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

S.C(SD) 3 & 4/2008

"APPROPRIATION BILL 2008"

PRESENT	Sarath N Silva,	Chief Justice
	R.A.N.G.Amaratunga	Judge of the Supreme Court
	P.A.Ratnayake	Judge of the Supreme Court

S.C(SD) 3/2008 Nihal Sri Amarasekera - Petitioner in person

S.C(SD) 4/2008 T.L.B. Hurulle - Petitioner

COUNSEL Y.I.W. Wijayatilake, P.C., A.S.G., with Janak de Silva, S.S.C., Maithree Amerasinghe, S.C., for the Attorney General

Shibly Aziz, P.C., with Anandi Cooray, Anslam Kaluarachchi, Sabrina Ahamed for the Petitioner (No. 4/2008)

Court assembled for hearing at 10.30 a.m on 24th October 2008

The above petitions presented in terms of Article 121(1) of the Constitution were taken up for hearing and considered together since it was agreed that the grounds of constitutionality raised in the petitions were identical.

The Petitioners in their submissions urged specific issues in respect of clauses 2 and 6 and contended that the Bill is inconsistent with Articles 148 and 150 of the Constitution.

Article 148 reads as follows :

"Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law."

The Petitioners submitted that "full control over public finance" vested by this Article would form part of the legislative power of the People exercised by Parliament in trust for the People in terms of Article 4(a) of the Constitution.

It was further contended that funds of the Republic not allocated by law to specific purposes form one Consolidated Fund in terms of Article 149(1) of the Constitution and that withdrawals from it have to be in terms of Article 150(1) and (2) of the Constitution that read as follows :

> "*(1) Save as otherwise expressly provided in paragraphs (3) and (4) of this Article, no sum shall be withdrawn from the Consolidated Fund except under the authority of a warrant under the hand of the Minister in charge of the subject of Finance.*
>
> (2) *No such warrant shall be issued unless the sum has by resolution of Parliament or by any law been granted for specified public services for the financial year during which the withdrawal is to take place or is otherwise lawfully charged on the Consolidated Fund."*

Paragraphs (3) and (4) of the Article mentioned above relate to instances where Parliament is dissolved and are not relevant to the matters at issue.

The Petitioners also submitted that to meet urgent and unforeseen expenditure there should be a Contingencies Fund as provided in Article 151(1) of the Constitution and when advances are made from the Consolidated Fund there should be a Supplementary Estimate presented to Parliament to replace the amount advanced in terms of Article 151(3) of the Constitution. It is common ground that at present there is no Contingencies Fund and the fiscal position of the country does not permit the establishment of such a Fund. Conceding this position the Petitioners contended that in any event in keeping with the full control Parliament should exercise over public finance, when funds are required to meet unforeseen expenditure, such expenditure should be

approved by Parliament on the basis of a Supplementary Estimate in the manner provided for in Article 151(3) of the Constitution.

We are in agreement with the submissions of the Petitioners as to the basis on which the full control over public finance vested in Parliament should be exercised. In the Determination made by a Bench of Seven Judges in regard to the Bill titled the 19th Amendment to the Constitution (S.D No.11-40/2002) this Court laid down the manner in which the provisions of Articles 3 and 4 of the Constitution as to sovereignty of the People and its exercise have to be interpreted. According to that Determination in terms of Article 4(a) of the Constitution, Parliament is the custodian of legislative power of the People and will exercise that power in trust for the People in whom sovereignty is reposed. Legislative power includes the "full control over public finance" as stated in Article 148 cited above, which in our opinion is also a vital component of the balance of power firmly established by the Constitution in relation to the respective organs of government.

Article 30(1) of the Constitution states that the President is the "Head of the Executive and of the Government." in terms of Article 43(1) the Cabinet of Ministers is charged with the direction and control of the Government and is collectively responsible and answerable to Parliament. One important check on the exercise of executive power is that finance required for such exercise remains within the full control of Parliament – the legislature. There are three vital components of such control in terms of the Constitution viz:

(i) control of the sources of finance i.e imposition of taxes, levies, rates and the like and the creation of any debt of the Republic;

(ii) control by way of allocation of public finance to the respective departments and agencies of Government and setting of limits of such expenditure;

(iii) control by way of continuous audit and check as to due diligence in performance in relation to (i) and (ii).

Since such control is exercised by Parliament in trust for the People, we are of the opinion that the process should be transparent and in the public domain, so that People who remain Sovereign are informed as to the manner control is exercised. It follows that any Act of Parliament concerning public finance should be premised on a disclosure of the basis of such enactment so as to be transparent in its implications. And, an Act lacking in such transparency or being an alienation of control by Parliament would be inconsistent with Article 148 of the Constitution.

In the light of the foregoing we would consider the specific grounds urged in respect of clauses 2 and 6 of the Bill.

Clause 2 of the Bill

The Appropriation Act is the foremost legislation concerning public finance for any particular financial year. The Preamble to the Bill, under review specifically states that it is intended to make financial provision in respect of activities of the Government during the financial year and for the payment of advances from public funds.

The format of Appropriation Bill has been broadly similar over the years. Following such format Clause 2 of the Bill contains an estimate of Government expenditure for the forthcoming year, that is 1.1.2009 to 31.12.2009 (financial year 2009). A statement of such expenditure is contained in the first schedule under different Heads, with each Head having one or two programmes. One program, styled Programmes No. 1, relates to Operational Activities applicable to all Heads. The other Programme, styled Programm 2, relates to Development Activities applicable only to certain Heads.

It is a known parliamentary practice that after the second reading of the Appropriation Bill the Committee of the whole House considers each Head of expenditure separately on the basis of the detailed estimates that are presented to Parliament.

The Petitioner in S.D 3/2008, Mr. Nihal Sri Amarasekera, submitted that the Recurrent and Capital Expenditure estimated at Rs. 980,634,464,000/- (approximately Rs. 980 Billion) specified in clause 2(1) being the total of the expenditure under the Heads set out in the first schedule does not in fact constitute the totality of governmental expenditure in the financial year 2009. That, this figure does not include the debt service payments due from Government by way of interest and capital in the financial year 2009. in respect of the loans taken and the debt raised by the Republic. On that basis he submitted that there is a non disclosure of the total expenditure of Government for the financial year 2009 and that clause 2 premised on such non disclosure is inconsistent with Article 148 of the Constitution.

The submission of the Additional Solicitor General who supported the Bill is that clause 2(1) contains a reservation that the expenditure of Government set out therein is "*without prejudice to any other laws authorizing any expenditure*"

It was submitted that there are other provisions in the Constitution and specific laws that provide for payments from the Consolidated Fund and that such expenditure is not included in the sum of approximately Rs. 980 Billion set out in clause 2(1). It was further submitted that details of such expenditure would be tendered to Parliament in the Budget Estimates of 2009. An extract of which was submitted to Court. According to this extract in the financial year 2009 in addition to the Rs. 980 Billion specified as expenditure of Government, a further expenditure of Rs. 738,779,568,000/- (Approximately Rs. 738 billion) would have to be incurred for such other expenditure. Thus the expenditure of Government for the financial year 2009 would not only be 980 billion specified in clause 2(1) but also include a further Rs. 738 Billion, totaling Rs. 1719 Billion. Of this a component Rs. 722 Billion would be for debt service, whereas the estimated revenue for the year is Rs. 875 Billion.

Whilst there may be some merit in the submission of Addl. Solicitor General that clause 2(1) makes a reservation in respect of expenditure authorized by any other law, the submission of the Petitioner that clause 2(1) does not set out a proper account of governmental expenditure for the financial year is correct. The purpose of the Appropriation Bill is to set out the estimate for the financial year. Debt service and other matters in respect of which the expenditure is charged on the Consolidated Fund are equally activities of the Government. Any estimate to be complete should include the totality of the expenditure in respect of all Government activities in the financial year. In this instance the total expenditure is clearly not disclosed in clause 2(1). A large component of approximately Rs. 738 Billion is not included.

It was submitted by Addl. Solicitor General that the borrowing limit of 849 billion is set out in clause 2(1)(b). to meet the deficit between the total expenditure of approximately Rs. 1719 billion and the expected revenue of Rs.875 Billion. In other words it is expected to meet the debt service payments due in the financial year 2009 amounting to Rs. 722 Billion by raising further debt. It is relevant to note that here, that as submitted by Mr. Amarasekera, in terms of clause 2(1)(b) proceeds of loans could only be used to meet the expenditure of Rs. 980 Billion included in clause 2(1). Accordingly debt service payments that are not included in clause 2(1) cannot be met from the proceeds of loans. Be that as it may, assuming the premise presented by the State, the Government is caught in a veritable "debt trap" in which debt service payments for the current year are met by raising further debt in that year thereby increasing the debt service payments for the succeeding year. These facts have been kept away from the public domain by the statutory device in clause 2(1) of excluding expenditure under any other law.. The staggering debt service payments of Rs. 722 Billion for the financial year 2009 reflect an accumulation of public debt over the past years that has resulted from irresponsible and reckless handling of public finance by the Treasury and a failure on the part of Parliament to exercise full control of public finance as mandated by Article 148 of the Constitution. Hence we agree with the submission of the Petitioners that the enactment of the Clause 2 in the present

form without the disclosure of the additional expenditure of Rs. 738 Billion would amount to an inconsistency with Article 148 of the Constitution. The Clause would cease to be inconsistent if it is amended by the inclusion of the expenditure already charged on the Consolidated Fund in terms of other laws being approximately Rs. 738 Billion according to the Estimates. Such items of expenditure may be included in a separate schedule.

Clause 6(1) of the Bill

This clause permits the Secretary to the Treasury, the Deputy Secretary to the Treasury or the Director General of National Budget Department to transfer any money allocated under the "Development Activities" Program appearing under Head "Department of National Budget" as specified in the 1st schedule to any other Program under any other Head in the schedule. It further provides that the monies so transferred shall be deemed to have been covered by a supplementary estimate by the appropriate Minister.

The submission of the Petitioners is that the allocation of money under the respective Heads in the Appropriation Act is a legislative measure taken by Parliament and the provision in clause 6 in effect empowers the Treasury officials to amend the allocation that has been made by Parliament. It was also submitted that if there is a shortfall in the allocation made to a particular Head of expenditure the proper procedure in terms of the Constitution is to present a supplementary estimate to Parliament. In terms of clause 6(1), instead of such a supplementary estimate being submitted to Parliament, the Treasury officials are empowered to provide the extra allocation which is then deemed to have been covered by a supplementary estimate submitted by the appropriate Minister. On this basis it was contended that the clause amounts to an alienation of the full control of Public Finance vested in Parliament by Article 148 read with Article 150(1) and (2) cited above to Treasury officials. Hence clause 6 is inconsistent with Articles 148 and 150 (1) and (2) of the Constitution.

A similar challenge was made in respect of the Appropriation Bill of 2007, and this Court having considered the matter, made a determination there was no alienation of Parliamentary control of Public Finance.

The Petitioners now contend that the said determination was made without examining the nature and volume of the transfers made and on the assumption that such transfers are duly reported to Parliament through the medium of the Reports submitted to Parliament in terms of the Fiscal Management (Responsibility) Act No.3 of 2003. It is recorded in the determination that the transfers "should be specifically indicated in the relevant Reports submitted in terms of Fiscal Management (Responsibility) Act No. 3 of 2003.with reasons for the particular deviations."

The Petitioners submitted ~~that~~ the Mid Year Fiscal Position Report 2008 submitted to Parliament covering the first 4 months of the year 2008 which admittedly does not include any of the transfers that have been made. In the result, upto date transfers made in respect of the current year have not been reported to Parliament. This position is conceded by the State.

Addl. Solicitor General submitted that the Fiscal Management Report 2009 would be presented to Parliament on 6th November 2008 (Budget day). An initial copy of which was tendered to Court. This copy reveals that during the period 1st January to 30th September 2008, Treasury officials have made 108 transfers in terms of clause 6(1) of the 2007 Appropriation Act. A sum of Rs. 7,558, 078,445/- has been transferred from the Recurrent Account and a sum of Rs. 13,422,507,041/- has been transferred from the Capital Account under the Head "Department of National Budget" That is nearly Rs. 21 Billion have been transferred by Treasury officials during the period from the "Development Activities Program" to other activities under a large number of Heads. The transfers reveal that many of them have been for foreign travel, purchase of vehicles and for other miscellaneous items of expenditure far removed from "Development Activities". Furthermore this report does not specify any reason which required the particular deviations to be made. Hence there has been no compliance of the determination made by this Court.

The items of Government expenditure are included under over 300 Heads, specified in the 1st schedule to the Bill. As noted above each Head has one or two Programs, in respect of which too, specific amounts are stated. This allocation is a legislative act of Parliament in the exercise of powers vested in Parliament in terms of Articles 148 and 150 of the Constitution. From the Appropriation Act No. 44 of 2003 onwards a budgetary practice evolved in which large allocations have been made under the Head "Department of National Budget", with a provision similar to clause 6 referred to above authorizing a transfer by Treasury officials to any other Head. By this means the recourse to Parliament to obtain supplementary allocations when there is a shortfall in any particular Head has been obviated and that function of Parliament has been alienated to Treasury Officials who have made transfers from the amounts allocated to "Development Activities" under the Head Department of National Budget..

Addl. Solicitor General conceded that although Program is titled "Development Activities," in fact it is utilized for miscellaneous expenditure. In the present Bill under Head 240 titled "Department of National Budget" following amounts are allocated under the Development Activities Program, where Rs. 4,980,000,000]- as Recurrent Expenditure and Rs. 27,647,500,000/- as Capital expenditure. Accordingly a sum of approximately 32 Billion is thus set apart to be transferred at the discretion of Treasury officials to any other Head. As noted above for 9 months in the current year 108 such transfers have been made amounting to Rs. 21 Billion.

According to the same Report titled "Fiscal Management Report 2009" which as stated above will be tabled in Parliament only on 06.11.2008, during the period 16.10.2007 to 31.12.2007, 127 such transfers have been made totalling a Recurrent expenditure of Rs. 34,422,384,169/- and a capital expenditure of Rs. 33,262,585,762/-. Thus during the period of 2 ½ months transfers have been made approximately Rs. 69 Billion. An examination of the subjects in respect of which and the amounts of such transfers reveal that the then Secretary to the Treasury has been operating a "Budget" of his own. It

appears that the observations made in respect of previous year's Appropriation Bill has inhibited such transfers showing a marked reduction of such transfers, from 69 Billion for 2 ½ months in 2007 to Rs. 21 Billion for the first 9 months of this year. But the problem remains.

For the reasons stated above we are of the opinion that clause 6(1) of the Bill is in derogation of the control of public finance that should be exercised by Parliament and is accordingly inconsistent with Articles 148 and 150 of the Constitution.

Addl. Solicitor General submitted that in the current volatile fiscal situation some measure of flexibility should be permitted since the allocations in schedule 1 are made on a lower estimate than what would be the actual expenditure. In the circumstances the power of transfer as provided in clause 6(1) should be sustained by providing Parliament with an effective opportunity of reviewing each transfer. We are inclined to agree with this submission in respect of which the Petitioners had no serious objection.

Accordingly, we are of the opinion that the inconsistency with Articles 148 and 150would cease if clause 6(1) is amended by the inclusion of a specific provision that the money so transferred shall be deemed to be a supplementary allocation made to the particular Ministry and the transfer including the reasons therefor are reported to Parliament within a period of two months from the date such transfer is effected.

For the reasons stated above we make a determination in terms of Article 123 of the Constitution that provisions in clauses 2(1) and 6(1) of the Appropriation Bill 2008 are inconsistent with the Constitution and may only be passed by special majority required under the provisions of Article 84(2) of the Constitution.

We also make a further determination –

i) if clause 2(1) is amended by the inclusion of the expenditure already charged on the Consolidated Fund in terms of other laws, with such items of expenditure being included in a separate schedule; and,

ii) clause 6(1) of the Bill is amended with the inclusion of specific provision that the money transferred shall be deemed to be a supplementary allocation to the relevant Ministry and reported to Parliament stating the reasons for such transfers within a period of two months from the date of the transfer..

We wish to place on record our appreciation of the assistance rendered to Court by the Additional Solicitor General and the Secretary, Ministry of Finance who was present in Court and produced all material documents; and Mr. Nihal Sri Amarasekera who appeared in person and Presidents Counsel who appeared for the other Petitioners.

Sarath N Silva
Chief Justice

R.A.N.G. Amaratunga
Judge of the Supreme Court

P.A.Rathayake
Judge of the Supreme Court