

# Appropriation Bill 2007 & Supreme Court Determination

© Nihal Sri Ameresekere F.C.A., F.C.M.A., C.M.A., C.F.E.

One of the contentious issues was **Clause 6** of the Appropriation Bill, which reads thus:

**"Any money allocated to Recurrent Expenditure or Capital Expenditure under the "Development Activities" Programme appearing under the Head "Department of National Budget" specified in the First Schedule, may be transferred to any other Programme under any other Head in that Schedule, by Order of the Secretary to the Treasury or any other officer authorized by him. The money so transferred shall be deemed to have been covered by a supplementary estimate submitted by the appropriate Minister." (Emphasis added)**

The dicta in the Supreme Court Determination in relation to the foregoing is as follows:

"It was further submitted in particular that the final sentence in clause 6, which reads as:

*"The money so transferred shall be deemed to have been covered by a supplementary estimate submitted by the appropriate Minister"*

is an abdication of Parliamentary control.

**The Additional Solicitor General submitted that there is no abdication of Parliamentary control of public finance, since money could be transferred by the Secretary to the Treasury in terms of Clause 6, only dependent on the amount voted by Parliament for "Development Activities" (Head 240 – Department of National Budget – Programme 2). He submitted that the amount would be voted in terms of Rule 131 of the Standing Orders after a specific consideration of the budgeted expenditure under the Programme. In doing so a Committee of the whole Parliament would in terms of the Standing Orders take cognizance and deliberate not only whether the amount appearing under the Programme of "Development Activities" should be approved but also take cognizance of the fact that the Secretary to the Treasury is authorized in terms of the principal Clause to transfer any sum under that Programme to meet expenditure under any other Head and Programme.**

**On this basis it was submitted that the vesting discretion by Parliament in the Secretary to the Treasury would only be after due and proper consideration and cannot amount to an abdication of Parliamentary control of public finance as contended by the Petitioners.**

**It was further submitted that in any event the amount so transferred by the Secretary to the Treasury would be to meet expenditure under any other Head and Programme already included in the Appropriation Bill." (Emphasis added)**

Thus it has been conceded by the Addl. Solicitor General that 'full disclosure' is in fact made to Parliament, for the Parliament at the Committee Stage to examine and approve the items of expenditure, which in terms of Articles 149 and 150 of the Constitution could only be in respect of specific purposes and specified expenditure. Therefore, the Addl. Solicitor General has conceded that the expenditure under "Development Activities" – (Head 240 Department of National Budget) is in fact for specific purposes and specified expenditure, and is accordingly approved by Parliament at the Committee Stage, giving specific consideration thereto. **If in fact this is so, then there would be no problem.**

If so, then what is the reason to permit the Secretary to the Treasury the right to transfer such funds for other purposes, without approval of Parliament and without informing Parliament through a Supplementary Estimates, where funds allocated for specific purposes have been used for other purposes not approved by Parliament ?

However, contrary to such stance of the Addl. Solicitor General, based on further submissions made by him for 'flexibility', the Supreme Court has made the following observations:

*"The immediate responsibility of meeting unexpected expenditure under other Heads and Programmes would finally rest on the Department of National Budget. In this context it appears that from the year 2003 a budgetary method has been adopted in which a relatively large sum is allocated under the Head "Department of National Budget" with an attendant reduction under other Heads and at times a further cut proposed by the Minister to balance the Budget, on the*

premise that urgent and immediate excess expenditure under other Heads be met by a transfer from the Head, Department of National Budget. The submission of Addl. Solicitor General is that such action is necessary in view of the volatile state of the country's financial position resulting from a variety of factors, including the escalating defence expenditure caused by the war, steeply rising oil prices, inflation and an unfavourable balance of payments situation resulting in the downward trend of the Rupee *vis-à-vis* other currencies.

We have to accept the submissions of the Additional Solicitor General as to the context in which Parliament has passed into law clauses to the same effect consistently from the year 2003 onwards. **The volatile situation may not provide the space and time for a supplementary estimate and the machinery of Government could otherwise come to a halt. A degree of flexibility may therefore be necessary as contended. We are also inclined to agree with the submissions of the Additional Solicitor General that the establishment of a Contingencies Fund to meet urgent and unforeseen expenditure as envisaged by Article 151 is farfetched in the current fiscal context plainly due to a lack of resources.**"

**"The provision that the transfer in terms of Clause 6 is deemed to be a supplementary estimate connotes that it is not intended to cover authorized expenditure.** The qualification suggested could therefore be a contradiction in terms." *(Emphasis added)*

On an examination of the Government's Audited Annual Accounts for 2006 it is seen that there is no 'Contingencies Fund' in existence, where an amount of such 'Contingencies Fund' is available in monetary resources in any fund or bank account. In fact it is a mere 'conceptual fund', with even the "Consolidated Fund" disclosing an accumulated Deficit of Rs. 113 billion in December 2006. Those Officers, who represented the Secretary to the Treasury, and had instructed the Addl. Solicitor General, had misdirected him on the said facts, leading to the Supreme Court having been misled into believing that monetary resources are in fact available in a 'Contingencies Fund'.

In the foregoing context, attention is drawn to the constitutional mandates of Article 151 of the Constitution.

- Article 151 (1) – "Notwithstanding any of the provisions of Article 149, Parliament may by law create a Contingencies Fund for the purpose of **providing for urgent and unforeseen expenditure.**"
- Article 151 (2) – **"The Minister in charge of the subject of Finance**, is satisfied –
- a) that there is need for any such expenditure, and
  - b) that no provision for such expenditure exists,
- may, **with the consent of the President**, authorize provision to be made therefor by an advance from the Contingencies Fund"
- Article 151 (3) – "As soon as possible **after every such advance**, a **Supplementary Estimate** shall be presented to Parliament for the purpose of replacing the amount so advanced."

Thus, the Constitution has specifically laid down a scheme for payment of urgent and unforeseen expenditure, without stipulation of any limit or 'cap', whatsoever, and for the reporting thereof to be made to Parliament, **only after the expenditure had been incurred, with the approval of both Minister of Finance and the President.**

Therefore, the necessity of providing 'space and time' for a Supplementary Estimate, before such urgent and unforeseen expenditure is met, as the Addl. Solicitor General had submitted, as instructed by the Officers representing Secretary to the Treasury, does not in fact arise, since such urgent and unforeseen payments are permitted to be made and Supplementary Estimates are submitted, only after the payments have been made for information and approval of Parliament. The Sinhala version of the Constitution stipulates that such reporting to Parliament of Supplementary Estimates, after payments have been made, has to be without delay (Ww±{ýs,).

Therefore, the question arises, as to what inhibits such reporting of such urgent and unforeseen expenditure to Parliament, without delay (Ww±{ýs,) ? The question also arises, as to why and how the Officers representing Secretary to the Treasury had wrongly instructed the Addl. Solicitor General to have misled the Supreme Court into believing that Supplementary Estimates have to receive **prior** approval of Parliament, to meet urgent and unforeseen expenditure, **before** such expenditure is met ?

Supreme Court *inter-alia* made observations as follows:

Our attention has also been drawn to the Fiscal Management (Responsibility) Act No.3 of 2003. The Act provides for extensive Parliamentary supervision of the fiscal position at different stages."

"It is thus seen that although a discretion is vested by Clause 6 in the Secretary to the Treasury to transfer money voted under Head 240 of the "Department of National Budget" to meet expenditure under any other Head and Program, any such transfer could come within the purview of the Parliament pursuant to the reporting mechanisms as contained in the Fiscal Management (Responsibility) Act No.3 of 2003.

Thus the vesting of discretion in the Secretary to the Treasury from the year 2003 as noted above, has been matched by the reporting mechanisms introduced to ensure Fiscal Management Responsibility from the same year.

In the circumstances Clause 6 would not in our view be inconsistent with Article 148 of the Constitution and the connected Articles, since the Parliament finally retains full control of public finance not only in the matter of allocation of expenditure but also by supervision of the actual expenditure for which there is adequate legislative provision in Article 154 of the Constitution and the Fiscal Management (Responsibility) Act No. 3 of 2003."

The reporting mechanism under the Fiscal Management (Responsibility) Act No. 3 of 2003 is for accountability both to Parliament and the **public**. Such reporting is before 6 months during the current Financial Year in respect of the first 4 months, and 5 months after the end of a Financial Year, in respect of the entire Financial Year completed.

Would such reporting alone fulfill the foregoing constitutional mandate to submit to Parliament Supplementary Estimates for expenditure without delay (Ww±{ýs,) after such expenditure had been incurred ? Could a Statute override a constitutional mandate ? Could a reporting stipulated under a Statute, satisfy the constitutional mandate to inform Parliament, without delay (Ww±{ýs,) ?

The Supreme Court, in fact, has recognized that there is severe criticism of the absence of transparency and prudential financial management, and has made the following observations:

"But, considering the severe criticism made, we have to observe that for purposes of ensuring transparency and prudential financial management, the transfers made in terms of Clause 6 that are deemed to be supplementary estimates should be specifically included in the relevant reports submitted in terms of the Fiscal Management (Responsibility) Act. No. 3 of 2003, with reasons for the particular deviation."

**"But we note that in the Reports submitted there is no specific reference to the transfers made by the Secretary, in terms of Sections 5(3) or 6 of the previous Appropriation Acts" (Emphasis added)**

In such circumstances, the Supreme Court had made the following direction for full disclosure with reasons for deviation:

"We wish to however note the observation stated above that any transfer made from the "Development Activities" Program, in terms of Clause 6 to any other Programme under any other Head by order of the Secretary to the Treasury should be specifically included in the respective Reports submitted in terms of Fiscal Management Responsibility Act No. 3 of 2003 with reasons for such deviation."

A Full Bench of the Supreme Court presided by the Chief Justice in the matter of the Tax Amnesty of 2003 stated thus:

"It is to be borne in mind that public revenue is held in trust for the People of Sri Lanka, who cannot be denied its benefit"

In a recent Report to the Public Accounts Committee and Public Enterprises Committee, the former Auditor General, at present the Project Director, assisting to strengthen the Parliamentary control of public finance by these two Committees, had stated as follows, which indeed reveals a very alarming situation.

**"This position has led to an aggravated situation due to the very wide gap between the Budget approved by our Parliament and the budget actually executed and the practice of not obtaining a special approval or authority of Parliament for such variances.**

**The revision of the Budget approved by the Parliament for the year 2006 by Rs. 220.2 Billion at the discretion of the Officers, as explained in detail in (2) Paragraph of Part II of this report can be cited as an example.**

**The revision of the budget by Rs.220.2 Billion at the discretion of the officers in terms of provisions in Section 5 of the Appropriation Act, No. 39 of 2005 including Rs.166 Billion in terms of authority granted under Section 6 of the said Act raises the question whether it tantamount to a partial abdication of the powers of full control over the Public Finance vested in the Parliament by Article 148.**

**As compared with Rs.609 Billion originally approved for expenditure for the year 2006 and Rs.1,072.8 Billion stated as the actual expenditure, that sum of Rs.220.2 Billion represents a very high percentage.**

**This becomes more serious as this form of version left to the discretion of the Officers has been arranged in such manner, it does not need the approval or sanction of the Parliament as well as that of the Cabinet of Ministries or even the Minister. (Emphasis added)**

A 7-Member Bench of Supreme Court in its Determination on the proposed 19<sup>th</sup> Amendment to the Constitution, *inter-alia*, stated thus:

"Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution."

"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective"

Therefore, would not the question arise, as to whether the Executive President, by assigning unto himself the powers and functions of the Minister of Finance, thereby having control and direction over the Secretary to the Treasury, could circumvent the foregoing dicta of a 7-Member Bench of Supreme Court, that power that is attributed by the Constitution to one organ of Government i.e. the Parliament, cannot be transferred or relinquished or removed to another organ of Government i.e. the Executive Presidency, another organ of Government ?

Is not the Speaker bounden to ensure that Parliament upholds the constitutional mandates ?