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

In the matter of an application to determine whether the Bill titled 'Contempt of a Court, Tribunal or Institution' or any part thereof is inconsistent with the Constitution in terms of Article 120 read with Articles 121 &78 of the Constitution &/or Article 134 of the Constitution.

W. J. Basil Fernando, 126, St. Annes Lane, Katukurunda, Moratuwa

Presently at:
25 G/F, Tai Wai New Village, Tai Wai, Shatin, New Territories, Hong Kong SAR.

PETITIONER

SC (SD)

Application. No-59/2023

Vs.

Hon. Attorney General, Attorney General's Department, Colombo 12.

RESPONDENT

TO HIS LORDSHIP THE CHIEF JUSTICE, AND THEIR LORDSHIPS AND LADYSHIPS; THE OTHER HONOURABLE JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

Before: Hon. Justice Murdu Fernando, PC,

Hon. Justice Shiran Gooneratne,

Hon. Justice Achala Wengappuli

Argued On: 03rd & 4th August 2023

WRITTEN SUBMISSIONS FOR THE PETITIONERS IN SD(SD) 59 & 60/2023

'Justice is not a cloistered virtue'

-Lord Atkin in Ambard v. Attorney-General for Trinidad and Tobago [1936] A.C. 322.

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INTRODUCTION

1. WHEREAS on completion of oral submissions, Your Lordships' Court permitted parties to file written submissions to supplement the brief oral submissions made, and hence these written submissions are filed challenging the constitutionality of the "*'Contempt of a Court, Tribunal or Institution' Bill.*

2. It is respectfully submitted, that the *'Contempt of a Court, Tribunal or Institution' Bill*, was ordered to be published by the *Minister of Justice, Prison Affairs and Constitutional Reforms,* and is purportedly for, *inter alia,* the uniform application of the law relating to contempt.

3. In our respectful submission, the Bill seeks to codify into law, a common law *sui generis* jurisdiction of a court to punish for contempt of itself, and, *inter alia;*

    a) It seeks to amend/repeal, alter or add to *Article 105* of the Constitution without expressly saying so or conforming to the requirements set out in *Article 82* of the Constitution, and therefore, the *Speaker* is precluded from permitting such Bill to proceed;

    b) It seeks to codify into law, the common law powers to punish for contempt of court, utilising vague and/or overbroad language, contrary to the principles of *Natural Justice*;

    c) It seeks to re-introduce certain common law offences that have been rejected in the common law itself;

    d) There is no rational nexus between the objects sought to be achieved and the provisions contained therein;

    e) It makes no distinction between any civil forms of contempt or criminal.

JURISDICTION OF COURT

Scope of Review

4. Your Ladyship and Lordships in exercising jurisdiction under *Article 120* as read with *Article 121* are called upon to consider whether provisions of a Bill violate the Constitution. If Your Ladyship and Lordships determine the Bill/any provisions thereof, are unconstitutional, thereafter consequentially Your Ladyship and Lordships will have to determine [*vide Article 123(2)*] if the Bill can be passed by a *Special Majority* [*vide Article 84(2)*] and/or a *Referendum* [*vide Article 83*].

5. In our respectful submission, any new Bill, which has the potential of violating Fundamental Rights, must be presented (i) in the manner & form permitted by our Constitution and (ii) any restriction must be to the extent permissible in our Constitution. Your Ladyship and Lordships will recall that in the **Sri Lanka Broadcasting Authority Bill SC(SD) 1/97-15/97**, Your Ladyship's Court held that "any abridgment, restriction, or denial of a fundamental right can be legally made only (1) in the manner and (2) and to the extent provided by the Constitution." [*vide* page 98].

6. However, in the instant application, as the *Contempt of a Court, Tribunal or Institution' Bill*, has been introduced by the *Minister of Justice, Prison Affairs and Constitutional Reforms,* **not** as a Bill for the repeal, alternation or addition of a provision of the Constitution, **but in fact** as will be demonstrated below, had the **effect** of amending, repealing, adding and/or altering *Article 105,* Your Ladyship and Lordships will necessarily also have to consider, whether ***Article 82*** of the Constitution has been complied with. For convenience of Your Ladyship's Court, the relevant *Article 82* is recreated below verbatim;

CHAPTER XII

THE LEGISLATURE

Amendment of the Constitution

Amendment or repeal of the Constitution must be expressed

82. (1) No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution.

(2) No Bill for the repeal of the Constitution shall be placed on the Order Paper of Parliament unless the Bill contains provisions replacing the Constitution and is described in the long title thereof as being an Act for the repeal and replacement of the Constitution.

(3) If in the opinion of the Speaker, a Bill does not comply with the requirements of paragraph (1) or paragraph (2) of this Article, he shall direct that such Bill be not proceeded with unless it is amended so as to comply with those requirements.

(4) Notwithstanding anything in the preceding provisions of this Article, it shall be lawful for a Bill which complies with the requirements of paragraph (1) or paragraph (2) of this Article to be amended by Parliament provided that the Bill as so amended shall comply with those requirements.

(5) A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon in accordance with the provisions of Article 80 or 79.

(6) No provision in any law shall, or shall be deemed to, amend, repeal or replace the Constitution or any provision thereof, or be so interpreted or construed, unless enacted in accordance with the requirements of the preceding provisions of this Article.

(7) In this Chapter, "amendment" includes repeal, alteration and addition.

7. Your Ladyship and Lordships will appreciate that the Constitution is supreme [*vide* **Premachandra v Major Montague Jayawickreme [1994] 2 SLR 90, 111**]. So much so, that the fact that the People have clearly set out in the Constitution itself, that the Constitution is adopted as the Supreme Law of the Republic [*vide* ***Svasti***]. Such principle is *so important* that the *Svasti* even *visually* emphasises each phrase

"do hereby adopt and enact"

this

CONSTITUTION

as the

SUPREME LAW"

by granting each such phrase, its own individual line in the *Svasti.* Thus and otherwise, in our respectful submission, the *Minister of Justice, Prison Affairs and Constitutional Reforms,* must comply exactly, with the provisions of the Constitution, including *Article 82* in presenting a Bill, which has the effect of repealing, adding and/or altering any provision of the Constitution.

8. Thus and otherwise, **firstly** Your Ladyship's Court must be satisfied, that the Bill is presented in the proper *manner & form* set out in the Constitution. We submit, that the Bill has the *effect* of *repealing, altering, adding* or making *consequential amendments* [*vide Article 82*] to *Article 105* of the Constitution. For the purposes of this Bill, we urge Your Ladyship's Court, to consider at least the following four (4) aspects of *Article 105*;

    a) **The Supreme Court is a creature of the Constitution:** *Article 105(1)* specifically states the "subject to the provisions of the Constitution" there will be several courts. *Article 105(1)(a)* specifically lists Your Ladyship's Court as one such established Court. This must be read in contradistinction to *Article 105(1)(c)* where High Courts/Courts of First Instance etc., may be ordained

and established by Parliament. *Article 105(2)* specifically however, **excludes Your Ladyship's Court** (in contradistinction to all other courts/tribunals/institutions) as a Court that is deemed to be "created and established by Parliament". It is only those *other* courts that Parliament can *replace, abolish, amend powers/duties & procedure* of under *Article 15(2)* of the Constitution as they can be done only by a Law/Act of Parliament as opposed to a Constitutional amendment;

b) **The Supreme Court & Court of Appeal have unique powers to punish for contempt**: Your Ladyship and Lordships will appreciate that *Article 105(3)* specifically permits imprisonment or fine as "court may deem fit". Your Ladyship's and Lordships' attention was drawn to ***Regent International Hotels Ltd v Cyril Gardiner & Ors [1978-79-80] 1 SLR 278***, where court exercising powers under *Article 105(3)* crafted an appropriate remedy of imprisonment *till contempt is purged* to deal with that situation. Furthermore, in ***Hewamanna v de Silva [1983] 1 SLR 1,*** in the absence of malice the court though affirming the rule, did not impose any punishment on the respondents;

c) **The Supreme Court & Court of Appeal have powers, fettered only by the Constitution *vis-à-vis* punishment of contempt:** Your Ladyship's and Lordships' attention is again drawn to *Article 105(3)* where the power to punish is "as the court may deem fit". Since *Article 105* is "subject to the provisions of the Constitution" [*vide Article 105(1)*], such powers are curtailed by the spirit & morality of the Constitution, which would naturally evolve over time;

d) **The Court of Appeal has power to punish for contempt of any other court, tribunal or institution ordained & established by Parliament other than the Supreme Court**: Again, we advert to *Article 105(3)* which is clear on this matter.

9. As will be demonstrated below, this Bill seeks to *curtail* those powers, and introduce a purported *procedure* for exercise of such *sui generis* powers, both of Your Ladyship's Court *and* the Court of Appeal. Your Ladyship and Lordships will appreciate, that this is a **clear *repeal, alteration, addition &/or consequential amendment*** to *Article 105* of the Constitution. We submit that such *must* be done in the proper **manner & form** set out in the Constitution. The failure to do so would mean that this Bill cannot proceed. Thus and otherwise the manner in which this can be done is through a constitutional amendment and the form is 'by law' i.e. published with sufficient clarity for a citizen to regulate their conduct. We further submit that if the Learned Additional Solicitor General proposes a multitude of changes to the Bill as it was published, the Bill falls short of the proper form stipulated by the Constitution.

10. The Bill further, in *clause 11(1)* by expressly omitting a reference to *clause 5(3)* of the Bill, completely strips away the power of the Court of Appeal to punish for contempt of other courts. In our respectful submission, this is an attack on the *Sovereign Judicial Power* of the People.

11. **The three (3) submissions of the *Learned Additional Solicitor General* are not tenable:** <u>Firstly:</u> We categorically reject the submissions of the *Learned Additional Solicitor General,* that power to punish for contempt in *Article 105* is merely a forum jurisdiction. In our respectful submission <u>***Article 105*** **is not merely a forum jurisdiction**</u>. In our respectful submission, <u>*Article 105*</u> clearly contains the "powers of [superior courts of record] to punish for contempt". This is a Constitutionally vested power. That is why <u>*Article 118*</u> is prefaced by saying Your Ladyship's Court is subject "to the provisions of the Constitution". Thus when in <u>*Article 118(a)*</u> Your Ladyship's Court is exercising jurisdiction in respect of "constitutional matters" that would include *Article 120* to interpret the Constitution, *Article 121 & 121* the ordinary and special exercise of constitutional jurisdiction in respect of bills etc., This would also include *Article 105* in our respectful submission. If the *Learned Additional Solicitor General's* submission is taken to its logical conclusion, it essentially means that

all instances Your Ladyship's Court has punished for contempt as provided for in *Article 105* up to now, have been unconstitutional (including punishemnts/imprisonsment). This would have two serious repercussions, in that any individuals currently facing contempt are therefore being dealt with unconstitutionally, and all past authorities would have no value. We submit that this cannot be the case.

12. Second we further, categorically reject the submission of the *Learned Additional Solicitor General* that such an alteration of the Constitution is permissible by a reading of *Article 4(d), 118, & 136* read with *Article 105(3).* In our respectful submission, that would *only* be relevant when considering the *extent* of any restrictions on fundamental rights. It would however **not be relevant to ascertain whether the Bill is in the manner & form required by the Constitution**. The *very fact* that the *Learned Additional Solicitor General* himself, admitted in proceedings on 4th August 2023 that the *existing* nature of contempt and its powers of punishment violate the *entire gamut of Articles 10 through 14* lend credence to our submissions below, that a very high level of scrutiny is required, when introducing elements of such an offence, and the procedure to be followed for its punishment. However, again, we re-iterate that such is relevant to evaluating the *extent* of the provisions of the Bill, but *not* whether it is in the proper *manner & form* required in the Constitution.

13. Third: We categorically reject the submission made on the ***Counter Terrorism Bill SC SD 41-47/2018*** that where an existing law is consistent with the Constitution, the relaxation of that law cannot violate the Constitution. Such must be understood in the **context of the *Prevention of Terrorism (Temporary Provisions) Act*.** Your Ladyship's Court will recall that in ***Weerawansa v Attorney General [2000] 1 SLR 387, 395*** Your Ladyship's Court recognised that the *PTA* was unconstitutional, but it had been passed by a 2/3 majority *as permitted by our Constitution.* In our respectful submission, what is permitted by our Constitution in this instance, is for a constitutional amendment to be tabled, to address all the

concerns articulated by the *Learned Additional Solicitor General* regarding the inherent "arbitrariness" relating to contempt that he submits, is what this Bill seeks to redress. We submit that we are not opposed to this idea in principle. We merely urge, that it is done (i) in the *manner & form* permitted in the Constitution, and be strictly circumscribed to the (ii) *extent* that is required in a democratic society, with adequate safeguards to guard against all the abuse, the *Learned Additional Solicitor General* indicates that the Bill seeks to address.

14. Thus and otherwise, as the Constitution is Supreme the failure to follow the provisions set out therein would require Your Ladyship's Court to make that strict observation in the determination.

15. However, if for any reason, Your Ladyship's Court is of the view that the Bill is in the proper manner & form set out in the Constitution, then Your Ladyship and Lordships will have to evaluate the **second** aspect of the Bill, which is whether it is to the **extent permitted by the Constitution.**

16. In evaluating this second aspect of the *extent* of the Bill, Your Ladyships' Court will have to evaluate whether the Bill violates Fundamental Rights. Such is only permissible if it is in conformity with *Article 15* of the Constitution i.e., (i) by law (i.e., accessible/clear etc.); (ii) for a legitimate aim (different sub articles in *Article 15* have different legitimate aims set out); (iii) whether it is necessary in a democratic society (as recognised in ***Sunila Abeysekera v Ariya Rubasinghe Competent Authority & Ors [2000] 1 SLR 314, 369*** and more recently in the introduction of *Article 14A*) and whether (iv) it is a proportionate restriction. All these considerations, coupled with *Article 4(d) & 118(b)* gives rise to a very strict level of scrutiny, which we have adverted to below at paragraphs **19** to **22**.

17. In such an evaluation of *Article 15* as set out above, Your Ladyship and Lordships will appreciate, that as the Constitution is Supreme, any evaluation of a Bill *now* must conform to the Constitution and the wealth of jurisprudence accumulated over the

years in interpreting the same, *especially* in view of Fundamental Rights, which are an aspect of *Sovereignty* which is a doubly unique feature in our Constitution, in that;

a) Your Ladyship's Court has held that articulation of Sovereignty from the People's perspective [*Article 3*] as opposed to merely using it a descriptive power of the State [*Article 1*] in and of itself, is a unique feature of our Constitution [*vide* **Re Nineteenth Amendment to the Constitution [2002] 3 SLR 86 at 95**]; and

b) Your Ladyship's Court has also held that, the recognition of Fundamental Rights as a part of Sovereignty, is a further unique feature of our Constitution [*vide* **SC(Ref)/01/2008 International Covenant on Civil & Political Rights Advisory Opinion [2009] 2 SLR 389 at 394**].

> "It is thus seen that fundamental rights declared and recognized by the Constitution form part of the sovereignty of the people and have to be respected, secured and advanced by all organs of Government. This is, in our opinion a unique feature of the Constitution which entrenches fundamental rights as part of the **inalienable Sovereignty of the People**. Thus the **fundamental rights acquire a higher status** as forming part of the Supreme Law of the land and **cannot be abridged**, restricted or denied **except in the manner and to the extent** expressly provided for in the Constitution itself.
>
> [emphasis added]

18. Thus and otherwise, any new Bill must pass constitutional muster, and the existence of the same or similar provisions in the existing law is irrelevant, and does **not** in any manner grant a "stamp of constitutionality" to the current Bill, which is the subject matter of the instant Bill Determination. [*vide* **Recovery of Loans by Banks (Special Provisions Amendment) Bill SC (SD) 22/2003 *vide* page 432**], a position echoed recently in **Special Goods and Services Tax Bill SC (SD) 1/2022-9/2022**, where Your Ladyship's Court determined;

> **"Thus, this Court will consider the constitutionality of the impugned clauses of the SGST Bill irrespective of the possible existence of similar or identical provisions of existing laws,** while of course noting and taking cognizance of the existence of such provisions in laws previously enacted by Parliament."

Intensity of Review

19. In engaging in this constitutional review, as Your Ladyship and Lordships are exercising the *Sovereign Judicial Power* of the People under *Article 4(c)* in reviewing the constitutionality of Bills [*per* Wanasundera J., in **Re Thirteenth Amendment to the Constitution (1987) 2 SLR 312, 337**,][1], Your Lordships exercise, a very stringent / intensive review of provisions of a Bill.

20. This exercise of Judicial Power of the People, as aspect of Sovereignty, is also given to Your Lordships' in the context of Your Lordships' duty to respect, secure and **advance** fundamental rights [*vide* ***Article 4(d)***].

21. Thus and otherwise, there is a very onerous duty laid upon Your Ladyship's Court by *Articles 121, 3, 4(d) & 118(b)* when exercising the Judicial Power of the People in reviewing the constitutionality of a Bill, especially as such Bill can potentially infringe Fundamental Rights of the People, and as in this case, **introduces approximately thirty (30) vaguely defined offences, including speech offences (as morefully described below).**

22. That is why, in determining whether a Bill violates a constitutional provision, Your Ladyship's Court has found that the duty is to determine whether the **effect** of the clauses in the Bill *might* violate a fundamental right. Your Ladyship and Lordships will not allow clauses that have a '**propensity or likelihood to encourage or**

[1] Where Court held "Judicial power however is mentioned in Article 4 (c), but one has to look even beyond it to other provisions to ascertain its true nature and content. For example, the provisions relating to the independence of the judiciary, the subject's right to challenge proposed legislation, his right to vindicate his fundamental rights and to have his disputes litigated in the courts are essential features of this power."

permit' Constitutional violations to be passed into law. This was clearly set out in the **Sri Lanka Broadcasting Authority Bill (supra.)** where Your Ladyship's Court determined as follows;

> "The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. (…) These things may not happen, but they *might* happen because they are permitted. **The evils to be prevented are those that might happen**. Cf. *Gros-jean*." [*vide* page 101]
>
> [emphasis added]

SOVEREIGNTY

Sovereignty & human rights

23. Your Ladyship and Lordships will appreciate the submissions made at paragraphs **17** above regarding *Sovereignty* and the unique features of our Constitution.

24. The practical application of sovereignty of the People can be seen in **Article 4** of the Constitution and therefore;

    a) the inalienability of Sovereignty is "read into each of the sub paragraphs in **Article 4** [*vide* **Re Nineteenth Amendment to the Constitution (2002) (supra.)** at 97 ;

    b) *Articles 3 & 4* are read together, and considered to be inextricably interwoven, [*vide* **Special Goods and Services Tax Bill Determination (supra)**]. Thus and otherwise, any infringement of Fundamental Rights, can be considered to violate *Article 3* of the Constitution.

25. We respectfully submit, that there is a need to protect the sanctity of Courts, judicial proceedings and judgments/orders therefrom, and the administration of justice, and such must be carefully balanced in the public interest, *vis-à-vis* the rights of citizens, including their rights of discussion, and the right to be informed regarding matters of public interest.

Sovereignty & Contempt

26. Thus and otherwise, we submit, that the *rationale* for this *sui generis* power to punish for contempt of court, is the overriding interest, in protecting the public's confidence in the administration of justice, as the failure to do so, could result in weakening the spirit of obedience to the law. Which we submit is a harm done to the public, as the *Sovereign Judicial Power* of the People, is one that is exercised by the judiciary for the good of the People themselves. Thus public confidence, is foundational to the rationale. Your Lordships will appreciate that thus there may be at time, two competing public interests that Your Lordships' will have to balance, such as the freedom of expression, and such must be balanced in a manner that is for the good of the People, in a manner that does not damage public confidence.

27. That is why, several seminal pronouncements from the United Kingdom clearly focus on the protection of administration of justice. The following are submitted for Your Ladyship's and Lordships' consideration;

    a) ***Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2)*** **:** In this matter, a well-known politician and lawyer *Rt. Hon. Quintin Hogg, Q.C., M.P.,* wrote an article in the weekly periodical "Punch" titled ""The Gaming Muddle" vigorously criticising a recent decision of the Court of Appeal, whilst also incorrectly attributing certain Queens Bench Divisional Court decisions, as ones of the Court of Appeal. The article stated, *inter alia,* that certain statutes had "been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous decisions of the courts, including the Court of Appeal." The applicant Mr. Blackburn asked the same Court of Appeal for an order that the writer had been guilty of contempt of court. The Court dismissed the application, (that the article did not amount to a contempt of court), essentially saying that though the court has jurisdiction to consider an allegation of contempt of itself, such jurisdiction will never be used to protect the court against criticism of itself

or its decisions in exercise of the right to freedom of speech. This clearly indicates that **mere criticism of a court's decision, even though in bad taste and containing inaccuracies of fact, does not amount to contempt of court**. In fact, we refer Your Ladyship and Lordships to the dicta of Lord Denning, which said at page 154-155;

> "That article is certainly critical of this court. In so far as it referred to the Court of Appeal, it is admittedly erroneous. This court did not in the gaming cases give any decision which was erroneous, nor one which was overruled by the House of Lords. But is the article a contempt of court?
>
> This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.
>
> **Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.**
>
> It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.
>
> Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.
>
> So it comes to this: Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the uttermost."

[emphasis added]

A copy of this judgment is annexed herewith marked ***X1*** *for convenience of Your Lordships' Court.*

b) ***Dhooharika v Director of Public Prosecutions (Commonwealth Lawyers' Association intervening) [2014] UKPC 11***: In this application, the Defendant had written an article, which was published in a weekly newspaper, concerning the Chief Justice of Mauritius. A disbarred barrister (H), who was a director of a company involved in court proceedings, had made serious allegations in the media against the Chief Justice and had called for a tribunal to investigate. In his article, the Defendant (D) summarised this (disbarred) barrister's comments and pointed out the importance of judges maintaining their integrity and being publicly accountable. The Director of Public Prosecutions of Mauritius brought contempt proceedings against D, who claimed that he had written the article in good faith and in the public interest, and that he had simply reported H's views without endorsing them. The Supreme Court of Mauritius held that the article conveyed the message that H's allegations were justified. It held that such articles brought the judiciary into disrepute and damaged public confidence in the administration of justice. It discouraged D's counsel from calling him to give evidence. The Constitution of Mauritius 1968 s.12 provided for individual freedom of expression except where the actions taken thereunder were not reasonably justifiable in a democratic society. The Defendant appealed his conviction. There were several issues namely (i) whether the offence of "scandalising the court" still existed in Mauritius, in the light of s.12 ; (ii) if it did, what its ingredients were; (iii) whether D's trial had been unfair as a result of his having been refused the right to give evidence; and (iv) whether D had been properly convicted. In considering these matters, it was held that the offence of scandalising the court existed solely to protect the administration of justice, not the feelings of judges. In order for it to be made out, there had to be a real risk of undermining public confidence in the administration of justice.

Members of the public expressing criticisms of the judiciary would be immune from prosecution if they were genuinely exercising their right of criticism and were not acting out of malice or with the intention of impairing the administration of justice. The burden was on the prosecution to establish evidence of bad faith beyond reasonable doubt. It was also found that the conclusion that D had been acting in bad faith was unjustified. No reasonable reader would have concluded from his article that the Chief Justice must have been guilty of serious wrongdoing, or that D was expressing his own adverse views. Rather, the thrust of the article was that the Chief Justice should put his position before a tribunal in order to defend his integrity. At page 893 Your Ladyship and Lordships will appreciate that it was held by *Lord Clarke of Stone-cum-Ebony*, on reviewing several authorities, (especially of *Lord Steyn's*) as follows in relation to the offence of scandalising the judiciary;

> "It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the right of criticising, in good faith, in private or public, the public act done in the seat of justice:

*Annexed herewith marked **X2** is a copy of the above cited judgment.*

28. Thus and otherwise, we submit, that the rationale for power to punish for contempt of court, is purely in the interests of the People, and thus consonant with the idea of *Sovereignty* in Article 3 of the Constitution. That is why, even the term "contempt of court" is now considered somewhat archaic. Your Ladyship and Lordships will appreciate the following;

a) ***Morris v Crown Office [1970] 2 QB 114, 129***: In this case, a group of Welsh students interrupted the proceedings in a libel action in the High Court, upon which the judge sentenced fourteen of them to three months' imprisonment each and fined the remaining eight who apologised for their behaviour, fifty pounds each. On an appeal by eleven students, who were all, save one, under 21 years of age, the court held, *inter alia,* that though the sentences were not excessive, the appellants should be released forthwith. Salmon LJ's observations clearly point to the **archaic nature of the term**;

> "The archaic description of these proceedings as "contempt of court" is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented;

*Annexed herewith marked **X3** is a copy of the judgment in Morris v Crown Office [1970] 2 QB 114, 129*

b) ***Attorney General v Times Newspapers Ltd [1974] AC 273*** (The *Thalidomide* case) : Your Lordships' will recall that in this famous case, The House of Lords held that the publication of articles by the Sunday Times (about facts relating to the Distillers Company which manufactured and marketed a drug containing thalidomide for pregnant mothers, which caused gross deformities in their children) highlighting the plight of thalidomide children would be a contempt of court whilst litigation in the matter is pending. In this case, (at page 322) Lord Cross of Chelsea, pointed to the **authoritarian overtones** of the term 'contempt of court' which was counterproductive.

> “"Contempt of court" means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to anyone who defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens, whether on the left or the right or in the centre, should be anxious to safeguard. When the alleged contempt consists in giving utterance either publicly or privately to opinions with regard to or connected with legal proceedings, whether civil or criminal, the law of contempt constitutes an interference with freedom of speech, and I agree with my noble and learned friend that we should be careful to see that the rules as to "contempt" do not inhibit freedom of speech more than is reasonably necessary to ensure that the administration of justice is not interfered with. ”

*Annexed herewith marked **X4** is a copy of the judgment in Attorney General v Times Newspapers Ltd [1974] AC 273.*

29. Thus and otherwise, we submit that based on the long recognised principle as explained in cases such as ***Home Office v Harman [1983] 1 AC 280*** and ***Attorney General v Times Newspapers Ltd [1992] 1 AC 191***, there are nominally two categories of contempt of court, loosely termed ‘civil’[2] [such as disobedience of orders/failure to attend despite summons etc.] and ‘criminal’ [such as in the

[2] In the recent case of ***Elliott Cuciurean v The Secretary of State for Transport High Speed Two (HS2) Limited*** [2021] EWCA Civ 357 the Court held “the essence of the wrong is disobedience to an order. Disobedience to an order made in civil proceedings is known as "civil contempt". The contempt proceedings are brought in the civil not the criminal courts. The procedure is regulated by common law and Part 81 of the Civil Procedure Rules. The proceedings are not brought by the state, through the Attorney General or otherwise, in the public interest. They are normally brought by the beneficiary of the order that is said to have been disobeyed, whose main if not sole purpose will be to uphold and ensure compliance with the order. In summary, this is "contempt which is not itself a crime": *R v O'Brien [2014] UKSC 23 [2014] AC 1246 [42] (Lord Toulson)* . Hence the use of language such as "liability" and "sanction" rather than "conviction" and "sentence".”

face/hearing of court etc.] contempt, under the common law, as established in the U.K.

30. Under these two broad categories, Your Lordships' will appreciate, that there are several species of contempt, such as;

    a) Publication contempt;
    b) Disruptive behaviour in the courtroom (contempt in the face of court/contempt *in curie*)
    c) Scandalising the court
    d) Non-compliance/disobedience with court orders/directions/undertakings;
    e) Obstructing the work of court (false statements/evidence etc.)

31. However, we submit, that there are certain species of contempt which have now been considered obsolete. We submit that such would indicate that **they are no longer in the interest of the Public and attempting to re-introduce such by way of this Bill, would be contrary to *Article 3*** of the Constitution/the *Sovereignty* of the People.

Scandalising contempt - no longer in the public interest

32. The offence of scandalising the court in Sri Lanka is considered to be any act/omission which tends to lower the authority of a court/judge. In our respectful submission, "authority" has not been decisively defined, but is generally understood to mean the deference to judges, as seen in ***In the Matter of ARMAND DE SOUZA, Editor of the Ceylon Morning Leader (1914) 18 NLR 33, 39-40*** *per* Woodrenton CJ.

> "In the still later case of R. v. Davies, the Judges adopt the language of Chief Justice Wilmot in the old case of R. v. Almon, in which the word " authority, " as it occurs in proceedings of this kind, was interpreted as meaning " the deference and respect payable to the Judges of the Court"

33. The Common Law basis for this offence therefore appears to be to safeguard the dignity of the court, as there is an 'overriding interest in protecting the public's confidence in the administration of justice' [*vide A-G (Singapore) v Chee Soon Juan [2006] SGHC 54*], because the Court (and the Judges) are the "channels by which the King's justice is conveyed to the people" [*vide* ***The King v Almon (1765) Wilmot 243 97 E.R. 94***].

34. A further justification for the same appears to be the concern that judges cannot respond to criticism. As Lord Denning said in *Blackburn (supra)* "All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms.". However, in our respectful submission, such justification no longer appears to hold water the world over. We respectfully advert Your Lordships' to the following;

    a) **Hon. J.D. Heydon** a former Justice of the High Court of Australia, in his article *Does Political Criticism of Judges Damage Judicial Independence: Judicial Power Protect Policy Exchange (2018) 37 U Queensland LJ 179* states that there are different **defensive techniques** available to judges to counter such criticism such as;

        i. For the judge to rely for support on academic lawyers or politicians or journalists (at page 180) which he does not recommend;

        ii. anonymous responses by judges, (*ibid*) where he highlights such an anonymous response widely believed to be written by Mr Justice Devlin in response to criticism of a judgement delivered by a bench of which he was a member [*R v Vickers*];

    And he even concludes by posing the question

    > Where judges seek to preserve judicial independence in response to political criticism by threatening use of the contempt power, do they actually strengthen the hands of those who oppose judicial

independence?

b) **Hon. Sir Daryl Lawson** a former Justice of the High Court of Australia, in an address, published as *'Judges and the Media' (1987) 10 UNSWLJ 17* has observed how judges have at times used the newspapers to appropriately respond to criticism *even* at a time when it was presumed to be inappropriate [at page 27], he says;

> "I may perhaps be forgiven for thinking that nowadays, that civilized little incident might not (if, indeed, it was at the time) be effective to eradicate a slur unfairly cast upon a judge. Certainly there have been other occasions when judges have thought it necessary to vindicate themselves by writing to the newspapers. In 1887 Stephen J. did so in answer to suggestions that he doubted whether a death sentence should be carried out. And in 1975 Bridge J., who was criticized for failing to recommend minimum terms in a criminal case, took what he called "the wholly exceptional course" of writing to The Times newspaper to deny unfounded charges and to justify this omission "in the hope of forestalling further ill-informed comment"

c) **Lord David Pannick** a life peer in the House of Lords, in an article *"We do not fear criticism, nor do we resent it": abolition of the offence of scandalising the judiciary, P.L. 2014, Jan, 5-10* has pointed out how "In London, the Lord Chief Justice gives regular press conferences to address issues of judicial administration and can make a public statement in answer to criticisms, where appropriate"

Annexed herewith marked ***X5*** *is a copy of the abovementioned article by Lord David Pannick.*

d) In fact, there have even been instances where judges have responded on television, to what they perceived as unfair criticism. See; *County Court judges defend judicial system amid calls for overhaul by Tineka Everaardt*.

35. With regard to the justification of protecting dignity of Court/judges and the public's confidence in the administration of justice, Your Lordships' will appreciate that it has over time been thought that, *inter alia;*

    a) Initially in Sri Lanka ***Rule on Hulugalle 39 NLR 294*** where Court was of the view that the offence of scandalising the court though *alleged* to be obsolete in England was still being used. However, Your Ladyship's Court will appreciate that much water has flowed under that bridge since, as can be seen from what is morefully set out below;

    b) Shielding judges from criticism is *counter productive* as can be seen by the observations of *Mr. Justice Black* in the 1941 case of ***Bridges v State of California 314 US 252 at 270-271 (1941)*** where court said;

    > "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

    c) Such respect is earned, rather than commanded as can be seen in the writings of *Sachs J.,* in ***The State v Mamabolo (2001) 3 S.A. 409 (CC)*** where the Constitutional Court of South Africa said [at para 77];

    > "If respect for the judiciary is to be regarded as integral to the maintenance of the rule of law, as I believe it should be, such respect will be spontaneous, enduring and real to the degree that it is earned, rather than to the extent that it is commanded."

    d) This view of the judges, in our respectful submission, is why the courts have on several occasions, felt that the offence of scandalising judges was

"obsolete" in England as far back as 1899, [*vide* ***McLeod v St Aubyn***][3] and again "virtually obsolescent" in 1984 by Lord Diplock, in ***Secretary of State for Defence v Guardian Newspapers Ltd***[4] Your Lordships will appreciate that similar views have been expressed in Australia[5] and Canada.[6]

36. Your Lordships' will appreciate that, in such a background considering its counter-productive nature (and thus not in the public interest), and virtual obsolescence, the U.K. has completely abolished the common law offence of scandalising the judiciary. Your Lordships will appreciate that;

    a) The Parliament in debating the abolition of the common law offence found that there was no loss in such abolition [at column 560] [7]

    > " I think I am right in saying that there has been no successful prosecution for this offence since 1931. That surely gives a great deal of emphasis to the point made by the noble Lords, Lord Pannick and Lord Bew, that this offence is out of date. There would be hardly any loss, and not much gain either in practical terms, if the crime were abolished"

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[3] See ***McLeod v St Aubyn [1899] A.C. 549,*** where the Court said "Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court."

[4] ***Secretary of State for Defence v Guardian Newspapers Ltd [1984] 3 All E.R. 601***; in the context of publishing a secret document which had purported national security implications

[5] See R v Nicholls (1911) 12 CLR 280, 285 (Griffith CJ);

[6] **R. v. Kopyto,** (1987) 24 O.A.C. 81 (CA); where the Ontario Court of Appeal has held that legislation preserving the common law offence of scandalising the court infringed the guarantee of freedom of expression contained in s 2(b) of the Canadian Charter of Rights and Freedoms ('Canadian Charter') referred to in HOW FRAGILE ARE THE COURTS? FREEDOM OF SPEECH AND CRITICISM OF THE JUDICIARY - JUSTICE RONALD SACKVILLE Monash University Law Review (Vol 3 1, No 2 '05) at 201

[7] United Kingdom, Parliamentary Debates, House of Lords, 2 July 2012, vol 738,

col 559-60 (Lord Borrie). Available online < https://hansard.parliament.uk/Lords/2012-07-02/debates/12070228000160/CrimeAndCourtsBill(HL) >

b) And even recognised the **chilling effect** that such an offence has on the freedom of expression [at column 559];

> In this country, we have a long tradition of freedom of speech, from which the judiciary is not immune. John Bunyan's *The Pilgrim's Progress* is a classic example in the 17th century of how that tradition has operated. In the view of those of us who support the amendment, the common-law offence of scandalising the judiciary is obsolete and has an unnecessary chilling effect on free speech.

c) Your Lordships' will appreciate that thereafter the common law offence was abolished by the *Crime and Courts Act 2013* which provides in *Section 33* that

> Scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is abolished as a form of contempt of court under the common law of England and Wales.

d) Thus, Lord David Pannick in his article (*supra*), at page 10 concluded that;

> "Parliament was correct to conclude that there is no justification for retaining the criminal offence of scandalising the judiciary. Indeed, respect for the judiciary, so vital to the maintenance of the rule of law, is undermined rather than strengthened by the existence and use of a criminal offence which provides special protection against free speech relating to the judiciary. Respect for the courts will be all the stronger "to the degree that it is earned, rather than to the extent that it is commanded". Hopefully, s.33 of the Crime and Courts Act will encourage the legislatures in Scotland, Northern Ireland and in other common law jurisdictions to abolish the offence of scandalising the judiciary."

37. Thus and otherwise, we respectfully submit that there is no longer a place for the offence of scandalising the judiciary.

38. In any event, Your Ladyship's Court will appreciate, that there have been the world over, various instances of where such a vague offence has been used, and it appears

unfortunate, that the use of it has political overtones, and varying levels of applications. Your Ladyship's Court will recall, that time and time again, this Court has determined that there is a need for clarity, sufficient explicit guidelines which regulate conduct and the absence of the same is a violation of ***Article 12(1)*** of the Constitution. Therefore, in our respectful submission, introducing such a vague and now obsolete offence, into the Statute Books is an affront to the dignity of Court, and *not* necessary in a democratic society. We submit a few examples of instances that such contempt of court has been used in varying jurisdictions, which have adverse consequences on a representative democracy;

a) **Sri Lanka:** A former Cabinet Minister, D.M. Banda was punished with 2 years rigorous imprisonment for contempt of court for saying to the media that he and his party "*would not accept any shameful decision the Court gives*" regarding a reference made to Court by the President for an opinion on questions relating to the exercise of defence powers between the President and the Minister of Defence. On appealing to the UNHRC, Your Ladyship's Court will appreciate the unfortunate finding therein, in ***Dissanayake, Mudiyanselage Sumanaweera Banda v Sri Lanka Communication No. 1373/2005, 22 July 2008*** where it found;

> 8.2 The Committee recalls its observation, in previous jurisprudence , that courts notably in Common Law jurisdictions have traditionally exercised authority to maintain order and dignity in court proceedings by the exercise of a summary power to impose penalties for "contempt of court." In this jurisprudence, the Committee also observed that the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition of "arbitrary" deprivation of liberty, within the meaning of article 9, paragraph 1, of the Covenant. The fact that an act constituting a violation of article 9, paragraph 1, is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State

party as a whole. 8.3 In the current case, the author was sentenced to two years rigorous imprisonment for having stated at a public meeting that he would not accept any "disgraceful decision" of the Supreme Court, in relation to a pending opinion on the exercise of defence powers between the President and the Minister of Defence. As argued by the State party, and confirmed on a review of the judgement itself, it would appear that the word "disgraceful" was considered by the Court as a "mild" translation of the word uttered. The State party refers to the Supreme Court's argument that the sentence was "deterrent" in nature, given the fact that the author had previously been charged with contempt but had not been convicted because of his apology. It would thus appear that the severity of the author's sentence was based on two contempt charges, of one of which he had not been convicted. In addition, the Committee notes that the State party has provided no explanation of why summary proceedings were necessary in this case, particularly in light of the fact that the incident leading to the charge had not been made in the "face of the court". The Committee finds that neither the Court nor the State party has provided any reasoned explanation as to why such a severe and summary penalty was warranted, in the exercise of the Court's power to maintain orderly proceedings, if indeed the provision of an advisory opinion can constitute proceedings to which any summary contempt of court ought to be applicable. Thus, it concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1. 8.4 The Committee concludes that the State party has violated article 19 of the Covenant, as the sentence imposed upon the author was disproportionate to any legitimate aim under article 19, paragraph 3.

b) In our respectful submission, the introduction of such publication offences such as scandalising the judiciary, by this Bill, unnecessarily opens up our judiciary to such scathing comment. We submit that such offences are *not* constitutionally permitted;

c) **Singapore :** a visiting American academic, *Christopher Lingle*, was charged and convicted for scandalising on the basis of an article published in the *International Herald Tribune* in which he had expressed the view that certain (unnamed) governments in Southeast Asia which he called "intolerant regimes" and a "compliant judiciary" had used considerable ingenuity in suppressing political dissent.[8] He had subsequently left Singapore after being questioned by the Singapore Police;[9]

d) **Malaysia** : In Malaysia, one *Murray Heibert*, published a story commenting on the speed with which a civil suite filed by the wife of a sitting Court of Appeal judge had "raced through Malaysia's legal labyrinth". He was found to be in contempt and imprisoned for approximately a month.[10]

39. We further respectfully submit that, scandalising contempt also has the effect of stifling public criticism of the judiciary, judges and/or its decisions which would otherwise be in the public interest. For instance, recently a man charged with sexually assaulting a teenage girl by putting his hand down the trouser of the girl, pulling her underwear and grabbing her buttocks, and having confessed to the same while claiming it was a joke, was cleared by an Italian Court on the basis that the sexual assault only lasted 'between 5 and 10 seconds'. The ruling attracted public outrage and the victim as well as the public using various modes such as social media networks, expressed their displeasure and loss of confidence in the judicial system.

[8] Available [online] at https://www.rcfp.org/american-professor-newspaper-fined-singapore-article/ accessed on 05th August 2023.

[9] Available [online] at https://www.rcfp.org/professor-and-paper-charged-contempt-over-critical-article/ accessed on 05th August 2023; Available [online] at https://www.latimes.com/archives/la-xpm-1994-10-25-mn-54579-story.html accessed on 05th August 2023.

[10] Available [online] at https://cpj.org/1999/09/high-court-jails-canadian-journalist-for-contempt/ accessed on 05th August 2023.; Available [online] at https://cpj.org/1999/12/canadian-correspondent-freed-in-kuala-lumpur/ accessed on 05th August 2023.

In fact, there were short videos uploaded on social media networks by various individuals of their intimate parts being touched for 10 seconds.

Annexed herewith marked ***X6***[11] *is a copy of news item titled "Italian man cleared of assault because grope only lasted 'between five and 10 seconds".*

Strict liability for publications

40. Your Ladyship and Lordships will recall, that in the aforementioned *Thalidomide case,* the House of Lords, essentially favoured *strict liability* for a publication that might prejudicially affect judicial proceedings. However, when this matter was appealed, in ***Sunday Times v United Kingdom (1979-80) 2 E.H.R.R. 245***, The *European Court of Human Rights* [ECtHR] found that there had been an interference with the freedom of expression contained in the *European Convention on Human Rights* [ECHR], in that the interference (i.e., the injunction) was not necessary in a democratic society for maintaining the authority and impartiality of the judiciary, in the absence of **a real and substantial risk** of interference with or prejudice to the administration of justice [also found in the concurring Opinion of *Judge Zekia* at paragraph 27 & 41] ,

> "The prejudgment principle does not provide the press with a reasonably safe guide for their publications. The absolute rule indicated by Lord Cross in applying the prejudgment test—not taking into account whether a real risk of interference with or prejudice to the course of justice exists—inhibits innocuous publications dealing incidentally with issues and evidence in pending cases in order to avoid a gradual slide towards trial by newspapers or other mass media. This appears to me to be a very restrictive absolute rule which is difficult to reconcile with the liberty of the press. In a matter of public concern such as the national tragedy of thalidomide, it would be very difficult to avoid, in

[11] Available [online] at https://www.theguardian.com/world/2023/jul/13/fury-italy-school-caretaker-cleared-groping-assault-lasted-seconds accessed on 05th August 2023

> one way or another, reference to the issues and evidence involved in a pending case." [at para 27]

*Annexed herewith marked **X7** is a copy of Sunday Times v United Kingdom (1979-80) 2 E.H.R.R. 245*

41. Your Ladyship and Lordships will appreciate that this resulted in the *Contempt of Court Act (1981)* being passed in the U.K. to bring their law in line with the ECHR and the ECtHR decision above. This Act, clarified and **limited** the above strict liability principle, limiting the rule to instances that creates a substantial risk that a publication creates a substantial risk that ongoing judicial proceedings will be *seriously impeded* or prejudiced. *Section 2(2) & 2(3)* of the Act are recreated below for convenience of Your Ladyship's Court;

> 2.— Limitation of scope of strict liability.
>
> (2) The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.
> ß
> (3) The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication.

42. The House of Lords has interpreted "substantial risk" by adding further restrictions, that the substantial risk must be "neither remote nor theoretical" *vide* ***Attorney General v Guardian Newspapers Ltd. (No.3) [1992] 1 W.L.R. 874 at 881***, where the House of Lords took the view that the publication of a statement that a criminal defendant was awaiting trial on other charges did not necessarily create a substantial risk that the course of justice would be seriously impeded. Even if there were any risk, it was incidental to a discussion in good faith on a matter of general public interest and so, the strict liability rule would not have applied.

PROVISIONS OF THE BILL

43. In our respectful submission, the Bill *in toto* violates Fundamental Rights, and is neither in the (i) manner and form, required by the Constitution or (ii) to the permissible extent for such restrictions/violations. Thus and otherwise, we submit that the Bill, as it violates/restricts Fundamental Rights, is not one that is a proportionate response, nor one that is necessary in a democratic society.

Clause 2 : objects of the Bill

44. Your Lordships will appreciate that *clause 2* of the Bill, contains several objects, including;

> "**2.** The objects of this Act shall be to-
>
> (...)
>
> (*d*) preserve and maintain the effectiveness and impartiality of a court, tribunal and institution;
>
> (*e*) safe guard public order, public health and morals;
>
> (*f*) strike a balance between the right of expression, fair comment and compliance with judicial directives;
>
> (*g*) set out with precision the ambit of contempt of a court, tribunal and institution; and "

45. As will be demonstrated below, the Bill fails to set out with precision the ambit of contempt of court [*vide clause 2(g)*].

Clause 2(d) : effectiveness

46. We respectfully submit, that *Article 105(3)* gives Your Ladyship's Court and the Court of Appeal a **unique power** to craft an appropriate punishment, in the event of contempt, for the good of the People and the administration of justice. Such was seen in ***Regent International Hotels Ltd v Cyril Gardiner* (supra).** Even in the case of ***Hewamanna v de Silva [1983] 1 SLR 1, 195*** although Your Ladyship's Court affirmed the rule, having regard to the circumstances such as the absence of

malice, imposed no punishment on the respondents. However, this Bill appears to fetter such power, and would in fact have a negative impact on the effectiveness of Court. Thus and otherwise the Court can give a harsher or milder punishment than is contemplated by this Bill. Such power is clearly curtailed by the Bill, for instance where the power to discharge or remit the punishment is unlocked only where there has been an apology [*vide Clause 11(4)*].

Clause 2(d) : impartiality

47. In our respectful submission, the Bill fails to ensure impartiality of courts & tribunals, inasmuch as, the procedure set out for punishing for contempt of court, **does not mandate that the rule of natural justice are followed**. In our respectful submission, *clause 7(4)* for example, does not seek to actively preserve the impartiality of courts, and is *prima facie,* in violation of the principles of *Natural Justice,* in that it permits the court to be both witness, accuser and judge. We submit that such is contrary to the Constitution, and the objects of the Bill itself.

Clause 2(e) : public order, public health & morals

48. In our respectful submission, the objects of a Bill, must have some rationale nexus with what is sought to be achieved. At the outset, we submit that the reference to public health and morals is misplaced and creates an ambiguity with regards to the objects of the Bill.

49. Further, we submit that **public order** in fact, relates to a state of peace and tranquillity, and prevention of disorder [*vide* ***Yasapala v. Ranil Wickramasinghe & Others FRD (1) 143, 159***]. Your Ladyship's Court will observe that His Lordship Sharvananda J in *Fundamental Rights in Sri Lanka, A Commentary,* has even written citing *Sodhi Shamser v State of Pepsu, (1954) S.C. 267* that even the 'scurrilous attack upon a judge' cannot be punished in the interests of public order unless there is a reasonable apprehension of a breach of peace. Thus and otherwise, we submit that such has no rational nexus to what is sought to be achieved by the Bill.

Clause 2(f) : 'right' of expression.

50. In our respectful submission, the use of the word "right" connotes a corresponding "duty". This is in complete contrast to the **freedom of expression** guaranteed in the Constitution by *Article 14(1)(a)* of the Constitution.

51. We submit that our Constitution provides for the '*freedom* of speech and expression' which denotes an absence of control, interference and restriction unless as provided for in the Constitution, and that is much wider than the term '*rights*'. It is our respectful submission that freedom of expression includes the right to speak, to be heard, the 'right to know', the right to seek, receive, and impart information through any media. Thus we submit that the term '*righ*t' may denote restrictions not envisaged by the Constitution, and unduly limit the freedom of speech and expression guaranteed by a Constitution.

Clause 3 : offences

52. We preface these submissions, by stating that;

    a) *Article 105(1)* established the Supreme Court (subject to the provisions of the Constitution and not subject to any Laws enacted by Parliament);

    b) *Article 105(2)* permits Parliament to *replace, abolish or amend power/duties / jurisdiction & procedure* of *any* court/tribunal/institution ordained & established by Parliament *except* Your Ladyship's Court. Thus, any definition of contempt, of procedure to deal with and punish such, can only be *subject to the Constitution* and thus would require a constitutional amendment;

    c) *Article 118* sets out merely the "general jurisdiction" of Your Ladyship's Court, again, only subject to the provisions of the Constitution. It clearly does not contemplate special *sui generis* jurisdictions and powers, to punish for contempt of itself, set out in *Article 105*. Thus and otherwise, no offences can

be set out in respect of contempt *vis-à-vis* Your Ladyship's Court, unless by way of constitutional amendment.

53. In addition to the above, in our respectful submission, *clause 3* of the Bill purports to create approximately 30 different offences of contempt of court, some of which have fallen into obsolescence in the common law, as morefully described below;

    i. Committing an act or omission with intent to bring the authority of a court, tribunal and institution and administration of justice into *disrespect* [*Clause 3(1)(a)*];

    ii. Committing an act or omission with intent to bring the authority of a court, tribunal and institution and administration of justice into *disregard* [*Clause 3(1)(a)*]*;*

    iii. Committing an act or omission *with intent to interfere* with the judicial process in relation to any ongoing litigation [*Clause 3(1)(b)*];

    iv. Committing an act or omission *with intent to cause prejudice* to the judicial process in relation to any ongoing litigation[*Clause 3(1)(b)*];

    v. Wilful disobedience to *any judgment, decree, direction, order, writ* or other process of a court, tribunal or institution [*Clause 3(2)(a)*];

    vi. Wilful breach of *an undertaking* given to a court, tribunal or institution [*Clause 3(2)(b)*]

    vii. Expressing, pronouncing or publishing any matter that is not substantially true which *scandalizes the judicial authority of a court, tribunal or institution* [*Clause 3(2)(c)*]*;*

    viii. Scandalizing a court, tribunal or institution, or a judge or judicial officer *with intent to interfere with the due administration of justice* [*Clause 3(2)(e)*];

    ix. Expressing, pronouncing or publishing any matter that is not substantially true which *scandalizes the dignity of a court, tribunal or institution* [*Clause 3(2)(c)*]*;*

    x. Expressing, pronouncing or publishing any matter that is not substantially true which *lowers the judicial authority of a court, tribunal or institution* [*Clause 3(2)(c)*]*;*

xi. Expressing, pronouncing or publishing any matter that is not substantially true which *lowers the dignity of a court, tribunal or institution* [*Clause 3(2)(c)*]*;*

xii. Expressing, pronouncing or publishing any matter that is not substantially true which *interferes with the due course of any judicial proceeding* [*Clause 3(2)(c)*]*;*

xiii. Expressing, pronouncing or publishing any matter that is not substantially true which *prejudices the due course of any judicial proceeding* [*Clause 3(2)(c)*];

xiv. Expressing, pronouncing or publishing any matter that is not substantially true which *interferes with the administration of justice* [*Clause 3(2)(c)*]

xv. Expressing, pronouncing or publishing any matter that is not substantially true which *obstructs the administration of justice;*

xvi. Scandalizing a court, tribunal or institution, or a judge or judicial officer *with intent to excite dissatisfaction in the minds of the public in regard to a court, tribunal or institution* [*Clause 3(2)(e)*];

xvii. Scandalizing a court, tribunal or institution, or a judge or judicial officer with *intent to cast public suspicion on the administration of justice* [*Clause 3(2)(e)*];

xviii. Doing any other act which *scandalizes the judicial authority of a court, tribunal or institution* [*Clause 3(2)(c)*]*;*

xix. Doing any other act which *scandalizes the dignity of a court, tribunal or institution* [*Clause 3(2)(c)*]*;*

xx. Doing any other act which *lowers the judicial authority of a court, tribunal or institution* [*Clause 3(2)(c)*]*;*

xxi. Doing any other act *which lowers the dignity of a court, tribunal or institution* [*Clause 3(2)(c)*]*;*

xxii. Doing any other act which *prejudices the due course of any judicial proceeding* [*Clause 3(2)(c)*]*;*

xxiii. Doing any other act which *interferes with the due course of any judicial proceeding* [*Clause 3(2)(c)*]*;*

xxiv. Doing any other act *which interferes with the administration of justice* [*Clause 3(2)(c)*]*;*

xxv. Doing any other act which *obstructs the administration of justice* [*Clause 3(2)(c)*]*;*

xxvi. Use of any electronic device or other instrument for audio or visual recording or both in a court, tribunal or institution without the leave of the court, tribunal or institution already obtained [*Clause 3(2)(d)*];

xxvii. Bringing into a court, tribunal or institution any such device or instrument for the purpose of audio or visual recording or both, without the leave of the court, tribunal or institution already obtained [*Clause 3(2)(d)*];

xxviii. Publication of an audio or a visual recording or both of a proceeding or part of a proceeding of a court, tribunal or institution made by means of any electronic device or other instrument, or any such recording derived directly or indirectly from such device or instrument without the leave of the court, tribunal or institution already obtained [*Clause 3(2)(d)*];

xxix. Transmission of an audio or a visual recording or both of a proceeding or part of a proceeding of a court, tribunal or institution made by means of any electronic device or other instrument, or any such recording derived directly or indirectly from such device or instrument without the leave of the court, tribunal or institution already obtained [*Clause 3(2)(d)*];

xxx. Use of any electronic device or other instrument, or publication or transmission of an audio or a visual recording or both of a proceeding of a court, tribunal or institution, in contravention of any leave granted under sub-paragraph (i) or subparagraph (ii) [*Clause 3(2)(d)*].

54. Your Ladyship and Lordships will appreciate that *clause 3* creates offences in relation to "courts" which are not defined, and "tribunals" and "institutions" both of which are defined at *clause 16* in an identical manner as follows;

> "institution" means, an institution created and established for the administration of justice and for the adjudication and settlement of industrial and other disputes;
>
> "tribunal" means, a tribunal created and established for the administration of justice and for the adjudication and settlement of industrial and other disputes"

55. In our respectful submission, it is not clear and/or explicit on the face of the Bill, how such tribunals and/or institutions are "created and established". In our

respectful submission, 'adjudication' of 'disputes' is the province of the judiciary under *Article 4(c)* of the Constitution, and such can only be by way of a *Judicial Officer* as defined in *Article 170* of the Constitution. In our respectful submission, "created and established" is vague, and fails to clearly set out how such tribunal/institution shall be so created and established.

56. In our respectful submission, quite apart from what is set out above, *clause 3* being one of the core provisions of the Bill;

    a) Is vague and overbroad;

    b) Creates strict liability offences, which are not clearly delineated in a manner that would permit a citizen to regulate their conduct;

    c) Is a disproportionate restriction on freedom of expression;

    d) Is not a restriction of Fundamental Rights, which are necessary in a democratic society.

Clause 3(2)(c)(i) Strict liability speech offences of scandalizing

> "The courts are not fragile flowers that will wither in the hot heat of controversy".
>
> *Per* Cory J.A.in *R. v Kopyto (1987) 47 D.L.R. (4th) 213* at 227

57. In our respectful submission, *clause 3(2)(c)(i)* contains four (4) different types of strict liability offences [i.e., of (i) scandalizing judicial authority (ii) lowering judicial authority, (iii) scandalizing dignity (iv) lowering dignity] in one of two ways [i.e., by expressing, pronouncing, or publishing or (ii) by doing any other act]. The said *clause* is recreated below for convenience of Your Lordships' Court.

    (2) Save as provided for in any other written law and subject to the provisions of the Constitution, any person who does any of the

> following acts commits contempt of a court, tribunal or institution, as the case may be: -
>
> (c) expressing, pronouncing or publishing any matter that is not substantially true which, or doing any other act which-
>
> (i) scandalizes or lowers the judicial authority or dignity of a court, tribunal or institution;

58. In our respectful submission, the multiple above offences, have several constitutional infirmities, such as;

    a) Ambiguity and overbreadth *vis-s-vis* 'institutions'

    b) The strict liability set out, without a proportionate limitation, as necessary in a democratic society;

    c) Ambiguity and lack of clarity of what amounts to "substantially true" when read with the purported application of defences under *clause 4* which are based on "true facts" [*vide clause 4(1)*] or "true and accurate facts" [*vide clause 4(2)*];

    d) The introduction of an offence of "scandalising" in the face of the common law move *away* from such, coupled with the lack of clarity regarding what amounts to "scandalising";

    e) The ambiguity as to the distinction between "scandalising" and lowering either "judicial authority" or "dignity"

Institutions

59. We submit that there is a definitional ambiguity regarding the inclusion of the term "institutions" and makes this provision unconstitutionally overbroad in violation of ***Article 12(1)*** of the Constitution.

Strict liability

60. Further, we submit that *clause 3(2)(c)* does not purport to set out any *intent* that is required for the commission of the several offences set out therein. We submit that;

    a) Such is disproportionate and an excessive restriction on *freedom of expression* contrary to ***Article 14(1)(a)*** of the Constitution;

    b) Such would have a **chilling effect** of free speech and is not a restriction that is necessary in a democratic society.

61. It is further, unclear, whether attempting to impose another vague "substantially true" qualification here, implies that there is a *mens rea* element to the offence. A situation further exacerbated by *clause 4* which introduces different degrees of "true" and "true and accurate" facts as defences in certain limited instances.

62. In our submission, a plain reading of the Bill indicates that it is intended to be a strict liability offence, however *in the event Your Ladyships' Court were to think otherwise,* we have addressed the *mens rea* element below at paragraph **72**.

Substantially true

63. Your Lordships will also appreciate, that it purports to set a vague standard of "substantially true". In our respectful submission, in a democracy, public debate would necessarily entail therein *some* aspect of falsity in speech/discussion/debate. We refer Your Lordships' to a passage by *Kozinski CJ* in the case of ***United States v Alverez 638 F.3d 666, 674-75 (9th Cir. 2011)*** to buttress our submissions;

> "Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost $10 at poker"); to prevent grief ("The doc says you're getting better"); to maintain domestic tranquility ("She's just a friend"); to avoid social stigma ("I just haven't met the right

> woman"); for career advancement ("I'm sooo lucky to have a smart boss like you"); to avoid being lonely ("I love opera"); to eliminate a rival ("He has a boyfriend"); to achieve an objective ("But I love you so much"); to defeat an objective ("I'm allergic to latex"); to make an exit ("It's not you, it's me"); to delay the inevitable ("The check is in the mail"); to communicate displeasure ("There's nothing wrong"); to get someone off your back ("I'll call you about lunch"); to escape a nudnik ("My mother's on the other line"); to namedrop ("We go way back"); to set up a surprise party ("I need help moving the piano"); to buy time ("I'm on my way"); to keep up appearances ("We're not talking divorce"); to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop")."

64. Your Ladyship's Court will appreciate that, we are not advocating a position that *knowingly/maliciously* engaging in false speech is deserving of the same constitutional protection as speech that can be categorised as otherwise 'political speech' and/or dissent. However, we submit that *some* falsity as well as error is *unavoidable* in public debate and discussion. Thus and otherwise, in a functional representative democracy, imposing ***criminal sanctions*** on false speech is a disproportionate response, and a disproportionate punishment. One that is not supported by a compelling interest, that is necessary in a democratic society.

65. Your Ladyship's Court will appreciate that *Article 12(1)* in providing for equal protection of the Law, contains within it the idea of the *Rule of Law* and the idea that powers of officials must be exercised under the *Public Trust Doctrine*. Thus and

otherwise, basic concepts such as answerability (and indeed criticism) applies even to judicial officers. We respectfully submit that what is importing a vague standard of "substantially true" may have a chilling effect on a citizen who would be unable to criticise an errant judge, *and thereby uphold the dignity of court* without going on a voyage of discovery to ascertain that what he believes to be true, and in the public interest in in fact, "substantially true". Your Ladyship and Lordships will appreciate that;

a) The public may have a corresponding overriding public interest **right to know** about matters relating to an errant judge;

b) Thus, exposure, and the protection of freedom of expression is preferred. Your Lordships' will appreciate, that even in the context of emergency powers, Your Lordships' have taken the view that freedom of expression is to be protected, holding that "exposure may be the most effective and expeditious means of remedying a situation enormously prejudicial to national security" (*vide* **Withanage v Amunugama [2001] 1 SLR 391 at 405-406**) Thus and otherwise, this provision is violative of *Article 12(1)* as read with *Article 14(1)(a)* and thus *Article 3 & 4* of the Constitution;

c) Your Lordships' will recall that in **Karunanayake Joseph Benildus Silva v Chief Inspector P.G. Wimalasiri (unreported) SCFR 63/2009 S.C.M. 22nd September 2015** individuals were arrested for pasting posters calling on the government to stop attacks on media personnel. This was done in the backdrop of attacks on media institutions and the assassination of an editor of a leading newspaper. The police took objection to these posters being pasted over already pasted posters hailing the Sri Lankan military for its victory in the thirty year civil war, and arrested the petitioners in the matter as it was perceived that the posters were 'anti-government'. Petitioners were erroneously charged with criminal defamation (which was repealed more than half a decade back) as well as sedition. Your Ladyship's Court specifically held

that criticism of the government was permissible, so long as there was no incitement to violence;

d) Similarly, in **Sisira Kumara Wahalathanthri & Dannister Gunasekara v Jayantha Wickramaratne Inspector General of Police (unreported) SCFR 768/2009 S.C.M. 5-11-2015** when the opposition party's office was burnt to the ground and the police did not undertake due investigation, the members of the party put up a banner over its burnt office against the government of the day claiming that the ruling dispensation had behaved undemocratically. Several individuals were arrested because the banners were allegedly critical of the government and promoted ill will and hostility among the people. Yet again, the court stressed upon the importance of any government being open to uninhibited public criticism and emphasised that attempts to curtail this would be an undesirable fettering of freedom of expression. In the banner, the government was targeted through the President by being labelled as """immensely dirty (corrupt) Rajapakse (referring to the President) government" "මහ ජරා රාජපක්ෂ ආණ්ඩුවක්". Your Lordships again held that *section 120* of the *Penal Code* does not negate the free speech guarantees in the Constitution and causing mere annoyance or embarrassment to the Head of the State would not trigger a conviction under the section. Like in the previous case, Your Ladyship's Court recognised that being critical of the government is essential in any democratic country.

66. Thus and otherwise, in the absence of some *incitement* to *wilfully disobey the function/orders of courts,* the qualification of a vague standard of "substantially true" does not sufficiently preserve the freedom of expression, as required by *Article 14(1)(a)* as read with *Article 15, 1, 3 & 4*.

Doing any other act

67. Your Lordships will appreciate that, "any other act" can also come within the ambit of this strict liability offence. In our respectful submission, this is constitutionally overbroad, and contrary to ***Article 12(1).***

Scandalizing

68. Your Ladyships' Court will appreciate what is hereinbefore morefully enumerated at paragraphs **32-39** of these written submissions, regarding how the offence of scandalising is now **obsolete** and worse, **counter productive**.

69. In our respectful submission, attempting to introduce such a counter-productive offence into our Statue Law, is contrary to ***Article 3*** as read with ***Article 1*** of the Constitution and the *preambular* promises of *inter alia,* a representative democracy, justice and independence of the judiciary, as such is clearly *not* in the interest of the People, and *not* necessary in a functioning democracy.

70. In any event, we submit that there are several infirmities with attempting to codify an offence such as this, *inter alia;*

    a) No clear definition of the speech and conduct that the offence covers;

    b) No certainty as to the mental element

    c) Penal consequences without any requirement of malice or intent to incite some wilful disobedience of the proceedings of Court etc. Your Ladyship and Lordships will appreciate that in ***Hewamanna v De Silva (supra.)*** did not impose any punishment having regard to the absence of malice;

    d) Extremely wide standing;

    e) Incompatible with Your Ladyship's Court's jurisprudence on freedom of expression. The existence of a criminal law will deter people from speaking out and has a chilling effect;

f) Incompatible with the principles of *Natural Justice,* and public confidence will not be restored/strengthened, by the Judges themselves determining impropriety;

g) On the rare occasion criticism deserves a response, Judges themselves have observed that there are better means of answering, that criminal sanctions.

No clear definition

71. Your Lordships will appreciate that the Bill contained no definition of what expression/pronouncement/publication would amount to scandalising the judicial authority of a court/tribunal/institution. Nor does it contain any definition of what "any other act" would amount to the same. We submit the following for consideration by Your Ladyship's Court;

a) Your Ladyship's Court may recall that in Sri Lanka various actions/statements have in the past been considered to scandalise the judiciary;

i. In ***Anthony Fernando v. Sri Lanka, Communication No. 1189/2003, U.N. Doc. CCPR/C/83/D/1189/2003 (2005)***[12] the United Nations Human Rights Committee found that the author of the Communication had been found by the domestic court to be in contempt of court because "*he raised his voice and insisted on his right to pursue the application.*", leading to his arbitrary detention and subsequent torture;

ii. ***In the matter of Armand de Souza (supra)*** an article which gave rise to innuendos that a Police Magistrate did not exercise his own judgment, but allowed himself to be improperly influenced by the Police. Was considered to amount to contempt. However, Your

[12] Available [online] at http://hrlibrary.umn.edu/undocs/1189-2003.html accessed on 08-08-2023

Ladyship and Lordships will recall that on more than one occasion, Your Ladyship's Court has commented disapprovingly of **mechanical orders** issued by Learned Magistrates [*vide* ***Danny v. Sirinimal Silva, Inspector Of Police, Police Station, Chilaw and Others [2001] 1 SLR 29, 31***];

iii. In ***Amarasekera v Gunawardena (1914) 1 Bal.N.C. 52,53*** it was found that when an individual spoke in a loud voice, in an offensive or contemptuous tone in Court, that he would not comply with an order/decree, *even though he was entitled to appeal it,* the Court found this to be contemptuous. Your Ladyship's Court will appreciate how vague factors such as loud/contemptuous tone may be;

iv. ***In re Vanny Aiyar (1915) 18 NLR 180, 180-181*** there was an issue of the manner in which an individual was dressed in Court, which amounted to contempt proceedings, as the person had entered a Court, wearing a shawl covering his shoulders, without removing the same on entry. There the Court found that *ipso facto* the individual did not commit contempt as he had dressed in a "manner aggregable to British ideas and conception of respectful attire". However, Your Ladyship's Court will appreciate the vague nature of the acts that amount to such contempt.

b) However, it is now accepted that the *principle of legal certainty* requires that any offence be drafted with sufficient precision to permit a citizen to regulate their conduct. Thus and otherwise, we submit that a cardinal principle would be that, no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it. Your Ladyship's Court in the context of Bill has time and time again commented on the requirement of clarity in for example the ***Prevention of Terrorism (Temporary Provisions) Amendment Bill SC(SD) 13-18/2022***

and even going so far as saying that things should be *explicitly* set out [*vide* ***Pradeshiya Sabha Amendment Bill 2/1995* [Decisions of the Supreme Court on Parliamentary Bill Vol. II at page 72**];

c) We submit that it is inconceivable to *presume* that the general public is so lacking in critical faculties that they will simply accept verbatim, any 'scandalous' story that casts the court/judge in an unfavourable light, thus immediately causing a loss in public confidence. We reject the notion of such a gullible public, that this Bill would presume.

No certainty as to the mental element

72. In our respectful submission, a plain reading of *clause 3(2)(c)* indicates that this is a *strict liability* offence, which we submit is a disproportionate restriction on the Fundamental Rights of the People, and not one that is necessary in a democratic society. However, we submit, that the inclusion of "substantially true" coupled with the defences based on the different standards of facts which are "true" or "true and accurate" is ambiguous. In any event, Your Ladyship's Court will appreciate, that even the English Common Law has observed that the issue of *mens rea* is a "minefield" *vis-à-vis* contempt [*per* Donaldson MR in ***Attorney General v Newspaper Publishing PLC [1988] Ch 333, 373*** [13]]. Thus in ***Perera v The King [1951] AC 482, 488*** *per* Lord Radcliffe, the Privy Council found that appellant had not scandalised the Ceylonese judiciary because his criticisms were honest' and made 'in good faith', thus indicating that there was a mental element to contempt.

[13] Court said at page 373-374 "Mens rea in the law of contempt is something of a minefield. The reason is that it is wholly the creature of the common law and has developed on a case by case basis, as no doubt it will continue to do"

Extremely wide standing

73. Your Ladyship's Court will appreciate that *clause 8(1)(c)* *clause 9(1)(c)* of the Bill indicate that "any" person can bring a motion for contempt of court. In our respectful submission, this wide standing adds to the oppressiveness of the already vaguely defined offence.

Incompatible with freedom of expression

74. In our respectful submission, Your Ladyship's Court has given a wide interpretation to the freedoms enshrined in ***Article 14(1)(a)*** of the Constitution [*vide* ***Joseph Perera v Attorney General [1999] 1 SLR 199*** and ***Channa Pieris v Attorney General [1994] 1 SLR 1.*** In considering such freedoms the introduction of this offences, is contrary to such jurisprudence. We submit the following for consideration by Your Ladyship's Court;

    a) In a hypothetical situation, where it is *in the public interest,* to properly criticise a judge/court and/or actions in/outside court, this offence effectively precludes the same;

    b) In our respectful submission, such restriction has a **chilling effect** on the freedom of expression;

    c) Further, such is not compatible with the maintenance of the constitutionally prescribed system of representative government;

    d) In our respectful submission, this above position is strengthened by Your Ladyship's Court's recent determination in the ***Anti-Corruption Bill Determination SD 16/2023-21/2023*** where Your Ladyship's Court determined that freedom from corruption, is a part of *Sovereignty;*

Contrary to the principals of Natural Justice

75. Your Ladyship's Court will appreciate that the Bill does not **ensure** that the principles of *Natural Justice* would be followed. We submit the following for consideration of Your Ladyship's Court;

   a) **Contempt of Court in the face of the Supreme Court/Court of Appeal:** *clause 7(1)* read with *clause 7(3)* & *clause 7(4)* indicate that the principles of *Natural Justice* may be followed *if,*

      i. the individual accused of contempt in the face of Your Ladyship's Court or the Court of Appeal *asks* for such, *and*

      ii. the Court is of the opinion it is *practicable* to do so *and*

      iii. In the *interests of proper administration of justice* such request should be allowed,

   b) Even then, we submit that such preconditions, only require the matter to be placed before his Lordship the Chief Justice for *such directions* as he/she *may think fit;*

   c) Your Ladyship's Court in numerous instances have held that non-compliance with the rules of *Natural Justice* violates ***Article 12(1)*** of the Constitution *vide* ***Jayawardena v Dharani Wijayatilake [2001] 1 SLR 132***; ***Prasanna Withanage v Sarath Amunuugama [2001] 1 SLR 391*** *per* Mark Fernando J.

Alternatives to criminal sanctions

76. In this regard, we refer Your Ladyship and Lordships to the article of *Lord David Pannick (supra)* marked **X5** at page 10, where the following is set out, and has been favourably cited even in the *Privy Council* in the ***Dhooharika v Director of Public Prosecutions (Commonwealth Lawyers' Association intervening)*** *(supra);*

> where criticism deserves a response, there are other means of answering it than by a criminal prosecution. Often, the criticism of a judge will not deserve any response. A wise judge follows the advice of Lord Justice Simon Brown (now Lord Brown of Eaton-under-Heywood) in a case in 1999: "a wry smile is, I think, our usual response and the more extravagant the allegations, the more ludicrous they sound".[14] During the Committee Stage debate on the Crime and Courts Bill, the amendment was supported by Lord Carswell, a former Lord Chief Justice of Northern Ireland. He said that if judges were unjustly criticised (as he had been), "they have to shrug their shoulders and get on with it[15]"

Counter-productive:

77. Your Ladyship and Lordships will appreciate that we have adverted to how counter-productive such an offence is, at paragraphs 28 and 35 above. Your Ladyship's Court will additionally take note of the following;

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[14] Attorney-General v Scriven CO 1632/99 (Divisional Court) as quoted in Arlidge, Eady & Smith on Contempt, (2011), fn to para.5-207.

[15] Hansard, HL col.561 (July 2, 2012). See also Lord Morris for the Judicial Committee of the Privy Council in McLeod v St Aubyn [1899] A.C. 549 at 561: judges are "satisfied to leave to public opinion attacks or comments derogatory or scandalous to them".

a) The *Australian Law Reform Commission, Contempt (Report No 35, 1987),* at 264 has observed that prosecuting this offence risks having an utterly 'counter-productive effect' on popular respect for the courts'[16];

b) In India, Booker Prize-winning novelist Arundhati Roy wrote in an affidavit submitted to the Supreme Court of India that the Court displayed a 'disquieting inclination' to 'harass ... those who disagree with it", she was held in contempt of court. This prompted *Justice Hosbet Suresh* in 'Contentious Contempt', The Times of India (Mumbai), 16 August 2002, 14., a retired Judge, to publicly disapprove of such a move. Your Ladyship and Lordships will appreciate that essentially highlights the irony in that, the Indian Supreme Court, in purporting to protect public confidence in the judiciary and/or to possibly to prevent the public from believing her criticisms, responded by imprisoning her for her criticism. Such counter-productive effect is evident in *Justice Hosbet Suresh's* views.

Clause 3(2)(c)(ii) : prejudicing/interfering with the due course of judicial proceedings

78. In our respectful submission, *clause 3(2)(c)(ii)* appears to create two (2) offences of (i) prejudicing the due course of judicial proceedings and (ii) interfering with the same (i.e., the due course of judicial proceedings). Such offence too, appears to be a **strict liability** offence which can be committed in one of two (2) ways, names (i) by expressing, pronouncing, or publishing any matter that is not substantially true, or (ii) by any other act. Such clause reads as follows;

> (2) Save as provided for in any other written law and subject to the provisions of the Constitution, any person who does any of the following acts commits contempt of a court, tribunal or institution, as the case may be: -

---

[16] Available [online] at http://www8.austlii.edu.au/cgibin/viewdoc/au/other/lawreform/ALRC/1987/35.html accessed on 08th August 2023

(c) expressing, pronouncing or publishing any matter that is not substantially true which, or doing any other act which-

(...)

(ii) prejudices, or interferes with, the due course of any judicial proceeding;

79. We re-iterate our submissions above made in relation to *clause 3(2)(c)(i)* with regard to the above clause as well.

80. Further, we submit that, there is ambiguity in the offence, inasmuch as, *inter alia,*

a) The difference between the two offences of *prejudicing* and *interfering* is not explained, nor defined in the Bill;

b) The phrase *due course of any judicial proceeding* is also not defined.

81. This is especially so, as such must be read to be *different* from the offences set out in *clause 3(2)(c)(iii)* which speaks of;

a) *Interfering* with the *administration of justice* as opposed to *interfering* with the *due course of any judicial proceeding* in this clause;

b) *Obstructing* the *administration of justice*

Clause 3(2)(c)(iii) : interfering / obstructing with administration of justice

82. Your Lordships' will appreciate that *clause 3(2)(c)(iii)* also creates two (2) distinct offences as set out in the above paragraph **78**. For convenience of Your Ladyship's Court, the said clause reads as follows;

(2) Save as provided for in any other written law and subject to the provisions of the Constitution, any person who does any of the following acts commits contempt of a court, tribunal or institution, as the case may be: -

(c) expressing, pronouncing or publishing any matter that is not substantially true which, or doing any other act which-

(…)

(iii) interferes with, or obstructs the administration of justice;

83. In our respectful submission, the distinct phrases (*prejudices/ interferes/ obstructs* on the one hand, and *due course of any judicial proceeding/ administration of justice* on the other) used in *clause 3(2)(c)(ii)* as opposed to *(iii)* indicate that there are four (4) *distinct* strict liability offences between the two clauses, which can be done by either a speech act or any other act, and such must be clearly set out. Thus, it must be possible for a citizen to regulate his conduct so that he does not fall foul of the Law. The failure to adequately set out the same with clarity renders the provision unconstitutional.

Clause 3(2)(e) : scandalising with intent

84. In our respectful submission, again, the offence of scandalising the judiciary has been introduced by *clause 3(2)(e)* and appears to create three (3) offences. The relevant provisions is recreated below for convenience of Your Ladyship's Court;

> (2) Save as provided for in any other written law and subject to the provisions of the Constitution, any person who does any of the following acts commits contempt of a court, tribunal or institution, as the case may be: -
>
> (e) scandalizing a court, tribunal or institution, or a judge or judicial officer with intent to-
>
> (i) interfere with the due administration of justice;
>
> (ii) excite dissatisfaction in the minds of the public in regard to a court, tribunal or institution; or
>
> (iii) cast public suspicion on the administration of justice.

85. We respectfully re-iterate our submissions, regarding the offence of scandalising the judiciary which we have made before, and specifically re-iterate that being **counter-productive**, it is against *Article 1 & 3* of the Constitution, as read with the *preambular* promises therein, to try to introduce the same into our statute books.

Due administration of justice vis-à-vis Administration of justice

86. In addition, we submit that *clause 3(2)(e)(i)* uses a distinct phrase *due administration of justice* in contrast with *(iii)* which uses the phrase *administration of justice,* without any clarity and/or guidelines as to the difference imputed by such words. In our respectful submission, **every word in a statue must be given meaning**. Parliament cannot be presumed to waste its words or say anything in vain [*vide Govindrama v Jhimi Bai 1988 JLI 235*], and the presumption is always against superfluity in a statute. Thus, in ***Re King, deceased [1963] Ch 459*** the phrase "shall be annexed and incident to and shall go with the reversionary estate in the land" in the *Law of Property Act (1925),* was interpreted by *Diplock LJ* so that the expression "go with" was taking as adding something more to the expression "annexed and incident to" [at page 497]. Thus and otherwise, the addition of the word "due" before *administration of justice,* in *clause 3(2)(e)(i)* cannot be read as to render the word otiose.

87. In any event, Your Ladyship and Lordships will appreciate that *verbis legis non est recedendum,* i.e., the words in a statue are used precisely and not loosely, thus one must not vary the express words of a statue. Thus and otherwise, we respectfully submit, that as this Bill seeks to create a plethora of offences, which appear on the face of them to be distinct to each other, it is a cardinal rule, that such must be set out with sufficient precision, so that a citizen can regulate their conduct.

Excite dissatisfaction vis-à-vis cast public suspicion

88. Your Ladyship and Lordships will appreciate the justifications already set out regarding the freedom of expression and the offence of scandalising the judiciary.

89. In our respectful submission, this offence appears to prohibit even truthful comments, in the public interest, which may criticise an errant judge, a function which we submit would in fact uphold the dignity of courts. Your Ladyship's Court, has already held in ***Perera v Monetary Board of Sri Lanka [1994] 1 SLR 152, 166***, that there must be transparency and a thorough examination of matters. Whilst

A.R.B. Amerasinghe J., took such a position in the context of criteria/schemes of recruitment, in considering the above move of the common law jurisprudence *vis-à-vis* the accountability of judges, and openness to criticism, especially coupled with the unique features of *Sovereignty* and *Fundamental Rights* in our Constitution, there is no reason why such cannot extend to the judiciary as well, to prevent errant judicial officers from damaging the dignity of courts as a whole.

90. In our respectful submission, in a hypothetical situation where a judge were to abuse their power/privilege for personal gain, this provision effectively prohibits a public outcry regarding the same. In our respectful submission, the *defences against contempt* set out in *clause 4* would be of no avail, because;

    a) *Clause 4(1)* is limited to "true facts" made in "good faith" of either a;

        i. Proceeding;

        ii. Judgment or

        iii. Order (of a court tribunal or institution)

    Which in our respectful submission, would not cover a situation of abuse of power (or even a solicitation of a bribe);

    b) *Clause 4(2)(a)* is limited to pending litigation. It provides that "true *and* accurate facts" regarding any;

        i. Case;

        ii. Proceedings (before a court/tribunal/institution)

    c) Similarly *clause 4(2)(b)* is limited to concluded litigation, and is limited to fair comments on merits of any;

        i. Action ; or

        ii. Application, which has been heard and decided.

91. We again advert the attention of Your Ladyship's Court to the article of *Lord David Pannick (supra)* which states (at page 8-9) that (foot notes in the article are recreated);

> The true position is surely as stated by Houlden J.A. in the Ontario Court of Appeal:
>
> > "If the way in which judges and courts conduct their business commands respect, then they will receive respect, regardless of any abusive criticism that may be directed towards them". [17]
>
> If confidence in the judiciary is so low that statements by critics would resonate with the public, such confidence is not going to be restored by a criminal prosecution in which judges find the comments to be scandalous or in which the defendant apologises. (...)
>
> The second point is that the existence of a criminal offence of scandalising the judiciary will inevitably deter people from speaking out on perceived judicial errors. Judges, like other public servants, must be open to criticism because in this context, as in others, freedom of expression helps to expose error and injustice and it promotes debate on issues of public importance. The damage done by the maintenance of this offence substantially outweighs any possible good that it achieves.[18] Indeed, there is a particular reason of principle why judges should not impose restrictions on free speech that relates to the performance of their own functions. Justice Albie Sachs pointed out in the South African Constitutional Court that "as the ultimate guardian of free speech, the judiciary [should] show the greatest tolerance to criticism of its own functioning". [19]
>
> (...)
>
> "Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public to the need for reform, and to suggest the manner in which that reform may be achieved".[20]"

92. Thus and otherwise, we submit that such *clause 3(2)(e)* is not one that is necessary in a democratic society, and is violative of *Article 12(1) & 14(1)(a)* as read with *Article*

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[17] R. v Kopyto (1987) 47 DLR (4th) 213 at 255 per Houlden J.A

[18] See C. Walker "Scandalising in the Eighties" (1985) 101 L.Q.R. 359, 381-384.

[19] The State v Mamabolo (2001) 3 S.A. 409 (CC) (Sachs J., concurring judgment) at [78].

[20] R. v Kopyto (1987) 47 D.L.R. (4th) 213 at 226 per Cory J.A.

1, 3 & the *preambular* promises of our Constitution. Seeing as such is an offence, with penal consequences, we submit that it is also violative of *Article 13* of the Constitution.

93. Your Ladyship's Court will appreciate, that in certain instances, criticisms may be well founded, but set out in harsh terms. We respectfully advert Your Ladyship's attention to a lecture delivered by *Lord David Pannick* titled, *Scandalising the Judiciary: Criticism of Judges and the Law of Contempt* which recounts a useful anecdote [at pages 157-158] (foot notes are re-created) to supplement our submissions;

> "In 1900, Mr Justice Darling was the presiding judge at the Birmingham Spring Assizes. Mr Howard Gray, the editor of the local newspaper, the Birmingham Daily Argus, wrote a less than flattering article which the official Law Reports say, somewhat sanctimoniously, it was "unnecessary" to set out in detail.[21] Fortunately, another set of law reports, the Law Times, did inform its readers of the contents of the offending article, so preserving them for analysis by future generations of lawyers. In the article, Mr Gray described the judge as an "impudent little man in horsehair, a microcosm of conceit and empty-headedness". Mr Gray added that "no newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt". He suggested that the judge, assessed on his merits, would have been "a successful bus conductor".[22] Mr Gray's invective, harsh though it sounds, was in fact kinder than the view of legal historians about Mr Justice Darling's contribution to jurisprudence.[23] But Mr Gray was charged with contempt of court. He swore a grovelling affidavit of apology, no doubt on legal advice. The Lord Chief Justice, Lord Russell, described the article as "scurrilous abuse of a judge in his character of a judge". Finding contempt of court to be proved, the Lord Chief Justice said that but for the apology, the editor would have been sent to prison "for a

[21] R v Gray [1900] 2 QB 36, 37.

[22] R v Gray 82 LT Reports 534 (1900)

[23] See, for example, Dictionary of National Biography 1931–40, LG Wickham Legg (ed), 1949, page 211: "in charges of less gravity he often allowed himself to behave with a levity quite unsuited to the trial of a criminal case. … [He] frequently lost the respect of the jury to such an extent that they ignored or paid little attention" to him

> not inconsiderable period of time". Instead Mr Gray was fined £100 and ordered to pay the costs.[24]"

Annexed herewith marked ***X8*** *is a copy of the lecture 'Scandalising the Judiciary: Criticism of Judges and the Law of Contempt'.*

94. Your Ladyship and Lordships will appreciate the third foot note in his lecture (foot note number **24** above) which records the conduct of the particular judge *Mr. Justice Darling,* in a less than flattering manner;

> Dictionary of National Biography 1931–40, LG Wickham Legg (ed), 1949, page 211: "in charges of less gravity he often allowed himself to behave with a levity quite unsuited to the trial of a criminal case. … [He] frequently lost the respect of the jury to such an extent that they ignored or paid little attention" to him

95. Your Ladyship's will appreciate that in a modern representative democracy, especially one such as ours, which has given prominence to the freedom of expression, criticism of such instances would be in the public interest, and would rectify instances of injustice, and further the confidence in the judiciary.

Clause 4 : defences

96. In our respectful submission, *clause 4(1)* as set out above, is limited to publications pertaining to "a proceeding, judgment or order", whereas *clause 4(2)* deals with pending litigate [*clause 4(2)(a)*] and concluded litigation [*clause 4(2)(b)*]. It would not cover a fair criticism /general criticism of a judge/court, outside such limited matters. Thus, a judge abusing their authority for personal gain is not something that can be commented upon, as the various offences created by *clause 3* would have a chilling effect on any citizen wishing to engage in public discussion (or indeed private discussion; as *any* person can bring a motion of contempt) regarding the same. The relevant *clause 4* is recreated below for convenience of Your Ladyship's Court;

[24] [1900] 2 QB 36, 39–42.

> 4. (1) Any publication or expression of true facts made in good faith of a proceeding, judgment or order of a court, tribunal or institution on a matter of public interest shall not be deemed to be contempt of such court, tribunal or institution, where the risk of causing any impediment or prejudice to such proceeding, judgement or order is merely incidental.
>
> (2) Any publication or expression-
>
> (a) of true and accurate facts of any case or proceedings before a court, tribunal or institution made without malice or intention to impair the administration of justice; or
>
> (b) of fair comments on merits of any action or application which has been heard and decided, shall not be deemed to be contempt of a court, tribunal or institution where every attempt has been made to avoid any contempt and such publication or expression has been done bona fide.

97. Your Ladyship's Court, will appreciate the submissions already made with regard to the varying degrees of "truth" that are found in the Bill;

    a) "substantially true" ; *clause 3(2)(c)*

    b) "true facts" ; *clause 4(1)*

    c) "true and accurate facts" ; *clause 4(2)(a)*

98. Your Ladyship will also appreciate the submissions, already made, that *prima facie,* the offences introduced by *clause 3(2)(c)* appear to be strict liability offences, and these defences would not apply in any event.

99. The general tenor of *clause 4* does not appear to consider any overriding public interest in such criticisms, and/or accountability, and instead only permit criticisms where the risk of causing "any impediment or prejudice to such proceeding, judgment or order is **merely incidental**" [*vide clause 4(1)*]. In our respectful

submission, such is contrary to *Article 14(1)(a) and 12(1)* and what would be legitimate and proportionate restriction, necessary in a democratic society.

Clause 7 : Procedure where contempt is in the face of the Supreme Court or Court of Appeal

100. In our respectful submission, *clause 7(1)* provides that where it is **alleged** *or* **appears** to either Court, that contempt has been committed in its presence or hearing, the Court *may* cause such person to be detained in custody, expeditiously issue a rule on the alleged contemnor, and fix a date for hearing of the charge. Your Ladyship and Lordships will observe that;

    a) No parameters whatsoever with respect to the power of the Supreme Court or Court of Appeal to detain a person in terms of *Clause 7(1)(a)* have been set out, thus, is violative of *Articles 12(1), 13(1) & 13(2)* of the Constitution;

    b) The rule is issued by the same judge/judges in whose presence or hearing the contempt is alleged, and as contemptuous acts even in the presence or hearing of the court can take many forms, including direct unfounded and baseless allegations of a judge made before that same judge, as was evident in ***Justice Vijith Malalgoda v Nagananda Kodituwakku SC/Rule/01/2016 S.C.M. 18-03-2019***. If such judge/judges were to then issue a rule such would violate the principles of natural justice, particularly the *nemo judex in causa sua*. We submit that while it is open to the Court to utilise whatever procedure is appropriate in the circumstances, the Bill should not compel Your Ladyship's Court or the Court of Appeal to follow a procedure which on the face of it would violate natural justice. Therefore, it must not be permitted for the same judge/judges in whose presence or hearing the contempt is alleged to have been committed to issue such rules. This is especially so as it is not impossible to refer to the

matter to the Hon. Chief Justice or the President Court of Appeal for appropriate action;

c) Prior to the issuance of a rule the alleged contemnor is not afforded any opportunity for a hearing, which is also violative of *Article 12(1)* and *13(3)* of the Constitution.

101. *Clause 7(2)* awards the alleged contemnor the opportunity to make his defence, though silent on the right to legal representation, whilst *clause 7(3)* empowers either Court to hear the alleged contemnor, and take evidence thereon. However, *Clause 7(3)* does not provide for the alleged contemnor to tender an affidavit, while in *Clause 8(5)* [where contempt is not in the face of the Court] the opportunity to tender an affidavit is specifically provided for.

102. *Clause 7(4)* appears to provide for the rules of *Natural Justice* to be follows, but only subject to a series of conditions. Your Ladyship's Court will appreciate that;

a) *Clause 7(4)(a)* allows the alleged contemnor to make an application to have the charge against them, heard by a *different* judge, than the one in whose presence, contempt is alleged to have taken place. However, Your Ladyship's Court will appreciate that;

i. As he/she may be detained in custody at the point it is "alleged, or appears" to either Court that contempt has been committed [*vide clause 7(1)*], such individual may not have access to legal representation, and such option of making an application cannot be effectively resorted to;

ii. It is the *same* judge, in whose presence contempt is alleged to has been committed [hereinafter *same* judge] who entertains such application for a hearing before a *different* judge than the judge in

whose presence/hearing, contempt is alleged to have been committed [hereafter *different* judge]

b) *Clause 7(4)(b)* then requires the *same* judge to consider whether it is both (i) "practicable" and (ii) "in the interest of proper administration of justice" that such application to be heard before a *different* judge should be allowed;

c) Even then, the *proviso* the *clause 7(4)* indicates that such evaluation would not result in the charge being heard before a *different* judge. It merely then provides that the *same* judge would place the matter before the *Chief Justice,* who then *may* issue such directions as he "think fit to issue" regarding the trial.

103. Your Ladyship's Court will appreciate that, therefore, *clause 7* dictates, that the contempt must happen in the presence or hearing of either Your Ladyship's Court, or the Court of Appeal. *Clause 7* then appears to try to deal with such alleged contempt *immediately.* The alleged contemnor does not appear to have time to prepare a defence or seek legal counsel. The Court is forced to act as the *victim, witness, accuser, prosecutor & judge.* The Bill does nothing to alleviate such situation the Court is placed in. This has serious implications for a fair trial. Since ***Article 13(3)*** gives the accused a right to "a fair trial by a competent court" we submit that;

a) "**fair trial**" would include everything and anything necessary for a fair trial *per* Mark Fernando J., in. ***Wijepala v Attorney General [2001] 1 SLR 46, 49*** and would include legal representation which Your Ladyship's Court has held is the norm in ***Premaratne v Gunaratne (1965) 71 NLR 113, 115***. This position continues even to this day under the 1978 Constitution [*vide* ***B. Sirisena Cooray v. Tissa Dias Bandaranayake and Two Others [1999] 1 SLR 1,27***]. We submit, that adequate time to prepare a defence, too, would be included in a fair trial;

b) "**competent court**" in *Article 13(3)* we submit must be read to include the idea of an *impartial* court. Thus, we submit that the principles of *Natural Justice* and in particular *nemo judex in causa sua* must be followed. In our respectful submission, a criminal trial must conform to the principles of *Natural Justice* and the failure to do so renders such provision unconstitutional. We submit that this notion of impartiality is a salutary one, and any trial contrary to such principles would thus be unconstitutional.

104. Your Ladyship and Lordships will appreciate the **subjective nature of evaluation that would necessarily take place** based on *clause 7*. Your Lordships will appreciate that coupled with the vagueness inherent in the core provisions of the Bill *vis-à-vis* the offences [*clause 3*], this leaves unnecessary room for a blurring of a line between assuaging injured feelings of a judge and in fact, upholding the dignity of the Court.

105. These provisions in *clause 7* must be read in contradistinction with *clause 10* which deals with the *procedure for the exercise of the jurisdiction conferred on the Courts of First Instance to try for contempt of court.* Your Ladyship and Lordships will appreciate that *clause 7(2)* imposes an obligation on the Judge of the Court of First Instance to "inquire from the accused whether he wishes to be tried by a judge other than the Judge in whose presence or hearing the contempt of court is alleged to have been committed". We submit that such an obligation is more in line with keeping with the rules of *Natural Justice.*

106. In considering the nature of *clause 7* we respectfully submit that it is contrary to the **fair trial rights** set out in ***Article 13(3)*** of the Constitution, as well as the **presumption of innocence** in ***Article 13(5)***.

Arrest & Detention

107. When the Supreme Court and the Court of Appeal to detain a person who is alleged to have committed contempt in the face of the court in terms of *Clause 7(1)* such person is for all intents and purposes subjected to 'arrest'. The Constitution by *Article 13(1) & 13(2)* provides for the freedom from arbitrary arrest and detention. Although 'contempt of court' is recognised by *Article 15(2)* as a valid restriction (by law) for *Article 14(1)(a),* Your Ladyship and Lordships will observe that contempt of court is not a head under which *Article 13(1) & 13(2)* could be restricted under *Article 15(7)* of the Constitution. Your Ladyship and Lordships will further recall that in ***Namasivayam v Gunawardena [1989] 1 SLR 394*** the Court held that deprivation of the liberty to go where one pleased amounts to an arrest. Thus, the detention provided for in *Clause 7(1)* we submit is an arrest. We submit that continued and/or excessive detention is also contrary to *Article 13(2)* of the Constitution [*vide* ***Channa Pieris v Attorney General (supra.)***];

108. We submit that a law that permits arrest should expressly provide for, *inter alia,* the following safeguards;

    a) **The law must expressly set out the specific circumstances under which an arrest maybe made:** Your Ladyship and Lordships will observe that though there are several offences that maybe committed under the *Parliament (Powers and Privileges) Act* [*vide* Schedule A & B], that law itself only provides for a person to be arrested and detained under a single limited instance of '[…] creating or joining in any **disturbance** in Parliament or in the precincts during its actual sitting […]'. [*vide Section 21*]. Such law does not permit arrests to be made under that law for any and all offences in Schedule A & B;

    b) We further submit that there must be a rationale and proximate nexus between the object to be achieved and the arrest/detention. Your Ladyship and Lordships will bear in mind that *Clause 7* provides for the procedure in respect of contempt in the face of court. Drawing from *Section 21* of the

Parliament (Powers and Privileges) Act, if the arrest/detention is to ensure the smooth progression of the proceedings of the day, it may be reasonable to arrest/detain a person who creates or joins a disturbance within the precincts of the Court. However, this *Clause 7* fails to identify the objective sought to be achieved by the arrest/detention of an alleged contemnor, particularly given that the acts which may amount to contempt [*vide* Clause 3] are vague and overbroad. For instance, theoretically a person can be arrested/detained even for the use of an electronic device for audio/visual recording of the proceedings without the leave of court [*vide Clause 3(d)*] though there is no rational and proximate nexus to grant such wide power. We submit that perhaps an appropriate and reasonable justification for detaining an individual under *Clause 7* should be limited solely to where he/she causes disturbance to the proceedings of Court, which would interfere with the progress of proceedings. To permit a person to be detained for alleged 'contempt of court' given that 'contempt of court' under *Clause 3* is vague, overbroad, ambiguous and unreasonable, would violate *Article 13(1), 13(2)* and *12(1)* of the Constitution. We refer to *S. 21 Parliament (Powers and Privileges) Act* once again, and state that the arrest and detention permitted under that section, is not for a breach of Parliamentary Privilege, but for creating/joining a disturbance within Parliament or its precincts. Though discretion is granted to the Court by the use of the word 'may' in *Clause 7(1),* the **discretion itself is unfettered and should not be permitted**. ;

c) **Who is empowered to make the arrest?** *Clause 7(1)* fails to identify who is empowered to carry out the arrest/detain the alleged contemnor in custody;

d) **Period of detention:** Your Ladyship and Lordships will observe that *Clause 7(1)* has no parameters, as to the time period an alleged contemnor is to be detained for or the mode of release. We respectfully submit that such is violative of *Article 13(2)* of the Constitution which is as follows;

> "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

e) Thus, we submit that a law for arrest/detention absent of the procedural safeguards in relation to the period of detention or the procedure for release offends *Article 13(2)*. In fact, ostensibly the Bill by *Clause 7(1)* appears to be circumvent all the procedural safeguards contained in *Article 13(2)* and grants wide discretion under *Clause 7(7), 8(6) & 9(6)* for the granting of bail. We draw the attention of Court to *Section 41* of the *Code of Criminal Procedure Act* where a Magistrate is vested with power to arrest where an offence is committed in his presence, the Magistrate may commit the person to custody subject to the provisions in respect of bail under such Code. This proposed law contains no criteria to be considered or conditions to be imposed in respect of bail, and such therefore grants wide discretion to the Court contrary to *Article 13(2)*. Further, there is a lack of clarity as to the point of time bail becomes available to a person;

f) Furthermore, even in *Section 21* of the *Parliament (Powers and Privileges) Act* an upper limit to the period of detention is expressly set out i.e., detention is only pending the determination of whether such person should be punished for an offence under Part II, 'but no such person shall be kept in custody after the termination of the sitting'. Moreover, even the PTA, draconian and unconstitutional though it may be, does not fail to prescribe the upper limit for the period of detention under *Section 9;*

g) **There is no place of detention specified**: Another procedural safeguard in respect of arrest and detention is the place of detention, which the proposed

Clause 7(1) fails to provide for. The PTA in *Section 9* stipulates that detention order should contain the place of detention, and Your Ladyship's Court in ***Dissanayake v Superintendent Mahara Prison [1991] 2 SLR 247, 259*** held that the "entire order covering the detention, **the place of detention and conditions thereof is mandatory and non-compliance cannot be excused** save on exceptional grounds such as impossibility in giving effect to it." Such being the importance given by Your Ladyship's Court to the place of detention, if the law fails to provide for the place of detention such law is inconsistent with *Article 13(1) & 13(2)* of the Constitution. Another example is *Section 21* of the *Parliament (Powers and Privileges) Act,* where it is specifically provided for that a person arrested is to be kept in the custody of an 'officer of Parliament' [who is defined by the Act].

h) Thus and otherwise, we respectfully submit that *Clause 7(1)(a)* is inconsistent with *Articles 12(1), 13(1) and 13(2)* of the Constitution.

Fair trial

109. In our respectful submission, *Article 13(3)* of the Constitution, can only be subjected to restrictions under ***Article 15(8)*** of the Constitution with respect to the Armed Force, Police and other Forces "charged with the maintenance of public order". Such has no application to civilians. Thus and otherwise, we respectfully submit that it cannot be restricted expect by way of 2/3 majority in Parliament and a *Referendum.*

Presumption of innocence

110. In our respectful submission *Article 13(5)* of the Constitution, can only be subjected to restrictions under ***Article 15(1)*** of the Constitution, and *only* in the interests of **national security**. We respectfully submit that thus, the presumption of innocence cannot be interfered with for any other reason. We submit that there is no rational nexus between the presumption of innocence and contempt of court, and certainly no co-relation to ambiguously defined contempt of "institutions".

111. We respectfully submit, that summary procedure to punish for contempt has been described in English common law as one that is "draconian" and "unusual" *per* Lawton LJ., in ***Balogh v St. Albans Crown Court [1975] QB 73, 92***. *(The laughing gas case)*. We submit, that thus, the English common law also indicates that "a decision to imprison the man for contempt should never be taken too quickly. The judge should give himself time for reflection as to what is the best course to take" *per* Lawton LJ, in ***R. v Moran (Kevin John) (1985) 81 Cr. App. R. 51*** An added layer of protection was articulated in ***DPP v Channel Four Television Co. Ltd, [1993] 2 All E.R. 517*** that the procedure should be resorted to, only if no other procedure will do if the ends of justice are about to be met.

112. In our respectful submission, none of these protections are contained in the Bill.

Clause 8 : Procedure where contempt is not in the face of the Supreme Court or Court of Appeal

113. Your Ladyship and Lordships will appreciate that *clause 7 & 8* are largely similar when it comes to the procedure to be followed, and thus, a bulk of our submissions, in relation to *clause 7* would apply here to.

114. We respectfully submit that, *clause 8(1)* is vague and overbroad, in that it does not specifically lay down a requirement of disclosing sufficient grounds in the motion and/or for relevant affidavits and/or material to accompany such motions. Your Ladyship and Lordships will recall that contempt proceedings being criminal proceedings in nature, the judge is required to assess whether there are sufficient grounds to proceed.

115. Of persuasive value to Your Ladyship's Court is the case of ***Media Image Ltd v Dissanayake [2006] 3 SLR 215***, where the plaintiff-respondent had moved to charge the Sri Lanka Rupavahini Corporation for contempt of court for failure to comply with an enjoining order, the court had issued summons, and rejected the preliminary objections of the petitioner-respondents that the charge sheet did not

disclose the date and alleged act of contempt. The Court of Appeal however, held that in contempt proceedings as in criminal proceedings, required the judge to be satisfied prior to issuing summons that the 'petitioner had disclosed sufficient grounds to proceed against the respondents' [*vide* page 219]. It follows that there is an onus on the petitioner to disclose sufficient grounds. In our respectful submission, such ought to apply to the proceedings under *Clause 8(1)* as well, if such provision is to be consistent with *Articles 12(1), 13(3)* and *13(5)* of the Constitution.

116. Your Ladyship and Lordships will observe that in respect of breaches of privileges of Parliament, *Section 23(1)* of the *Parliament (Powers and Privileges) Act No. 21 of 1953 (as amended)*[25], where an application is made to Your Ladyship's Court by the Hon. Attorney General for breaches of privilege, such application is to be 'supported by evidence on affidavit'. Similarly, even in respect of motions made in terms of *Clause 8(1)* such motions in our respectful submission must be supported by evidence on affidavit.

117. Your Ladyship and Lordships will appreciate the **wide standing** contained in *clause 8(1)* of the Bill, which adds to the oppressive nature of the vaguely and overbroad offences set out in *clause 3*.

118. We submit that there is a typographical error in *clause 8(3)* in that "pursuing" should be in fact "perusing" at line 16.

119. Your Ladyship's Court will also appreciate that *clause 8(4)* appears to give an alleged contemnor an additional right to "file an affidavit" or to "adduce evidence in his

[25] 23. (1) Upon application made to the Supreme Court in that behalf by the Attorney-General and **supported by evidence on affidavit**, the court-

(a) may, if satisfied after perusal of the application and such evidence that any member or other person appears to have committed any offence under this Part, cause notice to be served on such member or person calling upon him to show cause why he should not be punished for that offence; and

(b) may if no cause or no sufficient cause as aforesaid is shown to the satisfaction of the court, after such inquiry as the court may consider necessary, convict him of the offence and sentence him to imprisonment of either description for a term not exceeding two years or to a fine.

defence". Such is different to *clause 7(3)* which permits "hearing" the alleged contemnor and "taking such evidence as may be necessary or as may be offered by such person".

Clause 9 : Procedure to move Court of Appeal re contempt of Court of First Instance

120. In our respectful submission, *clause 9* is by and large similar to *clause 8* and thus we would respectfully refer Your Ladyship's Court to the submissions made above.

Clause 11 : Punishment for contempt ; contrary to Article 105 & Article 12(1)

121. *Clause 11(1)* provides for punishment for contempt of court referred to in *clause 5(1)* of the Bill, i.e., the power of the Supreme Court or the Court of Appeal to "punish for contempt of itself" whether such contempt is committed "in it presence or hearing or elsewhere". Such *clause 11* permits imposition of a fine not exceeding Rs. 500,000 *and/or* simple imprisonment not exceeding one (1) year, unless there are subsequent convictions. In which case such is increased to Rs. 1,000,000 and two (2) years respectively.

122. *Clause 11(2)* provides for punishment for contempt of court referred to in *clause 6(1)* of the Bill, i.e., the power of the Courts of First Instance to punish for contempt of court committed in their "presence or hearing or in the course of proceedings in such Courts" and "any act which is specified" in the Bill or any other written law as being punishable as contempt. This contains a lesser punishment of a fine not exceeding Rs. 300,000 *and/or* simple imprisonment not exceeding six (6) months. In the case of subsequent convictions, this is increased to Rs. 500,000 and one (1) year.

123. *Clause 11(1) & (2)* thus appears to punish contemnors for the same acts with different punishments as morefully enumerated below.

124. The *proviso* to *clause 11(5)* prohibits imposition of any sentence in excess of what is specified herein.

125. *Clause 11* nor any other part of the Bill, provides for the consideration of mitigatory and aggravating circumstances and for the imposition of suspended sentences.

126. In our respectful submission, ***Article 105(3)*** of the Constitution, gives Your Ladyships Court, and the Court of Appeal, (i) **power to craft a suitable punishment** for contempt (ii) **subject to no limitations**. The relevant provision is recreated below for convenience of Your Lordships';

> 105(3) The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1)(c) of this Article, whether committed in the presence of such court or elsewhere:
>
> Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution to punish for contempt of itself.

Power to craft unique/suitable punishment:

127. Your Ladyships' Court will recall, that in the ***Regent International Hotels Ltd v Cyril Gardiner (Supra.)*** Your Ladyships' Court crafted a unique punishment, in that the Chairman of the Galle Face Hotel and several others, were imprisoned *until such time* that they purged their contempt, so as to enforce an Enjoining Order awarded. More recently in ***Re Hewa Aluth Sahal Arachchige Ajith Prasanna SC Contempt 3/2020 S. C. M. 24-01-2023*** Your Ladyship's Court commenting on *Article 105(3)* held that the legislature has given the discretion to the Court to decide on the punishment, and that being due to the varying degrees of contempt that may be caused. The relevant portion is recreated below for convenience;

> The legislature has left it to the Court to decide. It is understood as the nature of contempt may vary from a trivial one, where a warning from the court may suffice, to a profoundly serious one that may have been intended to challenge the fundamental supremacy of the rule of law the courts are bound to uphold. [at 12]

Thus, the Bill appears to repeal and/or alter and/or make consequential amendments to *Article 105(3)* in that it permits only particular, specified punishments.

Power of punishment is subject to no limitations:

128. We further submit that *Article 105(3)* is not subject to any limitations. Such limitations however, are imposed by this Bill. We submit that such is a repeal and/or alteration and/or amendment to *Article 105(3)* of the Constitution.

129. In our respectful submission, any such repeal and/or alteration and/or amendment to a provision of the Constitution must adhere to the requirements set out in *Article 82* and the failure to do so prohibits the Speaker for permitting such Bill to proceed in Parliament. We therefore respectfully urge Your Ladyship's Court, to make an appropriate observation in the determination regarding the same.

130. In any event, we additionally submit, that *clause 11(1)* appears to limit its application to *clause 5(1)* to the exclusion of *clause 5(3)* i.e., the Court of Appeals power to punish for contempt of a Court of First Instance. In our respectful submission, there is no reasonable justification for such an exclusion, and is a **blatant repeal and amendment of *Article 105(3)*** which clearly vests the Court of Appeal with the power to punish for contempt of High Court, and other Courts of First Instance.

Different punishment for the same acts:

131. Your Ladyship and Lordships will appreciate that *Clause 11(2)* imposes a lesser punishment than *Clause 11(1).* In our respectful submission, such punishments show that a differentiation is made as to the court which the contempt was committed against. The punishment is not relative to the type of contemptuous acts or omissions identified by *Clause 3.* The effect of *Clause 11(1) & 11(2)* is that the same act would be punished differently based on against which court the contempt is committed.

132. In our respectful submission, such would treat similarly circumstanced persons differently, which is not permitted by *Article 12(1).* For instance, Your Ladyship and Lordships will recall the case of ***Chandradasa Nanayakkara v Liyange Cyril [1984] 2 SLR 193***, where the respondent forcibly entered the chambers of the Learned Magistrate and addressed him in "rude language, abused him and threatened to dash the child on the floor and to kill or cause bodily harm to the Magistrate if his wife was not released forthwith" he was sentenced to 7 years rigorous imprisonment. However, if the proposed *Clauses 11(1) & (2)* were in force, and if two persons committed the same acts, one before the Supreme Court and the other before a Court of First Instance, though they committed the same acts and though the gravity of the offence is the same, former would receive a higher punishment and the latter a lesser punishment. In our respectful submission, such is not permitted by *Article 12(1)* of the Constitution.

133. It is in our view, reasonable and in line with *Article 12(1)* of the Constitution if the quantum of punishment is decided based on the nature/type of offence committed. In fact in ***Chandradasa Nanayakkara v Liyange Cyril (Supra.)*** His Lordship *Atukorale, J.* deciding the punishment to be imposed considered the nature and gravity of the offence [*vide* page 196] and made no consideration of the hierarchy of the courts in the deciding the punishment. In fact, *Atukorale J,* specifically disregards

the consideration of the Court the contempt occurs in. The relevant portion is recreated below for convenience;

> "The outrageous nature of the acts committed by the respondent constitutes not only an affront to the dignity and authority of the court but also a direct challenge to the fundamental supremacy of the law itself. It is a type of contemptuous conduct which appeared to us to be unprecedented in the annals of the courts of this country. **It is absolutely imperative that such conduct, whenever or in whatever court it occurs, should be dealt with speedily, firmly and unmercifully.**" [196]
>
> [Emphasis is ours]

134. Moreover, Your Ladyship and Lordships will observe that the offences or the acts which may amount to contempt as provided for in *Clause 3* categorise such as based on the court which the contempt was committed against. Therefore, to impose punishments based on such a distinction as depicted in *Clause 11(1) & 11(2)* is contrary to *Article 12(1)* of the Constitution.

No provision to consider mitigatory factors (or aggravating factors) and for the imposition of suspended sentences:

135. Additionally, we wish to draw Your Ladyship's Court's attention to two lacunas in respect of punishments as contained *Clause 11* of the Bill. The Legislature has failed to provide for explicitly for (1) the consideration of aggravating and/or mitigatory factors in punishment and (2) the suspension of sentences. We respectfully submit that, even under the present scheme where there is no law governing contempt of court, Your Ladyship's Court has exercised the power under *Article 105(3)* while giving due consideration to mitigatory factors and also imposing suspended sentences. For instance, in ***Re Hewa Aluth Sahal Arachchige Ajith Prasanna (Supra.)*** the Court considered both mitigatory and aggravating circumstances in deciding on the punishment to be imposed. In ***Re Ranjan Ramanayake SC Contempt 06/2018 S.C.M. 07-06-2022,*** the Your Ladyship's Court suspended the

sentence in terms of *Section 303* of the *Code of Criminal Procedure.* Thus, we respectfully submit that the failure to provide such in the context of contempt proceedings is a violation of *Article 12(1)* of the Constitution. As Your Ladyship's Court quite rightly observed that the Bill does not provide for the application of the *Code of Criminal Procedure* and/or certain provisions of it. Thus, under this Bill contempt proceedings cannot take into account *Section 303 CrPC* as Your Ladyship's Court has done in the past. This is particularly so as this proposed Act is to prevail over other law [*vide Clause 15*].

Clause 12 : Appeals

136. At the outset we submit that Your Ladyships' Court, in punishing for contempt of the Supreme Court, is in effect, functioning as a court of first instance. However, *clause 12* of the Bill contains **no right of appeal** from such a decision of the Supreme Court.

Clause 16 : Interpretation

137. We have already adverted to the vagueness in the interpretation provision with regard to "tribunal" and "institution" being identically defined.

138. We further submit that such is not in line with *Article 105(1)(c)* of the Constitution which refers to tribunals and institutions "as <u>Parliament</u> may from time to time <u>ordain and establish</u>"

139. In our respectful submission, such *clause 16* would therefore be void for both vagueness and overbreadth.

CONCLUSION

140. Thus and otherwise, we respectfully submit that the regulation of seemingly unfettered Constitutional powers that contain the potential for arbitrariness, while welcome, must be done in the proper manner and form prescribed by the Constitution. We therefore submit that the regulation of the law relating to contempt of courts must be by way of an amendment to *Article 105(3).* we respectfully urge Your Ladyship and Lordships to declare and determine that;

   a) The Bill as placed on the Order Paper of Parliament fails to comply with the requirements in *Article 82* of the Constitution;

   b) *Clauses 2(d), 2(e) & 2(f), 3(2)(c),* are violative of *Article 3, 4, 12(1),* and *14(1)(a)* of the Constitution;

   c) *Clause 3(2)(e)* is inconsistent with *Articles 3, 4, 12(1), 14(1)(a)* read with *Article 1, 3* and the Preamble;

   d) *Clause 4* is inconsistent with *Articles 3, 4, 12(1) & 14(1)(a)* of the Constitution;

   e) *Clause 7* is inconsistent with *Articles 3, 4, 12(1), 13(1), 13(2), 13(3)* and *13(5)* of the Constitution;

   f) *Clause 8 & 9* are inconsistent with *Articles 3, 4, 12(1), 13(3) & 13(5)* of the Constitution;

   g) *Clause 11* is inconsistent with *Articles 3, 4, 105 & 12(1)* of the Constitution;

   h) *Clause 12 & 16* are inconsistent with *Articles 3, 4, 12(1)* of the Constitution.

141. Thus and otherwise, even in the event Your Ladyship's Court is of the opinion that This Bill titled "Contempt of a Court, Tribunal or Institution Bill' is in the proper manner and form contemplated by the Constitution, we respectfully submit that as the core clauses of the Bill offend the Fundamental Rights and the Sovereignty of the People, this Bill and/or the aforementioned specific provisions of the Bill,

require compliance with *Articles 83* as read with *Article 80* of the Constitution for enactment into law, and cannot be enacted into law except unless approved by the People at a Referendum in addition to a two-thirds vote of the whole number of the members of Parliament in favour.

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