

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

**“SRI LANKA ELECTRICITY BILL”**

**SC (SD) No. 42/2024**

- Petitioners:**
1. Ceylon Electricity Board Engineers' Union
  2. Dhanushka Parakramasinghe
  3. Buddhika Wijayawardhana
  4. Jaliya Ratnayake

**Counsel:** Uditha Egalahewa, PC with N.K. Ashokbharan

**SC (SD) No. 43/2024**

- Petitioners:**
1. Employees' Union of the Public Utilities Commission of Sri Lanka
  2. S R Adhikaram
  3. W.A.T. Dhanushka
  4. Eng. P.A.T.I. Jayantha
  5. Eng. W.A.I.S. Kasthuriratne
  6. M.D. Ranjith Athula

**Counsel:** Shantha Jayawardena with Hirannya Damunupola

**SC (SD) No. 44/2024**

- Petitioners:**
1. Dhammika Sujeewa Dissanayake
  2. Thejappriya Athulakeerthi Wanniarachchi

**Counsel:** Uditha Egalahewa, PC with N.K. Ashokbharan

**Counsel:** Shantha Jayawardena with Hirannya Damunupola

SC (SD) No. 46/2024 Petitioner: Janaka Ratnayake

**Counsel:** Niranjan Arulpragasam with Lasika Udayangani

SC (SD) No. 47/2024 Petitioner: Duminda Nagamuwa

**Counsel:** Nuwan Bopage with Dinusha Thiranagama

SC (SD) No. 48/2024 Petitioner: Jamuni Kamantha Thushara

**Counsel:** Arjuna Kurukulasuriya

**Counsel:** J.M. Wijebandara

**SC (SD) No. 50/2024**      **Petitioners:**    1. Wellappuli Arachchige Gамиni Sisira Kumara

2. Pulukutti Arachchige Don Nipuna  
Thilanka

**Counsel:** Thishya Weragoda with Ayeshmantha Gayan  
and Kalani Dassanayake

**SC (SD) No. 51/2024**    **Petitioner:** Hon. Ranjith Madduma Bandara

**Counsel:** Farman Cassim, PC with Vinura Kularatne

**SC (SD) No. 52/2024**    **Petitioners:**

1. Dr. Don Joseph Tilak Siyambalapitiya
2. Wannakuwattewaduge Justin Lasantha Shavindranath Fernando
3. Hedigallage Pubudu Niroshan
4. Gisensly Janaka Aluthge

**Counsel:** Canishka Witharana with H. M. Thilakaratne,  
Sawani Rajakaruna and Tharaka Fernando

**SC (SD) No. 53/2024**    **Petitioner:** Korale Gedara Ranjan Kumara Seneviratne

**Counsel:** Canishka Witharana with H. M. Thilakaratne,  
Sawani Rajakaruna and Tharaka Fernando

vs.

**Respondent:** Hon. Attorney General

**Counsel:** Viveka Siriwardena, PC, Additional Solicitor General with Amasara Gajadheera, State Counsel, Ishara Madarasinghe, State Counsel, Medhaka Fernando, State Counsel and Madhushka Kannangara, State Counsel

<b>BEFORE:</b>	Vijith K. Malalgoda, PC	Judge of the Supreme Court
	A.L. Shiran Gooneratne	Judge of the Supreme Court
	Arjuna Obeyesekere	Judge of the Supreme Court

The Court assembled for hearing at 10.00 a.m. on 9<sup>th</sup> May 2024, 10<sup>th</sup> May 2024 and 13<sup>th</sup> May 2024.

A Bill in its long title referred to as “Sri Lanka Electricity”, and in its short title referred to as the “Sri Lanka Electricity Act” [the Bill] was published as a Supplement in Part II of the Government Gazette of 10<sup>th</sup> April 2024. It was presented in Parliament by the Hon. Minister of Power and Energy and was placed on the Order Paper of Parliament of 25<sup>th</sup> April 2024.

Twenty-nine Petitioners have invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution by filing the above numbered petitions in the Registry of the Supreme Court between 26<sup>th</sup> April 2024 and 9<sup>th</sup> May 2024. The Petitioners have prayed *inter alia* that this Court declare that the Bill in its entirety is in violation of Articles 2, 3, 4, 12(1), 12(2), 14(1) and 83 of the Constitution and for a determination that in addition to being passed with not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour [the special majority], the Bill must be approved by the People at a Referendum.

Upon receipt of the said petitions, the Registrar of this Court issued notice on the Attorney General, as required by Article 134(1) of the Constitution.

This Court heard extensive submissions from the learned President’s Counsel for the Petitioners in SC (SD) No. 42/2024 and SC(SD)No. 44/2024, the learned Counsel appearing for the Petitioners in the other applications, and the learned Additional Solicitor General. All parties were also afforded the opportunity of filing written submissions. In the course of her submissions, the learned Additional Solicitor General informed this Court that amendments will be moved at the Committee Stage of Parliament to several Clauses of the Bill. The said amendments will be referred to when reference is made in this Determination to the said Clauses.

## **Jurisdiction of Court**

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

*"(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –*

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

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

### **Reference of the Bill to Provincial Councils**

Mr. Shantha Jayawardena, the learned Counsel for the Petitioners in SC (SD) Nos. 43/2024 and 45/2024, submitted that in terms of Item 34 of List 1 of the Ninth Schedule to the Constitution [Provincial Council List] the “*development, conservation and management of sites and facilities in the Province for the generation and promotion of electrical energy (other than hydro-electric power and power generated to feed the national grid)*” is a matter for the Province and this Bill therefore attracts the provisions of Article 154G(3) of the Constitution, which reads as follows:

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

- (a) *where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting; or*
- (b) *where one or more Councils do not agree to the passing of the Bill, such Bill is passed by the special majority required by Article 82:*

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

Mr. Jayawardena submitted that the above requirement has not been complied with, and relying on the Determinations of this Court in the Divineguma Bill [Decisions of the Supreme Court on Parliamentary Bills (2010-2012), Vol. X, 87], the State Lands (Special Provisions) Bill [[Decisions of the Supreme Court on Parliamentary Bills (2019-2020), Vol. XV, 5] and the Town and Country Planning (Amendment) Bill [Decisions of the Supreme Court on Parliamentary Bills (2010-2012), Vol. X, 55], submitted that the Bill requires to be passed by the special majority of Parliament.

It is admitted that there has not been compliance with the above requirement in Article 154G(3), with the reason for such failure being that duly constituted Provincial Councils do not exist at this moment. This issue was raised in the Colombo Port City Economic Commission Bill [Decisions of the Supreme Court on Parliamentary Bills (2021) Vol. XVI, 23], where a bench of five Judges of this Court, having considered the applicability of Article 154G(3) in such circumstances, determined as follows:

*"It is the view of the Court that the requirement to refer a Bill to every Provincial Council is a procedural step in the legislative process. However, in interpreting this provision (in a situation where a Bill has not been referred to a Provincial Council) it is necessary to consider the application of the maxim 'lex non cogit ad impossibilia' – law does not compel a man to do that which he cannot possibly perform.*

*Court has previously held in Ananda Dharmadasa and Others v. Ariyaratne Hewage and Others [(2008) 2 SLR 19], that the principle 'lex non cogit ad impossibilia' is applicable in interpreting procedural requirements in the Constitution.*

*The existence of a Provincial Council constituted in accordance with the law is a pre-requisite to decide whether there is non-compliance with this procedural step in a given situation. It is pertinent to note that at present, none of the Provincial Councils have been constituted in accordance with the law. Therefore, referring a Bill to Provincial Councils at this point of time, for the expression of its views is an act which cannot possibly be performed. Thus, non-compliance with this procedural step which cannot be performed, in the present circumstances, should not adversely impact on the legislative power of Parliament, which is a part of inalienable sovereignty of the People."*

This position was re-iterated in the Twenty First Amendment to the Constitution Bill [SC (SD) Application Nos. 31, 32, 34, 36 and 37/2022, at page 8] where Article 154G(2) applied, and in the Petroleum Products (Special Provisions) (Amendment) Bill [SC (SD) Application Nos. 50-52/2022, at page 20]. We too are in agreement with the view expressed by this Court in the Colombo Port City Economic Commission Bill [supra].

Mr. Jayawardena however submitted that the reason for the absence of duly constituted Provincial Councils could be attributed to the failure on the part of the Executive to conduct elections to elect members to the Provincial Councils and in such a scenario, the fact of impossibility cannot be pleaded. It is outside the jurisdiction of this Court in these applications to delve into the reasons for elections to the Provincial Councils not being held. In these circumstances, we see no merit in the submission that this Bill must be passed by a special majority of Parliament as there has been a failure to comply with the provisions of Article 154G(3) of the Constitution.

### **Electricity as a basic commodity**

The benefits of electrification have had a direct impact in raising living standards of the People of this Country and have triggered rapid development in rural areas and at national level, creating new opportunities for investment. Energy plays a fundamental role in the economic growth process and forms a positive and significant causal link between the use of energy and economic growth. It would not be an exaggeration to say that electricity has become a basic need of our People, whichever part of this Country that one may be living, and for the economic sustenance of the Country.

In **Gamlakshage Sunil Seneviratne v Shelton Gunesekara, Assistant Investigation Officer CEB and Others** [SC (FR) Application No. 476/2012; SC Minutes of 16<sup>th</sup> December 2016], this Court stated that, “*Electrical energy in the present context, is indispensable for human life and the society would be put to severe hardships if these services are not made available. ... Any deficiency in service would lead to severe hardships on the society. To provide a service to all consumers without any discrimination and to provide safe and adequate service in a timely manner are the recognised duties of a public utility.*”

Mr. Jayawardena submitted that this was the justification for the declaration of the electricity sector as an essential service under the Essential Public Services Act, whenever the need for such a declaration arose.

### Present position in the Electricity sector

There are several laws that relate to the electricity sector in the country. Of them, the first is the Ceylon Electricity Board Act, No.17 of 1969, as amended. The second is the Sri Lanka Electricity Act, No. 20 of 2009, as amended. The third is the Public Utilities Commission of Sri Lanka Act, No. 35 of 2002, as amended. The fourth is the Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007. There are at least three important players that currently form the electricity sector in Sri Lanka. The first is the Ceylon Electricity Board, a statutory corporation incorporated under the Ceylon Electricity Board Act and which is fully owned by the Government of Sri Lanka. The second is the Lanka Electricity Company Limited, a majority of whose shares are held by the Ceylon Electricity Board. The third are those who have been issued with a generation license to generate electricity. All players are regulated by the Public Utilities Commission of Sri Lanka, to the extent specified in the Public Utilities Commission of Sri Lanka Act.

It is common ground that the Ceylon Electricity Board operates hydro, thermal, coal, wind and solar power plants which are situated around the Country and that the majority of the power that is consumed in Sri Lanka is generated by the Ceylon Electricity Board. In addition, there are several companies that produce power from thermal sources, as well as many privately owned small scale mini hydro, solar, and wind power plants, said to be in number over 360, and which the Petitioners claim provide approximately 18% of the power supply to the national grid. While all such entities transmit the electricity so generated to the Ceylon Electricity Board in terms of power purchase agreements, the generation activity of such entities is carried out pursuant to generation licenses issued by the Public Utilities Commission.

The Ceylon Electricity Board is the sole entity to whom a transmission license has been issued. It is the exclusive system control operator and transmission service provider who controls, operates and manages the **national grid of Sri Lanka** on a real time basis. The Ceylon Electricity Board and the Lanka Electricity Company Limited have been issued with distribution licenses which enables them to distribute to consumers the power generated by generation licensees using the transmission network owned by the Ceylon Electricity Board. It is perhaps important to state that as it stands now, there is no other grid other

than what is commonly referred to as the national grid, and that the transmission and distribution of electricity take place on this national grid.

Thus, it would be correct to state that the Ceylon Electricity Board is the major player in the power sector at this point of time. Being bestowed with this status carries with it the obligation of ensuring that there is an uninterrupted supply of power to the consumers, even in situations where one source of power generation may be experiencing an outage.

### **The need for reform**

The learned Additional Solicitor General Ms. Viveka Siriwardena, PC submitted that what exists within the Ceylon Electricity Board today is a highly centralised and a vertically integrated structure, as a result of which there is a lack of accountability at the functional level and a lack of efficient performance across the board. She submitted that this has contributed to the poor financial performance of the Ceylon Electricity Board and to the high cost of electricity in the country. It was also her position that the existing institutional framework is not conducive to any of the increasing demands of the power sector, and that institutional reforms are urgently required if the electricity sector of the Country is to be transformed to an efficient business.

She submitted further that since 1997, the Government has made many attempts at introducing regulatory and institutional reforms within the electricity sector. The first legislative attempt was in 2002 with the enactment of the Electricity Reforms Act No. 28 of 2002. The said Act was not given effect to, and was repealed with the introduction of the Sri Lanka Electricity Act in 2009 which too had as its object the institutional reforms within the power sector. With the introduction of this Act, the Public Utilities Commission was entrusted with the task of being the economic, safety and technical regulator for electricity. However, it was the position of the learned Additional Solicitor General that the reforms contemplated by the Government have not been forthcoming, with the resultant position being that the Ceylon Electricity Board is steeped in debt and inefficiency. This has in turn contributed to the Government being unable to attract the necessary investments to the electricity sector to meet the demands of the 21<sup>st</sup> century. The learned Counsel for the Petitioners however sought to contradict this position by claiming that the Ceylon

Electricity Board is currently making profits due to the adjustments made to the tariff that now reflects the cost of power generation and distribution.

It is in this background that the learned Additional Solicitor General submitted that the Bill seeks to introduce institutional and legal reforms to the existing legal framework in order to promote transparency and innovation and thereby improve the financial health and investment climate of the electricity sector with the ultimate beneficiaries being the People of this Country by way of reduced electricity tariffs. Of course, any such amendment to the legal framework must be in terms of the Constitution and must include the necessary checks and balances in order to ensure transparency, accountability and integrity of the processes that are sought to be introduced.

### **The proposed reforms**

The manner in which the Bill seeks to introduce the institutional reforms is set out in the preamble and Schedule I of the Bill. Simply put, the generation, transmission and distribution functions of the Ceylon Electricity Board which have already been referred to at the beginning of this Determination, are to be separated or, as referred to by all learned Counsel, ‘unbundled’ and entrusted to separate corporate entities to be established under the Companies Act, No. 7 of 2007 in the following manner:

- (1) One company of which one hundred percent of the shares shall be held by the Government of Sri Lanka to take over the **hydro power generation assets** of the Ceylon Electricity Board;
- (2) One company to take over the **coal power plant** owned and operated by Ceylon Electricity Board and the Lanka Coal Company;
- (3) One company to take over the **thermal generation assets** of the Ceylon Electricity Board;
- (4) One company to take over the **wind power plant owned**, possessed and operated by the Ceylon Electricity Board;

- (5) One company of which the Government of Sri Lanka holds one hundred percent of the shares to take over the **functions** of the Ceylon Electricity Board relating to generation, scheduling, commitment and economic dispatch of generating plants and functions relating to the planning of future electricity and transmission capacity; [Clause 9]
- (6) One company of which the Government of Sri Lanka holds more than fifty percent of the shares to take over the **functions** of the Ceylon Electricity Board relating to the development, maintenance and operation of the physical infrastructure that makes up the National Grid of Sri Lanka; [Clause 14]
- (7) Separate companies to take over the **distribution functions** of all the distribution divisions of the Ceylon Electricity Board.

In addition to the above, Schedule I also provides for the formation of such number of companies as shall be required for managing the residual functions of the Ceylon Electricity Board and another company to manage the Provident Fund and the Pension Fund of the Ceylon Electricity Board.

#### **Vague and overbroad provisions of a Bill and their nexus to Article 12(1)**

The majority of the submissions of the learned Counsel for the Petitioners fall into two categories. The first is that the provisions of the Bill relating to the implementation of the 'unbundling' of the Ceylon Electricity Board are unclear, vague and irrational and that such lack of clarity, vagueness and irrationality can result in the arbitrary implementation of the provisions of the Bill. The lack of clarity and irrationality referred to by the Petitioners permeates through many provisions of the Bill. The second is that the Minister assigned the subject of electricity has been conferred with unbridled power and that this too could lead to the arbitrary implementation of the provisions of the Bill.

The learned Additional Solicitor General however submitted that the Petitioners have failed to demonstrate how the structure of the Bill and the conferment of powers on the Minister would lead to their implementation in an arbitrary manner. She submitted further that in any event, the safeguards provided within the clauses of the Bill itself would prevent

any arbitrary exercise of power by the Minister and the implementation of the Bill in an arbitrary manner.

It was also her position that the function of this Court is to consider the provisions of the Bill as it presently reads and not speculate whether there can be an arbitrary exercise of power in implementing the provisions of the Bill. In support of her submission, the learned Additional Solicitor General drew the attention of this Court to the determination in the Third Amendment to the Constitution Bill [Decisions of the Supreme Court on Parliamentary Bills (1978-1983), Vol. I, 139 at page 147] where it was held that:

*"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."*

In 2002, this Court considered the Welfare Relief Benefits Bill [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII, 279] which was intended to provide the necessary legal framework for the payment of all welfare relief benefits. In response to the submission that there would be favouritism in the selection process, this Court, having considered *inter alia* the provisions of the bill including those relating to the selection process for the recipients of such benefits, the criteria for eligibility to receive assistance in terms of a scheme formulated under the bill, the date of commencement and the duration of the payments under a scheme and the fact that all schemes shall be published in the Gazette and placed before Parliament prior to the commencement of such schemes, this Court concluded that the said provisions offer **adequate safeguards** to ensure that the selection of the recipients under each scheme will be made in a non-discriminatory manner thereby ensuring compliance with Article 12 of the Constitution.

This Court went onto state that, "*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. The provisions*

*referred to above are in our view adequate safeguards in this regard”* [emphasis added; at page 282].

The above test has been cited with approval thereafter in several determinations of this Court including in the Twentieth Amendment to the Constitution Bill [Decisions of the Supreme Court on Parliamentary Bills (2019-2020), Vol. XV, 87 at pages 133-134], the Colombo Port City Economic Commission Bill [supra; at page 26] and the Petroleum Products (Special Provisions) (Amendment) Bill [supra; at pages 9-10].

In the Bureau of Rehabilitation Bill [SC (SD) Application Nos. 54-61/2022], the thrust of the submissions of the petitioners was twofold. The first was that the provisions of the bill were vague, overbroad, and lacked clarity and that as such, the bill was arbitrary and therefore inconsistent with the provisions of Article 12(1) of the Constitution. The second was that such a law could lead to the arbitrary implementation of its provisions and therefore violate Article 12(1). On this issue, this Court held as follows [at page 9]:

*“Vague provisions prevent persons from understanding the ambit of the law. Citizens will not have the knowledge of what is permissible and what is not. Governmental authorities cloaked with powers under vague provisions will not know the ambit of their powers and as such the implementation of such powers would become necessarily arbitrary. As was held by this Court in the Prevention of Terrorism (Temporary Provisions) Amendment Bill [SC (SD) Application Nos. 13-18/2022]:*

*“When a provision of law is vague, it would only benefit the wrongdoer. Such a provision would not uphold the Rule of Law”* [at page 22].

*“This Court has stated time and again that vagueness must be avoided in the bills in order to make such provisions consistent with Article 12(1) of the Constitution”* [at page 23].

*In assessing whether the provisions of a bill are vague or lack clarity, the question before this Court would be whether the bill has been drawn up with the amount of clarity and precision as would enable a reasonable person to discern which actions are forbidden, or which actions are required. If the operation and boundaries of the*

*bill in question cannot be identified without resorting to guesswork, then the provisions of the bill would be vague, and therefore arbitrary. Even if the provisions of the impugned Bill are unambiguous, if it fails to provide adequate safeguards in the exercise of such power, that too will be arbitrary. Thus, provisions that are vague and those that do not have adequate safeguards violate Article 12(1) of the Constitution.*

*In considering the application of a bill or its provisions, it is only plausible and real-world possibilities that would be entertained by this Court. The threat of potential abuse should not be based on fanciful hypotheses, and should always be guided by the perspective of the proverbial reasonable person. There should be a realistic possibility that the provisions of the Constitution would be abused through the provisions of the law. In such a situation, this Court undoubtedly possesses the jurisdiction to consider such possibilities, and would not have to wait for any actual or imminent infringement. The need for this Court to be proactive and vigilant is underscored by the absence of post-enactment review.” [emphasis added]*

This Court is mindful that the task of making policy is the prerogative of the Executive, and that the enactment of laws is within the domain of Parliament. Thus, whether the Government wishes to shift the electricity sector from being a Government owned utility provider to a profit earning sector consisting of many players is entirely a matter of policy.

It would however be important to bear in mind that the Directive Principles of State Policy contained in Article 27 of the Constitution shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society, and that the State has pledged to establish in Sri Lanka a Democratic Socialist Society, the objectives of which are more fully set out in Article 27(2).

With the ‘unbundling’ of the Ceylon Electricity Board, and with all its assets and functions being vested in or taken over by separate corporate entities, the Ceylon Electricity Board would no longer be the provider of electricity to the People of this Country. Instead, the Country would have separate corporate entities, some owned by the Government and

some the shareholding of which is not known, generating, transmitting and distributing electricity within the Country. Needless to state, the ‘unbundling’ must be carried out with the precision that such an exercise demands and the provisions in the Bill must not only not be vague but must be clear and precise. If the Bill or any provisions thereof are anything but clear, the consequences to the Country and its People would be disastrous.

A similar observation was made by this Court in the Determination of the Sri Lanka Electricity Bill and the Ceylon Electricity Board (Amendment) Bill [Decisions of the Supreme Court on Parliamentary Bills (2004-2006), Vol. VIII, 142] in the following terms:

*“The Bills contain extensive provisions with regard to the generation, transmission and supply of electricity and the regulation thereof. Considering the importance of an efficient, coordinated and economical supply of electricity from the perspectives of the day to day lives of the People on the one hand and industry and commerce vital to the economy of the country on the other, a careful scrutiny of the provisions is necessary for a proper determination as ‘to constitutionality.’”* [ at page 143]

*“Such a process of breaking up of a well entrenched single proprietary and functional entity into distinct units, to be vested in different companies having separate legal personality, would raise a range of legal issues.... The manner of separation of this unified entity which has functioned efficiently for several decades would be in itself a electrifying experience.”* [ at page 145]

In the ever expanding canvass of judicial review, and especially given the nature of the Bill and the critical importance of the Bill to the People of this Country, this Court must, in exercising its Constitutional role, adopt a more prudential approach and ensure that the Bill has been drawn up with the amount of clarity and precision that it demands.

Thus, we wish to reiterate that in examining the provisions of this Bill, we shall carefully consider whether the provisions of the Bill are in terms of the Constitution, whether such provisions are clear in the manner in which it shall be implemented, and whether the Bill has in place adequate criteria and sufficient safeguards for the achievement of the objective of the Bill in a manner that prevents arbitrariness in the decision-making process

and ensures that its provisions remain constitutional. It is only if the said matters are answered in the affirmative that a conclusion can be reached that the provisions of the Bill are consistent with the provisions of the Constitution and that the Bill may be passed by Parliament with a simple majority.

### **Objects of the Bill**

The objects of the Bill, contained in Clause 2 of the Bill, are re-produced below:

*"The objects of this Act, in relation to the generation, transmission, distribution, trade, supply and procurement of electricity shall be, -*

- (a) *to ensure improved Electricity Industry performance through independent and accountable corporate entities responsible for the provision and maintenance, of a well-coordinated, efficient and economical system of electricity supply throughout Sri Lanka at all times, through transparent policies;*
- (b) *to facilitate the establishment of independent and accountable corporate entities for the efficient supply of electricity throughout the country and to protect the interests of the consumers;*
- (c) *to promote and facilitate the establishment and functioning of the Wholesale Electricity Market;*
- (d) *to promote competition in the Electricity Industry by eliminating preferential treatment and barriers to entry, allowing open competitive procurement of new generation capacity including renewable energy, implementing transparent, merit order dispatch of generation capacity and providing non-discriminatory access to the transmission network for all types of generation technologies and consumers;*
- (e) *to ensure that entities to whom licences have been granted under this Act (hereinafter referred to as "licensees") will act efficiently in carrying out the activities authorised or required by the respective licences issued to them;*

- (f) *to ensure that all reasonable demands for electricity, including future requirements for electricity are met, whilst ensuring efficient use of electricity supplied to all premises;*
- (g) *to protect the public from dangers arising from the generation, transmission, distribution, trade, supply and procurement of electricity by improved safety standards, reliability and quality of services;*
- (h) *to identify the tariff principles to ensure affordability of electricity to all consumers and financial viability of licensees; and*
- (i) *to provide for the decarbonization of the Sri Lankan Electricity Industry and the promotion of renewable energy and energy integration in accordance with Sri Lanka's national policies and its international obligations whilst ensuring optimal use of natural resources."*

The learned Additional Solicitor General submitted that the Government is fully aware of the onerous task of ‘unbundling’ and that it has embarked on this ‘unbundling’ exercise in all seriousness. She submitted that this is demonstrated by the Cabinet Memoranda and the decisions thereon, and that a Reform Secretariat has already been established and tasked with the formulation of the initial steps towards the achievement of the objects of the Bill.

### **The plans and policies for the power system**

Clause 53 of the Bill defines:

- (a) electrical power system to mean “*the combination of electrical generators (i.e., power plants), transmission and distribution lines, equipment, circuits, and transformers used to generate and transport electricity from the generator to the consumption areas or to adjacent electrical power systems.”*

- (b) power system to mean, "*all aspects of generation, transmission, distribution and supply of electricity and includes one or more of the following, namely:- (a) generating stations; (b) transmission lines; (c) substations; (d) tie-lines; (e) load dispatch activities; (f) distribution mains; (g) electricity supply lines; (h) overhead lines; (i) service lines; and (j) works.*"

The Bill has put in place a twofold mechanism to ensure that the objects stipulated in Clause 2 are achieved.

First, it has identified that there must be in place, the following:

- (1) The Transfer Plan, the detailed provisions of which are contained in Clause 18, and which facilitates the 'unbundling' and the consequent taking over of the activity of the Ceylon Electricity Board by the entities that are to be established for such purpose;
- (2) The National Electricity Policy as provided for by Clause 4;
- (3) The National Tariff Policy, which shall form part of the National Electricity Policy;
- (4) The Annual Power Procurement Plan morefully referred to in Clause 10(2);
- (5) The Long Term Power System Development Plan prepared every two years in accordance with the approved National Electricity Policy for periods of ten years at a time [Clause 10(5)]. Clause 10(11) provides that this Plan shall "*ensure that there is sufficient capacity from generation plants to meet the reasonable estimated demand for electricity, for both generation expansion and transmission network development, inclusive of evaluation of least economic cost generation technologies, energy conversion and storage technologies, and other demand side technologies*" and "*identify new transmission capacity and transmission assets to augment the National Grid*".

Clause 39(1) provides that the Board of Directors of the Ceylon Electricity Board shall cooperate with the Power Sector Reforms Secretariat in the restructuring activities being carried out in terms of the Bill including providing information, in the identification and valuation of assets, and the allocation of staff to the successor entities.

Second, the Bill has identified the following bodies of persons who shall be responsible for the preparation of the above plans and policies:

- (1) Power Sector Reform Secretariat [Clause 38] which shall be responsible for the preparation of the Preliminary and Final Transfer Plan for the transition, transfer and reorganization of the Electricity Industry in Sri Lanka [Clause 18];
- (2) National Electricity Advisory Council which shall advise the Minister in formulating the National Electricity Policy [Clause 3(1)] and which shall be responsible for the formulation of the draft National Electricity Policy including the National Tariff Policy [Clause 4];
- (3) The National System Operator who shall be responsible for the preparation of the Annual Power Procurement Plan [Clauses 9 and 10(2)] and the Long Term Power System Development Plan [Clause 10(5)];
- (4) The National Transmission Network Service Provider [Clauses 14 and 15] who shall be responsible for the implementation of the functions of the Ceylon Electricity Board connected with the development, expansion and maintenance of the physical infrastructure of the National Grid of Sri Lanka and for the transmission of bulk electricity to distribution licensees.

As correctly submitted by the learned Additional Solicitor General, each of the above entities have a statutory obligation and responsibility to ensure that the objects of the Bill are achieved. It is clear that each and every one of the above plans and policies are interwoven with one another, thus ensuring that the electricity sector is transformed in a singular and coherent manner. The absence of one plan or policy will therefore certainly affect the viability of the reforms that are sought to be introduced by the Bill. Even though the Ceylon Electricity Board Act and the Electricity Act would stand repealed on the date

that this Bill comes into operation, the transitional provisions in the Bill do not keep alive the existing policies and plans until new plans and policies are prepared in terms of the proposed Act. It is indeed a matter of regret that the said transitional provisions are woefully inadequate in ensuring a smooth transition from the existing regime dominated by one player to a regime which would see the participation of many corporate entities with diverse ownership. In these circumstances, it is critical that the said plans and policies are in place well before the repeal of the Ceylon Electricity Board Act and the Electricity Act and prior to the Ceylon Electricity Board ceasing to be a legal entity.

### **The appointed date – Clause 1 of the Bill**

Article 80(1) of the Constitution provides that, “*Subject to the provisions of paragraph (2) of this Article, a Bill passed by Parliament shall become law when the certificate of the Speaker is endorsed thereon.*”

Clause 1(2) and (3) of the Bill reads as follows:

“(2) *The provisions of this Act other than the provisions of this section, section 3, section 38 and the sections specified in subsection (4) of this section shall come into operation on such date as shall be appointed by the Minister by Order published in the Gazette (hereinafter referred to as the “**appointed date**”).*

*Provided that, the appointed date shall be a date not later than six months from the date on which the Bill becomes an Act of Parliament:*

*Provided further, if no appointed date is published in the Gazette as required by this subsection, the provisions of this Act, other than the provisions of this section, section 3, section 38 and the sections specified in subsection (4) of this section shall come into operation immediately upon the expiry of six months from the date on which the Bill becomes an Act of Parliament.*

(3) *The provisions of this section, section 3 and section 38 shall come into operation on the date on which the Bill becomes an Act of Parliament.”*

Thus, in terms of Clause 1(2) and (3), only Clauses 1, 3 and 38 will become law when the certificate of the Speaker is endorsed. The effect of this Clause can be summarised as follows:

- (a) Although the Power Sector Reforms Secretariat is in place, the Preliminary Transfer Plan cannot be implemented until the Appointed Date, as Section 18 will not be operative;
- (b) Although the National Electricity Advisory Council is in place, the National Electricity Policy including the National Tariff Policy will not be in place as at the Appointed Date, as Section 4 will not be operative;
- (c) The National System Operator will not be incorporated until the Appointed Date as a result of which the Annual Power Procurement Plan and the Long Term Power System Development Plan will not be in place on the Appointed Date;
- (d) The National Transmission Network Service Provider who is responsible for the National Grid will not be in place until the Appointed Date and without which the transmission network cannot be put in operation, as Sections 14 and 15 will not be operative.

However, on the Appointed Date, which is a maximum period of six months from the date the Act comes into operation and with a mandatory long stop date without any provision for extension of such date even if the above plans and policies are not in place unless an amendment is made through an amendment to the law, the Ceylon Electricity Board Act together with the Electricity Act shall stand repealed. The issue with this position is exacerbated by the fact that the Bill does not contain the dates on which the above plans and policies shall be in place except the requirement to have a preliminary Transfer Plan on the Appointed Date and the Annual Power Procurement Plan to be in place on or before the 30<sup>th</sup> day of September of each year. The cumulative effect is that although the Bill seeks to ‘unbundle’ the Ceylon Electricity Board with a mandatory long stop date, the enabling provisions, together with the plans and policies would not be in place to implement such ‘unbundling’.

It is in these circumstances that Mr. Uditha Egalahewa, PC appearing for the Petitioners in SC (SD) No. 42/2024 and SC(SD) No. 44/2024 and Mr. Niranjan Arulpragasam, the learned Counsel appearing for the Petitioners in SC (SD) No. 46/2024 submitted that the entire Bill is vague and lacks clarity in its implementation and that the People would be saddled with a law that is neither cohesive nor coherent with the consequence being that the People may not have electricity. We have already referred to the logical relationship that each of the aforementioned plans and policies have in achieving the objects set out in Clause 2 and in the successful completion of the ‘unbundling’ exercise. In this background, we are in agreement with the learned Counsel for the Petitioners that given the way that Clause 1(2) presently reads, the Bill as a whole is vague and lacks clarity and violates Article 12(1) of the Constitution. The Bill as a whole must therefore be passed by the special majority of Parliament.

The learned Additional Solicitor General submitted that the following amendments will be moved at the Committee Stage of Parliament to Clause 1 and Schedule I:

- (1) Insertion of Sections 2, 4, 17, 18 and 39 in Clause 1(2);
- (2) Deletion of the words, ‘six months’ in both provisos to Clause 1(2) and Schedule I and by substituting therefor the words, ‘twelve months’.

While the vagueness attached to the implementation of the provisions of the Bill can be addressed to an extent by (1) above, we are of the view that:

- (1) Clause 9, Clause 10(1), Clause 10(2)(b), Clause 10(3), Clause 10(5), Clause 14 and Clause 15 must also be operative from the date the Bill becomes Law;
- (2) The Preliminary Transfer Plan, the National Electricity Policy including the National Tariff Policy, the Annual Power Procurement Plan and the Long Term Power System Development Plan must also be in place before the Minister publishes a notification in the Gazette specifying the Appointed Date;

- (3) The inconsistency of the Bill as a whole with Article 12(1) of the Constitution shall cease if Clause 1(2) and (3) are amended as follows:

Clause 1(2)

*"The provisions of this Act other than the provisions of this section, Section 2, Section 3, Section 4, Section 9, Section 10(1), Section 10(2)(b), Section 10(3), Section 10(5), Section 14, Section 15, Section 17, Section 18, Section 38, Section 39 and the sections specified in subsection (4) of this section shall come into operation on such date as shall be appointed by the Minister by Order published in the Gazette (hereinafter referred to as the "appointed date"):*

*Provided that prior to making such Order, the Minister shall be satisfied that the Preliminary Transfer Plan, the National Electricity Policy including the National Tariff Policy, the Annual Power Procurement Plan and the Long Term Power System Development Plan have been prepared, approved and are in place in accordance with the provisions of this Act:*

*Provided further that if no appointed date is published in the Gazette as required by this subsection even though the Minister is satisfied that the requirements in the first proviso have been met, the provisions of this Act, other than the provisions of this section, Section 2, Section 3, Section 4, Section 9, Section 10(1), Section 10(2)(b), Section 10(3), Section 10(5), Section 14, Section 15, Section 17, Section 18, Section 38, Section 39 and the sections specified in subsection (4) of this section, shall come into operation immediately upon the expiry of twelve months from the date on which the Bill becomes an Act of Parliament."*

Clause 1(3)

*"The provisions of this section, Section 2, section 3, Section 4, Section 9, Section 10(1), Section 10(2)(b), Section 10(3), Section 10(5), Section 14, Section 15, Section 17, Section 18, section 38 and Section 39 shall come into operation on the date on which the Bill becomes an Act of Parliament."*

### **Allocation and sale of shares in the proposed entities**

While the shareholding of some of the proposed corporate entities have been stipulated in Clauses 9, 14 and Schedule I, no such provision has been made in respect of the other corporate entities. The Bill does not specify if the Government shall hold shares in such entities at the time of their incorporation nor does the Bill contain any mechanism on the procedure that would be adopted in the sale or transfer of shares of such entities.

Needless to state, any sale of shares must be carried out:

- (a) only after a detailed identification and valuation of the assets and liabilities of each proposed entity is carried out, which process would reach finality only upon the completion of the Final Transfer Plan [Clause 18 and Clause 39(1)(b)]; and
- (b) only through a competitive bidding process in accordance with procurement guidelines prepared by the relevant authority in terms of the law, thus ensuring transparency and integrity in the sale of public assets.

Schedule I contains a list of the corporate entities that would be established and specifies what would be vested in each of such entities, ranging from 'assets' of the generating company to 'functions' of the distribution licensees. Clause 17(2) of the Bill however provides as follows:

*"On the appointed date, by virtue of the operation of the provisions of this section, the restructured activities of the Ceylon Electricity Board relating to the generation, transmission, distribution and supply of electricity, and all assets and liabilities of the Ceylon Electricity Board pertaining to generation, transmission, distribution and supply of electricity along with their respective duties and functions shall vest in the limited liability companies incorporated in terms of subsection (1), in accordance with the scheme set out in the transfer plan specified in section 18."*

While this Court is not in a position to decide as to what should be vested, the fact remains that there is an ambiguity between Clause 17(2) of the Bill and Schedule I as to what is being taken over by or vested in each of the corporate entities. Mr. Jayawardena submitted

further that the Bill is silent with regard to the share capital of such companies and the manner in which and by whom such share capital shall be contributed, as well as with regard to the management structure of such companies.

Due to the above issues, we are of the view that Clause 17 as it presently stands is inconsistent with Article 12(1) of the Constitution and needs to be approved by the special majority of Parliament.

The learned Additional Solicitor General submitted that an amendment shall be moved at the Committee Stage of Parliament to Clause 17(2) by re-numbering the said sub-clause as paragraph (a), and by inserting the following as paragraph (b):

*"The Secretary to the Treasury shall be initially allotted hundred per centum of the shares in the successor companies incorporated under this section other than the companies referred to in item (a), (f) and (h) (ii) of Schedule I in which the Secretary to the Treasury shall be permanently allotted hundred per centum of the shares."*

The lack of clarity with regard to the initial allocation of shares in the proposed corporate entities would be overcome if Clause 17(2) is amended as proposed by the learned Additional Solicitor General.

The learned Additional Solicitor General also submitted that an amendment shall be moved at the Committee Stage of Parliament to Clause 18(2) by the insertion of the following new paragraph numbered as (c) –

*"The Secretary to the Treasury may, with the prior approval of the Cabinet of Ministers, dispose of any shares issued or allotted to him in any successor company other than the companies referred to in items (a), (f) and (h) (ii) of Schedule I or of any rights over such shares only after the publication of the final transfer plan in the Gazette in terms of paragraph (b):*

*Provided that, the Secretary to the Treasury shall, in disposing any shares as specified in paragraph (c) ensure that the Government holds more than fifty per centum of the shares of the company referred to in item (e) of Schedule I."*

In terms of the proviso to Clause 39(1)(b), the Final Transfer Plan shall contain the final asset valuation and allocation, and therefore the sale of shares will not take place without a valuation of the assets being finalized. However, the said clause is silent as to who would be carrying out the said valuation. We are in agreement with Mr. Jayawardena that the assets of the Ceylon Electricity Board are public assets and hence, the valuation must be carried out by the Chief Valuer.

We are of the view that the lack of clarity arising from the absence of any mechanism on the procedure that would be adopted in the sale or transfer of shares of such entities would be addressed by the above amendment proposed by the learned Additional Solicitor General, and the inconsistency shall cease, provided the following amendments are also carried out:

- (a) the words, "*and having followed a transparent and competitive bidding process as stipulated by law*" in the proposed Clause 18(2)(c) are inserted after the words, "*prior approval of the Cabinet of Ministers*";
- (b) the words, "*with such valuation being carried out by the Chief Valuer*" are inserted at the end of Clause 39(1)(b) but before the proviso.

The lack of clarity with regard to the share capital and management of the corporate entities shall cease if provision in this regard is set out in the Preliminary Transfer Plan and reflected in Clause 18(3).

The inconsistency between Clause 17(2) and Schedule 1 shall cease if Schedule 1 is amended to reflect the provisions of Clause 17(2).

We are of the view that if the aforementioned amendments as proposed by the learned Additional Solicitor General and this Court are adopted, the aforementioned inconsistencies with Article 12(1) shall cease and Clause 17 may be passed by the simple majority of Parliament.

## **The National Grid**

Under the present regime, the Ceylon Electricity Board is responsible for the transmission network as well as the system control centre which is in overall charge of the national grid and the real time operation of the power sector. It is a composite operation that is carried out by a single entity and the intricacies of managing such an operation have been explained by the Petitioners.

As part of the ‘unbundling’ of the Ceylon Electricity Board, the system control and the real time operation is proposed to be split in two, with the formation of the following two corporate entities:

- (1) The National System Operator of which the Government holds 100% of the shares and to whom a national system operator license shall be issued [Clauses 9 and 10]. The primary functions of the National System Operator *inter alia* are as follows:
  - (a) Ensure that the **integrated operation** of the power system of the country be based on the projections in the annual power procurement plan, and the monitoring and reporting at the end of every calendar month, of any variations from the annual power procurement plan to the Regulator with reasons therefor. [Clause 10(2)(c)]
  - (b) The coordinated operation of the power system to ensure in real time the balance between electricity supply and demand. [Clause 10(2)(d)]
- (2) The National Transmission Network Service Provider of which the Government shall hold more than 50% of the shares and to whom a national transmission network service provider license shall be issued [Clauses 14 and 15]. This entity shall be responsible *inter alia* for the following:
  - (a) The implementation of the functions of the Ceylon Electricity Board connected with the development, expansion and maintenance of the physical infrastructure of the **National Grid of Sri Lanka** and for the transmission of bulk

electricity to distribution licensees, and other eligible entities in the domestic, regional or international market. [Clause 15(2)]

- (b) Connect and transmit electricity in bulk form, with the approval of the Regulator, in such manner as shall be prescribed, from generation licensees to distribution licensees and other eligible consumers and to connect the National Grid of Sri Lanka to the transmission network of regional markets and recover transmission charges or any other charges as shall be prescribed. [Clause 15(4)(f)]

Mr. Egalahewa, PC submitted that there are three transmission lines, namely 220kV and 132kV which are high voltage lines and the 33kV line which is of medium voltage. All high voltage power lines are subsequently stepped down and connected to the 33kV lines which are then transmitted to the distribution licensees for onward distribution to consumers. Several power generation plants are connected via the 33kV line to the Distribution network but through the grid sub-stations. Thus, all 33kV lines, whether they are stepped down from a higher voltage or generated at that voltage, are connected via the grid stations and the grid sub stations, which are controlled by the System Operator. Thus, as at present, the 33kV transmission lines form part of the transmission network and the National Grid, and are controlled by the Ceylon Electricity Board in its capacity as the System Controller.

We have already adverted to the definition of power system which according to Clause 53 shall mean, "***all aspects of generation, transmission, distribution and supply of electricity and includes one or more of the following, namely:- (a) generating stations; (b) transmission lines; (c) substations; (d) tie-lines; (e) load dispatch activities; (f) distribution mains; (g) electricity supply lines; (h) overhead lines; (i) service lines; and (j) works.***" The Long Term Development Plan [Clause 3(3)(v)], the National Electricity Policy [Clause 4(3)(a)], the role and scope of the Regulator [Clause 8(3)(k)], the operation and maintenance of the System Control Centre [Clause 10(2)(a)], ensuring that the integrated operation of the power system of the country be based on the projections in the annual power procurement plan [Clause 10(2)(c)], the coordinated operation of the power system

to ensure in real time the balance between electricity supply and demand [Clause 10(2)(d)], **are all centered, *inter alia* on the power system and the national grid.**

Clause 53 of the Bill contains the following definitions of grid, national grid and grid code:

Grid – a high voltage backbone system of interconnected transmission lines, substations and generating plants.

Grid Code – the operating procedures and standards for planning of power system, scheduling of generators, interconnection of generators, transmission equipment and consumers to the national grid, operation of the power system and the national grid and the metering of power transfers.

National Grid – the transmission network operating at a voltage **greater than 33 kilo volts** consisting of transmission assets owned by the National Transmission Network Service Provider and additional transmission licensees.

Thus, the Bill seeks to reduce the scope and ambit of the national grid to a transmission network greater than 33kV. The learned Additional Solicitor General submitted that an amendment will be moved at the Committee Stage of Parliament to the definition of ‘national grid’ and that the definition shall thereafter read as follows:

*“the transmission network operating at a voltage greater than 33 volts consisting of transmission assets and grid substations owned by the National Transmission Network Service Provider and additional transmission licensees”*

Mr. Egalahewa, PC submitted that the distribution system of the Ceylon Electricity Board, which carries out more than 90% of the electricity distribution in Sri Lanka, comes under four divisions with each division operating under a Distribution License issued by the Public Utilities Commission and regulated in terms of the Sri Lanka Electricity Act. Referring to the Energy Flow Diagram of January 2024 published by the Ceylon Electricity Board which outlines the movement of energy from diverse generation sources, such as coal, hydro, thermal oil, solar, and wind, through a complex network of transmission lines to end consumers, Mr. Egalahewa, PC submitted that the said diagram demonstrates the

complicated dynamics of energy distribution within the national electricity system, and underscores the interconnectedness of various elements of the energy infrastructure.

According to the Renewable Energy Generation Report [April 2023 - June 2023] published by the Public Utilities Commission, about 45% of the Renewable Energy Power Plants in the country generated by 361 Renewable Energy generation plants are connected through 33kV or Voltage levels below that, whereas it is only the major hydro [48%], wind plants operated by the Ceylon Electricity Board [3%] and wind plants operated by independent power producers [1-2%] that are connected at voltages higher than 33kV.

It was pointed out by the Petitioners that according to a Report published in December 2022 by the Ceylon Electricity Board titled ‘Way forward of integration of renewable energy resources to the national grid from year 2023 to 2026’, the policy of the Government is to achieve 70% of electricity through Renewable Energy sources, which shall be connected either with 33kV, 11kV, 400V or 230V levels.

Mr. Egalahewa, PC submitted that in view of the definition of ‘national grid’ in the Bill:

- (a) the transmission network below 33kV including all renewable energy power plants will be outside the control of the National System Operator who is responsible for the operation and maintenance of the System Control Centre, for the reason that “System Control Centre” as defined in Clause 53 means the “*Centre established under section 10 of this Act for carrying out real time operation of the National Grid*”;
- (b) the National Transmission Network Service Provider would not have any role over the transmission network operating at a voltage less than 33 kilo volts.

The result of the exclusion of lines operating at a voltage lower than 33kV is threefold. The first is that power generated by a generation licensee and transmitted via a transmission line below 33kV directly to a distributor licensee shall be outside the control of the National System Operator, who as we have already stated, is responsible for the “*coordinated operation of the power system to ensure in real time the balance between electricity supply and demand*.” The second is that all plants that generate and transmit via a transmission line below 33kV will be outside the purview of the National System Operator and the

National Transmission Network Service Provider, thus limiting the role of the National System Operator and the National Transmission Network Service Provider. The third is that the Bill does not specify who would control and administer those operating transmission lines below 33kV.

The response of the learned Additional Solicitor General was twofold.

She submitted that, firstly, in terms of Clause 5(3) of the Bill, all generation companies and distribution companies will function under a license issued by the Public Utilities Commission and that these licenses will invariably enable the Public Utilities Commission to exercise the necessary degree of control over the relevant generation licensee or distribution licensee and ensure that they carry out their activities subject to any directions or orders issued by the National System Operator. While the terms and conditions of such licenses have not been presented before us, the issue raised by the learned President's Counsel goes beyond a licensing and regulatory issue.

Secondly, the learned Additional Solicitor General submitted that in terms of Clause 10(14) of the Bill, "*The National System Operator shall enter into power purchase agreements with generation licensees and transmission service agreements with transmission licensees as specified in subsection (12)*," and that the concerns of the Petitioners would be addressed through this mechanism. In addition to Clause 10(14), the learned Additional Solicitor General submitted that an amendment shall be moved at the Committee Stage of Parliament to re-number Clause 10(14) as Clause 10(14)(a) and to add the following new paragraphs numbered as (b) – (d), so that the National System Operator shall enter into:

- "(b) power purchase agreements with generation licensees incorporated under the preliminary transfer plan specified in paragraph (a) of subsection (2) of section 18;*
- (c) power sales agreements with distribution licensees incorporated under the preliminary transfer plan specified in paragraph (a) of subsection (2) of section 18;*

- (d) *a transmission service agreement with the National Transmission Network Service Provider incorporated under the preliminary transfer plan specified in paragraph (a) of subsection (2) of section 18 and as specified in subsection (12) of section 10.”*

While the insertion of the above provisions would certainly add clarity and the much desired legal basis for the relationship between the National System Operator and the National Transmission Network Service Provider on the one hand and the generation and distribution licensees on the other, a rational and reasonable explanation has not been offered as to the limitation of the national grid to a transmission network greater than 33kV. It also leaves open, at least partially, the submission of the Petitioners that the coordinated and real time operation that must take place once the Ceylon Electricity Board is ‘unbundled’ would not take place due to the exclusion of transmission networks operating at a voltage lesser than 33kV. We are therefore inclined to agree with the learned President’s Counsel that the exclusion of transmission networks below 33kV leaves a huge lacuna in the efficient administration of the power system.

The omission of 33kV transmission lines from the definition of ‘National Grid’ has another far-reaching consequence. The Bill provides for the exporting or trading of electricity by interconnecting the national grid with the transmission network of regional markets. Clause 10 (13) provides as follows:

- “(a) *The National System Operator shall have the exclusive right of trading electricity with other countries under the authority of a National System Operator license issued under this Act.*
- (b) *The terms and conditions of trading which is intended to be done under paragraph (a) shall be approved by the Cabinet of Ministers.*
- (c) *No generation licensee shall be authorised to directly sell electricity to any country and no consumer or distribution licensee shall be authorised to purchase electricity from any country”*

Clause 16 however provides that such transmission interconnection shall be constructed only after obtaining the prior approval of the Cabinet of Ministers. However, where the transmission is carried out through a transmission network operating at a voltage less than 33kV, the approval of the Cabinet of Ministers will not be required nor would such activity come within the purview of the National System Operator since such lines are outside the definition of the national grid.

We are therefore of the view that the definition of 'national grid' in Clause 53 of the Bill lacks clarity and its implementation can lead to arbitrariness and a violation of Article 12(1). Hence, we are of the view that this definition can be passed only with the special majority of Parliament. However, the said inconsistency shall cease if the definition of 'national grid' is amended to read as follows:

*"National Grid" means, the transmission network consisting of transmission assets and grid substations owned by the National Transmission Network Service Provider and additional transmission licensees."*

### **Clause 11 – procurement**

Clause 11(1) of the Bill provides that the National System Operator shall, in accordance with the Long Term Power System Development Plan, procure electricity, generation capacity and energy storage capacity by calling for tenders based on the procedure set out therein. This includes calling for proposals, maintaining transparency and competition and adopting Electricity Industry specific procedures for such procurement and preparation of formats in consultation with the National Procurement Commission established in terms of Article 156B (1) of the Constitution.

While in terms of the second proviso, "*the requirement to submit a tender shall not be applicable in respect of any new generation plant or to the expansion of any existing generation plant that is being developed to meet any emergency situation as determined by the Cabinet of Ministers during a national calamity or a long term forced outage of a major generation plant, where protracted bid inviting process outweighs the potential benefit or procuring emergency capacity required to be provided by any person at least cost*", the first proviso to Clause 11(1) reads as follows:

*"Provided that, -*

- (i) *if the capacity of the generation plant is below or equal to the threshold value as specified under subsection (3), and the final approval has been granted to generate electricity through renewable energy resources by the Sri Lanka Sustainable Energy Authority under section 18 of the Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007;*
- (ii) *where on the day preceding the date of the coming into operation of this Act an approval of the Cabinet of Ministers has been obtained to develop a new generation plant or to expand the generation capacity of an existing generation plant; or*
- (iii) *where on the day preceding the appointed date a valid letter of award has been issued by the Ceylon Electricity Board in accordance with the provisions of the Sri Lanka Electricity Act, No. 20 of 2009,*

*the National System Operator shall not be required to comply with the provisions of this subsection:"*

We are of the view that the first proviso to Clause 11(1) can result in the selection of entities in violation of procurement guidelines that are currently in place, and such selection will be in violation of Article 12(1) of the Constitution. Hence, the first proviso to Clause 11(1) must be approved by the special majority of Parliament. However, such inconsistency shall cease and Clause 11(1) may be approved by a simple majority if the words, "*provided that the selection of the party to whom approval has been granted or the letter of award has been issued has been selected pursuant to a competitive and transparent procurement process.*" are inserted at the end of the first proviso.

### Employees of the Ceylon Electricity Board

The Petitioners in SC (SD) No. 42/2024 have pointed out that as at 1<sup>st</sup> January 2024, the Ceylon Electricity Board has a total of 21,988 employees in the following grades/services:

No.	Employee Grade/Service	Current Physical Strength (Nos.)
1	Electrical Engineering Service	764
2	Mechanical Engineering Service	84
3	Civil Engineering Service	67
4	All Executives in Accounting Grades	93
5	Other Executives	374
6	Middle Level Technical Grades	1,603
7	Clerical & Allied Services Grades	3,953
8	Skilled Field Technical Service Grades	5,090
9	Office Employee Services	640
10	Semi-Skilled Technical & Unskilled Field Services	7,276
11	Other Skilled Grades	2,044
<b>Total as at 01<sup>st</sup> January 2024</b>		<b>21,988</b>

It was also submitted that approximately 88% of these employees or 19296 in number are under the age of 50 years thus underlining the importance of providing job security to all employees of the Ceylon Electricity Board.

Clause 18(3) to Clause 18(5) of the Bill contains several provisions relating to the employees of the Ceylon Electricity Board.

Clause 18(3)(f) provides as follows:

*"The transfer plan prepared under subsection (1) shall ensure that all officers and servants of the Ceylon Electricity Board holding office in the Ceylon Electricity Board on the day preceding the appointed date shall be-*

- (i) *duly identified by the Ceylon Electricity Board;*
- (ii) *be notified by the Ceylon Electricity Board of their proposed assignation to the respective successor companies within four months of this **Act comes [sic] into operation; and***
- (iii) *be required to **notify the Ceylon Electricity Board** within two months of the receipt of the notice referred to in subparagraph (ii), whether they opt to be assigned to such respective successor companies or not,*  
*and shall with effect from the date succeeding the appointed date shall [sic] be assigned to such successor companies under the **preliminary transfer plan** with the same salary paid under their contract of employment with the Ceylon Electricity Board. Where an employee does not opt to be assigned to a successor company, such employee shall be **entitled to a voluntary retirement scheme** and the terms and conditions of such scheme shall be as prescribed."*

As Clause 1(2) presently reads, Clause 18 would come into operation only on the Appointed Date and the Preliminary Transfer Plan would be published in the Gazette on the day immediately succeeding the Appointed Date. In terms of Clause 18(3)(f), the assigning of employees to the successor companies would take place four months after the said date, with the employees having a further two months from that date to indicate if they wish to be assigned to the successor companies. As the Ceylon Electricity Board would cease to be in existence from the Appointed Date, the practical reality of Clause 18(3)(f) is that for a period of six months from the appointed date, the employees of the Ceylon Electricity Board would not have an employer and consequently would not be renumerated and the successor companies may not have employees, thus bringing the entire electrical sector to a standstill. Hence, Clause 18(3)(f) as it presently reads is vague and lacks clarity with regard to the date on which such provision becomes effective.

This Court has already held that Clause 1(2) of the Bill is vague and the Bill is in violation of Article 12(1) but that the said violation would cease if the said Clause is amended at the

Committee Stage of Parliament as proposed by this Court, so that *inter alia* Clause 18 would become operative from the date the Bill becomes law in terms of Article 80(1). If Clause 1(2) is amended as proposed by this Court, the above lack of clarity shall cease.

Although Clause 18(3)(f) appears on the face of it to give an employee an option to decide on whether he or she wishes to continue with the successor company or else accept a Voluntary Retirement Scheme, in reality there is no such option for the reason that details of the Voluntary Retirement Scheme are not made known to an employee at the time he or she is required to make a choice, but instead are to be prescribed, with no date for doing so being stipulated. Mr. Egalahewa, PC appearing for the Ceylon Electricity Board Engineers Union submitted further that if the criteria adopted in the calculation of compensation offered are not disclosed at the time the notice in terms of Clause 18(3)(f)(ii) is given, the employees would be compelled to accept employment with the successor company, which he submitted was arbitrary and violative of not only Article 12(1) but Article 14(1)(g), as well.

The next issue with Clause 18(3)(f) is that the employees would only be entitled to the payment of the **same salary** that they are currently drawing from the Ceylon Electricity Board. It was the position of Mr. Egalahewa, PC that the employees of the Ceylon Electricity Board are paid many allowances in addition to their salary, similar to all Public Servants and employees of statutory bodies, but the employees of the Ceylon Electricity Board would be deprived of these allowances if they opt to join the successor companies. As already observed, aggravating the issue is the fact that details of the Voluntary Retirement Scheme is to be prescribed with no date for doing so being stipulated, thus leaving the employees with no option but to accept employment with the successor at the basic salary that they are currently drawing.

The learned Additional Solicitor General submitted that depending on their grade and designation, the employees of the Ceylon Electricity Board are currently entitled *inter alia* to the payment of an Engineers Allowance, Incentive Allowance, Temporary Allowance, Qualification Based Incentive Allowance, OH & S Incentive Allowance, Staff Allowance, Transmission and Generation Planning Allowance, System Control Allowance etc. It was her position that the legality of the payment of these allowances have been queried by the

Auditor General as recently as November 2023 and that it is for that reason that Clause 18(3)(f) has been limited to the salary.

The employees of the Ceylon Electricity Board could not have paid the allowances to themselves and hence it was submitted by the learned Counsel for the Petitioners that it is safe to assume that such payments have been made pursuant to approval granted by the board of directors of the Ceylon Electricity Board. This Court inquired from the learned Additional Solicitor General if the Ceylon Electricity Board has responded to the said Audit Query and if the gross salary has been adjusted by removing the said allowances from the monthly renumeration of an employee. This Court was not apprised of the response of the Ceylon Electricity Board and the only inference that can be drawn is that as at today, an employee is being paid allowances in addition to their salary. Be that as it may, it is not within the purview of this Court in the exercise of the jurisdiction that it is exercising in these applications to determine the legality or otherwise of such payments. Instead, we are only concerned with the fact that if the contract of employment with the Ceylon Electricity Board is to be assigned to another entity, it must only be done with the consent of such employee and on terms and conditions not less favourable than those enjoyed by them on the day preceding the date on which the employees consent to join the successor employer. Any other course of action would violate Articles 12(1) and 14(1)(g).

In the above circumstances, we are of the view that Clause 18(3)(f) of the Bill as it presently stands is violative of Articles 12(1) and 14(1)(g) of the Constitution and requires to be approved by the special majority of Parliament.

The learned Additional Solicitor General submitted that amendments would be moved at the Committee Stage of Parliament to Clause 18(3)(f)(ii) and the rest of Clause 18(3)(f) which appears after sub-paragraph (iii), and that Clause 18(3)(f) shall stand amended as follows:

*"The transfer plan prepared under subsection (1) shall ensure that all officers and servants of the Ceylon Electricity Board holding office in the Ceylon Electricity Board on the day preceding the appointed date shall be-*

- (i) *duly identified by the Ceylon Electricity Board;*
- (ii) *be notified by the Ceylon Electricity Board of their proposed assignation to the respective successor companies within four months of this section coming into operation; and"*
- (iii) *be required to notify the Ceylon Electricity Board within two months of the receipt of the notice referred to in subparagraph (ii), whether they opt to be assigned to such respective successor companies or not,*

*and shall with effect from the date succeeding the appointed date shall be assigned to such successor companies under the preliminary transfer plan with the same salary paid under their contract of employment with the Ceylon Electricity Board. Where an employee does not opt to be assigned to a successor company, such employee shall be entitled to a voluntary retirement scheme and the terms and conditions of such scheme shall be prescribed within four months of this section coming into operation."*

The proposed amendment addresses all concerns expressed by the Petitioners which are referred to above except the fact that the employees would continue to be entitled only to their salary. The employees of the Ceylon Electricity Board would thus be denied the equal protection of the law enshrined in Article 12(1), as well as the protection afforded under Article 14(1)(g) and for that reason, we are of the view that Clause 18(3)(f) as proposed by the learned Additional Solicitor General must be approved by the special majority of Parliament. However, such inconsistency shall cease and Clause 18(3)(f) as proposed by the learned Additional Solicitor General may be approved by a simple majority if the words, '*with the same salary paid*' are deleted and replaced with the words, '*on terms and conditions not less favourable than those enjoyed by them on the day preceding the relevant date*'.

## **The Provident Fund and Pension Fund**

Schedule I of the Bill provides that a company, the entire shareholding of which shall always remain with the Government shall be incorporated to take over the functions of the Provident Fund and Pension Fund of the Ceylon Electricity Board and to act as the custodian and trustee and manage such Provident Fund and Pension Fund.

Clause 18(3)(e)(ii) provides as follows:

*"The transfer plan prepared under subsection (1) shall allocate to a company or companies referred to in section 17 whose sole shareholder shall be the Government of Sri Lanka, the functions of the Provident Fund and Pension Fund of the Ceylon Electricity Board as the custodian and trustee and to manage such Provident Fund and Pension Fund:*

*Provided that, both the Provident Fund and the Pension Fund shall be transferred to a separate company established for such purpose and the benefits of the said Provident Fund and the Pension Fund shall only apply to the employees on the day preceding the appointed date and former employees of the Ceylon Electricity Board:*

*Provided further, the governance structure for the company assigned to manage such funds shall be as prescribed and shall include representatives from employees on the day preceding the appointed date and former employees of the Ceylon Electricity Board who shall be consulted regarding the investment decisions of such funds;"*

Mr. Egalahewa, PC submitted that the Pension Fund of the Ceylon Electricity Board is a non-contributory fund, in that while the employees do not contribute to the fund, the Ceylon Electricity Board pays 7% of the total salary as calculated for the purposes of the provident fund, towards the Pension Fund. However, Clause 18(5)(b)(ii) provides as follows:

*"The successor companies and the officers and servants of the Ceylon Electricity Board who have become the employees of the successor companies on the date succeeding the appointed date shall make such contributions to the Provident Fund and Pension*

*Fund as they are required to make by rules or regulations of the Provident Fund and Pension Fund as the case may be."*

Mr. Egalahewa, PC raised several issues with regard to the above provision.

The first was that employees would now be called upon to contribute towards the Pension Fund and that it would therefore be a violation of their contract of employment with the Ceylon Electricity Board. While this Court has not been apprised if entitlement to a pension fund is part of the contract of employment of an employee, we have already determined that the continuation of employment with a successor company shall be '*on terms and conditions not less favourable than those enjoyed by them on the day preceding the relevant date*', unless Clause 18(3)(f) is approved by a special majority. In any event, this clause does not impose on an employee any additional burden in view of the qualification that the obligation to contribute will arise only if "*they are required to make by rules or regulations of the Provident Fund and Pension Fund as the case may be."*"

The second is that requiring an employer and an employee to contribute to a fund other than the Employees Provident Fund established under the Employees Provident Fund Act No. 15 of 1958, as amended is inconsistent with Section 27 of such Act. However, we are of the view that the said provision would not apply as the obligation is being created by an Act of Parliament.

The third issue is that although Clause 18(3)(e)(ii) stipulates that the Transfer Plan shall allocate to a company of which the Government shall be the sole shareholder, the functions of the Provident Fund and the Pensions Fund of the Ceylon Electricity Board, and that such company shall be the custodian and trustee of such Funds, the said Clause does not provide the manner in which the Company that is established to take over the functions of the Provident Fund and the Pensions Fund shall be funded. We have examined the Bill and find that there is no provision for the allocation of funds to meet the obligations of the Provident and Pension Funds. The failure to specify same would be catastrophic and would deprive the employees of the Ceylon Electricity Board of the equal protection of the law. We are therefore of the view that Clause 18(3)(e)(ii) of the Bill is inconsistent with the provisions of Article 12(1) and must be approved by the special majority of Parliament. The

said inconsistency shall however cease if Clause 18(3)(e)(ii) is amended by the insertion of the words, “*and the monies required to meet the Provident Fund obligations of the employees of the Ceylon Electricity Board*” at the end of in Clause 18(3)(e)(ii).

### **Payment of Gratuity**

Clause 18(4)(a) provides in respect of employees who opt to join the successor companies that their period of service with the Ceylon Electricity Board shall be counted for the purposes of calculating the pension entitlement and other retirement benefits of such employees, and where the aggregate period of service exceeds twenty years, such employee shall be entitled to, “*the grant of pension and retirement benefits which may be applicable to such officers and servants in accordance with the rules of the Pension Fund of the Ceylon Electricity Board*”. This Clause however does not specifically provide for gratuity in terms of the Payment of Gratuity Act, No. 12 of 1983, as amended and any argument that gratuity would be covered by the words, ‘*other retirement benefits*’ appears to be limited by the reference to such retirement benefits being ‘*in accordance with the rules of the Pension Fund*.’

The learned Additional Solicitor General submitted that an amendment will be moved at the Committee Stage of Parliament to amend Clause 18(5)(b)(ii) by the addition of the words, “*and the successor companies shall make all other statutory payments including gratuity to the employees of the Ceylon Electricity Board who have become the employees of the successor companies*” at the end of the said clause. The said amendment still leaves room for an interpretation that the period of service with the Ceylon Electricity Board is not counted when calculating the period of service for the payment of gratuity in terms of the Payment of Gratuity Act, and is therefore vague and violative of Article 12(1) of the Constitution. Clause 18(5)(b)(ii) would therefore require to be passed by a special majority of Parliament. The said inconsistency shall however cease if Clause 18(5)(b)(ii) is amended as follows:

*“The successor companies and the officers and servants of the Ceylon Electricity Board who have become the employees of the successor companies on the date succeeding the appointed date shall make such contributions to the Provident Fund and Pension*

*Fund as they are required to make by rules or regulations of the Provident Fund and Pension Fund, as the case may be, and the successor companies shall make all other statutory payments including gratuity to the employees of the Ceylon Electricity Board who have become the employees of the successor companies. The period that an employee served with the Ceylon Electricity Board shall be taken into consideration when calculating the statutory payments that are payable to such employees.”*

### **Powers of the Minister**

The Minister referred to in the Bill is the Minister assigned the subject of electricity in terms of Articles 44 and 45 of the Constitution. It was the position of several learned Counsel for the Petitioners that the Minister has been entrusted with enormous power in the implementation of the Bill without adequate safeguards.

In terms of Article 43(1), the Cabinet of Ministers is charged with the direction and control of the Government of the Republic and is responsible for the formulation of policy. In terms of Clause 4, the overall responsibility of formulating the national electricity policy which shall reflect the policy of the Government for the development of the electricity industry in a manner consistent with the national policy on energy is with the Minister. Clause 3 provides for the Minister to appoint the National Electricity Advisory Council to formulate the draft policy and advise the Minister in formulating the national electricity policy. Having gone through a process of public and stakeholder consultation, the draft Policy shall thereafter be approved by the Cabinet of Ministers. Clause 4(10) permits the Minister to issue policy guidelines in respect of those matters specified in such clause but with the approval of the Cabinet of Ministers. Thus, it is clear that while the Minister has been conferred with wide powers, he or she is required to obtain the approval of the Cabinet of Ministers, thus acting as a safeguard against any arbitrary exercise of power.

Most other powers conferred on the Minister by the Bill are subject to safeguards to prevent an arbitrary exercise of powers and/or are subject to the requirement to obtain the approval of the Cabinet of Ministers. However, Clause 21 which contains the procedure that must be followed by the regulator when considering an application for the grant of a license for generation, transmission, distribution or supply of electricity or for an extension

of any one of such licenses, provides in Clause 21(2) that the granting or extending of such a license by the regulator shall be with the concurrence of the Minister. A similar requirement to obtain the concurrence of the Minister applies in terms of Clause 23(1) to the modification of a license and in terms of Clause 23(2) to the revocation of a license.

While the Public Utilities Commission has been bestowed with the status of the Regulator for the Electricity Industry, Clause 5(2) provides that, "*In the exercise, performance and discharge of its powers, duties and functions in relation to the Electricity Industry, the Regulator shall at all times, act reasonably, with fairness, impartiality and independence and in a manner that is timely, transparent, objective and consistent with the principles and provisions in this Act.*" In these circumstances, we are of the view that the regulator must be allowed to function independently and free of any interference from the executive especially in the peculiar circumstances of this Bill where the ownership of most entities will not be in the control of the Government.

The necessity to obtain the concurrence of the Minister in Clauses 21 and 23 is therefore violative of Article 12(1) and the said Clauses must be approved by the special majority of Parliament. The said inconsistency shall however cease and Clauses 21 and 23 may be passed by the simple majority of Parliament if the requirement to obtain the concurrence of the Minister is removed by the deletion of the words, "*with the concurrence of the Minister*".

#### **Clause 48**

Clause 48 of the Bill [the removal of difficulties clause] provides as follows:

- "(1) If any difficulty arises in giving effect to the provisions of this Act or any Order, regulation rule or notification made under this Act, the Minister may take such steps as not inconsistent with the provisions of this Act, as may be necessary or expedient for eliminating any specific difficulty.*
- (2) The Minister may by Order published in the Gazette specify the steps taken for the purpose of removing any such difficulty"*

Mr. Vinura Kularatne and Mr. Thishya Weragoda, the learned Counsel for the Petitioners in SC (SD) No. 50/2024 and SC (SD) No. 51/2024 respectively, submitted that Clause 48 confers **wide powers** on the Minister to take any steps to remove any difficulty in giving effect to the provisions of the Bill but lacks the necessary safeguards to prevent arbitrariness in its implementation. It was submitted further that Clause 48 as it presently reads goes beyond mere legislative authorisation to take administrative action and for that reason too, the said Clause is contrary to Articles 3, 4(a) and 76 of the Constitution.

The learned Additional Solicitor General submitted that the rationale for the introduction of the ‘removal of difficulties clause’ or what was described by the learned Additional Solicitor General as something that resembles a ‘Henry VIII’ clause, which expression is a reference to King Henry VIII’s supposed preference for legislating directly by proclamation rather than through Parliament, has been explained by the Supreme Court of India in Madeva Upendra Sinai v Union of India [AIR 1975 SC 797], as being necessary:

*“to keep pace with the rapidly increasing responsibilities of a Welfare democratic State, the legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the Legislature and the endurance and skill of the draftsman, it is nearly impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties what might arise in its working due to a peculiar local condition or even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socioeconomic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the Legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the Legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the “removal of difficulty clause”, once frowned upon and nick-named as “Henry VIII clause” in scornful commemoration of the absolutist ways in which that English King got the “difficulties” in enforcing his autocratic will removed through the*

*instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post-independence era."*

The position of the learned Additional Solicitor General was that no unfettered discretion has been granted to the Minister to make any order that he or she wishes in that the power is limited to taking any such steps as are not inconsistent with the provisions of the Bill, and for that reason the said Clause is neither arbitrary nor violative of any constitutional provisions. It was further submitted that this is not the first time that such a clause is being introduced and that such provisions appear in many previous legislation including the Development Councils Act No. 35 of 1980 [Section 94], the Development Councils Election Act No. 20 of 1981 [Section 103], the Parliamentary Elections Act No. 1 of 1981 [Section 129], the Referendum Act No. 7 of 1981 [Section 77], the Provincial Councils Elections Act No. 2 of 1988 [Section 127], the Electricity Reforms Act No. 28 of 2002 [Section 61], the Sri Lanka Electricity Act No. 20 of 2009 [Section 55] and the Personal Data Protection Act No. 9 of 2022 [Section 55].

While it is correct that this provision appears in the Electricity Reforms Act, which was considered by this Court at bill stage, the Determination on the **Electricity Reforms Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991 – 2003) Volume VII; 291], bears no special consideration of such provision. Furthermore, it must be observed that while the relevant sections of the Development Councils Act, the Parliamentary Elections Act and the Referendum Act are differently circumscribed, the relevant sections in the latter three Acts referred to above have two safeguards which are not found in the impugned Clause, those being that steps taken by the Minister must not only be not inconsistent with the provisions of the Bill but with any other law as well, and that every order made shall as soon as practicable after it is made be laid before Parliament. Section 55 of the Data Protection Act had an additional safeguard when it specified that no order shall be made after the expiry of a period of five years from the date of coming into operation of that Act.

The scope for the abuse of such a provision was highlighted in **Madeva Upendra Sinai v Union of India** [supra], where the Supreme Court of India found that through the order made using such provision, the government had attempted to change the fundamental

scheme of the Act in question and therefore declared the removal of difficulties order as invalid for the reason that there were no ‘difficulties’ which required removal and therefore the orders were made in excess of the power conferred under the relevant Act.

A similar provision was considered by the Supreme Court of India in State of West Bengal v Anindya Sundar Das & Others [Civil Appeal Nos. 6706 and 6707/2020; Order dated 11<sup>th</sup> October 2022] where Chandrachud, J (as he then was) having referred to Madeva Upendra Sinai v Union of India stated as follows:

*“Section 60 contemplates a situation where inter alia any difficulty arises in giving effect to the provisions of the Act “on account of any lacunae or omission” in its provisions or for any other reason whatsoever. In such cases, the State government is empowered, as the occasion may require, to do anything which appears to it to be necessary for removing the difficulty notwithstanding anything to the contrary contained elsewhere in the Act or any other law. Where there is a specific provision, as in the present case Section 8(2)(a), it was not open to the State government to conjure up a lacunae or omission and purportedly exercise the power to remove difficulties. ... The State government chose the incorrect path under Section 60 by misusing the “removal of difficulty clause” to usurp the power of the Chancellor to make the appointment. A government cannot misuse the “removal of difficulty clause” to remove all obstacles in its path which arise due to statutory restrictions. Allowing such actions would be antithetical to the rule of law. Misusing the limited power granted to make minor adaptations and peripheral adjustments in a statute for making its implementation effective, to side-step the provisions of the statute altogether would defeat the purpose of the legislation.”* [emphasis added]

Quite apart from the strong propensity for the abuse of such provisions and hence the justification and the need for safeguards, its legality must be considered from the perspective of Articles 3, 4 and 76 of the Constitution. In terms of Article 3, sovereignty is in the People and is inalienable. Article 4 provides the manner in which the Sovereignty of the People shall be exercised and in Article 4(a) provides that the legislative power of the People shall be exercised by Parliament. In terms of Article 75, Parliament shall have power to make laws as stipulated therein.

Article 76 reads as follows:

- "(1) Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power.*
- (2) It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make, in any law relating to public security, provision empowering the President to make emergency regulations in accordance with such law.*
- (3) It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make any law containing any provision empowering any person or body to **make subordinate legislation for prescribed purposes**, including the power –*
  - (a) to appoint a date on which any law or any part thereof shall come into effect or cease to have effect;*
  - (b) to make by order any law or any part thereof applicable to any locality or to any class of persons; and*
  - (c) to create a legal person, by an order or an Act .."*

Thus, while delegated legislation is permissible in terms of Article 76, and while Parliament may empower the Minister to make subsidiary legislation, such power is subject to the limitation that the subsidiary legislation must be for a prescribed purpose, or in other words, the enabling law must prescribe the purpose for which subsidiary legislation can be made. We are of the view that Clause 48 does not contain a prescribed purpose within the contemplation of Article 76(3). The failure to prescribe the purpose leads to a situation beyond what is permissible under Article 76(3) and will result in the alienation of legislative power to the executive.

The question of placing before Parliament any steps taken by the Minister for legislative ratification will not arise as the delegation is not for a purpose which has been prescribed. If the purpose is prescribed, the question whether such purpose is vague or overbroad will have to be considered by the application of the test that we have referred to at the beginning of this Determination.

In these circumstances, we are of the view that Clause 48 is violative of Article 4(a) read together with Article 3 and hence, needs to be approved by the special majority of Parliament and by the People at a Referendum.

**Expertise of those entrusted to manage the entities that are to be established**

We have already stated that the Bill provides for the establishment of the Power Sector Reform Secretariat which shall be responsible for the preparation of the Preliminary and Final Transfer Plan, the National Electricity Advisory Council which shall advise the Minister in formulating the National Electricity Policy including the National Tariff Policy, the National System Operator who shall be responsible for the preparation of the Annual Power Procurement Plan and the Long Term Power System Development Plan, and the National Transmission Network Service Provider who shall be responsible for the implementation of the functions of the Ceylon Electricity Board connected with the development, expansion and maintenance of the physical infrastructure of the National Grid of Sri Lanka and for the transmission of bulk electricity to distribution licensees.

Given the objects of the Bill, the impact that the ‘unbundling’ of the Ceylon Electricity Board would have on the Country and her People, and the fact that separate entities are being established and entrusted with the necessary tasks, it was correctly submitted by Mr. Kularatne that it is equally important that these entities are led and managed by experts and professionals with experience in the relevant disciplines, and that the criteria for appointment be laid down to prevent friends and family of the appointing authority from being appointed. The time is certainly ripe for this Court to insist that meritocracy be restored, respected and adhered to when appointments are made by a Minister or any governmental authority and we therefore take the view that any failure to do so would result in the fundamental rights of the People guaranteed by Article 12(1) being infringed.

The necessity to appoint duly qualified persons was addressed in the Bureau of Rehabilitation Bill [supra; at page 26], where referring to the Determination in Petroleum Products (Special Provisions) (Amendment) Bill [supra], this Court stated as follows:

*"an argument was presented that even though the Energy Supply Committee established under the Energy Supply Act and tasked with the responsibility of recommending and advising the Minister with regard to the issuance of licenses comprised of representatives of the relevant stakeholders, so that necessary recommendations and advice could be tendered to the Minister taking into consideration the criteria as spelt out in the Petroleum Products (Special Provisions) Act, the Committee proposed under the Amendment Bill lacked such representation and that the change of composition of the Committee will result in the Minister exercising his powers arbitrarily without proper consultation with other stakeholders in violation of Article 12(1) of the Constitution.*

*This Court agreed with the said submission and held as follows [at page 17]:*

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

The Court went on to state in the Bureau of Rehabilitation Bill Determination that:

*"It would therefore be seen that this Court has time and again held that the ultimate decision maker under a particular law – in this case the Council – must have the necessary expertise and experience to carry out its core functions. Putting together a few officials of the State who may not have experience or expertise in the core functions of the Bureau, mixed with a few industry representatives, does not enable the Council to discharge its statutory duties and functions. We are of the view that the inconsistency in Clause 6 shall cease if the number of the appointed members are*

*increased to five, and of whom two persons shall possess academic and professional qualifications and experience in rehabilitation, two persons shall possess academic and professional qualifications and experience in social integration, and for the other member to possess academic and professional qualifications and experience in law and order."*

In terms of Clause 38, the Power Sector Reforms Secretariat has been entrusted with the power to direct and oversee the implementation of the reforms enumerated in the Bill and has been tasked with the following:

- (a) Facilitate the preparation of the Transfer Plan;
- (b) Coordinate the formulation of a comprehensive and efficient financial restructuring process which identifies methodology to be applied to the restructuring of the assets and liabilities of the Ceylon Electricity Board including the completion of the process of divesting the Ceylon Electricity Board of its activities as identified in the Transfer Plan;
- (c) Initiate capacity building of the National System Operator in operating the reformed power sector and in the procurement of new generation capacity using competitive, transparent and accountable procedures.

The Transfer Plan no doubt plays an extremely critical role in the entire ‘unbundling’ exercise. Clause 38(2) provides that the Minister shall appoint **not more than three persons** with integrity, and with **not less than ten years of experience** in one or more of the following fields to be members of the Power Sector Reforms Secretariat: - (i) public administration; (ii) human resource management; (iii) State owned enterprise restructuring; (iv) law; (v) engineering; (vi) public private partnership; or (vii) finance. The said Clause provides further that the Minister shall appoint a person possessing experience in one or more of the above fields to be the Director General of the Secretariat.

It is certainly not a fanciful hypothesis and it would be fully compliant with Clause 38(2) as it currently reads, for three Attorneys-at-Law with ten years of experience to be appointed to the Secretariat and as the Director General. Given the absence of any provision to

appoint other staff members to the Secretariat, the Secretariat would not have the benefit of any persons with experience in the field of power system planning and operation or an electrical engineer. Given the wide scope and ambit of the Transfer Plan, the Secretariat certainly needs persons with such experience and expertise, which expertise is part of the criteria when appointing persons to the National Electricity Advisory Council. We are therefore of the view that the criteria laid down in Clause 38(2) are insufficient to ensure that the persons who are to be appointed as members of the Secretariat and as Director General thereof shall have the experience and expertise that such persons should possess to implement the onerous task entrusted upon them by the Bill. For that reason Clause 38(2) of the Bill is inconsistent with Article 12(1) of the Constitution and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84.

The learned Additional Solicitor General submitted that an amendment shall be moved at the Committee Stage of Parliament to amend Clause 38(2) in the following manner:

*"(a) The Minister shall appoint not more than five persons with integrity, one of whom shall have not less than ten years experience in engineering, and the other four persons with not less than ten years of experience in one or more of the following fields to be members of the Power Sector Reforms Secretariat: -*

*(b) The Minister shall appoint a person possessing not less than ten years experience in one or more of the following fields to be the Director-General of the Power Sector Reforms Secretariat;"*

The said amendment does not address the concerns that we have already expressed. However, the inconsistency shall cease and Clause 38(2) may be passed with a simple majority if Clause 38(2) is amended as follows:

*"(a) The Minister shall appoint not more than five persons with integrity, one of whom shall have not less than ten years experience in electrical engineering, and the other four persons with not less than ten years of experience in one or more of the following fields to be members of the Power Sector Reforms Secretariat: -*

*(i) power system planning and operation; (ii) human resource management; (iii)*

*State owned enterprise restructuring; (iv) law; (v) public private partnership; or (vi) finance.*

- (b) *The Minister shall appoint a person possessing not less than fifteen years experience in one or more of the following fields to be the Director-General of the Power Sector Reforms Secretariat; - (i) power system planning and operation; (ii) human resource management; (iii) State owned enterprise restructuring; (iv) electric engineering; (v) public private partnership; or (vi) finance."*

A similar situation arises with regard to the Director General of the National Electricity Advisory Council and the Chief Executive Officer of the National System Operator who in terms of Clause 3(6)(a) and Clause 10(1)(c) respectively, are only required to have expertise, reached eminence and possess experience in administration. Both these clauses are vague and violative of Article 12(1).

The learned Additional Solicitor General submitted that an amendment would be moved at the Committee Stage of Parliament to amend Clause 10(1)(c) as follows:

*"The Chief Executive Officer of the National System Operator shall be a person who has expertise, reached eminence and has at least twenty years of experience in electrical engineering and administration who shall be appointed by the Board with the approval of the Minister."*

We are of the view that the aforementioned inconsistency shall cease if Clauses 3(6)(a) and 10(1)(c) are amended as proposed by the learned Additional Solicitor General. The said Clauses may thereafter be approved by the simple majority of Parliament.

There is one final matter that we wish to state with regard to those who are appointed by the Minister. Clause 3(9)(iii) of the Bill provides that a person shall be disqualified from being appointed to the National Electricity Advisory Council or from continuing to be a member of such Council if such person, "*is a connected person having any financial or other interest amounting to a conflict of interest directly or indirectly in any entity in the Electricity Industry or any matter performed by such person*". While '*a connected person*'

has not been defined, a similar provision is not available with regard to those appointed to the National System Operator, the National Transmission Network Service Provider and the Power Sector Reforms Secretariat. We are of the view that while similar provision must be included in respect of those appointed under the Bill by the Minister, it is important that the obligation be a positive act on the part of the Minister who shall prior to appointing a person as a member of any of the above entities satisfy himself that such person has no financial or other conflict of interest in the affairs of such entity, as is likely to affect adversely, the discharging of his functions as a member thereof.

### **Summary of the Determination**

- (1) The Bill as a whole is inconsistent with Article 12(1) of the Constitution and shall only be passed by the special majority of Parliament required under Article 84(2). This inconsistency shall however cease if Clause 1(2) and Clause 1(3) are amended as follows:

#### **(a) Clause 1(2)**

*"The provisions of this Act other than the provisions of this section, Section 2, Section 3, Section 4, Section 9, Section 10(1), Section 10(2)(b), Section 10(3), Section 10(5), Section 14, Section 15, Section 17, Section 18, Section 38, Section 39 and the sections specified in subsection (4) of this section shall come into operation on such date as shall be appointed by the Minister by Order published in the Gazette (hereinafter referred to as the "appointed date"):*

*Provided that prior to making such Order, the Minister shall be satisfied that the Preliminary Transfer Plan, the National Electricity Policy including the National Tariff Policy, the Annual Power Procurement Plan and the Long Term Power System Development Plan have been prepared, approved and are in place in accordance with the provisions of this Act:*

*Provided further that if no appointed date is published in the Gazette as required by this subsection even though the Minister is satisfied that the requirements in the first proviso have been met, the provisions of this Act, other than the provisions of this*

*section, Section 2, Section 3, Section 4, Section 9, Section 10(1), Section 10(2)(b), Section 10(3), Section 10(5), Section 14, Section 15, Section 17, Section 18, Section 38, Section 39 and the sections specified in subsection (4) of this section, shall come into operation immediately upon the expiry of twelve months from the date on which the Bill becomes an Act of Parliament.”*

**(b) Clause 1(3)**

*“The provisions of this section, Section 2, Section 3, Section 4, Section 9, Section 10(1), Section 10(2)(b), Section 10(3), Section 10(5), Section 14, Section 15, Section 17, Section 18, Section 38 and Section 39 shall come into operation on the date on which the Bill becomes an Act of Parliament.”*

- (2)** Clauses 3(6)(a) and 10(1)(c) are inconsistent with Article 12(1) of the Constitution and shall only be passed by the special majority required under Article 84(2). However, the inconsistency shall cease if Clauses 3(6)(a) and 10(1)(c) are amended as follows:

*“The Chief Executive Officer of the National System Operator shall be a person who has expertise, reached eminence and has at least twenty years of experience in electrical engineering and administration who shall be appointed by the Board with the approval of the Minister.”*

- (3)** The first proviso to Clause 11(1) of the Bill is inconsistent with Article 12(1) of the Constitution and shall only be passed by the special majority of Parliament required under Article 84(2). However, the said inconsistency shall cease if the words, *“provided that the selection of the party to whom approval has been granted or the letter of award has been issued has been selected pursuant to a competitive and transparent procurement process.”*, are inserted at the end of the first proviso.
- (4)** Clause 17 is inconsistent with Article 12(1) of the Constitution and shall only be passed by the special majority of Parliament required under Article 84(2). The said inconsistency shall however cease and Clause 17 may be passed by a simple majority if Clause 17 is amended as follows:

(a) By the insertion of the following new paragraph numbered as Clause 17(2)(b) –

*"The Secretary to the Treasury shall be initially allotted hundred per centum of the shares in the successor companies incorporated under this section other than the companies referred to in item (a), (f) and (h) (ii) of Schedule I in which the Secretary to the Treasury shall be permanently allotted hundred per centum of the shares."*

(b) By the insertion of the following new paragraph numbered as Clause 18(2)(c) –

*"The Secretary to the Treasury may, with the prior approval of the Cabinet of Ministers, and having followed a transparent and competitive bidding process as stipulated by law dispose of any shares issued or allotted to him in any successor company other than the companies referred to in items (a), (f) and (h) (ii) of Schedule I or of any rights over such shares only after the publication of the final transfer plan in the Gazette in terms of paragraph (b):*

*Provided that, the Secretary to the Treasury shall, in disposing any shares as specified in paragraph (c) ensure that the Government holds more than fifty per centum of the shares of the company referred to in item (e) of Schedule I."*

(c) By amending Clause 39(1)(b) to read as follows:

*"preliminary allocation of all assets and preliminary valuation of such assets including land, building, plant and machinery and other movable assets to successor companies prior to the appointed date with such valuation being carried out by the Chief Valuer:*

*Provided that, the Chief Executive Officer of the residual company established under paragraph (e) of subsection (3) of section 18 shall be responsible for final asset allocation and final asset valuation to be included in the final transfer plan;*

- (d) By the insertion of a new paragraph under Clause 18(3) to read as follows:  
*"identify the share capital, the management structure and the source of funds for the entities to be established under Section 17(1);"*
  - (e) By amending Schedule I in accordance with Clause 17(2).
- (5) Clause 18(3)(e)(ii) of the Bill is inconsistent with the provisions of Article 12(1) and shall only be passed by the special majority of Parliament required under Article 84(2). The said inconsistency shall however cease if Clause 18(3) is amended by the insertion of the words, *"and the monies required to meet the Provident Fund obligations of the employees of the Ceylon Electricity Board"* at the end of Clause 18(3)(e)(ii).
- (6) Clause 18(3)(f) of the Bill is inconsistent with Article 12(1) and Article 14(1)(g) of the Constitution and shall only be passed by the special majority of Parliament required under Article 84(2). However, the said inconsistency shall cease if Clause 18(3)(f) is amended as follows:

*"The transfer plan prepared under subsection (1) shall ensure that all officers and servants of the Ceylon Electricity Board holding office in the Ceylon Electricity Board on the day preceding the appointed date shall be-*

- (i) *duly identified by the Ceylon Electricity Board;*
- (ii) *be notified by the Ceylon Electricity Board of their proposed assignation to the respective successor companies within four months of this section coming into operation; and"*
- (iii) *be required to notify the Ceylon Electricity Board within two months of the receipt of the notice referred to in subparagraph (ii), whether they opt to be assigned to such respective successor companies or not,*

*and shall with effect from the date succeeding the appointed date shall be assigned to such successor companies under the preliminary transfer plan on terms and*

*conditions not less favourable than those enjoyed by them on the day preceding the relevant date under their contract of employment with the Ceylon Electricity Board. Where an employee does not opt to be assigned to a successor company, such employee shall be entitled to a voluntary retirement scheme and the terms and conditions of such scheme shall be prescribed within four months of this section coming into operation.”*

- (7) Clause 18(5)(b)(ii) is inconsistent with Article 12(1) of the Constitution and shall only be passed by the special majority of Parliament required under Article 84(2). The said inconsistency shall however cease if Clause 18(5)(b)(ii) is amended as follows:

*“The successor companies and the officers and servants of the Ceylon Electricity Board who have become the employees of the successor companies on the date succeeding the appointed date shall make such contributions to the Provident Fund and Pension Fund as they are required to make by rules or regulations of the Provident Fund and Pension Fund, as the case may be, and the successor companies shall make all other statutory payments including gratuity to the employees of the Ceylon Electricity Board who have become the employees of the successor companies. The period that an employee served with the Ceylon Electricity Board shall be taken into consideration when calculating the statutory payments that are payable to such employees.”*

- (8) Clauses 21 and 23 are inconsistent with Article 12(1) of the Constitution and shall only be passed by the special majority of Parliament required under Article 84(2). The said inconsistency shall however cease if the requirement in such Clauses to obtain the concurrence of the Minister is removed by the deletion of the words, “*with the concurrence of the Minister*”.
- (9) Clause 38(2) of the Bill is inconsistent with Article 12(1) of the Constitution and shall only be passed by the special majority required under Article 84(2). The said inconsistency shall cease if Clause 38(2) is amended as follows:

*“(a) The Minister shall appoint not more than five persons with integrity, one of whom shall have not less than ten years experience in electrical engineering, and*

*the other four persons with not less than ten years of experience in one or more of the following fields to be members of the Power Sector Reforms Secretariat: - (i) power system planning and operation; (ii) human resource management; (iii) State owned enterprise restructuring; (iv) law; (v) public private partnership; or (vi) finance.*

*(b) The Minister shall appoint a person possessing not less than fifteen years experience in one or more of the following fields to be the Director-General of the Power Sector Reforms Secretariat; - (i) power system planning and operation; (ii) human resource management; (iii) State owned enterprise restructuring; (iv) electric engineering; (v) public private partnership; or (vi) finance."*

**(10)** Clause 48 is violative of Article 4(a) read together with Articles 3 and 76 and hence, needs to be passed by the special majority of Parliament and approved by the People at a Referendum.

**(11)** The definition of 'national grid' in Clause 53 of the Bill is inconsistent with Article 12(1) of the Constitution and shall be passed by the special majority of Parliament required under Article 84(2). However, the said inconsistency shall cease if the said definition is amended as follows:

*(a) "National Grid" means, the transmission network consisting of transmission assets and grid substations owned by the National Transmission Network Service Provider and additional transmission licensees."*

*(b) By the insertion of the following new paragraphs numbered as Clause 10(14)(b) – (d):*

*"(b) power purchase agreements with generation licensees incorporated under the preliminary transfer plan specified in paragraph (a) of subsection (2) of section 18;*

- (c) powers sales agreements with distribution licensees incorporated under the preliminary transfer plan specified in paragraph (a) of subsection (2) of section 18;
- (d) a transmission service agreement with the National Transmission Network Service Provider incorporated under the preliminary transfer plan specified in paragraph (a) of subsection (2) of section 18 and as specified in subsection (12) of section 10."

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

VIJITH K. MALALGODA, PC, J  
JUDGE OF THE SUPREME COURT

A. L. SHIRAN GOONERATNE, J  
JUDGE OF THE SUPREME COURT

ARJUNA OBÉYÉSEKERE, J  
JUDGE OF THE SUPREME COURT