# Fundamental Rights Application by Nihal Sri Ameresekere on 'Expropriation Bill'

## Supreme Court directs that Notices be issued on all Respondents

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

When the Fundamental Rights Application filed by public interest activist Nihal Sri Ameresekere came up in the Supreme Court today before a Bench presided by Justice N.G. Amaratunga and Justices Sureshchandra and Sathya Hettige, Ameresekere appeared in person and made brief submissions. The Supreme Court directed that Notices be issued on all Respondents through the Registrar of the Supreme Court.

Ameresekere submitted to Court that he had filed his Application on November 14, 2011, when the Expropriation Bill was not law, and that thereafter he came to know that the Speaker had announced to Parliament on November 22, 2011 that the Bill had been certified into law.

In the circumstances, Ameresekere moved that he be permitted by Court to file an Amended Petition adding further Respondents, if necessary. The Court granted time till December 15, 2011 for Ameresekere to file the Amended Petition and directed notices be served on all Respondents through the Registrar of the Supreme Court.

Ameresekere making brief submissions in Court contended that Article 80 (3) of the Constitution does not prevent the Supreme Court from correcting the *per-incuriam* Determination, particularly read with Article 132 of the Constitution. He pointed out that notwithstanding Article 80(3), Article 129 enables Supreme Court to express an opinion even on a law.

Ameresekere pointed out that in previous instances, the Supreme Court in fact had changed and reversed its own Determinations ,as in the case of Tax Amnesty Law in 2003 and the Determinations on the Appropriation Bills of 2007 and 2008, where he, himself had personally appeared and made submissions resulting in such changes and reversals of the Supreme Court Determinations.

He contended that as per the Supreme Court Determinations that it was Supreme Court's duty and responsibility to ensure that all organs of Government operates within the limits of law, all being subject to the rule of law, and he urged the Supreme Court to consider correcting the *per-incuriam* Determination, and to leave it to the Legislature to decide as to what it should do in such circumstances, as in the instance of the Tax Amnesty Law.

Ameresekere further contended that though Article 122 of the Constitution provided for an 'Urgent Bill' that the Constitution also had its own checks and balances, and that in such circumstances, that Article 123(3), specifically in relation to an 'Urgent Bill' has stipulated, that if the Supreme Court entertains a 'doubt' whether the Bill or any provision is inconsistent with the Constitution, then it shall be deemed to have been determined that the Bill or such provisions of the Bill is inconsistent with the Constitution.

In his submissions Ameresekere stated out that the Supreme Court Determination itself revealed many instances, where doubts had been entertained by the Supreme Court, and that the Supreme Court itself had endeavoured to answer the doubts, and that thereby in terms of Article 123(3), admittedly the impugned Bill was deemed to be inconsistent with the Constitution.

In the instance of Hotel Developers (Lanka) PLC, (HDL) Ameresekere submitted that correct information had not been submitted to Supreme Court, and that it was Attorney General, who caused the protraction of the litigation by opposing the Winding-up Application made in November 2006, and that as per the provisions of the Expropriation Bill, a further Rs. 1700 Mn. would have to be paid to the Japanese as compensation, in violation of Article 28(d) of the Constitution, which mandates the protection of public property and to combat misuse and waste of public property.

Ameresekere intimated to Court that he had already filed an Application in the Commercial High Court to prevent this and suggested that the Attorney General consults the new Competent Authority and the Secretary to the Treasury, to proceed with the Application. Ameresekere pointed out that the new law was in contravention of the provisions of the Companies Act No. 7 of 2007, which provided for prompt payment for Shares and for restructuring and re-arrangement of Companies, and that the Supreme Court had determined that harsh, oppressive and unconscionable law prescribing a procedure other than the ordinary proceeding will be struck down.

Ameresekere asserted that he had obtained a write-off of Rs. 10,000 Mn., in 1995, which is equal to Rs. 70,000 Mn., to day and that the Governments Claim from HDL is only Rs. 12,000 Mn., of which only Rs. 4000 Mn. is Capital and balance Rs. 8000 Mn. interest, and that Civil Law Ordinance prevents the collection of more than 100% interest, and that in any case, no interest was chargeable from HDL after he had filed the Winding-up Application in November 2006, as per the provisions of the Companies Act.

Ameresekere emphasized to Court that he was supportive of the Government policy, but has opposed the process, and that he in fact has commenced investigating failed privatisations as far back as 2004, and that the SLIC and LMSL Cases were filed in the Supreme Court, which had been opposed at that time by the Attorney General and Secretary to the Treasury. Ameresekere handed over written Notes on his Oral Submissions to Court and the following 'extracts' in relation to the 'doubts' on the constitutionality of the new law had been set out as follows:

Article 123(3) of the Constitution stipulates thus:

> 123.(3) In the case of a Bill endorsed as provided in Article 122, **if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution,** and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article.

Article 123(3) is specifically in relation to Bills endorsed as 'Urgent Bills' by the Cabinet of Ministers as per Article 122 of the Constitution.

Hence, whilst providing for an emergency / urgency, the Constitution has a specified check put in place, that **if the Supreme Court entertains a doubt** whether the Bill or any provision thereof is inconsistent with the Constitution, that it shall be deemed to have been determined that the Bill or such provisions of the Bill is inconsistent with the Constitution.

**The threshold therefore is the question or whether there is in fact any 'doubt'**.

In this context, the following are cited:

i) Are not the Schedule to the Bill *ad-hominem and not categorization of groups on 'intelligible differentia'*. **Does this not create a doubt** ? *Privy Council Judgment in Appeal No. 23 of 1965 – Liyanage v Queen attached. – vide Annex IX*

ii) Can HDL be an '*Underperforming Enterprise'* under Schedule 1 simply because the Attorney General has said that there is protracted litigation, whilst the Attorney General had suppressed that there had been an Application to Wind-up HDL in November 2006, which he had opposed and caused the very protraction he now complains of ? **Does this not create a doubt** ?

iii) The Supreme Court Determination has specifically stated that – ' It was submitted that having such litigation does not mean that judicial power would be exercised through the Bill or there would be interference in the exercise of judicial power'. Was not the District Court exercising judicial power to Wind-up HDL ? **Does this not create a doubt** ?

iv) A 5 Member Bench of the Supreme Court had determined that **harsh, oppressive and unconscionable law** prescribing a procedure other than the **ordinary procedure** will be struck down. Was this law not **harsh** ? Was this law not **oppressive** ? Was this law not **unconscionable** ? Can the answers be given without any doubt ? **Does this not create a doubt** ?

v) Does not my Application in the Commercial High Court HC (C) WP No. 52/2011 under Part X of the Companies Act No. 7 of 2007 demonstrate that there is in fact **ordinary procedure** and that therefore as per the above Determination by the 5 Judge Bench of the Supreme Court there could not be a separate **harsh, oppressive and unconscionable** procedure ? Can this be answered without any doubt ? **Does this not create a doubt** ?

vi) Have not the access to the judiciary enshrined in Article 105 of the Constitution been denied to the affected parties ? Can this question be answered without any doubt ? **Does this not create a doubt** ?

vii) Have the affected parties been denied equal protection before the law ? Can this question be answered without any doubt ? **Does this not create a doubt** ?

viii) Article 154(G)(3) of the Constitution stipulates thus:

> 154. G (3) No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference and
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> (a) where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting; or
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> (b) where one or more Councils do not agree to the passing of the Bill, such Bill is passed by the special majority required by Article 82 :

Therefore, can it be said without any doubt, that the foregoing Article has not been violated ? **Does this not create a doubt** ?

The Supreme Court in SC (FR) No. 209/2007 at pages 46 to 50 (*vide* – Annex III) has dealt with this matter upholding the right of the Provincial Councils. Hence, would not a subsequent Determination thereon be bound by the said Judgment ? The Attorney General was a party in the said Application and it appears that the matter had been suppressed.

ix) Article 157 of the Constitution stipulates that *otherwise than in the interests of national security,* **no written law shall be enacted or made**, and no executive or administrative action be taken, in contravention of the provisions of such Treaty or Agreement.

x) HDL itself has large Japanese Investors and several other foreign investors are reported to have complained in other instances.

In the Determination it is stated that providing for prompt, adequate and effective compensation could enable written law to be enacted. If that be the case would not such provision have been included in Article 157 in like manner, as in the interest of national security ? Such is not the case. **Does this not create a doubt** ?

**Would not the foregoing have given rise to several doubts, thereby as mandated by Article 123(3) of the Constitution the impugned Bill had to be determined by the Supreme Court as inconsistent with the Constitution** ?