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LST REVIEW

Volume 14 Issue 194 December 2003



LAND RIGHTS

RIGHT TO EDUCATION

LAW & SOCIETY TRUST

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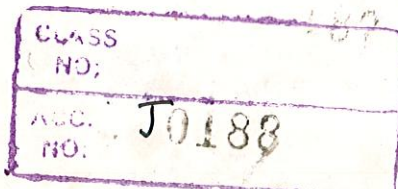
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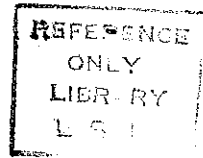
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Editor's Note

On 19th November, 2003, a Bill titled "Land Ownership" was placed on the Order Paper of Parliament. The Bill specified its objectives, *inter alia*, as being to "provide for the disposal of ownership of lands by the transfer of ownership of State Lands to citizens of Sri Lanka; for the removal of certain restrictions attached to grants and transfers made under the Land Development Ordinance (Chapter 464) and the Land Grants (Special Provisions) Act No 43 of 1979; and to provide for matters connected therewith or incidental thereto.

A number of petitioners challenged the Bill with regard to its constitutionality before the Supreme Court thereafter. The sum of their objections was firstly, that the Bill was inconsistent with the provisions of the Constitution in that it had been placed on the Order Paper of Parliament without it being first referred to every Provincial Council duly established under the Constitution in terms of Article 154(G)(3) of the Constitution read with item 18 of List 1 of the Ninth Schedule (the 'Provincial Councils List'), (Appendix 11).

It was contended that the Bill, though not a constitutional amendment, was seeking to unconstitutionally subject the power of the executive President to "make such grants and dispositions of lands and immovable property vested in the Republic as constitutionally decreed in Article 33(d) of the Constitution", (further amended by paragraph 1:3 of Appendix 11 to the Ninth Schedule to the Constitution, which imposed a duty upon the President to carry out alienations or dispositions of state land within a province on the advice of the relevant Provincial Council), to the Minister's recommendation and the Minister's opinion.

This, it was argued, was an attempted legislative exercise which amounted to an infringement of the executive presidential powers constitutionally decreed under Article 33(d) of the Constitution and therefore an infringement of Article 3 and 4(b) of the Constitution, requiring therefore, approval by the people at a Referendum.

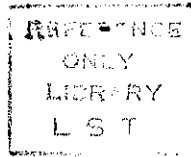
The Bill was further contended to be arbitrary in respect of several of its clauses, despite the purpose of the Bill being *prima facie*, for the purpose of the disposal of

ownership of lands by the transfer of ownership of state lands to citizens of Sri Lanka.

The LST Review carries in this issue, the Lands Bill itself as well as the Supreme Court determination declaring the Bill procedurally and substantially unconstitutional. The Court mandated accordingly that the Bill be approved by a special majority in terms of Article 84(2) of the Constitution as well as by the people at a Referendum in terms of Article 83(a) of the Constitution.

The Review also publishes a recent judgement by the Supreme Court relating to the Right to Education as well as an analysis of the judicial reasoning relevant to the same.

Kishali Pinto-Jayawardena



Land Ownership

L.D. - 0. 34/2002

AN ACT TO PROVIDE FOR THE DISPERSAL OF OWNERSHIP OF LANDS BY THE TRANSFER OF OWNERSHIP OF STATE LANDS TO CITIZENS OF SRI LANKA; FOR THE REMOVAL OF CERTAIN RESTRICTIONS ATTACHED TO GRANTS AND TRANSFERS MADE UNDER THE LAND DEVELOPMENT ORDINANCE (CHAPTER 464) AND THE LAND GRANTS (SPECIAL PROVISIONS) ACT, NO. 43 OF 1979; AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:-

- 1. (1) This Act may be cited as the Land Ownership Act, No. of 2003. The provisions of this Act shall apply to one or more of the Divisional Secretaries Divisions falling within an Administrative District or to all or any Grama Niladhari Divisions falling within any Divisional Secretary's Division as the Minister may specify from time to time, by Order published in the Gazette. Short title and application of the Act.
- 5
- (2) The Provisions of this Act shall not apply in respect of -
 - 10 (a) lands, the elevation of which is over one thousand five hundred and twenty-four meters above mean sea level;
 - 15 (b) lands falling within the limits of a municipality declared under the Municipal Councils Ordinance (Chapter 252) and the administrative limits of an urban council declared under the Urban Councils Ordinance (Chapter 255);
 - 20 (c) lands in urban areas falling within the administrative limits of a Pradeshiya Sabha, declared by the Minister by Order published in the Gazette as development areas, for the purposes of this Act.
 - 25 (d) lands in urban areas declared as development areas for the purposes of any other written law, for the time being in force.
- (3) (a) The provisions of this Act shall apply to all grants and transfers of land under the Land Development Ordinance (hereinafter referred to as "the Ordinance", and the Land Grants (Special Provisions) Act, (hereinafter referred to as "the Act"), made before the promulgation of the Thirteenth Amendment to the Constitution.
 - 5
 - (b) In respect of grants and transfers of land under the Ordinance or the Act as the case may be made, after the promulgation of the Thirteenth Amendment to the Constitution, the provisions of this Act shall apply only in respect of grants or transfers made in accordance with the Ordinance or the Act and the provisions of the said Thirteenth Amendment.
 - 10

PART I

15 **PROCEDURE FOR GRANT OF OWNERSHIP OF STATE
LAND**

2. (1) A person, who being a -

(a) permit holder to whom a grant has been issued in terms of subsection (4) of section 19 of the Ordinance; or

Persons entitled to a transfer of land in terms of this Act.

20 (b) person in whose favour a transfer of land has been made in terms of section 3 of the Act,

shall be entitled to forward an application in terms of this Act, requesting that the rights conveyed to him under such grant or transfer be converted to full ownership and to the right, title and interest in
25 such land free from all encumbrances: Provided that the person making the application shall forward proof that he has been in occupation of the land in respect of which the grant in terms of the Ordinance or the transfer in terms of the Act, has been made.

(2) A grantee under the Ordinance or a transferee under the Act
30 who is entitled to submit an application in terms of subsection (1) and who has complied with the provisions of subsection (1) may forward and application to the Land Commissioner with a copy thereof to the Divisional Secretary, Designated Officer or an officer authorized in that behalf in writing by the Land Commissioner, for the issue of a
5 Certificate granting him full ownership, free from all encumbrances of the land in respect of which the grant in terms of the Ordinance or the transfer in terms of the Act, has been made. The form, of the application and the procedure to be followed in making such application shall be as prescribed by regulations.

3. The Divisional Secretary, Designated Officer or an officer
10 authorized in that behalf in writing by the Land Commissioner, shall on receipt of the copy of an application submitted in terms of section 2, take all steps as may be necessary to ascertain the correctness of the statements contained therein and categorize the applications into two
15 groups; namely, those in respect of which no dispute exists and those in respect of which a dispute exists.

Divisional Secretary Designated Officer or authorized officer to categorize applications.

4. (1) Upon examination of the applications categorized in terms of
20 section 3 as those in respect of which no dispute exists and if a Survey Plan is available in respect of such lands, the Divisional Secretary, Designated Officer or the officer authorized in that behalf in writing by the Land Commissioner shall forthwith forward his observations to the Minister stating that a Certificate granting the applicant full
25 ownership, free from all encumbrances, be issued in terms of this Act.

Issue of Certificate where no dispute exists and there are survey plans.

(2) The Minister shall on receipt of the observations in terms of
30 subsection (1), after satisfying himself on the correctness of the observations, forthwith forward the application with all relevant documents to the President with a recommendation to the effect that in his opinion a Certificate in terms of this Act may be issued granting

the applicant full ownership, in respect of such land, free from all encumbrances.

35 (3) The President shall, on being satisfied upon a consideration of the relevant documents, of the correctness of the recommendation, within a period of three months of the same being forwarded to the President issue a Certificate substantially in the form set out in the First Schedule to the Act, granting the applicant full ownership, in respect of such land, free from all encumbrances. The Public Seal of
5 the Republic shall be affixed to such Certificate.

Action in respect of lands where there are disputes & c.

10 5. If upon consideration of an application submitted in terms of section 2 the Divisional Secretary, Designated Officer or officer authorized in that behalf in writing by the Land Commissioner, determines that a dispute exists in relation to the land to which the application relates and that no survey plans of the said land are available in support of such application, he shall after recording such fact, forward the application and all relevant documents along with his endorsement to the Land Commissioner for appropriate action in
15 terms of this Act.

Land Commissioner to take action in respect of disputed lands.

20 6. Upon receipt of the application and documents in terms of section 5, the Land Commissioner shall if he is in agreement with the endorsement of the Divisional Secretary, Designated Officer or the officer authorized in that behalf in writing by the Land Commissioner to the effect that no Certificate can be issued in respect of such land, forthwith take steps to inform the applicant of his decision.

25 7. (1) Any person aggrieved by the decision of the Land Commissioner under section 6 may appeal therefrom to the Board of Review established under section 15 (hereinafter referred to as the "Board") within twenty - one days of the decision of the Land
30 Commissioner being communicated to him requesting that for reasons adduced by him, the decision of the Land Commissioner be quashed and that a Certificate granting full ownership, free from all encumbrances be issued to him.

Appeal to Board of Review against decision of the Land Commissioner.

35 (2) The Board shall on an appeal being submitted to it under subsection (1), take all necessary steps to resolve any dispute in relation to such land and where necessary, require a survey to be conducted in respect of such land and make a recommendation in respect of the application. The Board may call for further information as may be necessary for it to carry out this function. Upon a final settlement of the appeal, the Board shall send back the application along with all relevant documents to the Land Commissioner requiring
5 him to forthwith inform the applicant of the terms of the recommendation.

10 (3) Every appeal in terms of this section shall be concluded within three months from the date of it being submitted to the Board. Upon conclusion of the appeal the Board shall, in writing, inform the Land Commissioner of its recommendation.

(4) In cases where the Board has recommended that the appeal be allowed, the Land Commissioner shall proceed to prepare the

15 Certificate in terms of the recommendation of the Board and forward
the same to the Minister who shall forward the same to the President
along with this recommendation to the effect that a Certificate in terms
of the Act may now be issued in respect of such land. If however the
20 Minister is not in agreement with the recommendation of the Board he
may refer the same back to the Land Commissioner for further
consideration. The procedure specified in the preceding sections shall
apply in such a case.

President to issue
Certificate.

25 8. The President shall, on receipt of the relevant documents in terms
of subsection (4) of section 7, and upon being satisfied on a
consideration of the relevant documents and the terms of the
recommendation of the Board, and the recommendation of the
Minister, within a period of three months of the same being forwarded
30 to the President, issue a Certificate substantially in the form set out in
the First Schedule to this Act, granting the applicant full ownership, in
respect of such land, free from all encumbrances. The Public Seal of
the Republic shall be affixed to such Certificate. If however, the
President is not in a agreement with the recommendation of the
35 Minister, the President may refer the same back to the Minister for
further consideration. The procedure specified in the preceding
sections shall apply in such a case.

9. (1) The Land Commissioner may delegate any power, duty or
function conferred or imposed on him under this Act, to any
Designated Officer or Divisional Secretary.

Delegation of power &
c, by Land
Commissioner.

5 (2) The Land Commissioner may, notwithstanding such
delegation continue to exercise, perform and discharge the power,
duty or function so delegated and may also withdraw such delegation
at any time.

10 (3) The persons to whom any power, duty or function is
delegated under subsection (1) shall in the exercise, performance or
discharge of the powers, duties and functions so delegated to them, be
subject to the general direction and control of the Land Commissioner.

15 10. Subject to the provisions of any other written law every transfer
of land by way of a Certificate under this Act shall be substantially in
the form set out in the First Schedule to this Act and be free of all
encumbrances.

Transfer under Act to
be absolute.

11. All land to be transferred under the provisions of this Act, shall,
in cases where no survey plans are available, be surveyed under the
supervision of the Surveyor-General.

Land where survey
plans not available to be
surveyed.

20 12. The Certificate, substantially in the form set out in the First
Schedule to this Act, in respect of a land alienated to any person under
this Act, shall contain a description of such land with reference to a
plan prepared by or under the authority of the Surveyor-General and
25 kept in his charge. There shall be attached to each Certificate a survey
plan of the land alienated by such Certificate.

Land to be described
with reference to plan.

13. The Surveyor-General shall cause to be issued to any person a copy of any plan or any part thereof, on payment of the prescribed fee. Copy of plan to be supplied on payment of fee.

5 14. (1) Every Certificate when issued shall be registered at the instance of the Land Commissioner in such manner as may be prescribed. Registration of Certificate.

(2) No fees shall be paid or recovered for such registration.

PART II

BOARD OF REVIEW

10 15. (1) There shall be established a Board of Review for the purpose of hearing appeals made in terms of section 7 of the Act and for making recommendations whether or not to issue Certificates transferring land in terms of the provisions of this Act.

15 (2) The Board shall consist of five persons chosen from among persons who are surveyors, lawyers or persons who have knowledge and experience in work connected to the development and settlement of land, appointed by the Minister and nominated with the concurrence of the Constitutional Council, as follows:- Establishment of a Board of Review.

(a) one person nominated by the President; and

20 (b) four persons nominated by the Minister,

(3) One of the members of the Board shall be appointed as the Chairman. A public officer shall be entitled to be appointed as a member of the Board.

25 (4) Every member of the Board shall hold office for a period of three years and shall be eligible for re-appointment.

(5) The Minister may remove any member of the Board, appointed under this section -

(a) if he is adjudged by a competent court to be of unsound mind; or.

(b) if he adjudged by a competent court to be insolvent or guilty of an offence involving moral turpitude.

(6) A member of the Board may at any time resign his office by letter addressed to the Minister.

5 (7) In the event of a vacancy occurring in the membership of the Board as a result of any member of the Board vacating office by death, resignation, removal from office or otherwise, another person shall, having regard to the provisions of subsection (2), be appointed to fill such vacancy.

10 (8) Where any member of the Board is by reason of illness, infirmity or absence from Sri Lanka for a period of not less than three months, temporarily unable to perform his duties, another person, may, having regard to the provisions of subsection (2), be appointed to act in his place.

15 (9) Where another person is appointed to fill a vacancy caused by the death, resignation and removal from office, or otherwise, of a member, the person so appointed shall hold such office during the unexpired part of the term of office of the member of the Board whom he succeeds.

20 (10) Any member of the Board who is absent without leave from three consecutive meetings of the Board, shall be deemed to have vacated his office.

25 16. The function of the Board shall be to review the appeals made to it against the recommendation of the Land Commissioner and make a recommendation in respect of the same. Function of the Board.

17. The Board shall have such powers as may be necessary for the discharge of its functions and in particular, shall have the power - Powers of the Board.

30 (a) to call for and inspect any document or other material connected with any transfer of land in terms of this Act;

(b) to summon and examine or consult any public officer or call for any information necessary for the performance of its functions under this Act; and

5 (c) to resolve disputes and hear and settle the appeals submitted to it in terms of section 7 of this Act.

18. (1) The Chairman shall preside at all meetings of the Board. In the absence of the Chairman from any meeting of the Board, a member chosen by the members of the Board present at such meeting, shall preside. Chairman of the Board to preside at meetings.

10 (2) The Board may delegate to the Chairman any power, duty or function conferred or imposed on, or assigned to, the Board by this Act.

15 (3) In the event of an equality of votes at any meetings of the Board, the Chairman or the member presiding at such meeting shall in addition to his vote, have a casting vote.

(4) If the Chairman is by reason of illness or absence from Sri Lanka, temporarily unable to perform the duties of his office, the Minister may appoint another member of the Board to act in his place.

20 19. (1) There shall be a Secretary to the Board. Secretary to the Board.
(2) The Secretary shall be a full time officer of the Board and shall be responsible for discharging the duties entrusted to him by the Board. The Secretary shall be responsible for the custody of the seal of the Board.

25 (3) The Secretary shall be remunerated at such rates as may be determined by the Board.

20. (1) The meetings of the Board shall be convened by the Chairman and shall be held at least once every month.

Meetings of the Board.

30 (2) The Chairman may call for more meetings whenever he thinks it necessary for the purpose of discharging the functions of the Board under this Act.

(3) The Secretary to the Ministry of the Minister may where he considers it necessary, instruct the Board to meet for the purpose of discharging the functions of the Board under this Act.

5 (4) The quorum for a meeting of the Board shall be three members.

(5) Subject to the provisions of this Act, regulations may be made, regulating the procedure to be followed with regard to the conduct of its meetings and the transaction of business at such meetings.

10

21. The members of the Board shall be remunerated in such manner and at such rates as may be determined by the Minister, in consultation with the Minister in charge of the subject of Finance.

Remuneration

15 22. (1) The Board may appoint such officers and servants as it considers necessary for the efficient discharge of its functions.

Staff of the Board

(2) The officers and servants appointed under subsection (1), shall be remunerated in such manner and at such rates and shall be subject to such conditions of service as may be determined by the Board with the approval of the Secretary to the Ministry of the Minister.

20

PART III

ADMINISTRATION

25 23. (1) The Land Commissioner shall be responsible for the administration of this Act, and the exercise and discharge of the powers and functions conferred and imposed upon him by this Act.

Administration

30 (2) In the exercise of his powers and the discharge of his functions under this Act, the Land Commissioner shall be subject to the general direction and control of the Secretary to the Ministry of the Minister.

5 24. (1) The Land Commissioner may from time to time give general or special directions to any Designated Officer, any Divisional Secretary or officer authorized in writing by the Land Commissioner, or Land Officer in relation to the performance of his duties relating to administration of State Land under this Act.

Land Commissioner may give directions.

10 (2) It shall be the duty of every Designated Officer, any Divisional Secretary or officer authorized in writing by the Land Commissioner, or Land Officer, to give effect to a direction given in terms of subsection (1).

(3) Any doubt arising out of a direction given in terms of subsection (1) shall be referred to the Land Commissioner for a decision.

PART IV

15

MISCELLANEOUS

25. The Minister may by Order published in the Gazette declare any area within the administrative limits of a Pradeshiya Sabha as a development area for the purpose of this Act. Declaration of development areas.
- 20 26. Notwithstanding anything in any other law no action shall be maintainable in any court of law against the State for damages arising from the occupation of land by any person to whom such land has been alienated. Transitional provisions.
- 25 27. No suit or prosecution shall lie against any public officer for anything done by him in good faith under this Act. Protection of action.
- 30 28. Any public officer who, in the exercise, performance or discharge of his powers, duties or functions under this Act, knowingly and willingly, acts on any information which is false or incorrect, shall be liable to a penalty of rupees five thousand where the wrongful act is limited to two occasions only. Public officers liable to penalty for acting on false information.
29. Any public officer who does not attend or give information which is within his knowledge when summoned under section 17 shall be liable to a penalty of rupees five thousand where the failure is limited to two occasions only. Public officer liable to penalty for failure to attend or give information.
- 5 30. On the failure of any public officer in discharging any function under this Act, to ascertain the correctness of any statement contained in a document forwarded to such officer, and such failure results in the making of an incorrect endorsement or recommendation, such officer shall be liable to a penalty of rupees five thousand where the failure is limited to two occasions only. Public officer liable to penalty for failure to ascertain correctness of statements.
- 10 31. Any public officer who has been liable to the payment of a penalty under the provisions of section 28, 29 or 30 on a third occasion shall be guilty of an offence and shall, on conviction after summary trial before a Magistrate be liable to a fine not exceeding ten thousand rupees or to imprisonment to a term not exceeding one year or to both such fine and imprisonment. Offence.
- 15 32. (1) The Minister may make regulations in respect of all matters which are required by this Act to be prescribed or in respect of which regulations are required or authorized to be made under this Act. Regulations

- 25 (2) In particular and without prejudice to the generality of the powers conferred by subsection (1) regulations may be made for, and with respect to, all or any of the following matters:-
- (a) the forms, fees, documents, and matters stated in or required by this Act to be prescribed and the procedure to be followed in relation to the same;
 - 30 (b) the procedure to be followed in the implementation of the provisions of this Act;
 - (c) the criteria on which, (inclusive of the nature and extent of the land and the use to which such land has been put by the person in occupation), the Divisional Secretary, Designated Officer or an officer authorized in that behalf in writing by the
5 Land Commissioner, is to make his endorsement;
 - (d) the criteria on which, (inclusive of the nature and extent of the land and the use to which such land has been put by the person in occupation), the Land Commissioner is to make his
10 recommendation;
 - (e) the manner of paying or recovering fees, costs or other charges;
 - (f) the manner of publishing or serving notices or of serving other process;
 - 15 (g) the procedure to be followed in respect of the resolution of disputes relating to land to which the provisions of this Act apply;
 - (h) the procedure to be followed in relation to lands which have been subdivided or lands which are subject to informal mortgages;
 - 20 (i) any matters incidental to or connected with the matters or subjects specifically referred to in this section;
 - (j) the preservation of lands containing material of archaeological significance or importance; and
 - 25 (k) the conservation and preservation of environmentally important features.
- 30 (3) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of publication, or on such later date as may be specified therein.
- 5 (4) Every regulation made by the Minister shall, as soon as convenient after its publication in the Gazette, be placed before Parliament for approval. Every regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval, but without prejudice to anything previously done there under.

(5) Notification of the date on which any regulation is deemed to be so rescinded shall be published in the Gazette.

10 **33.** A Certificate issued in terms of this Act shall, for all purposes, be deemed to be an "instrument affecting land" within the meaning and for the purposes of, the Registration of Documents Ordinance (Chapter 117) and an "instrument" within the meaning and for the purposes of the Registration of Title Act, No. 21 of 1998.

Certificate deemed to be an instrument affecting land.

15 **34.** (1) Where an alienee to whom land has been alienated under this Act dies intestate, title to irrigated land, which has been alienated under this Act, shall devolve on the eldest child of the alienee, subject to the life interest of the surviving spouse. In the event that
20 the alienee has no issue or is unmarried, the irrigated land shall be devolved according to the rules set out in the Second Schedule to this Act.

Succession on intestacy to be regulated by this Act.

(2) Where an alienee has only one child and he predeceases the alienee leaving issue, title to irrigated land shall devolve on the eldest grandchild of such alienee.

25 **35.** The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other written law and where there is any conflict or any inconsistency between the provisions of this Act and any other law, the provisions of this Act shall prevail
30 over such other law.

This Act to prevail in case of conflict.

36. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

Sinhala text to prevail in case of inconsistency.

37. In this Act, unless the context otherwise requires --

Interpretation.

5 "alienation" with its grammatical variations and cognate expressions shall mean the alienation of State land under this Act, the Land Development Ordinance or the Land Grants (Special Provisions) Act;

10 "Designated Officer" means an officer designated by the Land Commissioner and who is authorized to exercise, perform and discharge the powers, duties and functions which are delegated to him by the Land Commissioner;

15 "Divisional Secretary" means a person appointed to hold office as such in terms of the provisions of the Divisional Secretaries (Transfer of Powers) Act, No. 58 of 1992;

20 "Land Commissioner" means the officer appointed under section 3 of the Land Development Ordinance and includes an Additional Land Commissioner, Deputy Land Commissioner, and any other officer of his department authorized by the Land Commissioner in writing in respect of any particular matter of provision of this Act;

“land” includes –

- (a) the bed of any waterway or of any collection of water, whether natural or artificial;
 - 25 (b) things attached to the earth or permanently fastened to anything attached to the earth; and
 - (c) any title to land or any interest in the crops growing or to be grown thereon;
- 30 “Land Development Ordinance” means the Land Development Ordinance (Chapter 464)
- “Land Grants (Special Provisions) Act”, means the Land Grants (Special Provisions) Act, No. 43 of 1979;
- “land officer” has the same meaning as in the Land Development Ordinance;
- 5 “prescribed” means prescribed by regulations made under this Act;
- “State land” means all land to which the State is lawfully entitled together with all rights, interests and privileges attached or appertaining thereto;
- 10 “surveyed” means surveyed by the Surveyor-General or under his authority;
- 15 “Surveyor-General” means the Surveyor-General of Sri Lanka or any other officer deputed to act on his behalf for the purposes of this Act to the extent to which such officer is deputed, or a licensed surveyor authorized by the Surveyor-General for the purpose of this Act;
- “title” means any right, title, or interest to any land to which this Act applies.

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

A Bill titled "LAND OWNERSHIP"

In the matter of applications under Article
121(1) of the Constitution.

PRESENT	:	Shirani Bandaranayake J.A.N. de Silva Nihal Jayasinghe	Judge of the Supreme Court Judge of the Supreme Court Judge of the Supreme Court
S.D. No. 26/2003		Petitioner	Mohan Ellawala, Chief Minister, Sabaragamuwa Provincial Council, Ratnapura
		Counsel	A.A. de Silva, PC, With Champani Padmasekera, Neville Jayawardena and Prasanna Ubeysekera
S.D. No. 27/2003		Petitioner	Berty Premalal Dissanayake Chief Minister, North Central Provincial Council, Anuradhapura
		Counsel	Wijeyadasa Rajapakse, PC, with Kapila Liyaganamage, Rasika Dissanayake, Ananda de Silva and Lakshitha Jayawardena
S.D. No. 28/2003		Petitioner	Lasantha Alagiyawanna Meewitigammana, Urapola.
		Counsel	Dr. Jayampathy Wickremaratne, PC With Gaston Jayakody
S.D. No. 29/2003		Petitioner	Danny Hiththetiyyage Minister of Lands Southern Provincial Council Town Hall, Galle
		Counsel	Dr. J. de Almeida Gunaratne with Ms. Kishali Pinto Jayawardena, Ranga Ratnayake, Suranjith Hewamanne

S. D. No. 30/2003	Petitioner	Environmental Foundation Ltd No. 3. Campbell Terrace, Colombo 10
	Counsel	Ms. I.R. Rajapakse with J. Gunawardena, R. Dabare, Ms. P. Rajakeeya, Ms. I. Senadeera and Ms. U. Illeperuma
S.D. No. 31/2003	Petitioner	Hasanthapani Ratnayake Attorney-at-Law Legal Officer of Lawyers for Human Rights & Development, No. 233/1, Cotta Road, Colombo 8
	Counsel	K. Tiranagama with Jauffer Hassan
S.D. No. 33/2003	Petitioner	Sarath Ekanayake No. 27/1, Gemunu Mawatha Hanthana Place, Kandy
	Counsel	L.V.P. Wettasinghe with Kirthi Sigera and B. Manawadu
S.D. No. 34/2003	Petitioner	Senerath Attanayake Minister of Lands, Uva Provincial Council Kings Street, Badulla
	Counsel	S.S. Sahabandu, PC. with Hemantha Situge and Champani Padmasekera
S.D. No. 35/2003	Petitioner	Yatanwala Gamaralage Padmasiri Provincial Minister of Lands, Agriculture Industry, Rural Development, Minor Irrigation & Fisheries, Sabaragamuwa Provincial Council, New Town, Ratnapura.
	Counsel	D.P. Mendis, P.C. with B. Jayamanne and Nadeera Gunawardena
S.D. No. 36/2003	Petitioner	Dassanayake Gunaratna Basnayaka Mudiyanselage Dharmasiri Dasanayake "Chandima" Pahala Gomugomuwa, Munamaldeniya
	Counsel	Nihal Jayamanne, PC with Anandalal, Nanayakkara Ms. Uitha Collure Prasanna Obeysekera and Dilhan de Silva Uditha Egalahewa, SC with Vikum Abrew, SC, for State

Court assembled at 10.00 am on 10th December 2003

A Bill bearing the title "Land Ownership" was published in the Government Gazette and placed on the Order Paper of Parliament on 19th November 2003. 10 petitioners have challenged the constitutionality of this Bill by petitions presented to this Court and have thereby invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution. Hon. Attorney-General has been given due notice of the petitions.

The Bill according to its long title is "to provide for the dispersal of ownership of lands by the transfer of ownership of State Lands to citizens of Sri Lanka; for the removal of certain restrictions attached to grants and transfers made under the Land Development Ordinance (Chapter 464) and the Land Grants (Special Provisions) Act, No. 43 of 1979"

The petitioners contended that the provisions of the Bill in its entirety and the procedure followed in having the Bill placed in the Order Paper of Parliament are inconsistent with the Constitution.

The petitioners took up the later as a preliminary ground of challenge which we would now examine as it amounts to a threshold issue.

Learned Counsel for the petitioners contended that since the passing of the Thirteenth Amendment to the Constitution, the subject of land, which is said to mean "rights in or over land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix 11" of the 9th Schedule to the Constitution, is a matter set out as item No. 18 in List 1, commonly known as the Provincial Councils List, of the Thirteenth Amendment to the Constitution. Therefore they contended that the subject of land is devolved to the Provincial Councils.

Learned State Counsel did not agree with this contention. He submitted that purely because a subject matter is referred to in the Provincial Councils List, it cannot be taken into account that the subject in question is a devolved subject where the Provincial Councils have the power over it. Learned State Counsel referred to the Special Determination No. 2/91 on the Agrarian Services (Amendment) Bill in support of his contention where this Court held that it is not possible to determine whether a matter is a List 1 or a List 111 subject by merely looking at the headings on those lists.

Item 18 of the Provincial Councils list refers to the subject of land and states as follows:

"Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix 11"

Appendix 11, which again is under and in terms of the Provincial Councils list, is solely dedicated to matters pertaining to "land and land settlement." This refers to State lands and provides that it shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) of the Constitution and written law governing the matter. Subject to the aforesaid restriction, land is treated as a Provincial Council subject. However, there are certain special provisions that would applicable to the land coming under this purview of the Provincial Councils. Such special provisions are broadly categorised into 2 sections, namely,

1. State, Land,
2. Inter-provincial Irrigation and Land Development Projects, and
3. National Land Commission.

The Bill under reference deals with the subject areas that are referred to in item 1 of Appendix 11 of the Provincial Councils List. Item 1.3 in Appendix 11 refers to "alienation or disposition of State land within a Province and reads as follows:

"1.3 Alienation or disposition of the State land within a province to any citizen or to any organisation shall be by the president, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter"

This reaffirms the position that State land shall continue to vest in the Republic while the subject of land is a matter for the Provincial Council.

The position that was taken by the learned State Counsel, came up in Agrarian Services (Amendment) Bill. Agrarian Services as has been enumerated by this Court, is a subject which is given in the Provincial Councils List as well as in the Concurrent List in the Ninth Schedule to the Constitution. When a subject is listed in the Concurrent List, it would be necessary consider the subject matter in depth to ascertain how much authority the Provincial Councils would have over such a subject. However, this difficulty does not arise with regard to the question under review as there is no reference to the subject matter of land in the concurrent list.

In fact, in the Reserved List, reference is made to State lands and provides that,

"State lands and Foreshore, except to the extent specified in item 18 of List 1"

Such extents, as referred to earlier are clearly set out in Appendix 11 of the 9th Schedule, which specifically states that, "land shall be a Provincial Council Subject." In considering the aforementioned contents, it is abundantly clear that the matter in question is a Provincial Council subject that has been devolved to the Provincial Councils in terms with the Thirteenth Amendment.

The Thirteenth Amendment to the Constitution came into effect in 1987 and the Provincial Councils Act, No. 42 of 1987 was enacted in order to establish Provincial Councils in the country. Article 154(G) of the Constitution refers to the statues of the Provincial Councils and Article 154(G) 3 describes the position with regard to the law making power of the Central Government in respect of a subject given in the Provincial Councils List. Accordingly, in terms of Article 154(G) 3 of the Constitution, no Bill with regard to any matter set out in the Provincial Councils 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. The necessity of such reference to Provincial Council is for the purpose of expression of their views on the Bill within the specified time period. After such reference, in the event 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. In a situation 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 of the Constitution.

Article 154(G) (2) of the Constitution provides limited exceptions to the provisions specified in Article 154(G) 3, which reads as follows:

“Notwithstanding anything in paragraph (3) of this Article, Parliament may make laws, otherwise than in accordance with the procedure set out in that paragraph, in respect of any matter set out in the Provincial Council List for implementing any treaty, agreement or convention with any other country or countries or any decisions made at an international conference, association or other body (emphasis added)

Admittedly no such reference, as referred to in Article 154(G) 3, was made to the Provincial Councils and the Bill in question does not come within the categories referred to in Article 154(G) 2 of the Constitution.

In such circumstances, the Bill in question, being of a matter set out in the Provincial Councils List, shall not become law unless it has been referred by the President to every Provincial Council as required by Article 154(G) 3 of the Constitution.

The main contention of all the petitioners, as referred to earlier, was that the provisions, in its entirety of the Bill is inconsistent with the Constitution. The long title to the Bill on “Land Ownership” makes specific reference to the Land Development Ordinance (Chapter 464) and the Lands Grants (Special Provision) Act No. 43 of 1979. Both these statutes deal with alienation of state land and came into effect well before the Provincial Councils were established by virtue of the Thirteenth Amendment. Under the Land Development (Amendment) Act, No. 27 of 1989, in terms of section 19, State land is initially given on a permit to a person with a personal right of occupation, subject to payment of annual instalments. Once a permit holder has paid all sums due and developed the land to the satisfaction of the Government Agent, he becomes entitled to a grant. Even after becoming entitled to a grant, such grant would be subjected to certain conditions and the first and Second Schedules to the Land Development Ordinance of No. 19 of 1935 sets out such mandatory and optional conditions. Section 22A of the Land Development (Amendment) Act, No. 27 of 1981 prohibits the alienation of land to persons who are not citizens of Sri Lanka.

The Land Grants (Special Provisions) Act, No 43 of 1979 on the other hand deals with agricultural and estate lands that were originally privately owned and vested in the Land Reform Commission as excess lands. By virtue of the aforementioned Act, such land was vested in the State to be given to landless citizens of Sri Lanka. Section 5 of this Act however stipulate several conditions that would be applicable to such land.

The Land Ownership Bill provides for the holder of land under a grant made in terms of Section 19(4) of the Land Development Ordinance or Section 3 of the Land Grants (Special Provisions) Act referred to above, to apply for his existing right to be converted into full ownership, free of all encumbrances. The procedure for such grant of ownership of State land is described in Part 1 of the Bill. Accordingly an application in terms of the Bill, requesting that the rights conveyed to him under such grant or transfer be converted to full ownership to the “right, title and interest in such land free from all encumbrances” has to be forwarded to the Land Commissioner with a copy to Divisional Secretary, Designated Officer or to an authorized Officer. Such Officer shall thereafter forward his

observations to the Minister and the Minister on receipt of the observations, after satisfying himself on the correctness of the observations, forward all the relevant documents and the application to the President with his recommendation to the effect that in his opinion a certificate in terms of this Act may be issued granting the applicant full ownership in respect of such land, free from all encumbrances.

This procedure for the determination of such application has no provision for the Provincial Councils to be consulted and has bypassed them entirely.

Learned Counsel for the petitioners therefore strenuously argued that although the Bill does not state specifically that it is for the amendment or repeal of the Constitution, there are several clauses of the Bill which seek to amend impliedly or have the effect of amending the Constitution.

Admittedly, the bill does not state that it is seeking to amend any provision or provisions of the Constitution. On the contrary, the long title, referred to above, deals only with the transfer of ownership of State land to citizens of Sri Lanka.

Referring to amending statutes, Bindra is of the view that it is an alteration or a change of something established as law. He quotes Sutherland regarding amendments, who stated, citing *US v. La France* [(1931) 282 US 568] that:

"Any change of the scope or effect of an existing statute, whether by addition or omission, or substitution of provisions, which does not wholly terminate its existence; whether by an Act purporting to amend, repeal, revise or supplement, or by an Act independent and original in form is treated as amendatory. And it is the effect, not the name given to an Act that determines its character. If a subsequent statute does, in fact, modify and change the proceedings to be had under a former Act, the latter Act is an amendment of the earlier Act and must be so regard and treated, although it is not so called in the Act itself (emphasis added)" (N.S. Bindra, Interpretation of Statutes, 8th Edition, pp 621 – 622)

By the introduction of the Provincial Councils in terms of the Thirteenth Amendment to the Constitution, the subject of land, that is to say, "rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement" to the extent set out in Appendix 11 of the Ninth Schedule to the Constitution, became a subject that was allocated to the provincial Councils. Appendix 11, which refers to land and land settlement, clearly stated that State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) of the Constitution and written law governing the matter, Subject to the aforementioned; land was devolved as a Provincial Council subject, which had to be carried out subject to several special provisions given in Appendix 11. In that, the alienation or disposition of State land within a Province was to be by the president on the advice of the relevant Provincial Council. Therefore, the situation and procedure pertaining to alienation or disposition of State land within a province was clearly stipulated by constitutional provisions.

The proposed Bill, as has been stated in its long title is to provide for the dispersal of ownership of lands by the transfer of ownership of State lands to citizens of Sri Lanka and also speaks of "removal"

of certain restriction attached to grants and transfers made under the Land Development Ordinance and the Land Grants (Special Provisions) Act.

It is however to be remembered that land being one of the most valuable natural resources is to be utilized, while State land still continued to be vested in the Republic, by the Provincial Councils in accordance with the national policy formulated by the National Land Commission. Provision was made under the Thirteenth Amendment for the establishment of a National Land Commission which would prepare the national policy that would lay down general norms in regard to the use of land, having regard to soil, climate, rainfall, soil erosion, forest cover, environmental factors, economic viability, etc. The restriction that was attached to grants were laid down so as to retain control over the use of land and transfer of land in order to safeguard an invaluable natural resource.

The proposed Bill thus has ignored the basic framework, structure as well as the policy that was to be formulated under the National Land Commission and has introduced a different scheme. The Bill has totally ignored the concept of the President's function on the advice of the Provincial Council with regard to alienation and disposition of State land. The Bill has thereby totally bypassed the provisions containing in Appendix 11 which amounts to an implied amendment to the Constitution.

Chapter XII of the Constitution provides for amendments to the Constitution where it has clearly stated that amendment or repeal of the Constitution must be express. Such an amendment to the Constitution must comply with the provisions stipulated in Articles 82(1) and 82(2) of the Constitution.

In the backdrop of the aforementioned aspects we would now turn to examine the Clauses in the Bill which the petitioners have contended to be inconsistent with the Constitution.

Learned Counsel for the petitioners' contention was broadly two-fold. Firstly, they submitted that Clauses 1(1) and 1(2) are inconsistent with Article 12(1) of the Constitution. Secondly, they submitted that, Clauses 1(3)b, 2(2), 3, 32(2)c, 4(2), 4(3) and the entirety of parts 1,11 and 111 of the Bill are inconsistent with the Thirteenth Amendment to the Constitution.

(A) Inconsistencies with Article 12(1) of the Constitution

1. Clause 1(1)

Clause 1(1) refers to the short title and the application of the Bill. The said Clause states that the provisions of the Bill shall apply to "one or more of the Divisional Secretaries Division falling within an Administrative District or to all or to all or any Grama Niladhari Divisions falling within any Divisional Secretary's Division" The specifications of such application would be decided from time to time by the Minister. Learned Counsel for the petitioners contended that this provision is violative of Article 12(1) of the Constitution.

This Clause provides for the Bill be brought into force selectively to cover Divisional Secretaries Divisions or Grama Niladhari Division at the discretion of the Minister. There is no provision in the said clause, for the Minister to make such a decision on an intelligible criteria or basis. Article 12(1) of the Constitution, which provides a right to equality, specifies that 'all persons are equal before the

law and are entitled to the equal protection of the law.’ Although it is permitted to have differentiation without such action becoming a discrimination, this cannot be carried out in an ad hoc or in an arbitrary manner. The essential ingredient for such classification is that it should be based on an intelligible principle. Discussing such classifications, Kagzi points out that,

“There should be no discrimination between any two persons, if, as regards the subject-matter of legislation they are similarly situated ... Though the legislature has a wide choice in articulation of subject – matter in its laws, any classification should rest on real substantial criteria, and should be supported by an intelligible object intended to be pursued by the legislature. The legislature should neither treat unequals as equals, nor equals nor equals unequally without any rhyme or intelligible purposive differentia relatable to the legislative purpose spelled out by it.” (Jain Kagzi, the Constitution of India, 5th Edition, pg.210).”

When no such intelligible basis or criteria are given, that would amount to equals not been treated equally, violating the equal protection guaranteed in terms of Article 12(1) of the Constitution.

This clause therefore is inconsistent with article 12 (1) of the Constitution and will have to be passed by the special majority required under the provisions of paragraph 2 of article 84 of the Constitution.

2. Clause 1(2)

Clause 1(2) of the Bill spells out the exemptions from the provisions of the Act in respect of lands in urban areas reserved by the Minister for the purposes of development. The said clause reads as follows;

(2) The provisions of this Act shall not apply in respect of –

- (a) lands, the elevation of which is over one thousand five hundred and twenty-four meters above mean sea level;
- (b) lands falling within the limits of a municipality declared under the Municipal Councils Ordinance (chapter 252) and the administrative limits of an Urban Council declared under the Urban Councils Ordinance. (255);
- (c) lands in urban areas falling within the administrative limits of a Pradeshiya Sabha, declared by the Minister by order published in the Gazette as development areas, for the purposes of this act;
- (d) lands in urban areas declared as development areas for the purposes of any other written law, for the time being in force.

As pointed out by learned counsel for the petitioners, ‘there is no provision for similar exemptions and reservations of lands for development in rural areas. Considering the rural economy and the attempts for improvement of productivity in such areas, it is difficult to comprehend as to on what basis that the exemptions given to the urban areas and reservation of land for such development purposes were

not granted to the rural areas of the country. The relevant clause does not provide any basis for such kind of a classification and merely refers to four selected areas where the provisions of the bill shall not have any application. As pointed out earlier for a classification should be based on intelligible criteria and cannot be unreasonable or arbitrary. There is no necessity for legislative classification to be scientifically perfect or logically complete (*Kedar Nath v. State of West Bengal*) AIR 1953 (SC) 404). However, it has to be reasonable, justifiable and free from any arbitrariness. To achieve such object, it is necessary to indicate the basis of classification and where such basis is not forthcoming, the relevant clause would be violative of the equal protection guaranteed in terms of Article 12(1) of the Constitution. This clause therefore is inconsistent with Article 12(1) of the Constitution and will be required to be passed by the special majority under the provisions of paragraph 2 of Article 84 of the Constitution.

(B) Inconsistencies with the Thirteenth Amendment to the Constitution

1. Clause 1 (3) (b)

Clause 1(3) (b) of the Bill refers to the application of this Bill and is in the following terms:

"In respect of grants and transfers of land under the Ordinance or the Act as the case may be made after the promulgation of the Thirteenth Amendment to the Constitution, the provisions of this Act shall apply only in respect of grants or transfers made in accordance with the Ordinance or the Act and the provisions of the said Thirteenth Amendment."

Learned counsel for the petitioners submitted that this Clause is violative of the provisions of the Thirteenth Amendment to the Constitution.

As pointed out earlier, List 1 of the Ninth Schedule to the Constitution refers to the subjects that are coming within the purview of the Provincial Councils. Item 18 of such List and Appendix 11 to the Ninth Schedule of the Constitution, clearly refers to the subject of land. Accordingly, the subject matter envisaged in the Bill is on a subject coming within the purview of the Ninth Schedule in the Thirteenth Amendment to the Constitution. Clause 1 (3) (b), referred to earlier, acknowledge the fact that the proposed grants and transfers under the Bill must be made in accordance with 'the provisions of the said Thirteenth Amendment.'

In such circumstances, Clause 1 (3) (b) is inconsistent with item 18 of List 1 and paragraph 1:3 of the Appendix 11 of the Thirteenth Amendment to the Constitution. Therefore, it will be required to be passed by the special majority under the provisions of paragraph 2 of Article 84 of the Constitution.

2. Clause 2(2), Clause 3 and Clause 32(2) (C)

These 3 Clauses refer to the role of the Land Commissioner in the issuance of certificates to a grantee under the Land Development Ordinance No.19 of 1935 or a transfer under the Land Grants (Special Provisions) Act, No 43 of 1979, under the Land Ownership Bill. The contention of the petitioners' was that the proposed Bill would be taking over the powers of the Provincial Land Commissioner and

handling it over to the Land Commissioner at the Centre, which action amounts to an amendment to the Thirteenth Amendment the Constitution.

With the introduction of the Provincial Councils under the Thirteenth Amendment to the Constitution, and the subsequent legislation on Provincial Councils (Consequential Provisions) Act, No. 12 of 1989, the Provincial Land Commissioner was empowered to carry out the relevant functions regarding the grantees under the Land Development Ordinance and/or transfers under the Land Grants (Special Provisions) Act, No. 12 of 1989 in its preamble states that it is an Act to make interim provision for the interpretation of written law on matters set out in List I of the Ninth Schedule to the Constitution. Thus the position of Provincial Land Commissioner, which was created by the Constitution, making him a "creature of the Constitution", is now being amended by the provisions of the Bill in order to take over his powers to hand it over to the Land Commissioner in terms of the Bill. This is undoubtedly an implied amendment of the powers vested with the Provincial Commissioner of Lands which was derived from the Provisions of the Thirteenth Amendment.

Accordingly the said Clauses, namely Clause 2(2), 3 and 32(2)(C) of the Bill are inconsistent with the Thirteenth Amendment to the Constitution and therefore, it will be required to be passed by the special majority under the provisions of paragraph 2f of Article 84 of the Constitution.

3. Clauses 4(2) and 4(3) of Bill

Clauses 4(2) and 4(3) of the Bill are in the following terms:

"4(2) The Minister shall on receipt of the observations in terms of subsection (1), after satisfying himself on the correctness of the observations, forthwith forward the application with all relevant documents to the President with a recommendation to the effect that in his opinion a Certificate in terms of this Act may be issued granting the applicant full ownership, in respect of such land, free from all encumbrances.

4(3) The President shall, on being satisfied upon a consideration of the relevant documents, of the correctness of the recommendation, within a period of three months of the same being forwarded to the President issue a Certificate substantially in the form set out in the First Schedule to the Act, granting the applicant full ownership, in respect of such land, free from all encumbrances. The Public Seal of the Republic shall be affixed to such Certificate."

The petitioners contended that by virtue of these two Clauses, and especially by Clause 4(3), the Bill seeks to restrict the powers of the President of the Republic with regard to the powers relating to alienation of State Land.

Learned State Counsel on behalf of the Attorney General submitted that in term of Article 22(d) of the Constitution and the Appendix II of List I of the Ninth Schedule, Parliament is competent to make

laws to provide for the procedure of such alienation or disposition of State Land. Therefore he took up the position that the provisions of the present Bill has in no way restricted the discretionary power of the President to alienate State Land. Further he submitted that it was held in SC Determination No. 6/2001, (The Seventeenth Amendment Bill), that although there was a restriction in the exercise of the discretion hitherto vested in the President, the restriction *per se* would not be an erosion of the executive power by the President and there cannot be any inconsistency with Article 3 and Article 4(b) of the Constitution.

Prior to the establishment of Provincial Councils in terms of the Thirteenth Amendment to the Constitution, the Land Development Ordinance and the Land Grants (Special Provisions) Act vested the power of making grants and dispositions of lands and immovable property with the President of the Republic. Article 33(b) of the Constitution, which is in the following terms, specifically vests the power of disposition of lands and immovable property in the hands of the President.

“33. In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether executed before or after the commencement of the Constitution, the President shall have the power –

(2) to ... such grants and disposition of lands and immovable property vested in the Republic as he is by law required or empowered to do, and to use the Public seal for sealing all things whatsoever that shall seal.”

With the passing of the Thirteenth Amendment to the Constitution, such Constitutional power vested with the President was qualified by virtue of paragraph 1:3 of Appendix II to the Ninth Schedule to the Constitution. By such provision, the authority for alienation or disposition of the State land within a province to any citizen or to any organization was yet vested with the President. The new amendment brought in the concept that the President had to carry out such alienation or disposition **on the advice of the relevant Provincial Council** in accordance with the laws governing the matter. By this, a consultative process was introduced with regard to alienation or disposition of the State land within a Province. In effect, even after the establishment of Provincial Councils in 1987, State land continued to be vested in the Republic and disposition could be carried out only in accordance with Article 33(d) of the Constitution read with 1:3 of Appendix II to the Ninth Schedule to the Constitution.

It is to be noted that a qualification to the power vested with the President in terms of Article 33(d) could be effected only by an amendment to the Constitution.

The present Bill, which is admittedly not a constitutional amendment, is now seeking to subject the power of the President to the advice of the relevant Provincial Council to the Minister's recommendation and the Minister's opinion by virtue of an ordinary Bill. In fact, according to Clause 4(3) of the Bill, the President's function is restricted merely to satisfy herself as to the “consideration of the relevant documents and of the correction of the recommendation made by the Minister.”

In the SC Determination No. 6/2001, (decision on the Seventeenth Amendment), the question that had to be considered was whether the "subjection of the discretion of the President, to the recommendation and approval of the Constitutional Council as envisaged by the Bill would amount to an effective removal of the President's executive power." That Bill was introduced for the establishment of the Constitutional Council. Considering the relevant provisions this Court was of the view that "a restriction *per se* would not be an erosion of the executive power of the President, so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution." We are in agreement and have no conflict with the position taken by this Court in SC Determination No. 6/2001. However, in our view, the position of the present Bill differs substantially from the aforesaid Bill. The present Bill, to reiterate, has two basic purposes:

- (a) to provide for the dispersal of ownership of State land to citizens of Sri Lanka; and
- (b) for the removal of certain restrictions attached to grants and transfers made under the Land Development Ordinance and the Land Grants Act.

It is thus necessary to consider whether there is a restriction in the exercise of the discretion of the Executive Power and if so whether it amounts to an erosion of the executive authority so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution in the light of the aforementioned objective of the proposed Bill.

In *Bulankulama and others v. Secretary, Ministry of Industrial Development and Others* [(2000) 3 Sri L.R. 243] it was held that the national resources of the people were held in "Trust" for them by the Government. Justice Amerasinghe, discussing such trusteeship stated thus,

"The organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the Constitution, but also with the high and enlightened conceptions of the duties of our raters, in the efficient management of resources in the process of development ..."

Discussing the ancient history of land tenure, Hayley (Sinhalese law and customs, F.A. Hayley, chapter II) states that the Kings were the owners of the soil. Contributing to this view H.W. Codrington, (Ancient Land Tenure and Revenue in Ceylon, 1938) stated that,

"The king was bhupati or bhupala, 'lord of the earth', 'protector of the earth' or as the late Niti Nighanduwa (Chapter I, 2) terms Manu the Vaivasvata, the first King of men, 'lord (adhipati) of the fields of all.'"

From time immemorial, land has thus being held in 'Trust' for the people in this island; now a Republic. The principle that State land is held in public trust could be clearly seen in the Land Development Ordinance and the State Grants (Special Provision) Act, where land was allocated to land-less persons while reserving certain control by the State over such land.

Moreover, even at the time of the establishment of Provincial Councils in 1987, although the subject of land was devolved to the Provincial Councils, it did not defer from the policy that the 'land is being held in Trust for the people by the State.' In Appendix II, the opening paragraph clearly stated that,

"State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter."

Referring to the wording of Clause 4(3) of the Bill, learned Counsel for the Petitioners submitted that while Article 33(d) 'clearly decrees a power, Clause 4(3) has completely transferred that power to a duty or an obligation.' This in effect, it was submitted by the learned counsel, is a serious violation of not only Article 33(d) of the Constitution, but also of the executive power of the President, enshrined in Article 4(b) of the Constitution which the President exercises on behalf of the people in whom sovereignty resides.

Article 33 is contained in Chapter VII of the Constitution, which deals with the Executive – The President of the Republic. This Chapter, which consists of 12 main Articles, solely deals with the appointment, power and functions and the other matters relating to the office of the President of the Republic. Article 33, which consists of 6 sub Articles deals with the powers and functions of the President. The authority given to the President in terms of Article 33 thus flows from the power which is exercised in terms of Article 4(b) read with Article 3 of the Constitution.

According to Article 4(b) of the Constitution, "the executive power of the people, including the defence of Sri Lanka, shall be exercised by the President of the Republic who is elected by the people." In such a situation, transformation of a power that was decided by a constitutional provision, namely in terms of Article 33(d), to merely a duty or an obligation, by virtue of an ordinary Bill would amount to an erosion of the executive power of the people, which is exercised by the President of the Republic who had been elected by the people. This would in effect alienate the Executive Power from the people in contravention of Articles 3 and 4 of the Constitution.

This Court has ruled in a series of determinations that Article 3 is linked with Article 4 and that these two Articles must be read together (Vide SD 5/80, 1/82, 3/83, 1/84, 7/87, 11/2002 and 12/2002).

Hence whilst Clause 4(2) is inconsistent with Article 33(d) of the Constitution and 1:3 of Appendix II of the Thirteenth Amendment, Clause 4(3) is inconsistent with Articles 3 and 4 of the Constitution. We therefore, determine that the Bill in its present form is required to be passed by the special majority in terms of the provisions of paragraph 2 of Article 84 and approved by the people at a referendum by virtue of the provisions of Article 83.

The objections to the Bill in its entirety was based on the fact that the provisions of the proposed Bill are inconsistent with the provisions of the Thirteenth Amendment to the Constitution read with Article 33(d) of the Constitution. It is now apparent that the process for the alienation of State land which is held in trust by the State for the public benefit is prescribed in Appendix II of the Ninth Schedule and Article 33(d) of the Constitution. The present Bill clearly is suggestive of a different process of alienation of such land thereby infringing with a process provided by Constitutional provisions and for this reason the provisions of the Bill are inconsistent with the Thirteenth

Amendment to the Constitution read with Article 33(d) of the Constitution, which would require to be passed by the special majority under the provisions of Article 84(2) of the constitution.

For the reasons aforesaid, in addition to the procedural deficiencies referred to earlier, the Bill in its present form requires approval by people at a referendum in addition to a two-thirds majority vote (including those not present) in terms of Article 83 of the Constitution.

We shall place on record our deep appreciation of the valuable assistance given by all the learned Counsel for the petitioners and the State Counsel who appeared on behalf of the Hon. Attorney General.

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

J.A.N. de Silva,
Judge of the Supreme Court

Nihal Jayasinghe,
Judge of the Supreme Court

**In the Supreme Court of the Democratic
Socialist Republic of Sri Lanka**

In the matter of an application
under Article 126 of the Constitution.

**SC (Application)
No. 334/2002**

1. Deva Susila Premalatha
Karunathilaka
32/5, Poramba Cross Road
Ambalangoda
(the next friend of Amila
Karunathilaka of the same address
2. Amila Karunathilaka
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Ambalangoda

PETITIONERS

Vs.

1. D.M.G.A. Jayalath de Silva,
The Principal,
G/Dharmashoka Maha Vidyalaya,
Ambalangoda
2. Piyasena Geeganage,
The Director-National Schools,
Ministry of Human Resource
Development, Education and
Cultural Affairs
Isurupaya,
Sri Jayewardenapura Kotte,
Battaramulla
3. V.K. Nanayakkara,
The Secretary,
Ministry of Human Resource
Development, Education and
Cultural Affairs,
Isurupaya,
Sri Jayawardenapura Kotte,
Battaramulla
4. Dr. Karunasena Kodituwakku,
Minister of Human Resource
Development, Education and Cultural Affairs
Ministry of Human Resources Development,
Education and Cultural Affairs,
Isurupaya
Sri Jayewardenapura Kotte,
Battaramulla

5. Chithrananda de Zoysa,
No. 5, P.R. de Silva Mawatha,
Brahmanawatta,
Balapitiya
(The next friend of D. Sampath Udayanga de
Zoysa of the same address)
6. D. Sampath Udayanga de Zoysa,
No. 5, P.R. de Silva Mawatha,
Brahmanawatta,
Balapitiya
7. G.D. Rathnapala,
Metiwiliya, Pitigala
(The next friend of G.D. Mekhala Ratnamali of
the same address)
8. G.D. Mekhala Ratnamali,
Metiwiliya,
Pitigala
9. H. Luxman Nandalal,
"Siri Weda Nivasa",
Customs Road,
Dodanduwa
(The next friend of Diluka
Subhashini Hewawasam
of the same address)
10. Diluka Subhashini
Hewawasam,
"Siri Weda Nivasa"
Customs Road,
Dodanduwa
11. The Attorney General,
Attorney General's
Department,
Colombo 12

RESPONDENTS

BEFORE : Sarath N. Silva, C.J.
Shirani A. Bandaranayake, J.
Yapa, J.

ARGUED ON : 22.10.2002

WRITTEN SUBMISSIONS TENDERED ON :

for the petitioners : 28.10.2002

for the respondents : 06.11.2002

DECIDED ON : 25.11.2002

Shirani A. Bandaranayake, J.

The 2nd petitioner in this application is an 11 year old boy, represented by his next friend; the 1st petitioner, who is the mother of the child. Presently the child is without a school and according to the submissions made, is at home striving hard to study in whichever the limited way it is conceivable. By the numerous letters which are filed of Record, it appears that the 1st petitioner, a teacher by profession, has made every endeavour, for her son to obtain admission to G/Dharmashoka Vidyalaya, Ambalangoda, which is a mere 500 meters away from her permanent residence, to no avail.

The 1st petitioner joined the Government service as a teacher in September 1979, and was attached to Jinaratne Maha Vidyalaya, a school situated in Galle. During the period 1988-1989, she underwent training at the Balapitiya Teachers' Training College and was transferred to Attavilluwa Medhananda Government School in Puttalam with effect from 01.01.1990. This transfer was effected on the basis of compulsory service for teachers in difficult or uncongenial areas in the country, which is generally limited to a period of 5 years. The 2nd petitioner was born in February 1991, while she was serving in Puttalam and became eligible to be admitted to the year 1 in January 1997. Since June 1995, the 1st petitioner had been requesting for a transfer to Ambalangoda, admittedly, that being her native place. The documents marked P2 dated 19.06.1995, P3 dated 07.08.1996, P4 dated 01.11.1998 and P5 dated 28.11.2000, bear ample testimony to her unremitting efforts to obtain a transfer to a place closer to her native place. Meanwhile the 2nd petitioner commenced his studies at St. Andrew's Primary School in Puttalam in January 1997: admittedly a school with classes upto Grade 5. Meanwhile the 1st petitioner was transferred to Dharmashoka Vidyalaya, Ambalangoda with effect from 15.06.2001 (P10). Since then, the 1st petitioner had been making applications to the 1st respondent, seeking admission for the 2nd petitioner to the said school.

The petitioners' claim is that the 1st to 4th respondents have acted contrary to Clause 15(a) and/ or Clause 16 of the Circular No. 2001/15 (P22) and thereby infringed the 2nd petitioner's fundamental right to equality and equal protection of the law guaranteed to him by Article 12(1) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

It is not disputed that, the 2nd respondent is in charge of National schools as the Director of Education attached to the Ministry of Education. He, on the grievances of the 2nd petitioner, has taken the position that the 1st petitioner's transfer does not *per se* qualify the 2nd petitioner to be admitted to the same school, in terms of Clause 13 of the currently applicable School Admission Circular No. 2001/15. His explicit submission was that the maximum number of students per class in a Government school had to be maintained at 40 and if that number is exceeded, no further admissions

should be made from the date of the publication of the said Circular. Due to the above position, the 2nd respondent submitted that there were no vacancies in year 5 of Dharmashoka Vidyalaya and the application to admit the 2nd petitioner to Grade 5 in the year 2001 was therefore rejected.

Concerning the admission to grade 6, he submitted that Clauses 14 and 15 of the Circular No. 2001/15, regulates such admissions. The students who pass the Grade 5 scholarship examination were entitled to apply for entrance to a different school wherein all such application will be processed and selections made by the School Affairs Division of the Ministry of Education. For the Grade 5 scholarship holders to obtain entrance to a new school, a cut off mark would be worked out by the Ministry of Education based on the aggregate marks of all the applicants who have chosen the school, which results in the cut off mark differing from school to school. Consequently, the cut off mark for Dharmashoka Vidyalaya for admission to year 6 for the year 2002 was 148. The 2nd respondent took up the position that as the 2nd petitioner obtained only 139 marks (P7) he was not eligible for admission to the said school. Referring to the 6th, 8th and 10th respondents, who were admitted to Dharmashoka Vidyalaya, the 2nd respondent stated that, they were entitled to have a legitimate expectation of being admitted to the said school upon the marks they had obtained at the Grade 5 scholarship examination. He further took up the position that if the 2nd petitioner was admitted to Grade 6 of Dharmashoka Vidyalaya, that would cause grave prejudice to numerous other applicants, who have applied, but not selected as they have fallen short of the cut off mark by a few marks.

Admittedly the 2nd petitioner studied in a school at Puttalam, which had classes only upto Grade 5. Circular No. 2001/15 dated 29.05.2001 provided for such situations and Clause 16 specifically states that the Provincial Director of Education/ Zonal Director of Education should provide an alternative school for all students who have got through Grade 5 in such school. In such circumstances, it cannot be disputed that the educational authorities were responsible in allocating a school for the 2nd petitioner. Clause 16 referred to in Circular No. 2001/15, does not specify any obligation on the part of a parent to take any action for the purpose of such child gaining admission to a school.

No material was placed before this Court to establish that either the Provincial Director of Education for the North Western Province or the Zonal Director of Education for the North Western Province or the Zonal Director of Education for Puttalam, took any action to locate a suitable school for the 2nd petitioner. From a practical perspective it should have been the Provincial Director of Education for the Southern Province or the Zonal Director of Education for Ambalanda, who should have allocated a school for the 2nd petitioner, as his mother was transferred to Dharmashoka Vidyalaya in June 2001. Admittedly, no steps were taken by any person in authority in compliance with Clause 16.

Learned State Counsel for the respondents took pains to submit that in terms of Clause 13.1 of Circular No. 2001/15, dated 29.05.2001, that the number of students in a class of a Government school cannot exceed 40. The said Clause states that, at the time the Circular was issued, if there were more than 40 students, no more new students should be admitted to those classes. Indeed it is a laudable decision not to over crowd the classrooms, which would permit a better environment that would be conducive for the students in Government schools. However, it appears that the 1st respondent has paid no heed to the contents of this Clause. His letter dated 14.03.2002 to the 2nd respondent, which gives the breakdown of the number of students, as given below, demonstrates that all 10 classes of Grade 6 had more than 40 students, at a time well after the relevant Circular had come into effect:

6A – 44
6B – 45
6C – 44

6D – 45
6E – 45
6F – 44

6G – 44
6H – 45
6J – 44

6K – 45

In the circumstances it is revealing to note that the 8th respondent was admitted to Dharmashoka Vidyalaya on the basis of a letter, dated 08.05.2002, issued by a Director of Education (School Affairs) of the Ministry of Education. If I may reiterate, the 1st respondent, informed the 2nd respondent by letter dated 14.03.2002, that they are not having any vacancies, as all classes are accommodating more than 40 students. However, the Ministry issued a letter in order to admit the 8th respondent, ignoring the fact that all classes by that time had more than 40 students. It is also pertinent to note that the 8th respondent was moving from Sangamitta Girls school to Dharmashoka Vidyalaya. Admittedly, she had obtained 158 marks at the scholarship examination. However, Clause 13.1 does not refer to any special circumstances that should be taken into consideration in exceeding the maximum number of students in a class. It is thus clear that the 40 student limit in each class has been observed in the breach.

It is common ground that the 1st petitioner was endeavouring to admit the 2nd petitioner to Dharmashoka Vidyalaya since mid 2001. At that time the 2nd petitioner was studying in Grade 5 and the basis for such admission was the transfer of the mother, the 1st petitioner, from Puttalam to Ambalangoda. In this kind of a situation, the 1st respondent should have applied the guide – lines enumerated in Clause 13 of the Circular No. 2001/15.

Clause 13 of the said Circular dated 29.05.2001, provides for the following:

“Vacancies in Grade 2 to 11 (excluding Grade six) should be filled from the students in the following categories:

- A) students, whose parents/ lawful guardian, who are public servants and have come to reside in the area where the school is situated at;
- B) students whose parents/ lawful guardian who has changed their / his permanent residence to the area where the school is situated at.

It is not disputed that the 2nd petitioner falls into both categories as the 1st petitioner was transferred and at the same time the 1st petitioner shifted her permanent residence from Puttalam to Ambalangoda. The 1st and the 2nd respondents could have, thus considered the admission of the 2nd petitioner on the basis of Clause 13 of Circular No. 2001/15 to Grade 5.

The 1st petitioner was compelled to work in Puttalam, considered an uncongenial area as an administrative requirement in the service. She has served more than double the required period of 5 years. The 2nd petitioner, being the child, had to remain with the mother and receive his education in the same area, nearly 200 kilometres away from his native place. When the mother received the benefit of a transfer to her native place after more than a decade, it is only reasonable that the child should also receive the benefit of obtaining a school in the same area. Clause 13 vests the authorities

with ample power to grant such benefits to the child. Instead of looking at the situation in a realistic and humane way, they have unreasonably refrained from acting in terms of Clause 13.

The significance of Clause 16 of the said Circular, which is referred to earlier, could be seen with reference to section 37(2) of the Education Ordinance, No. 31 of 1939. This section refers to the powers conferred to the Minister to make Regulations for any matter referred under that section. The items under reference include the compulsive need for a child between the ages of 5 to 16 to attend school, and thus it reads as follows:

“(s) requiring, subject to such exemptions and qualifications as may be contained in such regulations, the parent of any child not less than five and not more than sixteen years of age residing within such area, to cause such child to attend a school unless he has made adequate and suitable provision for the education of such child ...”

Two broad aspects strike my mind on a consideration of the totality of the point at issue: firstly, a child at the tender age of 11 years falling prey to diffident decisions of the relevant authorities for no fault of his and secondly, having been made to approach the apex Court in the country to obtain redress for his grievance. These two matters, in my view speak volumes on the lackadaisical attitude of the authorities concerned in this extraordinarily important sphere of service.

The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out. Article 12(1) of the Constitution, which governs the principles of equality, approves actions which has a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions.

However, situations such as the instant case under review cannot be applauded, as the question in issue itself indicates clearly, that the refusal to admit the child to the school was not on a reasonable basis, but is a decision that rests on arbitrariness. At the time the 1st petitioner was transferred from Puttalam to Ambalangoda, the authorities should have acted in terms of Clauses 13 and 16 of the said Circular. To reiterate; Clause 13 enumerates a parents transfer and/or the change of residence as the basis for filling up vacancies in the Grades 2 to 11, excluding Grade 6, whereas Clause 16 stipulates a mandatory duty on the Educational authorities to allocate an alternative school for a child who has been studying in a school which has classes only up to Grade 5.

Considering the circumstances of this case, the following points are not in dispute: the 1st petitioner served in an uncongenial are for 11 years; she obtained a transfer to Dharmashoka Vidyalaya in June 2001, her present residence is a mere 500 meters away from the said school, her younger son was admitted to year 1 of Dharmashoka Vidyalaya in March 2002, the 2nd petitioner obtained 139 marks at the Grade 5 scholarship examination, he was attached to a school which has classes only up to Grade 5 and since January 2002, he is without a school.

It was Joseph Addison, in “The Spectato”, who referred to the value of Education, in the following words:

“Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home a friend, abroad an introduction, in solitude a solace, and in society an ornament. It chastens vice, it guides virtue, it gives at once, grace and government to genius.

Without it what is man? A splendid slave, a reasoning savage.”

The 2nd petitioner has been denied his cherished companion of education and compelled to languish at home whilst, the 1st petitioner, his mother teaches other children in the school located within 500 meters from his home. This was due to unreasonableness and arbitrariness in executive and administrative action in the failure to take necessary action in terms of Clauses 13 and 116 of Circular No. 2001/15, at the appropriate stage.

For the aforementioned reasons, I hold that the 2nd petitioner’s fundamental right guaranteed under Article 12(1) has been infringed by the State. I have made the State responsible, as the liability of this infringement cannot be attributed to an single officer of the Ministry of Education. The 2nd respondent is directed to make necessary arrangements for the 2nd petitioner to be admitted to the Grade 6 of the G/Dharmashoka Maha Vidyalaya, Ambalangoda, forthwith. The State is directed to pay a sum of Rs. 25,000/- to the 2nd petitioner as compensation and costs, for being deprived of formal education at a vital stage in his life. This amount is to be deposited, within a month from today, in a “Hapan” Children’ Savings Account at the National Savings Bank, Ambalangoda Branch in the name of the 2nd petitioner and the 1st petitioner as the guardian for such account.

JUDGE OF THE SUPREME COURT

SARATH N. SILVA, C.J.,

I agree

CHIEF JUSTICE

YAPA, J.

I agree

JUDGE OF THE SUPREME COURT

Is Education a Basic Human Right?

A Case Note - *Premalatha Karunathilaka and Amila Karunathilaka*

v.

D.M.G.A. Jayalath de Silva and Ten Others

*Rushika Patrick**

1. Introduction

The recent Supreme Court¹ decision on *Deva Susila Premalatha Karunathilaka and Amila Karunathilaka v. D.M.G.A. Jayalath de Silva and ten others*², despite its significance in so far as the right to education of Sri Lankan children is concerned, remains unreported. The case involved an application by one Premalatha Karunathilaka to the Supreme Court under Article 126 of the Constitution³ alleging that the respondents' failure to provide an opportunity to her son, (the 2nd petitioner), to attend school, violated his fundamental rights guaranteed by Article 12(1) of the Constitution.

2. Facts of the Case

The 2nd petitioner, (an 11 year old boy), was represented by his next friend, the 1st petitioner, (the mother of the child). The facts of the case, briefly, are as follows. The 1st petitioner started her teaching career in Galle. 11 years later, she was transferred to Puttalam. This transfer was effected on the basis of compulsory service for teachers in difficult or uncongenial areas in the country, which is usually for 5 years.

The 2nd petitioner was born in 1991, and commenced schooling in 1997, in a school in Puttalam which had classes only up to Grade 5. Since June 1995, the 1st petitioner had been requesting for a transfer to Ambalangoda, that being her native place. She was transferred to Dharmashoka Vidyalaya, Ambalangoda, with effect from 15.06.2001.

Since then, the 1st petitioner had been making applications to the 1st respondent, seeking admission for the 2nd petitioner, (her child), to the said school (Dharmashoka Vidyalaya, Ambalangoda). However, due to these applications being refused, (since January 2002 up to the date on which the case was decided), the 2nd Petitioner was unable to attend the said school. Effectively therefore, he had been deprived of his education while his mother taught other children in the school located within 500m from his home. The authorities had offered no alternative school to the child either.

* LL.B (Hons) (London)

¹ Hereinafter referred to as the Court.

² SC (Application) No.334/2002, S.C. Minutes 25.11.2002

³ "Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, ... apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief of such infringement. ..."

3. Contentions of the Parties

The contention put forward on behalf of the 2nd petitioner was that the respondents' have acted contrary to Clause 15(a) and Clause 16 of the School Admission Circular No. 2001/15, and thereby infringed his fundamental right to equality guaranteed by Article 12(1) of the 1978 Constitution.⁴

Clause 16 of the said Circular stipulates a mandatory duty on the educational authorities to allocate an alternative school for a child who has been studying in a school that has classes only up to Grade 5. The 2nd petitioner argued that this Clause has to be read together with section 37(2)(s) of the Education Ordinance, No.31 of 1939, which reads as follows:

"requiring...the parent of any child not less than five and not more than sixteen years of age residing within such area, to cause such child to attend a school unless he has made adequate and suitable provision for the education of such child; but so however that no regulation made for this purpose shall involve the attendance at any school by any child from any distance exceeding two miles"

On the other hand it was contended for the 2nd respondent (who is in charge of National schools as the Director of Education attached to the Ministry of Education), that the 1st petitioner's transfer does not *per se* qualify the 2nd petitioner to be admitted to the same school. They relied on Clause 13 of the Circular to support their argument, which states,

"Vacancies in Grade 2 to 11 (excluding Grade six) should be filled from the students in the following categories:

- A). Students, whose parents/lawful guardian, who are public servants and have come to reside in the area where the school is situated at;*
- B). Students whose parents/lawful guardian who has changed their/his permanent residence to the area where the school is situated at."*

It was further submitted that the maximum number of students per class had to be maintained at 40, and as there were no vacancies in year 5 of Dharmashoka Vidyalaya the application to admit the 2nd petitioner to Grade 5 in 2001 was rejected.

The counter argument put forward by the 2nd petitioner was that the 1st respondent had hitherto paid no heed to the clause in the Circular that regulated the maximum number of students per class. All classes in Grade 6 had more than 40 students per class. Also, the 8th respondent was admitted to the said school on the basis of a letter by the 2nd respondent. Although, the 8th respondent had obtained 158 marks, the 40-student limit in each class appeared to have been observed in the breach.

The 2nd respondent meanwhile, also contended that the cut off mark for Dharmashoka Vidyalaya for admission to year 6 for the year 2002 was 148 and that the 2nd petitioner had obtained only 139 marks. Therefore, and admitting him to the above mentioned school would cause grave prejudice to numerous other applicants who were not selected as they have fallen short of the cut off mark by a few marks.

⁴ "All persons are equal before the law and are entitled to the equal protection of the law"

The Court had to decide whether the failure of the educational authorities to allocate a school for the 2nd petitioner violated his fundamental rights guaranteed under Article 12(1) of the 1978 Constitution. The Court considered this issue on the basis that the 2nd petitioner was not admitted to Grade 5 of the aforementioned school when his mother was transferred to that same school.

4. Decision of the Court

The Supreme Court, (per Justice Shirani Bandaranayake), considered the fact that the 1st petitioner was transferred at the same time she shifted her permanent residence from Puttalam to Ambalangoda. The 1st and the 2nd respondents could have thus considered the admission of the 2nd petitioner on the basis of Clause 13 of the Circular to Grade 5, as the 2nd petitioner falls into both categories.

In this regard, it was relevant that the 1st petitioner had been compelled to work in Puttalam as an administrative requirement. She had served more than double the required period of 5 years. The 2nd petitioner, (being the child), had to remain with the mother and receive his education in the same area. It was only humane therefore that after the mother received the transfer, the child should also be able to receive his education in the same area.

Justice Bandaranayake stated that, instead of looking at the situation in a realistic and humane way, they have unreasonably refrained from acting in terms of Clause 13 of the School Admission Circular. Additionally, this inaction by the respondents also contravened Clause 16 the Circular.

The Court emphasized the fact that a child of 11 years had been denied access to education through no fault of his. This had been further aggravated by the fact of his being compelled to approach the apex Court to obtain redress for his grievance. The whole speaks volumes for the indifferent attitude of the authorities in what is a vital sphere of a child's life.

Further the basic concept governing equality is to remove unfairness and arbitrariness, and thereby discrimination. Consequently, on the facts of the case, the refusal to admit the child to the school was determined not to be on a reasonable basis.

Justice Bandaranayake stated the following:

*"Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home a friend, abroad an introduction, in solitude a solace, and in society an ornament. It chastens vice, it guides virtue, it gives at once, grace and government to genius. Without it what is man? A splendid slave, a reasoning savage."*⁵

The Court held that the Court that the 2nd petitioners fundamental right guaranteed under Article 12(1) has been infringed by the State. The 2nd respondent was directed to make necessary arrangements for the 2nd petitioner to be admitted to Grade 6 of the Dharmashoka Vidyalaya, Ambalangoda. The State was meanwhile directed to pay Rs. 25,000/- to the 2nd petitioner as compensation for being deprived of formal education.

⁵ Joseph Addison, in "The Spectator."

5. Comment

The judgement of the Supreme Court, analysed above, recognised particular substantive rights (as opposed to procedural rights), which are relevant in the context of the right to education.

The right to education is one of the most important rights proclaimed by the Universal Declaration of Human Rights⁶, because education is considered by the Declaration to be not only a right in itself but also a means of promoting peace and respect for human rights and fundamental freedoms generally.⁷ It recognizes education as a basic human right and a vital means of promoting peace.

It is also relevant in this context, that domestic laws and courts have also recognised this right in particular ways. Thus, Part 2, Protocol 1, Article 2 of the Human Rights Act 1998 (UK), which ratified the European Convention of Human Rights, has recognised the right to education.

In the Indian case of *Mohini Jain v. State of Karnataka and Others*⁸, it was held that the right to life is the compendious expression for all those rights that the courts must enforce because they are basic to the dignified enjoyment of life. The right to education flows directly from right to life. The right to live with human dignity enshrined in Article 21 cannot be assured unless it is accompanied by the right to education. Thus every citizen has a 'right to education' under the Constitution.

In another Indian case, *Unni Krishnan J.P. and Others v. State of Andhra Pradesh and Others*⁹, it was agreed that without education being provided to the citizens of this country, the objectives set forth in the Preamble to the Constitution could not be achieved. The Constitution would fail. The effect of holding that the right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law.

One would agree with the judicial reasoning in *Mohini Jain* that 'the right to education flows directly from the right to life.' However, the implication that citizens of India can demand that the State provide adequate educational institutions to satisfy all their educational needs, is more arguable.

6. Conclusion

One hopes that the jurisprudence of Sri Lanka's Supreme Court, in the context of the equality clause in Article 12, (as the Sri Lankan Constitution does not incorporate the right to life though it could be said that this right underpins all the rights specified in the constitutional document), will be equally activist, (as the Indian Supreme Court), in its interventions in so far as the rights of school children are concerned. Strong views taken by the Court in the judgement analysed in this Note, is a welcome development in this regard.

⁶Article 26 of the Declaration states, "Everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory."

⁷World Education Report 2000.

⁸(1992) 3 SCC 666

⁹(1993) 1 SCC 645