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

"SRI LANKA TELECOMMUNICATIONS (AMENDMENT) BILL"

S.C.S.D. No. 56/2024	**Petitioner:**	MTV Channel (Private) Limited, No. 146, Dawson Street, Colombo 02.
	Counsel:	Sanjeewa Jayawardena, P.C., with Lakmini Warusevithana and Punyajith Dunusinghe
S.C.S.D. No. 57/2024	**Petitioner:**	Ambika Satkunanathan, No. 27, Rudra Mawatha, Colombo 06.
	Counsel:	Pulasthi Hewamanna with Harini Jayawardhana, Fadhila Fairoze and Githmi Wijenarayana
S.C.S.D. No. 58/2024	**Petitioner:**	Media Law Forum (Guarantee) Limited. No. 170, 1st Floor, Hulftsdorp Street, Colombo 12.
	Counsel:	Lakshan Dias with Maneesha Kumarasinghe
S.C.S.D. No. 59/2024	**Petitioner:**	Lanka Broadcasters Guild (Guarantee) Limited, 105/3, 5th Lane, Colombo 03.
	Counsel:	Jagath Wickremanayake, P.C., with Samadi Gamlath

S.C.S.D. No. 60/2024	**Petitioner:**	Asia Broadcasting Corporation (Pvt.) Ltd., No. 35 and 37, East Tower, World Trade Center, Colombo 01.
	Counsel:	Manoj Bandara with Thidas Herath and Thamali Wijekoon
Respondents:	1.	Hon. Attorney General, Attorney General's Department, Colombo 12.
(In S.C.S.D. No. 58/2024)	2.	Hon. Kanaka Herath, State Ministry of Technology, Ministry of Technology, 1a, Galle Face Center Road, Colombo 02.
Counsel for the State:		Sumathi Dharmawardena, P.C., A.S.G., with Nirmalan Wigneswaran, D.S.G., Manohara Jayasinghe, D.S.G., Ishara Madarasinghe, S.C., Madushka Kannangara, S.C. and FIAT Counsel Maleesha Pasqual

Bench:	**Hon. Jayantha Jayasuriya, P.C.**	**Chief Justice**
	Hon. Murdu N. B. Fernando, P.C.	**Judge of the Supreme Court**
	Hon. Janak De Silva	**Judge of the Supreme Court**

The Court assembled for hearing at 10.00 a.m. on 27th and 28th of May 2024.

A Bill in its short title referred to as the "Sri Lanka Telecommunications (Amendment) Bill" [Bill] was published in the Government Gazette dated 26.04.2024 which was issued on 02.05.2024. It was placed on the Order Paper of Parliament on 10.05.2024.

Four (4) petitions bearing Nos. S.C.S.D. No. 56/2024, S.C.S.D. No. 57/2024, S.C.S.D. No. 58/2024 and S.C.S.D. No. 59/2024 were filed challenging the constitutionality 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.

Another petition bearing S.C.S.D. No. 60/2024 was filed on the day hearing began on the aforementioned petitions.

The Petitioners in S.C.S.D. No. 56/2024, S.C.S.D. No. 57/2024, S.C.S.D. No. 58/2024 and S.C.S.D. No. 59/2024 and the Hon. Attorney General were heard extensively. The Petitioner in S.C.S.D. No. 60/2024 was given a hearing exercising the discretion vested in Court in terms of Article 134 (3) of the Constitution since there were other petitions which were filed within the stipulated time period.

Jurisdiction of Court

At the commencement of the hearing, the learned ASG submitted that several Committee Stage Amendments were to be moved to the Bill that was placed on the Order Paper of Parliament on 10.05.2024. Copies of the proposed Committee Stage Amendments were submitted to Court and parties.

Several Petitioners objected to Court considering the proposed Committee Stage Amendments without first considering the constitutionality of the Bill.

This issue was examined by Court in **Ayurveda (Amendment) Bill Determination [S.C.S.D. Nos. 22-24/2023, S.C.S.D. 34-35/2023, S.C.S.D. 52/2023, S.C.S.D. 55/2023 and S.C.S.D. 57/2023]** and **Microfinance and Credit Regulatory Authority Bill Determination [S.C.S.D. Nos. 08-09/2024, 11/2024 and 14-17/2024]** where it was held that the jurisdiction of the Court in terms of Article 123 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 first 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.

We are in respectful agreement with this interpretation of the jurisdiction of Court.

Hence, notwithstanding the proposed Committee Stage Amendments which the Hon. Attorney General submitted to this Court as amendments to be introduced to the Bill during the Committee Stage debate in Parliament, this Court must first determine the constitutionality of the respective clauses of the Bill placed on the Order Paper of Parliament.

Committee Stage Amendments

Several Petitioners raised another connected issue on the proposed Committee Stage Amendments. It was submitted that latterly there is a trend of the Hon. Attorney General proposing a substantial number of amendments to a bill tabled in Parliament when it is challenged before this Court. It was submitted that this practice impinges on the constitutional right of any citizen to invoke the constitutional jurisdiction of Court.

In view of this contention, it becomes incumbent upon Court to examine its merits in the context of the proposed Committee Stage Amendments since in terms of Article 125 (1) of the Constitution, Court has the sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution.

In the SVASTI to the Constitution, it is declared that Parliament enacts the Constitution as the Supreme Law of the Republic. Hence, it is the Constitution that is supreme in Sri Lanka.

Accordingly, ***any bill as well as any Committee Stage Amendment*** proposed to the bill must be consistent with the Constitution. The constitutional responsibility of ensuring due compliance has been vested with the Supreme Court.

A judicial confirmation of this founding principle is found in ***Premachandra v. Major Montague Jayawickrema*** **[(1994) 2 Sri. L. R. 90 at 111]**, where it was held that *"[i]n Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary*".

Article 120 of the Constitution reads follows:

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

This jurisdiction can be invoked by any citizen pursuant to Article 121 (1) of the Constitution within fourteen days of the bill being placed on the Order Paper of the Parliament. Article 121 (2) prevents Parliament from having proceedings in relation to such bill until the determination of the Supreme Court has been made, or the expiration of a period of three weeks from the date of such petition, whichever occurs first.

The jurisdiction created by Article 120 and the right given to any citizen to invoke such jurisdiction pursuant to Article 121 (1) is given efficacy by Article 78 (1) which requires every bill to be published in the *Gazette* at least seven days before it is placed on the Order Paper of Parliament.

These constitutional provisions are a necessary corollary of the concept of Sovereignty embodied in the Constitution. Article 3 states that in the Republic of Sri Lanka, sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise. Accordingly, the powers of

government are expounded as the legislative power of the People, the executive power of the People and the judicial power of the People.

The People having declared the Constitution to be the supreme law of Sri Lanka, delegated their legislative power to Parliament to enact laws in accordance with the Constitution. Having done so, the People have by Article 120 vested the sole and exclusive jurisdiction to determine any question as to whether any bill or any provision thereof is inconsistent with the Constitution on this Court. Article 121 (1) gives the right to any citizen to invoke this jurisdiction of the Supreme Court within fourteen days of the bill being placed on the Order Paper of Parliament.

Hence, Articles 120 and 121 (1) must be viewed as a check by the People on the exercise of the legislative power of the People by Parliament. This constitutional jurisdiction and constitutional right, which is a check on the legislative power exercised by Parliament, cannot be deprived by a Committee Stage Amendment on which the sole and exclusive constitutional jurisdiction of the Supreme Court cannot be invoked by any citizen.

Any impairment of the right of a citizen to invoke the sole and exclusive constitutional jurisdiction of the Supreme Court to check whether the Parliament is exercising the legislative power of the People in conformity with the Constitution will impinge on Articles 3 and 4 of the Constitution.

Court is mindful that Article 74 (1) of the Constitution enables Parliament to adopt Standing Orders. It reads as follows:

> *"(1)* ***Subject to the provisions of the Constitution****, Parliament may by resolution or Standing Order provide for -*
>
> > *(i) the election and retirement of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees, and*

(ii) ***the regulation of its business****, the preservation of order at its sittings and any other matter for which provision is required or authorized to be so made by the Constitution."* (emphasis added)

Accordingly, Parliament has the power to provide for the regulation of its business by resolution or Standing Orders. Nevertheless, the resolution or Standing Orders are subject to the provisions of the Constitution. In other words, such resolution or Standing Orders cannot supersede or be inconsistent with any provisions of the Constitution.

We observe that Standing Order 61 [Standing Orders of the Parliament of the Democratic Socialist Republic of Sri Lanka (As amended up to 23rd November 2022), Published by the Parliament Secretariat)] reads as follows:

"Any amendment may be made to a Clause, or Clauses by deleting, substituting, inserting and adding provisions provided, the same be relevant to the subject matter of the Bill, and be otherwise in conformity with the Standing Orders."

Accordingly, the power of the Parliament to make a Committee Stage Amendment is recognised. Nevertheless, such power is not an unrestricted or untrammeled power. In modern democracies, there is no such thing as unlimited or unfettered power.

There are at least two restrictions discernible from Standing Order 61 on the power of Parliament to make a Committee Stage Amendment.

Firstly, any such amendment must be *relevant* to the subject matter of the Bill.

Secondly, and more importantly, any such Committee Stage Amendment must be in conformity with the Standing Orders. Given that Standing Orders themselves must be consistent with the Constitution, a necessary corollary is that *any Committee Stage*

Amendment sought to be done in terms of the Standing Orders *must also be consistent with the Constitution*.

This is the context in which Article 78(3) of the Constitution must be viewed and interpreted. It reads as follows:

> *"78. (3) Any amendment proposed to a Bill in Parliament shall not deviate from the merits and principles of such Bill."*

This provision was introduced by the Twentieth Amendment to the Constitution. This provision was not challenged. Nevertheless, in the **Twentieth Amendment to the Constitution Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (2019-2020), Vol. XV, page 87]**, Court observed that (at page 44):

> "*We observe that this new provision is progressive and enhances the People's legislative power by placing a check on Parliament that exercises legislative power in trust for the People. However, perusal of the proposed Committee Stage amendments tendered to Court by the Attorney-General, we observe that the aforementioned salutary provision in the Bill is proposed to be removed.*"

Although the Court observed that the Committee Stage Amendments was to remove the proposed Art. 78 (3), the Twentieth Amendment to the Constitution was passed, including present Article 78 (3), by the Parliament, on 22.10.2020.

This check on the legislative power of the People must be interpreted in a manner that protects and retains the constitutional right of any citizen to invoke the sole and exclusive jurisdiction of the Supreme Court to determine any question as to whether any bill or any provision thereof is inconsistent with the Constitution. Any contrary interpretation would violate Articles 3 and 4 of the Constitution.

We are mindful that the Proviso to Article 77 (2) allows the Attorney General to communicate his opinion on the constitutionality of an amendment proposed to a Bill in Parliament to the Speaker. Nevertheless, this cannot be interpreted to derogate from

the sole and exclusive jurisdiction vested by Article 120 on the Supreme Court to examine the constitutionality of any bill or any provision thereof or the deprivation of the constitutional right enshrined in Article 121 (1) for any citizen to invoke such jurisdiction.

Accordingly, Article 78 (3) and the Standing Orders must be interpreted in a way which protects the constitutional jurisdiction of Court and the constitutional right of any citizen to invoke this jurisdiction. The founding principle expounded earlier that any Committee Stage Amendment must be consistent with the Constitution and that the right given to any citizen to invoke the sole and exclusive jurisdiction of the Supreme Court to examine the constitutionality of a bill or any provision thereof cannot be swept away by the sidewind of a Committee Stage Amendment.

We will examine the proposed Committee Stage Amendments in this context after examining the constitutionality of the provisions of the Bill.

Scope of Examination

Mr. Hewamanna prefaced his submissions by drawing attention to the enactment of the Sri Lanka Telecommunications Act No. 25 of 1991 as amended ("SLT Act"). The constitutionality of the relevant bill was challenged but Court held that its jurisdiction was not properly invoked in terms of Article 121 [See **Sri Lanka Telecommunications Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII page 23]**. Hence, Court did not pronounce on the constitutionality of the clauses in the relevant bill which was subsequently enacted as the SLT Act.

Several Counsel drew our attention to the determination in **Sri Lanka Broadcasting Authority Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII, page 81 at 94]** where Court held that although a regulatory authority to regulate the airways is necessary, it is imperative that such an authority should be independent. There the Court upon examining the composition of the Board

of Directors of the proposed Sri Lanka Broadcasting Authority held that it was "no more than an arm of the Government" (at page 95).

Based on this analysis, it was pointed out that the composition of the Telecommunications Regulatory Commission of Sri Lanka ("TRC") established under the SLT Act is such that it lacks independence and is subject to governmental control.

However, Article 80 (3) prevents Court from '*questioning the validity'* of any Act of Parliament or even a single provision in such Act once endorsed by the President or the Speaker as the case may be. Thus, it is not possible for the Court to apply the dicta in **Sri Lanka Broadcasting Authority Bill Determination [supra.]** to the composition of the TRC. All that can be done is to draw the attention of the legislature to the said dicta.

Nevertheless, in **Recovery of Loans by Banks (Special Provisions) (Amendment) Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII, page 425 at 432],** Court held:

> *"This Court does not have the jurisdiction to examine the constitutionality of the Act already in force. However,* ***an amendment cannot be viewed in isolation****. It certainly cannot derive a stamp of constitutionality from the Act that is in force."* (emphasis added)

In **Prevention of Terrorism (Temporary Provisions) (Amendment) Bill Determination [S.C.S.D. 13-18/2022]** after considering the above extract, it was held (at page 14):

> *"We observe that this Court had made the above statement in that determination because of the fact that the provisions of that Bill (Recovery of Loans by Banks (Special Provisions) (Amendment) Bill) were not merely incidental in nature but had covered new ground seeking to strengthen the provisions of the Act then in force to the detriment of certain classes of persons. That was the basis upon which this Court held in the said determination that the provisions of that bill had denied the equal protection before the law*

guaranteed as a Fundamental Right under Article 12(1) of the Constitution. It was in that process that this Court stated that an amendment should not be viewed in isolation."

Hence, although Court cannot call into question the validity of the SLT Act in any manner in view of Article 80 (3), when fresh powers are sought to be given to the TRC to the detriment of certain class of persons, Court is constitutionally bound to examine such powers for any inconsistency with the Constitution. Where the Bill seeks to vest new powers on the TRC, Court is constitutionally bound to consider its constitutionality, keeping in mind the dicta in **Sri Lanka Broadcasting Authority Bill Determination [supra.]** and the composition of the TRC.

Several Counsel contended that certain provisions of the Bill ***may lead*** to the abuse of fundamental rights guaranteed under the Constitution. In the **Sri Lanka Broadcasting Authority Bill Determination [supra. page 101]** there may be support for this proposition.

However, the test for examining the constitutionality of a bill is not how it will be administered.

In the **Third Amendment to the Constitution Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (1978-1983), Vol. I, page 139 at 147]** it was held:

"[A] clear distinction must be borne in mind between the law and the administration of the law. A law cannot be struck down as discriminatory because of the fear that it may be administered in a discriminatory manner. Mere possibility of abuse of power is not sufficient ground to hold that a law offends the fundamental right of equality." (emphasis added)

A similar view was expressed in the **Agrarian Services (Amendment) Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII, page 9 at 12]** where it was held:

> *"There is of course the possibility that an attempt might be made to implement the Bill, after enactment, in a manner inconsistent with the Constitution. Our jurisdiction does not extend, quia timet, to make pronouncements intended to prevent or restrain possible future violations, particularly by persons or bodies other than the legislature; our jurisdiction is confined to determining whether the Bill as it stands would constitute an infringement of the Constitution."* (emphasis added)

Again, in the **Welfare Benefits Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII, page 279 at 282]** Court held:

> *"Counsel for the Petitioner submitted that recipients would be selected on the basis of political loyalty to the party in power and that there would be favoritism in the process. It is not within the jurisdiction of the Court to speculate as to what would happen in the implementation of the scheme. The provisions of the Bill should be examined objectively to ascertain whether there are sufficient safeguards to prevent discrimination on any of the grounds referred to in Article 12(2) of the Constitution and to prevent arbitrariness in the decision-making process."* (emphasis added)

This position was adopted by Court in **Colombo Port City Economic Commission Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (2021), Vol. XVI, page 23]** and **Microfinance and Credit Regulatory Authority Bill Determination [S.C.S.D. Nos. 08-09/2024, 11/2024, 14-17/2024]** where it was held follows:

> *"Moreover, when the Court opined in Sri Lanka Broadcasting Authority Bill (supra), that these things may not happen, but they might happen because they are permitted it was referring to a situation where power is conferred on an*

entity or person in vague terms or without any guidelines as to its exercise thus making it arbitrary and inconsistent with Article 12(1).”

Clause 3 (8)

Clause 3 of the Bill seeks to amend Section 5 of the SLT Act by adding Sections 5 (wa), 5 (wb), 5 (wc) and 5 (wd) to extend the powers, duties and functions of the TRC to carry out market analysis, to prevent significant market power and to promote fair competition.

Mr. Dias contended that the extensive powers sought to be conferred on the TRC by Clause 3 (8) ***may lead*** to the abuse of the fundamental rights guaranteed under the Constitution such as equal rights before law, including violations of privacy for both service providers and consumers, arbitrary and discriminatory regulatory interventions, over-regulation stifling business autonomy, economic burdens on service providers, and lack of transparency and accountability in decision-making and potentially infringing on due process rights.

Nevertheless, as more fully explained earlier, this is not the test Court must use to examine the constitutionality of a bill.

The learned ASG submitted that one of the fundamental aspects of the Bill is its focus on encouraging competition and preventing monopolistic behaviour. Our attention was drawn to the **Sri Lanka Broadcasting Authority Bill Determination [supra. at 93]** where Court specifically recognised the obligation to deal with anti-competitive practices, especially where the resources are limited, stating, “*Having regard to the limited availability of frequencies, and taking account of the fact that only a limited number of persons can be permitted to use the frequencies,* ***it is essential that there should be a grip on the dynamic aspects of broadcasting to prevent monopolistic domination of the field*** *by the government or by a few, if the competing interests of the various sections of the public are to be adequately served.”* (emphasis added)

According to Section 4 (d) of the SLT Act, one of the general objects to be achieved by the TRC is to promote effective competition between persons engaged in commercial activities connected with telecommunication and promote efficiency and economy on the part of such persons.

The learned ASG contended that the introduction of powers under Clause 3 (8) of the Bill is to enable the attainment of the objects in the SLT Act by enlarging the powers and duties of the TRC under Section 5 of the SLT Act.

The proposed Section 5 (wb) to the SLT Act empowers the TRC to intervene to prevent the emergence or abuse of significant market power. In the TRC Consultation Paper dated 02.02.2024 (at page 14), one criterion identified in determining significant market power is market position/share. Hence, it justifies empowering the TRC to intervene to both prevent the emergence as well as abuse of significant market power.

In **Ayurveda (Amendment) Bill Determination [supra. page 38],** Court held that 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.

We have considered Clause 3 (8). It is not vague and does not grant any unfettered power to the TRC. It seeks to empower the TRC to take *ex ante* and *ex post* regulation measures to prevent or remedy anti-competitive behaviour and market distortion which is essential for the full enjoyment of the fundamental right guaranteed by Article 14 (1)(a) of the Constitution.

We are not inclined to accept the contention that the powers sought to be conferred on the TRC would lead to a violation of privacy of the operators and consumers.

As far as the privacy of the operators are concerned, this contention overlooks Section 7 of the SLT Act which enables the TRC to require operators to furnish such information as directed.

In relation to the privacy of consumers, Section 3 of the Personal Data Protection Act No. 9 of 2022 states that the provisions of that law shall have effect notwithstanding anything to the contrary in any other written law. Where a public authority is governed by any other written law, it shall be lawful for such authority to carry out processing of personal data in accordance with the provisions of such written law, in so far as the protection of personal data of individuals is consistent with the Personal Data Protection Act No. 9 of 2022. Further the provisions of the Personal Data Protection Act shall prevail over any other written law, where there is any inconsistency.

We determine that Clause 3 (8) is not inconsistent with any provision in the Constitution.

Clause 4

Clause 4 of the Bill is to empower the TRC to approve or determine the tariffs. It introduces seven new sections to the SLT Act numbered 6A (1) to 6A (7).

In terms of Section 6A (1), the TRC shall *"approve or determine"* tariffs in a manner that is non-discriminatory and oriented towards costs. The operator can also propose tariffs or adjustments which the TRC can either approve or reject taking into consideration, the government policy and industry requirements and/or the facilities or services provided by the operator to a particular class of users or in a particular area.

Section 6A (4) allows the TRC to determine to forbear any tariff of any service subject to conditions or without conditions.

Section 6A (5) states that the TRC may, in consultation with the Minister, by way of rules make provision for a special tariff plan which shall "include manner of setting, reviewing, publishing, approving adjustments of tariff generally or for any particular telecommunication service provided by an operator or provider".

Mr. Dias contended that the proposed amendment Section 6A (1) has potential for abuse as the broad authority to approve or determine tariffs could be used to favour

certain operators, undermining the fairness and neutrality of the market due to the vast nature of the amendment as it does not describe or define the extents of the principles that are outlined therein.

It was further submitted that additionally there is a potential impact on consumers as consumers might face higher prices if tariff regulations lead to increased costs for service providers, which are passed on to end users.

Mr. Dias contended that proposed Sections 6A (2) and 6A (3) which provides for consideration of government policy in tariff approval could lead to politically motivated decisions that do not necessarily align with market realities or consumer interests and imposing conditions based on the facilities or services provided could result in unequal treatment of providers serving different areas or user classes.

Mr. Dias further submitted that the ability to create special tariff plans pursuant to proposed Section 6A (5) introduces additional complexity and uncertainty for service providers, who must navigate these plans to remain compliant. He finally contended that proposed Section 6A (6) could potentially impose operational restriction as prohibiting the provision of services without approved tariffs could stifle innovation and restrict the availability of new services, impacting both providers and consumers.

Accordingly, it was contended that Clause 4 of the Bill is inconsistent with the fundamental rights guaranteed by Articles 12 (1), 14 (1)(a) and 14 (1)(g).

The submission of Mr. Dias is based on the possibility that the power given to the TRC may be abused. However, as adumbrated earlier, this is not the test Court employs to consider the constitutionality of any bill. As long as the powers vested in a body is not vague, how the law will in fact be applied is not a matter for this Court in the exercise of its constitutional jurisdiction.

As the learned ASG pointed out, the TRC as the regulator already has the power to determine tariffs.

In terms of Section 5 (c) of the SLT Act, the TRC has the power *"to advise the government on matters relating to telecommunication including policies on tariffs, pricing and subsidies and legislative measures required for the provision of public telecommunications services"*.

Section 5 (k) of the SLT Act, empowers the TRC to determine in consultation with the Minister the tariffs or methods for determining such tariffs, taking into account government policy and the requirements of the operators in respect of the telecommunication services provided by the operators.

Furthermore, Section 17 (7)(k) of the SLT Act specifies the terms and conditions of a licence granted under this section to include, *"conditions specifying acceptable economic criteria in accordance with which the Authority shall approve tariff adjustments proposed by an operator"*.

Hence, we are in agreement with the contention of the learned ASG that the amendments envisaged by the insertion of Section 6A to the SLT Act in fact sets out guidelines regulating the exercise of the power already granted to the TRC under Sections 5 (c), 5 (k) and 17 (7)(k) of the SLT Act. These provisions in fact prevent any arbitrary exercise by the TRC of the power to regulate tariffs. For example, Clause 6A (1)(a) directs the TRC to determine tariffs on a non-discriminatory principle. This fortifies the fundamental right to equality guaranteed by Article 12 (1) of the Constitution.

Mr. Dias submitted that the discretionary power to forebear tariffs as proposed by Section 6A (4) could be applied selectively, benefitting some providers over others potentially leading to market biases.

The learned ASG submitted that tariff forbearance is not a new concept and that it is a mechanism that is applied in many jurisdictions. These jurisdictions exercise differing levels and aspects of tariff forbearance. Our attention was drawn to Section 11 (2) of the Telecom Regulatory Authority of India Act, 1997.

The need for regulatory forbearance has been explained by Prof. Rohan Samarajiva and Tahani Iqbal [*Banded forbearance: A new approach to price regulation in partially liberalized telecom markets*, International Journal of Regulation and Governance, 9(1), 19-40] as follows:

> *"Based on the premise that there is little need for intervention as the number of service providers grows and competition increased in a market place, regulators can refrain or forbear from intervening or imposing controls in a market. Schultz (1994) considers this as means to give new firms without market power the space needed to flourish.*
>
> *Deeming sufficient competition to exist in the Indian telecom sector, the Telecom Regulatory Authority of India (TRAI) forbears from price regulation in urban areas, although it does regulate some prices in rural areas…..*
>
> *India now has some of the lowest mobile tariffs in the world (LIRNEasia, 2008, 2009; Nokia, 2008a) and a flourishing mobile market – the compound annual growth rate for 2000-2005 for mobiles was 90.6 per cent (International Telecommunications Union, 2007). The findings of the Telecom Regulatory Environment (TRE) assessments carried out by LIRNEasia in 2006 and 2008, indicate that India received the highest scores on the tariff regulation dimension among the countries studied (Prem & Baburajan, 2009), indicating that TRAI's approach is appreciated by informed stakeholders.*
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> *Forbearance does not necessarily mean that the regulator relinquishes all responsibility for regulation; the regulator may choose to forbear on certain aspects only based on assessments of market power and potential for predatory pricing; and regulation may be re-imposed if justified. In the case of regulating the markets for terminal equipment, wireless services and toll services, the Canadian Radio-Television Commission (CRTC) forbore from regulating these markets deeming them 'workably competitive'. In the terminal equipment*

market, the Commission forbore on the sale, lease and maintenance of single-line, multi-line and data equipment. In the wireless services market, regulatory forbearance was enforced in markets for mobile phones and data and wireless devices; however, conditions were included to safeguard customer confidentiality with regard to interconnection (Organization for Economic Cooperation and Development, 2002). The toll-services market, on the other hand, was only partially forborne, with the CRTC requiring price and cost filings only in the market for long distance tolls. To decide on the competitiveness of a market, the Commission took into account the market share of the largest firm, the price elasticity of demand and the contestability of the market."

As the learned ASG pointed out, tariff forbearance is to be applied *"to a particular service"* and not individually on each operator or provider. Examples of services that may be subject to tariff forbearance could be certain value-added services such as news alerts, e-channeling messages, etc. Tariff forbearance is basically where a regulator specifies certain services for which its approval need not be obtained.

We determine that Clause 4 of the Bill is not inconsistent with any provision in the Constitution.

Clause 8

Clause 8 of the Bill introduces a new Section 9A to the SLT Act to empower the TRC to resolve the disputes arising out of anti-competitive practices, etc. The proposed section enables the TRC to carry out an investigation into a complaint made on the;

a. existence or the construed existence of an anti-competitive practice;

b. the acquisition, existence or the construed existence of an abuse of a dominant position (significant market power) which may affect the conditions in one or more markets in which an operator or provider operates a telecommunication service;

c. the creation or the construed creation of a merger situation; or

d. not having the right of access to market network at fair, cost-based and non-discriminatory terms and conditions.

Mr. Dias contended that Clause 8 infringes Articles 12, 14 (1)(g) and 14A.

Mr. Wickramanayake, P.C. contended that it infringes Articles 2, 3, 4 (c), 4 (d), 12 (1), 12 (2), 14 (1)(g) read with Articles 27 (2)(a) to 27 (2)(f), 27 (7), 27 (8), 27 (14) and Article 76 of the Constitution.

These contentions must be examined keeping in mind that Court, in **Sri Lanka Broadcasting Authority Bill Determination [supra. page 93]**, recognised the obligation to deal with anti-competitive practices, especially where the resources are limited as in frequencies.

Clause 8 focuses on anti-competitive practices, abuse of dominant position that affects the markets, mergers, and market access that is not fair, cost-based or discriminatory. Such an opportunity for intervention by the regulator to remedy market distortions is essential in the interest of both operators as well as customers.

As Indraratna [A. D. V. de S. Indraratna, *Consumer Affairs Authority in the Overall Context of Competition Policy* in Economic Policy in Sri Lanka, Issues and Debates, Kelegama (ed.), Sage Publications (2004), page 349] explains:

> *"Competition exists where there is free play of market forces […] Perfect competition, however, is an ideal situation […] In the absence of perfectly competitive market conditions, there must be a competition policy to promote competition in order to enhance both allocative efficiency and consumer welfare. For example, a provider of goods or services enjoying monopoly power can, depending on the degree of market imperfection, exploit the consumer through unfair or anti-competitive practices, such as misinformation, misleading advertisement, packaging, hoarding and predatory pricing. In such*

circumstances, there should be competition legislation to prevent such exploitation by the unscrupulous manufacturer or trader."

The international obligations undertaken by Sri Lanka in terms of the principles set out in the World Trade Organisation (WTO) Basic Agreement on Telecom Sector also requires the State to ensure that there is no monopolistic domination, especially in a field where the resources are limited.

Therefore, learned ASG submitted that it is incumbent upon the State to be vigilant in respect of a vital resource to prevent monopolistic domination. A licensee who has a monopoly or who has significant market power would be able to effectively block new competition and hold the people captive. Ensuring a level playing field is, therefore, a vital obligation.

The proposed law takes two further steps in terms of what the TRC can do when confronted with such practices. Where the public interest is <u>not</u> harmed, the TRC can permit the situation to exist with appropriate directions to remedy adverse effects on competitors. Where public interest <u>is harmed</u>, then the TRC will give directions to end the practice.

Proposed Section 9A (2) [Clause 8] states that the TRC ***may*** give the provider or operator who is the subject of such investigation, an opportunity to be heard and produce documents before making a determination and thereafter make an appropriate order. The use of the word ***may*** might be construed to mean that it is not compulsory for the rules of natural justice to be followed which makes it inconsistent with Article 12 (1) of the Constitution. The inconsistency will cease if the word ***"may"*** be replaced with the word ***"shall"***.

Subject to this, we determine that Clause 8 of the Bill is not inconsistent with any provision in the Constitution.

Clause 9

This clause amends Section 10 of the SLT Act by inserting a new Section 10 (1A) which empowers the TRC to divide and allocate any part of the radio frequency spectrum into number of bands ***it thinks appropriate*** and specify the service or purpose for which each band may be used, specify frequency channel plans and assign the radio frequency or any band of radio frequencies to users of radio communication apparatus in the manner provided in Section 22 of the SLT Act.

Mr. Jayawardena, P.C. submitted that these new powers will allow the TRC to distribute the right to use radio frequencies which is a limited resource in a manner that pleases the TRC. It was submitted that there are no restrictions or guidelines as to how these new powers will be exercised by the TRC and hence in effect grant the TRC unfettered and untrammeled powers, which violates Article 12 (1) of the Constitution.

Mr. Jayawardena, P.C. further submitted that these new powers to decide on the band sharing will allow the TRC to allocate a larger portion of the spectrum of frequency to television operators at the expense of radio operators, prompting the radio operators to go out of business. It was submitted that this will violate the fundamental right of access to information of radio listeners guaranteed by Article 14A of the Constitution.

Moreover, it was submitted that, in addition, the arbitrary allocation of frequency causing certain operators to go out of business will affect the right to livelihood of the employees of those operators and their legitimate expectations, violating Article 14 (1)(g) of the Constitution.

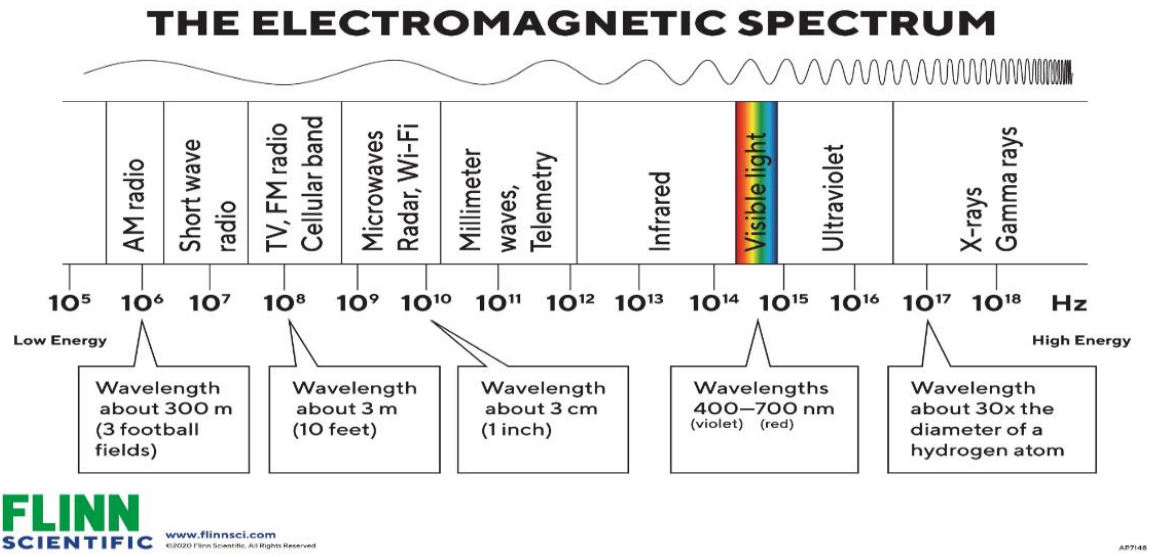
Mr. Wickramanayake, P.C. contended that the proposed subsections grant extensive powers to the TRC regarding the allocation and management of the radio frequency spectrum, as it thinks appropriate. It was contended such unfettered discretionary powers could lead to arbitrary and unequal treatment of different users and applicants. Without clear, objective criteria for the allocation and assignment of frequencies, there is a risk of discriminatory practices, violating the right to equality before the law protected under Article 12 (1) of the Constitution.

Furthermore, it was submitted that the extensive control over frequency allocation with discretionary terms and conditions could unduly restrict businesses and individuals from engaging freely in their lawful business activities. This can impact their ability to conduct their business efficiently and without undue interference, violating Article 14 (1)(g).

Furthermore Mr. Wickramanayake, P.C. contended that Clause 9 of the Bill is inconsistent with and/or in contravention of the provisions of Articles 3, 4 (d), 12 (1) and 14 (1)(g) of the Constitution and cannot be passed as law except if approved by the People at a referendum in addition to two thirds vote of the whole number of the Members of Parliament in favour as required by Article 83 (a) of the Constitution.

In understanding the scope of the proposed provisions, we found the technical explanation provided by the learned ASG quite useful which we quote *in extenso*.

Radio Waves are a type of Electromagnetic waves. The Electromagnetic Spectrum encompasses all electromagnetic radiation. These include visible light, ultraviolet rays, infrared rays, microwaves and radio waves. The following diagram sets out the Electromagnetic Spectrum.



Radio waves in the above diagram include TV, FM radio, Cellular band, short wave and AM radio waves. As can be observed, they have a low frequency and long wavelength, and are significant from a standpoint of human utility. This is because all telecommunication (whether it be broadcasting television programmes or long-distance telephone calls or accessing the internet via Wi-Fi) happens through radio waves.

Radio waves are usually understood as Electromagnetic Waves with frequencies below 300 gigahertz (GHz) and wavelengths greater than 1 millimetre (3⁄64 inch), which is about the diameter of a grain of rice.

They travel around the speed of light in a vacuum, which explains the virtually instantaneous communication that takes place when communicating through radio waves. They would require a transmitter to emit or transmit the radio waves and a receiver to be able to obtain the same.

The need to regulate radio wave frequencies is because radio waves used by one person can interfere with those used by another. This would disrupt the efficiency of

telecommunication and lead to conflict. This is why there must exist a legal regime which governs the use of radio waves.

The International Telecommunication Union (ITU) [established as the International Telegraph Union in 1865 and now an agency of the United Nations] is responsible for, amongst other matters, the creation and maintenance of a global telecommunication system which minimises conflict and maximises the utilisation of this finite resource.

For this purpose, the International Telecommunication Union, consequent upon a global conference, has divided the world into several regions specifying the radio spectrum range for each such region. Sri Lanka falls within Region 3. Telecommunication encompasses television, radio broadcasting, telephone communication and so much more. The International Telecommunication Union also determines the respective frequency ranges for these different types of telecommunications and the respective States are obligated to comply. Periodically, Member States of the Union meet and change these parameters and the respective Governments have to take action accordingly.

Therefore, the learned ASG submitted it is imperative that the State must be able to regulate the use of the Electromagnetic Spectrum. In **Sri Lanka Broadcasting Authority Bill Determination [supra. pages 90-93]** Court held as follows:

> "*Private broadcasting is a relatively new phenomenon even in the most developed countries. State owned organizations had been the exclusive means of broadcasting because of several reasons, including (1) the major capital investment required in building transmitters; (2) the limited number of available frequencies and the national and international need to make a rational and orderly use of the spectrum; (3) political concerns that required broadcasting, on account of its great impact on public opinion, to be the preserve of the State. Technological progress, including microwave transmission and the appearance of cable transmissions, the willingness of private entrepreneurs to invest in the*

business in broadcasting, and more liberal attitudes on the part of States have resulted in an increase in the number of private broadcasters.

However, although advances in technology have led to more efficient utilisation of the frequency spectrum, uses for that spectrum have also grown apace. As the U.S. Supreme Court observed in Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 367, 89 S.C. 1794,23 L.Ed. 371(1969)

> *"Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio navigational aids used by aircraft and vessels. Conflicts have emerged between such vital functions as defence preparedness and experimentation in methods of averting midair collisions through radio warning devices. "Land mobile services" such as police, ambulance, fire department, public utility and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum…."*

Scarcity is not entirely a thing of the past, and therefore States have a continuing and compelling need to regulate the use of the frequency spectrum. The U.S. Senate (S. Rep. No. 562, 86th Cong. 1st Sess. 8-9 (1959) U.S. Code Cong. & Adm News P2571) said that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." That observation was cited with approval by the U.S. Supreme Court in Red Lion Broadcasting Co. (supra). The Supreme Court of India too has endorsed the view that airwaves/frequencies are limited and must be regarded as "a public property" with regard to which the State must exercise control so that they will be used for the public good; […] ***It is recognized that States "have a right and a duty to ensure the orderly regulation of communications, and this can only be achieved by a licensing system" […]****.* ***Because of the public property nature of frequencies, licences to broadcast do not confer ownership of designated***

<u>frequencies, but only the temporary privilege of using them during a specified time […]</u>

Radio and television because of their pervasive and wide reach and influence on members of the public, constitute a most important means of mass communication. In order to play its role in advancing freedom of speech, the State, because of the limited availability of frequencies, must endeavour to ensure that the medium continues to be effective. Because of the limited availability of frequencies, chaos would ensue if the spectrum is uncontrolled and the usefulness of radio and television as a means of communication would soon come to an end, with unfortunate consequences for the right of free speech and independent thought……

Having regard to the limited availability of frequencies, and taking account of the fact that only a limited number of persons can be permitted to use the frequencies, it is essential that there should be a grip on the dynamic aspects of broadcasting to prevent monopolistic domination of the field either by the government or by a few, if the competing interests of the various sections of the public are to be adequately served. If the fundamental rights of freedom of thought and expression are to be fostered, there must be an adequate coverage of public issues and an ample play for the free and fair competition of opposing views. The imposition of conditions on licences to ensure that these criteria should be *observed do not transgress the right of freedom of speech, but they rather advance it by giving listeners and viewers the opportunity of considering different points of view […]"* (emphasis added)

Hence, there is a compelling reason to recognize the power of the TRC to divide and allocate any part of the radio frequency spectrum into number of bands and specify the service or purpose for which each band may be used, specify frequency channel plans and assign the radio frequency or any band of radio frequencies to users of radio communication apparatus.

Nevertheless, it cannot be done ***as the TRC thinks appropriate***. This is vague and hence arbitrary and inconsistent with Article 12 (1) of the Constitution.

In **Colombo Port City Economic Commission Determination [Decisions of the Supreme Court on Parliamentary Bills (2021), Vol. XVI, page 23 at 44]** Court held that:

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

For the aforesaid reasons, Clause 9 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 following amendment will be moved at the Committee Stage:

Page 8, Clause 9 : delete line 10 to 11 and substitute the following:-

> "frequency spectrum into number of bands based on International Telecommunication Union policies and guidelines or international best practices, in the best interest of the efficient management of the frequency spectrum and specify the service or";

We are of the view that the inconsistency with Article 12 (1) will cease if Clause 9 is amended as suggested.

The learned ASG submitted that a further amendment is proposed to Clause 9 as follows:

Page 8, Clause 9 : insert the following immediately after line 17:-

> "(d) vary the service or services or purpose for which such radio frequency has been assigned, from time to time."

The Bill as *Gazetted* only provides for the division and allocation of any part of the radio frequency spectrum into number of bands and to specify the service or purpose for which each band may be used. Once it is so divided and allocated, the TRC can assign the radio frequency or any band of radio frequencies to users of radio communication. The proposed amendment seeks to permit the variation of the service or services for which such radio frequency has been assigned.

Such a power can affect the operators as well as users of radio communication. Allowing this Committee Stage Amendment will be inconsistent with Article 121 (1) read with Articles 3 and 4 of the Constitution for the reasons adumbrated above and earlier under "Committee Stage Amendments" 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.

We are of the view that this further amendment can be done only after *Gazetting* as an amendment and permitting any citizen to invoke the constitutional jurisdiction in terms of Article 121 (1) of the Constitution.

Clause 12

This seeks to amend Section 17 of the SLT Act to empower the TRC to issue directions to operators who have been issued with a license under that section.

Mr. Wickremanayake, P.C. submitted that this seeks to grant TRC the power to issue directions to any operator to whom a license has been issued under Section 17 to share the use, with another operator specified by the TRC, of any ***facility*** owned or used by such operator, including any radio access network, subject to such terms and conditions specified by rules made under the SLT Act.

It was submitted that forcing operators to share their privately owned facilities may infringe on their right to property as well as operational autonomy as protected under

Article 14 (1)(g) of the Constitution, which guarantees the freedom to engage in any lawful occupation, profession, trade, business or enterprise.

Furthermore, Mr. Wickremanayake, P.C. submitted that arbitrary, unfair and discriminatory use of the above provision by the TRC, could result in unequal treatment of operators violating Article 12 (1) of the Constitution.

Accordingly, it was submitted that Clause 12 (2) of the Bill is inconsistent with and/or in contravention of the provisions of Articles 3, 4 (d), 12 (1), 12 (2) and 14 (1)(g) of the Constitution and cannot be passed as law except if approved by the People at a Referendum in addition to two thirds vote of the whole number of the members of Parliament in favour as required by Article 83 (a) of the Constitution.

The learned ASG countered that Radio Access Network (RAN) sharing is a universally accepted practice which benefits the public. He drew our attention to The International Telecommunications Union (ITU) web site which states as follows:

> *"In developing countries in particular, mobile telephony has been central in making services available to large sections of the population. However, much remains to be done to increase the penetration of mobile services, particularly in rural areas. The problem arises from the high cost of network infrastructure. This leads to high prices, as operators seek to recover their investment.*
>
> *Sharing mobile infrastructure is an alternative that lowers the cost of network deployment, especially in rural areas or marginal markets. Mobile infrastructure sharing may also stimulate migration to new technologies and the deployment of mobile broadband. It may also enhance competition between mobile operators and service providers, when safeguards are used to prevent anti-competitive behaviour.*"

There are two types of mobile infrastructure sharing: passive and active. The former refers to the sharing of physical space, for example by buildings, sites and masts, where networks remain separate. In active sharing, elements of the active layer of a mobile network are shared, such as antennas, entire base stations or even elements of the core network. Active sharing includes mobile roaming, which allows an operator to make use of another's network in a place where it has no coverage or infrastructure of its own.

Most European countries promote passive mobile infrastructure sharing by mobile operators. Countries such as Brazil and Canada have adopted active mobile infrastructure sharing whilst Jordan, India and Malaysia have adopted passive mobile infrastructure sharing.

Hence, in principle there can be no objection to implementing mobile infrastructure sharing. Nevertheless, there are certain matters which are of concern to Court.

Firstly, as Mr. Wickremanayake, P.C. pointed out, the word "facility" is not defined in the SLT Act or the Bill. Hence the power to direct the sharing of such facilities is vague and hence arbitrary and 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 word *"facility"* in Clause 12, page 13 line 14 is replaced with the word *"infrastructure"* which is defined in Clause 36 of the Bill.

Secondly, we observe that the sharing of any facility owned or used by an operator must be **subject to rules made under the SLT Act**. These rules are made by the TRC and are subject only to the approval of the Minister pursuant to Section 68 (3) of the SLT Act. There is no need for Parliamentary oversight.

Mr. Wickremanayake, P.C. submitted that in view of the composition of the TRC and the dicta in **Sri Broadcasting Authority Bill Determination [supra.]**, this infringes Article 12 (1) of the Constitution.

As pointed out earlier, where the Bill seeks to vest new power on the TRC, Court can examine the composition of the TRC and its independence in examining the constitutionality of the Bill. Court observes that the rule making power granted to the TRC to specify the terms and conditions under which sharing of infrastructure can be directed is subject only to the approval of the Minister who has a pervasive control over the TRC.

In this context, we note that in **Sri Lanka Broadcasting Authority Bill Determination [supra. page 95]** Court held that:

> "*The Minister is empowered by clause 19 to make regulations, inter alia, prescribing "the guidelines to be followed by persons licensed under this Act in the presentation of programmes including commercial advertisements". Contrary to the usual practice - e.g. see section 46 of the Ceylon Broadcasting Corporation Act and section 31 of the Sri Lanka Rupavahini Corporation Act the Minister is neither required to publish the regulations in the Gazette nor is he required to bring the regulations to Parliament for approval.*
>
> *The Authority is empowered by clause 5 (g) to issue directions to licence holders. Clause 7(7) empowers the Authority to suspend or cancel any licence issued to a licence holder who fails to comply with directions issued by it. Clause 17 makes it an offence for a person to fail to comply with the directions given by the Authority.*
>
> *Having regard to the composition of the Board of Directors of the Authority, the lack of security of tenure in office either of the Chairman or of the appointed members, and having regard to the power of the Minister to give directions which the Authority is obliged to follow, the Authority, it was said by learned counsel for one of the petitioners is "no more than an arm of the Government". We agree that the Authority lacks the independence required of a body*

entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."

Hence, the sharing of any facility owned or used by an operator being made subject to rules made by the TRC under the SLT Act is inconsistent with the **Sri Lanka Broadcasting Authority Bill Determination [supra.]** and 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 such terms and conditions are specified by regulations made under Parliamentary oversight. Accordingly, the said inconsistency will cease if the following amendment is made:

Clause 12 page 13 delete line 17 and substitute the following:

"specified by regulations made under this Act."

Clause 13

Clause 13 of the Bill provides for the insertion of new Sections 17A and 17B immediately after the existing Section 17.

In order to understand the scope of the proposed amendments, it is necessary to appreciate that a broadcaster requires two licenses to conduct its business effectively. These are the license for broadcasting, issued under Section 17 of the SLT Act, and the license to hold a particular radio frequency, issued under Section 22 of the SLT Act. Presently, there is no provision to revoke a license issued under Section 17 of the SLT Act.

In terms of proposed Section 17A (1), the Minister may revoke a licence issued under Section 17 of the SLT Act to a provider for breach of terms and conditions of the licence ***and on any contravention of the provisions of this Act or any regulation or rule made thereunder*.**

The Minister shall provide reasons for the revocation fifteen days prior to the date of revocation and shall specify the date of revocation in the Gazette not being a date earlier than thirty days from the date of publication of the Order.

Where a licence is revoked, an interim arrangement shall be specified for operating the telecommunication system in respect of which the licence issued to the operator has been revoked.

The licensee has the right of appeal to the Court of Appeal against the decision to revoke by the Minister within thirty days from the date of communication of the decision and the Court of Appeal may confirm or set aside the order of the Minister.

We observe that a licence issued under Section 17 of the SLT Act shall, in terms of Section 17 (6)(c) of the SLT Act, be subject to terms and conditions. Thereafter, Section 17 (7) goes on to specify the conditions that may be imposed under Section 17 (6)(c) of the SLT Act.

Therefore, the structure of the SLT Act is to provide for the terms and conditions of a licence to be issued under Section 17 (1) to be specified in terms of the SLT Act itself. Clause 13 [Proposed Section 17A. (1)] seeks to provide for the revocation of such licence on the breach of terms and conditions of the licence, for any contravention of the provisions of the SLT Act or any regulation or rule made thereunder.

We are of the view that the amendment to provide for the revocation of a licence issued under Section 17 for any contravention of the provisions of the SLT Act or any regulation or rule made thereunder is vague and overly broad and therefore inconsistent with Article 12 (1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

This inconsistency will cease if Section 17A. (1) in Clause 13 is amended by deleting the words *"and on any contravention of the provisions of this Act or any regulation or rule made thereunder."*

In terms of Section 17B, the following activities are prohibited except under the authority of a licence issued by the TRC:

(a) providing infrastructure services specified by rules, required for operating a telecommunication system;

(b) providing telecommunication services specified by rules; or

(c) providing cable landing station facilities.

Such a licence is subject to the terms and conditions specified in the licence and is required to conform to such technical standards as may be determined by the TRC by rules made thereunder and will be liable for revocation where there is a breach of any of the terms and conditions of the licence or on the failure by the licensee to comply with required technical standards.

There is an appeal to the Court of Appeal against the decision to refuse an application for a licence or the revocation of a licence within a period of thirty days from the date of communication of the relevant decision.

Furthermore, in terms of proposed Section 17B (8), ***Rules*** shall be made to specify the manner of making an application for a licence, requirements to be fulfilled by an applicant to make an application for each category of licence, period of validity and the manner of renewal of licence and grounds for suspension or cancellation of licence.

Mr. Wickramanayake, P.C. submitted that the broad discretion given to the Minister and the TRC to revoke such licenses can lead to arbitrary and unjust decisions as it lacks clear criteria and safeguards which can infringe upon the principles of natural justice and due process. It was contended that Clause 13 of the Bill in its entirety is inconsistent with Articles 3, 4 (d), 12 (1), 14 (1)(a), 14 (1)(g) read with Articles 27 (2)(a) to 27 (2)(f), 27 (7), 27 (8), 27 (14) and Article 76 of the Constitution.

As adumbrated earlier, though the SLT Act is now law and accordingly Court cannot call into question its validity, when new powers are sought to be vested in an entity established thereunder by the Bill to the detriment of a class of persons , this Court has a constitutional duty to examine the constitutionality of the vesting of such powers under the Bill.

Proposed Section 17B (4)(b) permits the TRC to specify terms and conditions of a licence. There are no guidelines regulating the terms and conditions that can be prescribed. Proposed Section 17B (6) empowers the TRC to revoke a licence on the breach of any terms and conditions of the licence. Proposed Section 17 (8)(d) empowers the TRC to make Rules specifying the grounds for suspension or cancellation of a licence.

These provisions are vague and confer unfettered power on the TRC to revoke a licence and 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:

(a) proposed Section 17B (4)(b) is deleted; and

(b) proposed Section 17B(6) is amended by deleting the words “on the breach of any terms and conditions of the licence or”;

(c) proposed Section 17 (8)(d) is deleted.

Clause 16

This seeks to empower the TRC to make arrangements for the operators to enter into interconnection agreements, to investigate on anti-competitive practices of operators who are parties to an interconnection agreement and to make rules with regard to interconnection rates and for the implementation of the interconnection agreements.

Mr. Wickramanayake, P.C. submitted that this clause grants the TRC significant discretion to mandate interconnection agreements and set their terms. This broad discretionary power, without clear criteria or safeguards, can lead to unequal treatment of different operators. It was submitted that there is a risk of arbitrary decisions that may favour certain operators over others, which infringes the right to equality before law guaranteed by Article 12 (1).

It was further submitted that the compulsory nature of the interconnection agreements and the detailed regulation by the TRC could unduly restrict operators' ability to conduct their business as they deem fit. This interference could hamper their operational freedom and autonomy, thereby impacting their business decisions and economic freedom which infringes Article 14 (1)(g).

Mr. Wickramanayake, P.C. concluded that Clause 16 in its entirety is inconsistent with Articles 3, 4 (d), 12 (1) and 14 (1)(g) read with Articles 27 (2)(a) to 27 (2)(f), 27 (7), 27 (8), 27 (14) and Article 76 of the Constitution and cannot be passed as law unless approved by the People at a Referendum in addition to two thirds of the whole number of the members voting in favour as required by Article 83(a) of the Constitution.

Sri Lanka is a member of the WTO and has made commitments under the General Agreement on Trade in Services (GATS) in the telecommunications sector.

One commitment undertaken by Sri Lanka is to provide interconnection on non-discriminatory terms, in a timely fashion and at cost-oriented rates that are transparent and sufficiently unbundled. Interconnection is the most critical instrument in allowing a competitive telecommunications market. If existing suppliers unreasonably refuse to grant interconnection it would be a barrier to entry and prevent healthy competition, ultimately affecting consumers. However, it appears that Sri Lanka has failed to implement this commitment due to the SLT Act not making provisions for interconnection.

The learned ASG submitted that rules made by the TRC already provides for interconnection and all that Clause 16 seeks to do is to clarify and circumscribe the powers already with the TRC.

Interconnection facilities benefit the consumer at the end of the day and assists in meeting the just requirements of the general welfare of a democratic society. The fundamental rights guaranteed under Article 12 (1) and 14 (1)(g) can be restricted in terms of Article 15 (7) for the purpose of meeting the just requirements of the general welfare of a democratic society.

We are of the view that Clause 16 is not inconsistent with any provision in the Constitution.

Clause 18

This seeks to amend Section 22 of the SLT Act to extend the power of the TRC to issue licenses to possess radio frequency emitting apparatus, to withdraw licenses issued under this section and to make rules in order to exempt any person or class of persons from obtaining a licence under that section in the public interest and in order to promote the common use of any radio frequency.

This is one of the clauses in the Bill to which the most objections were raised.

Prior to examining these objections, the interface between Articles 10 and 14 (1)(a) must be examined as it was submitted that a violation of Article 14 (1)(a) is also a violation of Article 10.

Our attention was drawn to the decision in ***Fernando v. The Sri Lanka Broadcasting Corporation and Others*** **[(1996) 1 Sri. L. R. 156 at 179**] where it was held:

> *"The observations in Stanley v. Georgia suggest a better rationale that information is the staple food of thought, and that the right to information, simpliciter, is a corollary of the freedom of thought guaranteed by Article 10.*

Article 10 denies government the power to control men's minds, while Article 14(1) (a) excludes the power to curb their tongues'.

It was submitted that there the Court recognized the necessary corollary between Articles 10 and 14 (1)(a) of the Constitution. Furthermore, it was submitted that Court had reaffirmed and cited ***Fernando v. The Sri Lanka Broadcasting Corporation and Others*** **[supra.]** with approval in ***Kurukulasuriya and another v. Sri Lanka Rupavahini Corporation and others*** **[S.C. (FR) 556/2008 and 557/2008, S.C.M. 17.02.2021].**

Mr. Jayawardena, P.C. submitted that any obstruction of the right to know on the part of the public, constitutes a controlling of the minds of men by the government, which is prohibited by Article 10. It was further submitted that any intrusion into the freedom of the media, particularly during the vital period preceding an election, would result in the obstruction of the freedom of the people to know, and thereby contribute to the violation of the freedom of thought that is prohibited by Article 10 of the Constitution.

Our attention was drawn to the decision in ***Fernando v. The Sri Lanka Broadcasting Corporation and Others*** **[supra.]** where Fernando, J. held that the right to receive information is not included in the freedom of speech or expression, but is included in the freedom of thought that is guaranteed in Article 10 of the Constitution. Fernando, J. (at pages 178-179) states as follows:

"Neither these decisions nor the arguments of Mr. Goonesekera persuade me that the right to receive information, simpliciter, is included in the freedom of speech and expression. Those decisions do not set out the process of reasoning by which the conclusion was reached that the freedom of speech does include the right to receive information, simpliciter. The observations in Stanley v Georgia suggest a better rationale that information, simpliciter, is a corollary of the freedom of thought guaranteed by Article 10. Article 10 denies the government the power to control men's minds, while Article 14(1)(a) excludes the power to curb their tongues."

The interface between different fundamental rights must be judged based on the constitutional provisions which recognise such fundamental rights. Although there may be an overlap between some fundamental rights in general, the interface between those rights depends on the relevant constitutional structure.

According to our Constitution, the fundamental right of freedom of thought, conscience and religion enshrined in Article 10 is an absolute right. There are no restrictions on such rights that are recognised in the Constitution. In practice, such freedoms cannot be restricted as they are not manifested.

On the contrary, the fundamental right to the freedom of speech and expression including publication enshrined in Article 14 (1)(a) is not an absolute right. It can be restricted in terms of Articles 15 (2), 15 (7) and 15 (8).

There lies the clear interface between the fundamental right of freedom of thought, conscience and religion enshrined in Article 10 and the freedom of speech and expression including publication enshrined in Article 14 (1)(a). These two are distinct fundamental rights. Every violation of the fundamental right enshrined in Article 14 (1)(a) is not *ipso facto* a violation of the fundamental right enshrined in Article 10. Since the exercise of the freedom of speech and expression including publication can, in terms of Article 15 (2), be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence it cannot be claimed that such a restrictions infringe the fundamental right of freedom of thought, conscience and religion enshrined in Article 10 since no restrictions are permitted to the fundamental right of freedom of thought, conscience and religion.

Thus, in **Sri Lanka Broadcasting Authority Bill Determination [supra. page 101]** it was held:

> *"Although the freedom of speech and the freedom of thought are related, cognate rights, they have their separate identities. The freedom of speech and*

the freedom of thought are general, independent constitutional rights. The right of free speech is not merely one that is keyed to the freedom to the freedom of thought: in the circumstances of a case there may be a violation of the right of free speech and a violation of the right of freedom of thought. In another that may not be so. The rights are distinct and violation must be independently established."

We will now examine the objections of the Petitioners to different parts of Clause 18 of the Bill.

Clause 18 (3)

Clause 18 (3) of the Bill seeks to empower the TRC to specify the service or services or purpose for which a radio frequency license should be utilised by the introduction of a new clause to Section 22 of the SLT Act which reads as follows:

"(2A) A licence issued under subsection (1) shall specify the service or services or purpose for which such radio frequency or radio frequency emitting apparatus are used and the period of the validity of such licence."

Mr. Wickramanayake, P.C. submitted that this provision confers unfettered power on the TRC to dictate the content broadcast by a broadcasting network, thus significantly infringing upon rights guaranteed under Articles 10, 14 (1)(a) and 14A of the Constitution.

The freedom of speech and expression including publication is a quintessential right in any democratic society. Democracy has no seasons. Its values pervade all seasons. In any democracy, the opinion of the people is a vital source for the rulers to understand the needs of the people. The opinion of the people is reflected not only through the exercise of their franchise at elections. Freedom of speech and expression including publication has a continuing value and is a vital mode of communication in the hands of the people whose sovereign rights are held in trust by the Government to be

exercised only in the public interest. It enables the people to express their opinion to the Government. It must be protected at all times by citizens and organs of Government alike. It is only through a vibrant exercise of the fundamental right to freedom of speech and expression including publication might the Government of the day try and understand the views and the needs of the people and address them.

In ***Sunila Abeysekera v. Ariya Rubasinghe and others*** **[(2000) 1 Sri.L.R. 314 at 337 and 355-356]**, it was held that:

> *"Freedom of speech necessarily protects the right to receive information, regardless of the social worth of such information […] Exceptions [to Article 14(1)(a)] must be narrowly and strictly construed for the reason that the freedom of speech constitutes one of the essential foundations of a democratic society, which, as we have seen, the Constitution, in no uncertain terms, declares Sri Lanka to be."*

Nevertheless, we are of the view that the scope of the proposed new Section 22 (2A) must be read and understood in the context of Clause 9 of the Bill which brings in a new subsection (1A) to Section 10 of the SLT Act which seeks to empower the TRC to divide and allocate any part of the radio frequency spectrum into a number of bands and specify the service or purpose for which each band may be used.

The power to be vested in the TRC consequent to the proposed new section 22 (2A) is a corollary of such power. Once the TRC divides and allocates any part of the radio frequency spectrum into a number of bands and specifies the service or purpose for which each band may be used, the TRC is empowered to issue licenses under Section 22 (1) of the SLT Act specifying the service or services or purpose which such radio frequency or radio frequency emitting apparatus are used.

We are of the view that the proposed new section 22 (2A) does not empower the TRC to dictate the content of broadcasts by a broadcasting or telecommunication network.

It only empowers the TRC to specify the service or services or purpose for which a radio frequency license is issued.

We determine that Clause 18 (3) is not inconsistent with any provision in the Constitution.

Clause 18 (5)

This clause seeks to introduce four new sub-sections numbered as (3A) to (3D) to Section 22 of the SLT Act. They are:

> *"(3A) The Commission may vary or withdraw any radio frequency assigned by the frequency licence under subsection (1) or the service or services or purpose for which such radio frequency has been assigned, from time to time.*
>
> *(3B) The Commission may revoke, vary or withdraw any radio frequency after giving written notice to the relevant person prior to a reasonable period of such revocation, variation or withdrawal and giving reasons therefor.*
>
> *(3C) The Commission may consider payment of any compensation to the relevant person whose frequency licence has been varied or withdrawn under subsection (3B).*
>
> *(3D) In the overall planning and management of radio frequency spectrum, the Commission shall have power to direct any person to whom a licence has been issued under subsection (1) to comply with and to implement new technologies for the efficient use of radio frequency spectrum in the public interest"*

Presently, Section 22 (3) of the SLT Act empowers the TRC to revoke and determine any licence granted under this section for breach of any of the conditions and restrictions to which it is subject to or in the event of any default in payment of any consideration payable thereunder or on the failure of the licensee to comply with any regulations.

The Bill seeks to bring in a new provision as Section 22 (3A) which empowers the TRC to vary or withdraw any radio frequency licence. It does not specify the grounds on which such variation or revocation can be done. In other words, it gives the TRC unfettered power to do so.

A further new Section 22 (3B) empowers the TRC to revoke, vary or withdraw any frequency licence after giving notice. Again, it confers unfettered power to do so. Proposed Section 22 (3C) empowers the TRC to consider granting compensation to the person concerned.

Mr. Jayawardena, P.C. submitted that the provision for compensation was never included in the SLT Act. Under the SLT Act the basis for cancellation or withdrawal of a license is violating a condition in the license. In the Bill the TRC may cancel a license at its whims and fancy and then the TRC **may** consider the award of compensation.

It was submitted that the Bill seeks to award compensation for the cancellation of frequency licenses issued under Section 22 of the SLT Act. Mr. Jayawardena P.C. submitted that the cancellation of the license amounts to a violation of the fundamental right to livelihood stipulated in Article 14 (1)(g) of the Constitution. Moreover, it was submitted that the Bill seeks to empower the TRC to award compensation for a violation of a fundamental right. It was further submitted that the awarding of compensation for the violation of a fundamental right can only be done by the Supreme Court after a declaration to the effect that a violation of a fundamental right has been made and that the purported empowerment of the TRC amounts to a usurpation of the jurisdiction of the Supreme Court.

Mr. Wickramanayake, P.C. objected to the same provisions substantially on the same grounds. In addition, he made the following points:

(a) According to the SLT Act, licenses for the use of any radio frequency or radio frequency emitting apparatus issued under Section 22 of the SLT Act do not possess an

expiration date. However, Clause 18 (3) seeks to introduce a period for the validity of such licence.

The broadcasting industry operates within a unique framework wherein the imposition of an expiry period on business licenses would pose significant threats to their operational stability. The absence of clear, objective criteria and safeguards against misuse could potentially result in arbitrary and disproportionate regulatory actions against licensees. Furthermore, broadcasting networks and businesses make substantial investments in infrastructure development and other operational aspects to sustain their activities. Should the TRC opt not to renew a license, particularly in the absence of established renewal procedures, this could constitute a violation of Articles 12 (1) and 14 (1)(g) of the Constitution.

(b) The proposed amendment grants the TRC the authority to dictate the service, services, or purposes for which a radio license should be utilised. This provision undoubtedly confers unfettered power on the TRC to dictate the content broadcast by a broadcasting network, thus significantly infringing upon rights guaranteed under Articles 10, 14 (1)(a) and 14A of the Constitution.

(c) Section 22 (4) of the SLT Act only provides an appeal procedure for aggrieved parties in the circumstances specified therein and has not been amended to include the newly introduced subsections (3A), (3B), (3C), and (3D). Additionally, the absence of a mandatory requirement for the TRC to consult licensees before making decisions to revoke, vary, or withdraw radio frequencies the licensees are using may lead to potential abuses of power, infringing upon the principles of natural justice and the right to a fair hearing as enshrined in Article 13 (3) of the Constitution.

(d) Clause 18 (6) by conferring the power to grant exemptions without any conditions whatsoever, has the potential to create a situation where certain individuals or groups are granted privileged access to radio frequencies. Such preferential treatment could

lead to unequal treatment and discrimination, contravening the principle of equality enshrined in Article 12 (1) of the Constitution.

(e) According to the the newly introduced subsection 22 (7) of the SLT Act, the TRC may adopt a competition-based methodology in assigning radio frequencies, promulgated by rules made under the SLT Act. He submitted that the lack of clear criteria, definition of what constitutes "competition-based methodology" and potential for arbitrary rule-making can lead to unequal treatment and discrimination, violating Article 12 (1). Additionally, the arbitrary application of competition-based methodologies without sufficient safeguards can disrupt business operations, violating Article 14 (1)(g).

Accordingly, Mr. Wickramanayake P.C. submitted that Clause 18 of the Bill in its entirety, is inconsistent with and/or in contravention of the provisions of Articles 3, 4 (d), 10, 12 (1), 13 (3) and 14 (1)(g) of the Constitution and cannot be passed as law except if approved by the People at a Referendum in addition to two thirds vote of the whole number of the Members of Parliament in favour as required by Article 83 (a) of the Constitution.

We agree with the contention that that the proposed Sections 22 (3A) and 22 (3B) are vague and seek to confer unfettered and arbitrary power on the TRC to vary or withdraw any frequency assigned by the frequency licence. No doubt it contemplates the variation or revocation only of a radio frequency and not the frequency licence as a whole. Nevertheless, vesting of such power to revoke or vary is inconsistent with the fundamental rights guaranteed by Article 14 (1)(a), 14 (1)(g) and 12 (1) and can only be passed with the special majority required under paragraph (2) of Article 84.

In **Ayurveda (Amendment) Bill Determination [supra. page 46]** it was held:

> *"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."*

The learned ASG submitted the following Committee Stage Amendment will be moved to remedy the infringement.

Page 24, Clause 18 :

(1) delete lines 1 to 22 (both inclusive) and substitute the following:-

"(3A) In the overall planning and management of radio frequency spectrum, the Commission shall have power to-

(a) direct any person to whom a licence has been issued under subsection (1) to comply with and to implement new technologies for the efficient use of radio frequency spectrum in the public interest; and

(b) vary any radio frequency after giving written notice to the relevant person prior to a reasonable period of such variation and giving reasons therefor.

(3B) Any person who is aggrieved by the variation of the radio frequency referred to in paragraph (b) of subsection (3A) may appeal to the Commission within three weeks from the receipt of such notice referred to in that paragraph.

(3C) The Commission shall, after considering any objection to such variation communicate its decision to the person who made an appeal to the Commission within three weeks from the date of receipt of such appeal.

(3D) The Commission may consider payment of any compensation to the relevant person whose radio frequency has been varied under paragraph (b) of subsection (3A)."; and

(2) insert the following immediately after line 22:-

"(6) by the insertion immediately after subsection (4) thereof, of the following new subsection:-

"(4A) Any person who is aggrieved by the decision referred to subsection (3C) of this section may appeal to the Court of Appeal within one months from the date of communication of the decision of the Commission." "

The effect of the Committee Stage Amendment is to remove the power that was to be given to the TRC to revoke or withdraw any radio frequency licence. The TRC will only have the power to vary any radio frequency licence which is lesser in scope from revoking or withdrawing. This power is the corollary to the power granted to the TRC to divide and allocate any part of the radio frequency spectrum by the proposed amendment to Section 10 of the SLT Act.

We are of the view that the proposed Committee Stage Amendment substantially addresses the constitutional inconsistencies raised by the Petitioners.

Nevertheless, we are concerned that during the pendency of the dispute, there must be an opportunity for the aggrieved party to seek interim relief from the Court of Appeal. There is also the issue of a fair hearing to the aggrieved party. Hence, the inconsistencies adumbrated above will cease if Clause 18 is amended as follows:

Page 24, Clause 18 :

(1) delete lines 1 to 22 (both inclusive) and substitute the following:-

"(3A) In the overall planning and management of radio frequency spectrum, the Commission shall have power to-

(a) direct any person to whom a licence has been issued under subsection (1) to comply with and to implement new technologies for the efficient use of radio frequency spectrum in the public interest; and

(b) vary any radio frequency after giving written notice to the relevant person prior to a reasonable period of such variation and giving reasons therefor.

(3B) Any person who is aggrieved by the variation of the radio frequency referred to in paragraph (b) of subsection (3A) may appeal to the Commission within three weeks from the receipt of such notice referred to in that paragraph.

(3C) The Commission shall, after giving such aggrieved person a fair hearing on any objection to such variation communicate its decision to the person who made an appeal to the Commission within three weeks from the date of receipt of such appeal.

(3D) The Commission may consider payment of any compensation to the relevant person whose radio frequency has been varied under paragraph (b) of subsection (3A)."; and

(2) insert the following immediately after line 22:-

"(6) by the insertion immediately after subsection (4) thereof, of the following new subsection:-

(4A) Any person who is aggrieved by the decision referred to in subsection (3C) of this section may appeal to the Court of Appeal within one months from the date of communication of the decision of the Commission.

(4B) The Court of Appeal may grant any interim relief to such aggrieved person pending the final determination of the appeal."

Accordingly, once the Bill is enacted into law, the TRC will have the power to divide and allocate any part of the radio frequency spectrum into number of bands [Proposed Section 10 (1A)]. Proposed Section 22 (2A) allows the TRC to specify the service or services or purposes for which such radio frequency licence is issued. Subsequently, acting in terms of proposed Section 22 (3A) of the Bill, the TRC will have the power to

vary any radio frequency for which a radio frequency licence has been granted after giving written notice to the relevant person prior to a reasonable period of such variation and giving reasons therefor.

Nevertheless, this variation can take place only within the division of the radio frequency spectrum the TRC has made acting pursuant to Proposed Section 10 (1A). The TRC cannot make any variations to this division once made as we have earlier held that the proposed Committee Stage Amendment to Clause 9, viz.:

> Page 8, Clause 9 : insert the following immediately after line 17:-
> "(d) vary the service or services or purpose for which such radio frequency has been assigned, from time to time."

is inconsistent with Article 121 (1) read with Articles 3 and 4 of the Constitution for the reasons adumbrated above and earlier under "Committee Stage Amendments" 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.

It can be sought to be done only after *Gazetting* as an amendment and permitting any citizen to invoke the constitutional jurisdiction in terms of Article 121 (1) of the Constitution.

Clause 18(7)

This has two parts. Firstly, it seeks to provide for making of rules to exempt any person or class of persons from obtaining a licence under that section, in the public interest and in order to promote the common use of any radio frequency.

Mr. Wickramanayake, P.C. submitted that this provision, by conferring the power to grant exemptions without any conditions whatsoever, has the potential to create a situation where certain individuals or groups are granted privileged access to radio frequencies. Such preferential treatment could lead to unequal treatment and

discrimination, contravening the principle of equality enshrined in Article 12 (1) of the Constitution.

According to Section 22 (1) of the SLT Act, no person shall use any radio frequency or any radio frequency emitting apparatus except under the authority of a licence issued by the TRC. The new provision to be introduced as Section 22 (6) seeks to grant exemption to any person or class of persons from obtaining a licence for the use or possession, establishment or installation of any radio frequency emitting apparatus.

Learned ASG submitted that Clause 18 (7) (proposed Section 22 (6)) is not intended to exempt any broadcaster or telecom operator from the requirement of obtaining a Section 17 license to operate a "telecommunication system" but only limited to the requirement to use "radio frequency emitting apparatus". These are two different licenses and the Petitioners' complaint that it would permit "preferred" broadcasters from being exempt from having to have a license to carry out broadcasting is completely devoid of merit. The exemptions with regard to operating telecommunication systems are set out in Section 20 of the SLT Act. What the proposed amendment seeks to do is to provide a mechanism to exempt very short-range infrared control equipment which include remote controls, garage door openers, transmitter equipment with output power below 50 MW.

The learned ASG drew our attention to the Radio and Telecommunication Terminal Equipment (RTTE) Type Approval Rules made by the TRC under Section 68 read with Sections 5 (o), 5 (q), 5 (v) and 5 (w) of the SLT Act and published in Gazette Extraordinary No. 2196/51 dated 09.10.2020.

Upon an examination of the exemptions set out in this Gazette, it is clear that the exemption is directed at short range infrared remote control equipment including TV remote controls, garage door openers, RTTE embedded in desktop computers and laptops, etc. This classification is based on an intelligible criterion which has a rational relation to the objective of the Bill.

We determine that the proposed Section 22 (6) is not inconsistent with any provision in the Constitution.

Secondly, the proposed Section 22 (7) seeks to allow the TRC to adopt the competition-based methodology in assigning radio frequencies.

Mr. Wickremanayake, P.C. submitted that the lack of clear criteria, definition of what constitutes "competition-based methodology" and potential for arbitrary rule-making can lead to unequal treatment and discrimination, violating Article 12 (1). Additionally, the arbitrary application of competition-based methodologies without sufficient safeguards can disrupt business operations, violating Articles 3, 4 (d), 12 (1), 13 (3) and 14 (1) (g) of the Constitution and cannot be passed as law except if approved by the People at a Referendum in addition to two thirds vote of the whole number of the Members of Parliament in favour as required by Article 83 (a) of the Constitution.

The learned ASG responded that the amendments proposed by the new Section 22 (7) to the SLT Act relating to the pricing of licenses is consistent with the approach in the United Kingdom's Wireless Telegraphy Act of 2006. Our attention was drawn to official manual published by Office of Communications of the United Kingdom ("Ofcom"). Accordingly, it appears that the Ofcom manual recognizes two approaches, "Administrative Pricing" and "Auctions".

According to the learned ASG, in Administrative Pricing, the price is determined by the regulator (or "spectrum manager"). The fee is set to "reflect the opportunity cost associated with the use of the spectrum". The Auction approach approximates to the competition-based methodology contemplated by the new Section 22 (7). Auctions promote economic efficiency in that the licence is granted to the party that places the greatest value on it. Further, auctions are more transparent than the subjective administrative pricing. The other advantage of an auction is that it provides a better opportunity for a new player to enter the market.

Learned ASG further submitted that the proposed amendments are immensely prudent in that it allows the regulator to pursue both methods. This is particularly important because the "auction" or "competition-based" approach has certain disadvantages which can be easily overlooked.

We are examining the constitutionality of the Bill. It appears that the competition-based model is used internationally in assigning radio frequencies. It is not vague.

Nevertheless, as submitted by the learned ASG since it has certain disadvantages, we are of the view that allowing such methodology to be promulgated by rules made by the TRC is inconsistent with Articles 12 (1) and 14 (1)(a) of the Constitution. The inconsistency will cease if proposed Section 22 (7) is amended so that the competition-based methodology in assigning radio frequencies is promulgated by regulations made under the SLT Act with Parliamentary oversight.

Clause 20

This clause brings in Sections 22AA to 22AD. They seek to:

(a) empower the TRC to monitor, manage and protect the submarine cables laid within the territorial waters of Sri Lanka connected with the provision of any telecommunication service under the SLT Act with the assistance of the Sri Lanka Navy, Department of Coast Guard and Sri Lanka Police,

(b) to establish the National Submarine Cable Protection Committee to advise the TRC in the monitoring, management and protection of the submarine cables etc.,

(c) to enable the President to declare the protection zones by proclamations published in the *Gazette*, in relation to a submarine cable and submarine cable landing stations,

(d) to empower the TRC to make rules to specify activities prohibited to be carried out in, over or under any protection zone, and

(e) to empower the authorized officers to arrest without a warrant within Sri Lanka including in territorial waters or within a protection zone, any person who commits an offence under Section 22AC, or contravenes any rule made thereunder and to produce him before the High Court of the competent jurisdiction.

Mr. Hewamanna made lengthy submissions on the constitutionality of this clause which can be summarised as follows:

(i) The proposed Section 22AC does not create any offence, and thus the proposed Section 22AD in referring to the same is prima facie erroneous. This cannot be introduced at a later stage by way of a new law either **[Bureau of Rehabilitation Bill Determination (S.C.S.D. 54-61/2022)]** and the principle of legal certainty requires that any offence must be clearly set out.

(ii) The proposed Section 22AC (1) empowers the TRC to make rules, and the proposed Section 22AD (1) permits the arrest for contravention of such rules. This is contrary to Article 76 as read with Articles 3 and 4 of the Constitution. [**Colombo Port City Economic Commission Bill Determination (supra)**].

(iii) The United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention") of which Sri Lanka is a signatory, came into force in 1994. The Convention provides the right to lay submarine cables and further provides for State to adopt laws and regulations necessary to criminalize damaging submarine cables done willfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications [vide Article 113]. Any offence purported to be created under the proposed section must be clearly spelt out in the Bill [and not introduced through a rule], and must provide for exceptions such as recognised in Article 113 of UNCLOS.

(iv) UNCLOS provides for indemnification for any loss incurred by a person who sacrificed an equipment to avoid damaging/injuring a submarine cable.

(v) Proposed Section 22AD(2) seeks to permit even military officers to engage in activities under the SLT Act, and has the effect of normalising/creating a state of emergency contrary to Article 155. The several clauses of the Bill are inter alia, constitutionally overbroad, and not being restrictions on human rights necessary in democratic society, and such are not proportionate to the purpose of passing such a Bill and completely violate the provisions of the Constitution pertaining to civil liberties and judicial power of the People during times of normalcy, is contrary to the structure of our Constitution, and a disproportionate response.

(vi) Proposed section 22AD (2) provides for property to be "seized and detained" without giving the owner an opportunity to show cause. Such is unconstitutional as set out in ***Manawadu v. The Attorney General*** **[(1987) 2 Sri.L.R. 30, 35]**.

(vii) Proposed Section 22AB empowers the President to declare protection zones. Such decision of the President to declare, or refuse to declare a protection zone, by virtue of the proposed section 22AB (6) is rendered *"final and conclusive"* after setting out a detailed mechanism for coming to that final conclusion. The decisions of the President, can only be challenged by way of fundamental rights applications, and the Constitution only grants such level of immunity to declarations of war and peace under Article 35(1). Excluding Courts jurisdiction under Article 126(1) as read with Article 17 is unjustifiable and unconstitutional. In ***Sampanthan v. Attorney General*** **[S.C.F.R. 351/2018, S.C.M. 13.12.2018]** it was held that the immunity awarded under Article 35 is clearly limited to declarations of war and peace. As held in ***Mallikarachchi v. Siva Pasupathi (Attorney General)*** **[(1985) 1 Sri.L.R. 74, 78]** per Sharvanada CJ, the President is not above the law. **In Re The Twentieth Amendment to the Constitution Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (2019-2020), Vol. XV, page 87]** Court held that removing the right to challenge decisions of the President would violate Articles 3 and 4.

We have considered the points raised by Mr. Hewamanna and set out below our determination on the relevant clauses:

(a) Proposed Section 22AB (1) allows the President to declare a protection zone. Section 22AB (6) makes the decision of the President *"final and conclusive"*. The words "final and conclusive" means only that no appeal lies. It does not exclude judicial review. [See ***Gover v. Field* (1944) 1 All E.R. 151**, ***Pearlman v. Keepers and Governors of Harrow School* (1979) 1 All E.R. 365, *Page v. Hull University Visitor* (1993) 1 All E.R 97**]

The Proviso to Article 35(1) of the Constitution allows any person to make an application against the Attorney General, in respect of anything done or omitted to be done by the President, in his official capacity except on the exercise of powers under Article 33(g).

Constitutional provisions cannot be amended by an Act unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the bill and is described in the long title thereof as being by an Act for the amendment of the Constitution [Article 82(1)]. The Bill does not so state.

Therefore, we determine that Clause 22AB(6) does not have the effect of giving immunity to a decision made under the proposed Section 22AB(6).

(b) Proposed Section 22AC does not specify any offence. However, proposed Section 22AD proceeds on the basis that the acts specified in proposed Section 22AC are offences. Therefore, Clause 22AD is irrational and inconsistent with Article 12(1) and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG informed that the following Committee Stage Amendment will be moved:

"22AC. (1) The Minister shall, in consultation with the Committee, make regulations to specify activities prohibited to be carried out in, over or under any protection zone including the following:-

(a) prohibiting the use of following fishing methods and equipments:-

(i) trawl gear that is designed to work on or near the seabed;

(ii) a net anchored to the seabed and kept upright by floating; (iii) a fishing line that is designed to catch fish at or near the seabed;

(iv) a dredger;

(v) a pot or trap;

(vi) a seine;

(vii) a structure moored to the seabed with the primary function of attracting fish for capture;

(b) prohibiting the towing, operating, or suspending from a ship-

(i) any item mentioned in paragraph (a); or

(ii) a net, rope, chain or any other thing used in connection with fishing operations;

(c) prohibiting the lowering, raising or suspending an anchor from a ship;

(d) prohibiting sand mining;

(e) prohibiting exploring for or exploiting resources (other than marine species);

(f) prohibiting mining or the use of mining techniques;

(g) prohibiting any activity that involves a serious risk that an object will connect with the seabed, if a connection between the object and a submarine cable would be capable of damaging the submarine cable; or

(h) prohibiting any activity that, if done near a submarine cable, would involve a serious risk of damaging the submarine cable.

(2) Any person who contravenes any regulation made under subsection (1) commits an offence shall be liable on conviction to a fine not exceeding one hundred million rupees or to imprisonment of either description for a term not exceeding ten years or to both such fine and such imprisonment..";.

22AD. (1) Any authorized officer may arrest without a warrant within Sri Lanka including in territorial waters or within a protection zone, any person who commits an

offence under section 22AC and may produce him before the Magistrate Court of the competent jurisdiction.";

2) Where a person is arrested under subsection (1), any article that has been used in the commission of the offence in respect of which such person has been arrested, may be seized and detained in a place, as may be determined by the Magistrate Court of the Competent jurisdiction.

In this regard it is pertinent to observe that the proposed Committee Stage Amendment to proposed Section 22AC (2) introduces "offences" for which persons could be held liable to one hundred million rupees and or imprisonment for a term not exceeding ten years.

In our view introduction of such a Committee Stage Amendment deprives the opportunity for any citizen to challenge the constitutionality of a provision which has serious repercussions on the liberty of persons. Therefore, the Proposed Committee Stage Amendment to Clause 20 introducing Section 22AC (2) is inconsistent with Article 121 (1) read with Articles 3 and 4 of the Constitution for the reasons adumbrated above and earlier under "Committee Stage Amendments" 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.

It can be sought to be done only after *Gazetting* as an amendment and permitting any citizen to invoke the constitutional jurisdiction in terms of Article 121 (1) of the Constitution.

In view of our determination on the Committee Stage Amendment to Clause 20 [proposed Section 22AC (2)], proposed Section 22AD becomes redundant.

Clause 31

This repeals and brings in a new Section 47. Mr. Hewamanna submitted that the use of the word "acquainting" in Section 47(b) impinges on the rights of a whistle blower exposing him to criminal sanctions.

In the **Anti-Corruption Bill Determination [S.C.S.D. Nos. 16-21/2023, page 58]** it was held that whistle blowing is an important element in ensuring the sovereign right of the people to a Government free of bribery or corruption.

We observe that the provisions of Clause 31 are substantially the same as the acts specified in Section 47 of the SLT Act. Hence, it is not possible for Court to pronounce upon the constitutionality of the impugned clause in view of Article 80(3) of the Constitution.

Clause 32

Clause 32 amends Section 59 of the SLT Act by repealing the existing sub-section (1) and providing that, every person who persistently makes telephone calls, or sends or transmits messages using a telephone or publishes, sends or transmits telephone numbers of other subscribers without reasonable excuse for the purpose of causing annoyance, inconvenience or needless anxiety, commits an offence.

Mr. Hewamanna contended that the proposed amendment under Clause 32 is vague and permits disproportionate criminalisation of matters and permits militarization of civilian matters. It was also submitted that consequent to the decision in ***Ramzi Razik v C.I. Senaratne*** **[S.C.(F.R.) 135/2020, S.C.M. 14.11.2023]** a high threshold is required to impose penal sanctions to freedom of speech and expression.

Section 59(1) of the SLT Act makes persistent making of telephone calls without reasonable excuse for the purpose of causing annoyance or inconvenience an offence. Clause 32 of the Bill adds “needless anxiety” to that section.

The learned ASG submitted that Clause 32 seeks to achieve two objectives. Proposed Section 59(1) as contemplated in the Bill consists of paragraph (a) and paragraph (b). Paragraph (a) captures what was in the original Section 59(1) with one difference. Section 59(1)(a) expands the proscription to messages using a telephone. This is obviously a modernization of the legislative text to encompass new modes of

telecommunication such as text messages or messages sent through popular applications created for electronic devices such as WhatsApp®. It was submitted that if the proscription in the original enactment was never considered improper and unconstitutional, there is no basis to denounce the provision as updated in the Bill which makes the proscription more meaningful in light of technological developments.

According to the learned ASG the new paragraph (b) proposed to Section 59(1) admittedly introduces a new provision. This paragraph helps give effect to the right to privacy recognized by our Constitution. A person's telephone number is unique and personal to him or her and sharing that number without permission would violate such person's right of privacy. Any concerns that a casual sharing of a friend's or colleague's number would entail criminal liability are completely unfounded as the offence requires an intention to cause "annoyance, inconvenience or needless anxiety".

We have considered the submissions and determine that Clause 32 is not inconsistent with any provision in the Constitution.

Clause 33

This provision brings in Sections 59A and 59B. They seek to include a new offence and provides a penalty for causing public commotion or disrupting public tranquility using a telephone. Several Petitioners sought to impugn the constitutionality of this Clause.

We did indicate to the learned ASG that this provision is clearly vague and creating an offence in such vague terms is inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

The learned ASG informed that a Committee Stage Amendment will be proposed to delete proposed Section 59A completely. The inconsistency will cease if the proposed Section 59A is deleted completely.

Clause 35

This clause amends Section 68 of the SLT Act and brings in Section 68(1A) which seeks to extend the power of the TRC for making rules for the purpose of –

(a) formulating Codes of Practice applicable to respective operators, providers and licensees;

(b) for issuing guidelines, from time to time, which shall be adhered to by the operators, providers and licensees; and

(c) for the management of radio frequency spectrum.

Mr. Jayawardena P.C. contended that this provision gives room for arbitrariness, as there is no Parliamentary supervision, which would have existed if the law calls for regulations which needs to be approved by Parliament.

The new power in (c) is arguably wide enough to cover making of rules permitting the TRC to change the band identified in terms of the proposed Committee Stage Amendment Clause 9. We have earlier held that this is not possible.

Furthermore, the powers given by (b) and (c) are vague and overbroad and inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

This inconsistency will cease if Clause 35 is amended by deleting the proposed Section 68(1A)(b) and Section 68(1A)(c).

Subject to above, none of the other provisions in the Bill are inconsistent with any provision in the Constitution. Other than the Committee Stage Amendments which are specifically referred to in this Determination, we have not considered the constitutionality of any other Committee Stage Amendment.

The Determination of the Court

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

1. Proposed Section 9A (2) [Clause 8] states that the TRC ***may*** give the provider or operator who is the subject of such investigation, an opportunity to be heard and produce documents before making a determination and thereafter make an appropriate order. The use of the word ***may*** might be construed to mean that it is not compulsory for the rules of natural justice to be followed which makes it inconsistent with Article 12 (1) of the Constitution. The inconsistency will cease if the word ***"may"*** be replaced with the word ***"shall"***.

2. Clause 9 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 following amendment will be moved at the Committee Stage:

   Page 8, Clause 9 : delete line 10 to 11 and substitute the following:-
   "frequency spectrum into number of bands based on International Telecommunication Union policies and guidelines or international best practices, in the best interest of the efficient management of the frequency spectrum and specify the service or";

   We are of the view that the inconsistency with Article 12 (1) will cease if Clause 9 is amended as suggested.

3. The learned ASG submitted that a further amendment is proposed to Clause 9 as follows:

   Page 8, Clause 9 : insert the following immediately after line 17:-
   "(d) vary the service or services or purpose for which such radio frequency has been assigned, from time to time."

The proposed amendment is inconsistent with Article 121 (1) read with Articles 3 and 4 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.

4. Clause 12 [proposed Section 17(10)] 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:

(i) the word *"facility"* in Clause 12, page 13 line 14 is replaced with the word *"infrastructure"*;

(ii) line 17 on page 13 is deleted and substitute the following:

"specified by regulations made under this Act."

5. Clause 13 [proposed Section 17A. (1)] is vague and overly broad and therefore 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 Section 17A. (1) in Clause 13 is amended by deleting the words *"and on any contravention of the provisions of this Act or any regulation or rule made thereunder."*

6. Clause 13 [proposed Section 17B] is vague and confer unfettered power on the TRC to revoke a licence and 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:

(a) proposed Section 17B (4)(b) is deleted; and

(b) proposed Section 17B(6) is amended by deleting the words "on the breach of any terms and conditions of the licence or";

(c) proposed Section 17 (8)(d) is deleted.

7. Clause 18 (5) [proposed Sections 22 (3A) and 22 (3B)] are vague and is inconsistent with the fundamental rights guaranteed by Article 14 (1)(a), 14 (1)(g) and 12 (1) and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if Clause 18(5) is amended as follows:

Page 24, Clause 18 :

(1) delete lines 1 to 22 (both inclusive) and substitute the following:-

"(3A) In the overall planning and management of radio frequency spectrum, the Commission shall have power to-

(a) direct any person to whom a licence has been issued under subsection (1) to comply with and to implement new technologies for the efficient use of radio frequency spectrum in the public interest; and

(b) vary any radio frequency after giving written notice to the relevant person prior to a reasonable period of such variation and giving reasons therefor.

(3B) Any person who is aggrieved by the variation of the radio frequency referred to in paragraph (b) of subsection (3A) may appeal to the Commission within three weeks from the receipt of such notice referred to in that paragraph.

(3C) The Commission shall, after giving such aggrieved person a fair hearing on any objection to such variation communicate its decision to the person who made an appeal to the Commission within three weeks from the date of receipt of such appeal.

(3D) The Commission may consider payment of any compensation to the relevant person whose radio frequency has been varied under paragraph (b) of subsection (3A)."; and

(2) insert the following immediately after line 22:-

"(6) by the insertion immediately after subsection (4) thereof, of the following new subsection:-

"(4A) Any person who is aggrieved by the decision referred to in subsection (3C) of this section may appeal to the Court of Appeal within one months from the date of communication of the decision of the Commission.

(4B) The Court of Appeal may grant any interim relief to such aggrieved person pending the final determination of the appeal." "

8. Clause 18(7) of the Bill [proposed Section 22(7)] is inconsistent with Articles 12 (1) and 14 (1)(a) of the Constitution. The inconsistency will cease if proposed Section 22 (7) is amended so that the competition-based methodology in assigning radio frequencies is promulgated by regulations made under the SLT Act with Parliamentary oversight.

9. Clause 20 [proposed Section 22AD] is irrational and inconsistent with Article 12(1) and can only be passed with the special majority required under paragraph (2) of Article 84.

10. The learned ASG informed that a Committee Stage Amendment will be moved to amend proposed Section 22AC (2) whereby an offence is created by such Committee Stage Amendment. The Proposed Committee Stage Amendment to Clause 20 introducing Section 22AC (2) is inconsistent with Article 121 (1) read with Articles 3 and 4 of the Constitution for the reasons adumbrated above and earlier under "Committee Stage Amendments" 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.

11. In view of our determinations set out in 9 and 10 above, proposed Section 22AD becomes redundant.

12. Clause 33 of the Bill [proposed Section 59A] is vague and is inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

The inconsistency will cease if proposed Section 59A is deleted.

13. Clause 35 of the Bill [proposed Section 68(1A)(b) and Section 68(1A)(c)] is vague and overbroad and inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

    This inconsistency will cease if Clause 35 is amended by deleting the proposed Section 68(1A)(b) and Section 68(1A)(c).

14. Subject to above, none of the other provisions in the Bill are inconsistent with any provision in the Constitution. Other than the Committee Stage Amendments which are specifically referred to in this Determination, we have not considered the constitutionality of any other Committee Stage Amendment.

We wish to place on record our deep appreciation of the assistance given by the learned President's Counsel and other Counsel who appeared for the Petitioners and the learned Additional Solicitor General who represented the Hon. Attorney General in these proceedings.

Jayantha Jayasuriya, P.C.,
Chief Justice

Murdu N. B. Fernando, P.C.,
Judge of the Supreme Court

Janak De Silva
Judge of the Supreme Court