayurveda Pharmacist is required if one is to operate an *Ayurveda Hospital, herbal cultivation, herbarium, Ayurveda sale centre or Ayurveda Store.* In terms of the Main Act, the presence of an Ayurveda Pharmacist is required only if one were to operate an Ayurveda Pharmacy.

Mr. Gnanaraj submitted the redefinition of the role and function of the Ayurveda Pharmacist and the requirement to employ an Ayurveda Pharmacist if one is to operate a Ayurveda *hospital, sale centre, store* etc. prejudicially affects the Petitioner's rights as a registered Ayurveda Practitioner for the following reasons:

a. In terms of Section 67(1) of the Main Act, every registered ayurveda practitioner shall be entitled to practice ayurveda.

b. In the tradition of Ayurveda, the ayurveda practitioner adopts a more holistic approach in treating an ailment. Apart from diagnosing, treating a patient and prescribing medicine, an ayurveda practitioner would also be engaged in preparing/manufacturing the required medicine; nursing; rehabilitative care including massage therapy; palliative care; preventative care etc.

c. The identification of the Ayurveda Pharmacist as the person entitled to *manufacture medicine* creates ambiguity as to whether an ayurveda practitioner would no longer be permitted to manufacture medicine unless such practitioner is also registered as an ayurveda pharmacist.

d. The requirement now to employ a registered ayurveda pharmacist to operate a registered *Ayurveda Hospital, herbal cultivation, herbarium, Ayurveda sale centre or Ayurveda Store* takes away the right of the Petitioner, who is a registered ayurveda practitioner, from continuing to operate his registered Ayurveda hospital without an ayurveda pharmacist. As adverted to above, a registered ayurveda practitioner would treat patients using treatment and medicine prepared using his own intellectual property or from traditional sources which have been passed to him from his ancestry. If the Petitioner is compelled to operate the Hospital by employing a pharmacist to whom the Petitioner would be required to share his intellectual property or traditional knowledge that would constitute a disclosure of Trade Secrets for which no protection is available to him by Law.

It was further submitted the said requirement to employ a registered ayurveda pharmacist has an impact on the intellectual property rights of the registered Ayurveda Practitioner, which is governed by the Intellectual Property Act, No. 36 of 2003. Accordingly, it was submitted that the said Clause is violative of Articles 12(1) and 14(1)*(g)* read with Articles 3 and 4(d) of the Constitution.

Court is now exercising its constitutional jurisdiction. It is aimed at ascertaining whether the Bill or any provision therein is inconsistent with the Constitution. A Bill is not inconsistent with the Constitution merely due to any inconsistency with any existing Act.

We are of the view that the position put forward is untenable. Presently, a person can, in terms of section 10 of the Main Act, use any premises for the purpose of an ayurveda hospital, ayurvedic pharmacy, ayurvedic dispensary or ayurvedic store provided that such premises have been registered an ayurvedic hospital, ayurvedic pharmacy, ayurvedic dispensary or ayurvedic store and that person is registered as the proprietor.

The Bill seeks to permit such person to use for the purposes of such business, any name, title, addition or description which may be used by a registered ayurveda pharmacist if he employs a registered ayurveda pharmacist to perform the functions specified therein. Thus, the need to employ a registered ayurveda pharmacist arises only in those circumstances.

Clause 43

Mr. Gnanaraj contended that Clause 43 of the Bill amends Section 79 of the Main Act which relates to offences in relation to registered ayurveda hospitals, pharmacies, dispensaries, and stores. Clause 43 brings *inter alia* '*any Ayurveda drug manufactory'* within the ambit of the said Section 79. It was submitted that that the term '*Ayurveda drug manufactory'* is not defined in the Main Act or Bill and is, therefore, vague and inconsistent with Article 12 (1) read with Articles 3 and 4(d) of the Constitution.

Section 89 of the Main Act defines "ayurvedic pharmacy" to include any place where ayurvedic drugs or medicines are manufactured, prepared or compounded. Therefore, we see no vagueness in the term '*Ayurveda drug manufactory'*.

Clause 44 (2)

Clause 44 of the Bill seeks to amend Section 80 of the Main Act which provides for offences and penalties. Clause 44(2) seeks to introduce a new offence where to cover a situation where *any person … commits an act involving damage to public health.*

Mr. Gnanaraj submitted that the phrase *"damage to public health"* is overbroad, vague and is, therefore, violative of Article 12(1) read with Articles 3 and 4(d) of the Constitution.

We note that "public health" is a term found in several laws in Sri Lanka including Section 18(2) of the 1972 Constitution and Article 14(7) of the 1978 Constitution. Moreover, *damage* is a common word in legal parlance with no ambiguities. We see no merit in this contention.

The Petitioners in S.C.S.D. 34/2023 and 35/2023 submitted that there is a disproportionate increase of penal consequences by Clause 44(4) of the Bill.

The learned ASG submitted that the following amendment will be moved at the Committee Stage to Section 80(2) which will then read:

> ""(2) Any person who contravenes the provisions of this Act or any regulation made thereunder, while practicing Ayurveda under the Authority of a licence issued under this Act, commits an offence under this Act and shall be liable on conviction after summary trial before a Magistrate, to a fine not exceeding one hundred thousand rupees or to imprisonment of either description, for a term not exceeding one year or to both such fine and imprisonment.";

We are of the view that the proposed amendment is not inconsistent with the Constitution.

Clause 46(1)

Clause 46 of the Bill seeks to amend Section 89 of the Main Act setting out the interpretation of defined terms. Clause 46(1) seeks to amend the definition of *Ayurveda* to bring '*Yoga'* within its ambit.

The Petitioners in S.C.S.D. 22/2023, 23/2023, 34/2023, 35/2023 and 55/2023 have assailed the continuality of this provision.

Mr. Gnanaraj submitted that although 'Yoga' is a practice that can improve one's mental and physical well-being, it cannot be considered as a *system of medicine and surgery,* and it is, therefore, irrational to bring 'Yoga' within the ambit of the term *'Ayurveda'*.

In ***Budhan Choudhry v. State of Bihar*** **[AIR 1955 SC 191]** the Supreme Court of India held:

> *"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, viz: (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of the classification and the objects of the Act."*

The preamble in the Main Act shows that it is to regulate the practice of ayurveda. Ayurveda is defined to include the Siddha, Unani and Desiya Chikitsa systems of medicine and surgery and any other system of medicine indigenous to Asian countries and recognised as such by their respective Governments. No reasonable basis or classification appears on the face of the Bill or is deducible from the surrounding circumstances or matters of common knowledge to bring *Yoga* within this definition.

Moreover, as Mr. Gnanaraj correctly submitted, if the Bill is enacted, *Yoga* practitioners can register as ayurveda practitioners and thereafter be entitled to engage in the practice of ayurveda medicine which includes, *inter alia*, medically treating patients, prescribing medicine etc. This can mislead the public and pose a threat to public health and safety contrary to the objects of the Main Act and Bill.

We determine that Clause 46(1) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if amended as follows:

Page 30 Clause 46:(1) Delete lines 6 to 15 (both inclusive) and substitute the following:-

> "Ayurveda" includes the Ayurveda, Siddha, Unani and Desiya Chikitsa systems of medicine and surgery and any other system of medicine indigenous to Asian countries and recognized as such by the Governments of such respective countries;

Mr. Canishka Vitharana appearing for the Petitioner in S.C.S.D. 55/2023 submitted that the Main Act when enacted identified ayurveda as a system of medicine and surgery. However, it was submitted that in the Sinhala version of the Bill, the words used for "medicine and surgery" when translated means a system of drug treatment/medical treatment. This does not involve any constitutional inconsistency. We nevertheless place it on record for due consideration if needed.

The Determination of the Court

The determination of the Court as to the constitutionality of the Bill titled "Ayurveda (Amendment) Bill" is as follows:

1. Clauses 2, 3, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40 and 41 of the Bill are inconsistent with Article 9 of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of Article 83. The inconsistency will cease if Clauses 2, 3, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40 and 41 of the Bill are amended by deleting the words *Ayurveda Bhaisajjaka* (ආයුර්වේද භෙසජ්ජක) and *Bhaisajjaka* (භෙසජ්ජක).

2. Clause 46(4) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if the following amendments are made:

   Page 31 Clause 46

   Delete lines 27 to 30 (both inclusive) and substitute the following:-

   "Herbal Cultivation" means the cultivation of any medicinal plants for Ayurveda purposes as prescribed in the Ayurveda Code and shall include crop, harvest or residual of such growth used for a commercial purpose;";

   Page 26 Clause 42: (1) Delete line 27 and substitute the following:-

   "(j) the declaration of any medicinal plant which requires a licence or permit for cultivation; any other matter incidental to or";

3. Clause 11(3) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if the following amendments are made:

   Page 6 Clause 11:

   Delete lines 21 to 27 (both inclusive) and substitute the following: -

   "(3) by the repeal of paragraph (f) thereof and the substitution therefor of the following new paragraph:-

   "(f) not more than twelve members appointed by the Minister of whom-

   (i) three shall be so appointed from among persons who are not registered ayurveda practitioners; …"

4. Clause 13 of the Bill which seeks to amend the Main Act by, *inter alia*, repealing subsections (e) and (f) of Section 13 (1) of the Main Act is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if subsections (e) and (f) of Section 13(1) of the Main Act are retained.

5. Clauses 24(1)(a), 25 and 46(2) of the Bill are inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if those Clauses are removed.

6. Clause 46(1) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if amended as follows:

   Page 30 Clause 46: (1) Delete lines 6 to 15 (both inclusive) and substitute the following:- "Ayurveda" includes the Ayurveda, Siddha, Unani and Desiya Chikitsa systems of medicine and surgery and any other system of medicine indigenous to Asian countries and recognized as such by the Governments of such respective countries;"

We wish to place on record our deep appreciation of the assistance given by the learned Counsel who appeared for the Petitioners, Intervenient Petitioner and the learned Additional Solicitor General who represented the Hon. Attorney-General, in these proceedings.

In conclusion, we wish to record that our attention was drawn to several textual discrepancies between the Sinhala, Tamil and English texts of the Bill. This causes a lot of concern to the Court in its deliberations. We note that it also affects the legislators who are deprived of a correct understanding of the Bill unless such discrepancies are corrected. The State undertook to correct all these discrepancies at the appropriate stage of the legislative process.

S. Thurairaja, PC
Judge of the Supreme Court

Yasantha Kodagoda, PC
Judge of the Supreme Court

Janak De Silva
Judge of the Supreme Court