TILWIN SILVA
v
RANIL WICKREMASINGHE AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 461/2002
JUNE 2, 2006
SEPTEMBER 22, 2006
NOVEMBER 23, 2006
JANUARY 18, 2007

Writ of Certiorari – Quash decision to sign Cease Fire Agreement (CFA) – Agreement illegal? – Null and void? – Constitution Article 4 (b) Article 29 read with Article 30 (1), Article 43(1) 6th Amendment Article 140 – Executive power – Collective responsibility of Cabinet – Policy decision – Legality of entering into an agreement with the LTTE? – Prevention of Terrorism Act No. 48 of 1979 – Judicial Review – Policy decisions – Could the Court consider the illegality or mala fide of a policy decision?

The petitioner sought a *writ of certiorari* to quash the decision of the 1st respondent Prime Minister to sign the CFA, and further sought a declaration that the said agreement is illegal, null and void – and a writ of prohibition not to sign any similar agreements.

Held:

(1) The petitioner's prayer for a declaration to declare that the agreement is illegal, null and void cannot be granted, as Article 140 does not empower this Court to grant and issue orders in the nature of declarations. The petitioner's prayer for a writ of prohibition not to sign any similar agreement is vague wide and doubtful and such relief cannot be granted.

Held further:

(2) The Cabinet which consists of the President – Head of the Cabinet, the Prime Minister and the Cabinet of Ministers is in charge of the direction and control of the Government and they are collectively responsible to Parliament (Article 43 (1)). When these provisions are considered, in the light of the concept of collective responsibility of the Cabinet the President and the Cabinet are part of one unit that is collectively responsible.

The deliberation within the Cabinet amongst its members including the President, is a matter for the concern of the Cabinet and not of this Court.

Once the act is considered to have been carried out by the Cabinet or consequent to a Cabinet decision then it necessarily follows the President– member and Head of the Cabinet is part of it and in the collective nature of the Cabinet decision. Hence the decision of the Cabinet to enter into a CFA with the LTTE cannot be said to have been taken without the concurrence of the President.

Per Sriskandarajah, J.:

"As a matter of fact this agreement was not terminated by the Governments of Sri Lanka even though this was in operation during two Executive Presidents of the Republic and two Governments of different politiçal parties – this shows the desire of the President and the consecutive governments to have the said agreements in force to achieve the objects enumerated in the preamble of the CFA".

(3) Cabinet which is headed by the President and which is in charge of the direction and the control of the Government could take a policy decision to enter into an agreement with the LTTE and the 1st respondent who was the Prime Minister and a member of the Cabinet could enter into an agreement for and on behalf of the Government of Sri Lanka.

Once a policy decision is taken by the Cabinet to enter into a CFA with the LTTE, it could be implemented by the Executive.

(4) The petitioner's contention that the CFA binds the government not to prosecute the violators of the Prevention of Terrorism Act (PTA) is untenable. The gazetted regulations show that, the violations of the PTA are proceeded while the CFA is in full force.

(5) The challenge of the petitioner that the CFA is in violation of the concept of State and Sovereignty cannot be maintained. Judicial Review could be based upon the legal rules which regulate the use of governmental power. The challenges are based on the elementary concept of illegality, irrationality, proportionality and procedural impropriety. The petitioner cannot complain to this Court in judicial review proceedings that the CFA alienated the Sovereignty of the people or violates the concept of State.

(6) The preamble to CFA sets out the intention of parties. The short and simple definition that can be given to the CFA is that it is a value decision attached to efforts to resolve a conflict. From the preamble it is clear that this document is a policy document on a political issue. It is axiomatic that the contents of a policy document cannot be read and integrated as statutory provisions. Too much of legalism cannot be imported in understanding the scope and meaning of the clauses contained in policy formulations.

For a policy decision to have legal consequences or legal impact that policy decision should have been taken either by invoking a statutory provision or statutory power should have been conferred on the said decision, it is pertinent to note that neither statutory provision had been invoked nor statutory power had been conferred on the CFA.

(7) CFA is a mere decision of policy to build confidence between parties to find a negotiated solution to the ongoing ethnic conflict in Sri Lanka. As there is no statutory power conferred on the CFA or involved on the termination of the CFA it has no legal consequences or legal impact, it cannot be tested in Court for its legality and the CFA is not amenable to judicial review.

APPLICATION for a writ of *certiorari* / prohibition.

Cases referred to:

(1) *Parameswary Jayathevan* v *Attorney-General and others* 1992 2 Sri LR 337 at 360.

(2) In *Re the 13th Amendment to the Constitution and the Provincial Council Act* 1982 2 Sri LR 312 at 322.

(3) In *Re the 19th Amendment to the Constitution* 2002 3 Sri LR 85.

(4) *Wimal Weerawansa and 13 others* v *Attorney-General and 3 others* (P Toms Case).

(5) *Ram Jawa* v *State of Punjab* 1955 2 Sri LR at 235 and 236.

(6) *Blackburn* v *Attorney -General* 1971 1 WLR 1037.

(7) *Premachandra v Major Montague Jayawickrama* 1994 Sri L.R. 90 at 107.

(8) *Baker v Carr* (1962) 369 US 186.

(9) *Bhut Nath v State of West Bengal* AIR 1974 SC 806, 811

(10) *BALCO Employees Union (Legal)* v *Union of India and others* AIR 2002 SC 350.

(11) *Narmada Bachao Andolan* v *Union of India and others* 2000 10 SSC 664 at 763.

Manohara de Silva PC with *Udaya Gammanpila, Pasan Gunasena, Bandara Thalagune* and *Anusha Perusinghe* for the petitioner.

Harsha Fernando SSC for the 1st, 26th and 28th to 60th respondents.

Shibly Aziz PC with *A.P. Niles* and *Rohana Deshapriya* for the 3rd to 25th respondents.

2nd respondent absent and unrepresented.

Cur.adv.vult.

March 6, 2007

SRISKANDARAJAH, J.

The Petitioner is the General-Secretary of the Janatha Vimukthi Peramuna (JVP) which is a recognized political party in Sri Lanka. The 1st respondent was the Prime Minister of Sri Lanka during the relevant time and the 2nd respondent, is the Leader of the Liberation Tigers of Tamil Eelam, (LTTE), 3rd to the 25th respondents were members of the Cabinet of Ministers of Sri Lanka during the relevant time. Consequent to the Parliamentary General Election which was held on 2nd of April 2004 a new Cabinet of Ministers have been appointed and the new Cabinet of Ministers are added as the 27th to the 59th respondents.

The petitioner in this application has sought a writ of *Certiorari* to quash whole or a part of the 'Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam' marked as P5 and also a writ of Prohibition restricting and or prohibiting the respondents from giving effect to and or acting in any manner to give effect to the decision and or undertaking in the said agreement in whole or in part. The said agreement is hereinafter referred to as CFA.

The CFA in its preamble states:

"The overall objective of the Government of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the GOSL) and the Liberation Tigers of Tamil Eelam (hereinafter referred to as the LTTE) is to find a negotiated solution to the ongoing ethnic conflict in Sri Lanka.

The GOSL and the LTTE (hereinafter referred to as the Parties) recognize the importance of bringing an end to the hostilities and improving the living conditions for all inhabitants affected by the conflict. Bringing an end to the hostilities is also seen by the parties as a means of establishing a positive atmosphere in which further steps towards negotiations on a lasting solution can be taken.

The parties further recognize that groups that are not directly party to the conflict are also suffering the consequences of it. This is particularly the case as regards the Muslim population.

Therefore the provisions of this Agreement regarding the security of civilians and their property apply to all inhabitants.

With reference to the above, the Parties have agreed to enter into a ceasefire, refrain from conduct that would undermine the good intentions or violate the spirit of this agreement and implement confidence-building measures as indicated in the articles below."

Article 1 of the CFA titled "Modalities of Ceasefire" and states that the parties have decided to enter into a ceasefire. Articles 1.2 and 1.3 are titled "Military Operations" and deals with the cessation of military action. Articles 1.4 to 1.8 are titled "Separation of forces" and deals with the separation of the forces of the Government and the LTTE. Articles 1.9 to 1.13 are titled "Freedom of movement" and deal with the movement of the forces of each side through the territories controlled by the other side. Article 2 is titled "Measures to restore normalcy" and deals with various "Confidence – building measures". Article 3 is titled "The Monitoring Mission" and deals with the setting up of an international monitoring mission. Article 4 is a miscellaneous provision, and is titled "Entry into force, amendments and termination of the Agreement". It is an admitted fact that the CFA came into force on 23.2.2002 and is still in force.

The petitioner submitted that by the CFA, the aforementioned 1st respondent has agreed to bind the government of Sri Lanka as enumerated in his petition in paragraph 9(a) to (k). He contended that the 1st respondent when he signed the CFA was only the Prime Minister of Sri Lanka and he was not clothed with any power, authority or jurisdiction to bind the Government of the Democratic Socialist Republic of Sri Lanka in the said CFA.

The petitioner further contended that the 1st respondent in his capacity as the Prime Minister is not a member or an agent of the Executive of the Republic. The executive power of the People shall be exercised by the President of the Republic under Article 4(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as Constitution). According to Article 43(1) of the Constitution, there shall be a Cabinet of Ministers charged with the direction and control of the Government of Sri Lanka. It was held in *Parameswary Jayathevan* v *Attorney-General and*

others[1] at 360 that the Cabinet can exercise certain executive powers. In *Re the 13th Amendment to the Constitution and the Provincial Council Bill*[2] at 322, it was held that Provincial Governors can exercise the executive power of the President. However the petitioner contended that the Prime Minister as a member of the Cabinet or otherwise cannot exercise the executive power of the President. The Prime Minister is merely the member of Parliament who in the President's opinion is mostly likely to command the confidence of Parliament (Article 43(3) of the Constitution). Accordingly, the Prime Minister's post is in the Legislature and not in the Executive. The Supreme Court held in *Re* the *19th Amendment to the Constitution*[3] that the Executive cannot alienate its powers or functions to the Legislature. Hence the 1st respondent has no capacity to enter into an agreement on behalf of the Government of Sri Lanka.

The petitioner contended that whereas the President of the Democratic Socialist Republic of Sri Lanka is the Head of the State, the Head of the Executive and of the Government and the Commander in Chief of the Armed Forces, vide Article 30(1)of the Constitution and vested with the executive power of the Republic of Sri Lanka including the defence of Sri Lanka vide Article 4(b) of the Constitution, the President was neither a party nor had given concurrence to the CFA. The petitioner relied on a news item which appeared in the 'Island' newspaper of 23.2.2002 marked P6 which news item stated "the Presidential Secretariat stated that the President was only informed of the said purported agreement only after the 2nd respondent had placed his signature and just few hours prior the 1st respondent was scheduled to place his signature thereon. The President had expressed her surprise and concern with regard to the manner in which this purported agreement had been prepared."

The petitioner admitted (in paragraph 13 of his affidavit) that the said agreement had been briefed by the 1st respondent the Prime Minister to the Cabinet consisting of the 3rd to the 25th respondents and a decision was taken to enter into the CFA.

Before considering the capacity of the 1st respondent (The Prime Minister) to enter into the CFA it is important to consider the

exercise of the Executive power under the Constitution.

The President of the Republic of Sri Lanka is the Head of the State the Head of the Executive and the Head of the Government (Article 30(1) of the Constitution). The Cabinet which consists of the President (as the member and the head of the Cabinet of Ministers), the Prime Minister (who is a member of the Cabinet) and the Cabinet of Ministers, is in charge of the direction and the control of the Government of the Republic and they are collectively responsible to Parliament (Article 43(1) of the Constitution). When these provisions are considered in the light of the concept of "collective responsibility" of the Cabinet, the President and the Cabinet are part of one unit that is collectively responsible.

When commenting on the confidentiality and collective responsibility of the Cabinet a former Judge of the Constitutional Court Joseph A.L. Cooray in the Book titled"Constitutional and Administrative Law of Sri Lanka" – 1995 at page 191 stated:

> "The proceedings of the Cabinet of Ministers are secret and confidential. The secrecy of Cabinet decisions is necessary for arriving at a compromise and agreement through frank discussions among the Ministers under the direction of the President, as Head of the Executive and the Cabinet. This practice gives effect to the principles of public unanimity and collective responsibility and also tends to promote strong and stable government."

The deliberation within the Cabinet amongst it members including the Head of the Cabinet (the President of Sri Lanka) is a matter for the concern of the Cabinet and not of this court. The Supreme Court in *Wimal Weerawansa and 13 others* v *Attorney General and 3 others*[4] when dealing with the Communications between the President and the Cabinet held thus;

> "in this instance the MOUs has been tabled in Parliament and there is no evidence before this court that the Cabinet of Ministers has not been apprised of the MOU at the time of its execution. In any event if there is a fault in these respects on the part of the President, they are matters for the immediate concern of the Cabinet of Ministers and Parliament and not of this Court..."

Therefore, once an act is considered to have been carried out by the Cabinet or consequent to a decision of the Cabinet, then it necessarily follows that the President who is a member of the Cabinet of Ministers and Head of the Cabinet of Ministers (Article 43(2) of the Constitution) is part of it and and is clothed in the collective nature of the cabinet decision. Hence the decision of the Cabinet to enter into a CFA with the 2nd respondent cannot be said to have been taken without the concurrence of the President.

In any event Article 4.4 of the CFA provides for the unilateral termination of the CFA. It provides:

"This agreement shall remain in force until notice of termination is given by either party to the Royal Norwegian Government. Such notice shall be given fourteen (14) days in advance of the effective date of the termination."

As contended by the petitioner if the President of the Republic at the time of the execution of this agreement or at any time thereafter expressed his dissatisfaction of the said agreement, as the Head of the Government of Sri Lanka the President would have unilaterally terminated the said agreement. As a matter of fact this agreement was not terminated by the Government of Sri Lanka even though this was in operation during two Executive Presidents of the Republic and two governments of different political parties. This shows the desire of the President and the consecutive governments' to have the said agreement in force to achieve the objects enumerated in the preamble of the said agreement.

Once a policy decision is taken by the Cabinet to enter into a CFA with the 2nd respondent it could be implemented by the Executive.

Even though the Constitution has not specifically provided for the separation of powers the legislative scheme of the Constitution has provided for a functional separation of powers. This could be seen in Article 4 of the Constitution and elaborated under separate Chapters of the Constitution. The provisions relating to Executive Powers is contained in Chapters VII, VIII and IX, the Legislative Powers in Chapters X to XII and the Judicial Power in Chapters XV and XVI.

By virtue of Article 4(b) of the Constitution the executive power shall be exercised by the President. Even though the executive power cannot be comprehensively defined, the Indian Supreme Court in *Ram Jawa* v *The State of Punjab*[5] observed:

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject of course, to the provisions of the Constitution or any law.
>
> The executive function comprises both the determination of policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on and supervision of the general administration of the State."

The Executive provided in the Constitution includes The President (Chapter VII), The Cabinet of Ministers (Chapter VIII) and The Public Service (Chapter IX). As executive power encompasses a wide area, the President, while personally performing some of the executive functions, operates the rest of the executive functions of government through the Cabinet of Ministers and Public Officers.

The President appoints the Prime Minister (Article 43(2) of the Constitution) a Member of Parliament who in his opinion is most likely to command the confidence of Parliament. The President, Prime Minister and the Ministers are members of Cabinet (Article 43(2) of the Constitution) and the Cabinet is responsible to the Parliament (Article 43(1) of the Constitution). In relation to the appointment of Cabinet of Ministers it is laid down that the President shall make such appointment in consultation with the Prime Minister. However there is no obligation on the part of the President to follow the advice of the Prime Minister. In these contexts the Prime Minister has a pivotal role to play, as being the Member of the Cabinet and Member of Parliament who commands the confidence of Parliament, especially when the President and the majority of the members of Parliament are represented by two different political parties which has different political premise. In this instant the Prime Minister was the head of the governing party

and the President belongs to the party which was in the opposition. Hence the submission of the petitioner that the post of the Prime Minister is in the legislature and not in the executive has no merit.

In *Wimal Weerawansa and 13 others* v *Attorney-General and 3 others (supra)* the Supreme Court observed that there is no illegality, in the President of the Republic entering into a Memorandum of Understanding for the establishment of a Tsunami Operation Management Structure (P-TOMS), and in this instant the MOU has been agreed and accepted on 24.6.2005 by the Secretary, Minister of Relief, Rehabilitation and Reconstruction (the 3rd respondent in the said case) for and on behalf of the Government of the Democratic Socialist Republic of Sri Lanka (GOSL) and the 4th respondent (in the said case) for and on behalf of the Liberation Tigers of Tamil Eelam (LTTE). In the above circumstances a Public officer has agreed and accepted for and on behalf of the Government of Sri Lanka. As I have discussed above the President, while personally performing some of the executive functions, operates the rest of the executive functions of Government through the Cabinet of Ministers and Public Officers. Hence the submission of the petitioner that the Prime Minister cannot sign an agreement for and on behalf of the Government of Sri Lanka has no merit.

From the above analysis it is clear that the Cabinet which is headed by the President and which is in charge of the direction and the control of the Government could take a policy decision to enter into an agreement with the 2nd respondent and the 1st respondent who was the Prime Minister and the member of the Cabinet could enter into an agreement for an on behalf of the Government of Sri Lanka. In view of the above the submissions of the petitioner that the 1st respondent is not clothed with any power or authority or jurisdiction to sign the CFA, in as much as the President of the Democratic Socialist Republic is the Head of the State and the 1st respondent has usurped the powers of the President by entering into the aforesaid agreement and it is in violation of Article 30 of the Constitution, have no basis.

The petitioner has also challenged the said agreement on the basis that no one has authority to sign any agreement with the 2nd respondent and /or the LTTE. The said agreement namely;

'Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam' (P5) was signed by the 1st respondent with the 2nd respondent the leader of the LTTE. The petitioner contended as the LTTE was proscribed by the Government of Sri Lanka under the Prevention of Terrorism Act, any agreement signed by any body including the 1st respondent with the LTTE is illegal and bad in law.

This question was dealt with by the Supreme Court in *Wimal Weerawansa and 13 others* v *Attorney-General and 3 others (supra).* Where the Chief Justice Sarath N. Silva when deciding the alleged infringement of fundamental rights relate to the Memorandum of Understanding (MOU) for the establishment of a Tsunami Operation Management Structure (P-TOMS), which has been agreed and accepted on 24.6.2005 by the 3rd respondent (in the said case), the Secretary, Ministry of Relief Rehabilitation and Reconstruction for and on behalf of the Government of the Democratic Socialist Republic of Sri Lanka (GOSL) and the 4th respondent (in the said case) for an on behalf of the Liberation Tigers of Tamil Eelam (LTTE) held;

> "Mr. S.L. Gunasekera, contended that it is illegal to enter into the MOU with the LTTE which he described as a terrorist organisation that caused tremendous loss of life and property in this country. The contention is that even assuming that the President could enter into a MOU for the object and reasons stated in the preamble, the other party to the MOU is not an entity recognised in law and should not be so recognised due to antecedent illegal activities of the organisation.
>
> In this regard I have to note that the matter so strenuously urged by Counsel cannot by itself denude the status of the 4th respondent to enter into the MOU. The circumstances urged by Counsel cannot and should not have the effect of placing the 4th respondent and the Organisation that he seeks to represent beyond the rule of law. We have to also bear in mind that already a Cease-Fire Agreement has been entered into on 23.2.2002 between the Government of Sri Lanka and the LTTE, which according to section 2(b) of the MOU "shall continue in full force and effect".

In these circumstances there is no illegality in entering into the MOU with the 4th respondent..."

In this judgment the Supreme Court has unequivocally held that the Government entering into an MOU with the LTTE is not illegal. Therefore the petitioner's claim that any agreement signed by anybody including the 1st respondent with the LTTE is illegal and bad in law is untenable.

The petitioner also challenged the said agreement on the basis that certain clauses mentioned in the agreement binds the government and thereby alienated the sovereignty of the people which includes the power of government. The petitioner submitted that the 1st respondent agreed to bind the Government in the following manner which violates certain Articles of the Constitution.

a) by agreeing to stop all the offensive military operations against the LTTE which is a proscribed organisation under the provisions of the Prevention of Terrorism Act *inter-alia* in violation of Articles 1, 2, 3, 4, 27, 28, 30, 157A of the Constitution,

b) by restricting the right of movement of Sri Lanka Armed Forces *inter-alia* in violation of Articles 1, 2, 3, 4,14, 27, 28, 30, 157A of the Constitution,

c) by providing confidential information with regard to defence localities to an organisation called the Sri Lanka Monitoring Mission consisting of non-citizens *inter-alia* in violation of Articles 1, 2, 3, 4, 27, 28, 30, and 157A of the Constitution,

d) by restricting the use and possession of ammunition and other military equipment by the armed forces *inter-alia* in violation of Articles 1,2,3,4,27, 28, 30, 157A of the Constitution,

e) by restricting the Armed services personnel from entering into areas specified in article 1.4 and 1.5, *inter-alia* in violation of Articles 1, 2, 3, 4, 27, 28, 30 and 157A of the Constitution,

f) by demarcating areas in the territory of Sri Lanka to which the armed forces or any agency of the government would not have access and thereby handing over and/or granting full control of certain areas to an armed terrorist organisation

inter-alia in violation of Articles 1, 2, 3, 4, 27, 28, 30, 157A of the Constitution,

g) by permitting members of an armed terrorist organisation namely the LTTE to man check points *inter-alia* in violation of Articles 1, 2, 3, 4, 27, 28, 30, 157A of the Constitution,

h) by declaring that the Prevention of Terrorism Act entered into by Parliament and presently part of the law of the land be made ineffective and agreeing not to prosecute violators of the said Act under the provisions of the said Act *inter-alia* in violation of Articles 3, 4(a), 27, 28, 75 and 76 of the Constitution and by usurping the legislative and judicial power of the people,

i) by abdicating the power of the government by restricting the right of the armed forces to protect the territorial integrity of the State.

j) whilst permitting LTTE to carry and possess arms and denying other Tamil Groups (Opposed to the LTTE) and other political parties to carry weapons thereby denying equality before law in violation of the Article 12(1) and 12(2) of the Constitution.

k) compelling the Sri Lankan Government to absorb illegal armed cadres to the Sri Lankan armed forces in violation of the criteria of recruitment under the Army Act, Navy Act and Air Force Act and the breach of Article 12(1) and 12(2) of the Constitution.

The learned Counsel for the petitioner strenuously argued that by the CFA the Prevention of Terrorism Act entered into by Parliament and presently part of the law of the land be made ineffective by agreeing not to prosecute violators of the said Act and it is a violation of Article 75 and 76 of the Constitution.

This Court could take judicial notice of the fact that the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 (sic) of 2006 published in the Gazette Extraordinary No. 1474/5 of 6th December 2006 provides for the prosecution of the violators of the Prevention of Terrorism Act. Regulation 6 of the said regulation prohibits any person, group,

groups of persons or an organisation engaging in "specified terrorist activity". Regulation 20 defines "specified terrorist Activity" i.e. "Specified terrorist activity" means an offence specified in the Prevention of Terrorism Act, No. 48 of 1979, ... and Regulation 10 provides that "Any person who acts in contravention of Regulation 6 of these regulations shall be guilty of an offence, and shall on conviction by the High Court be sentenced to a term of imprisonment of not less than ten years and not exceeding twenty years". This shows that the violators of the Prevention of Terrorism Act are prosecuted while the CFA is in full force. Therefore the petitioner's contention that the CFA is in violation of Article 75 and 76 is untenable.

The petitioner also contended that certain provisions of the CFA mentioned above violate Articles 27 and 28 of the Constitution; namely the Directive Principles of State Policy and Fundamental Duties. Article 29 of the Constitution specifically provides that no question of inconsistency with the provisions in Chapter VI of the Constitution i.e. Article 27 and Article 28 shall be raised in any Court or Tribunal. Therefore the inconsistency of the CFA if any to Article 27 and Article 28 of the Constitution is not justiciable.

The petitioner's grievance that the CFA violates Article 30 of the Constitution; namely the powers of the President of the Republic, has already been analysed by me in this Order in detail and I have concluded that the submission that CFA violate Article 30 of the Constitution has no basis.

The petitioner contended that certain clauses in the CFA is in violation of Article 12(1), 12(2) and 14 of the Constitution. These Articles are in relation to Fundamental Rights. The jurisdiction of this court is ousted by Article 126 of the Constitution in deciding questions affecting fundamental rights. Hence the petitioner cannot challenge the CFA on the basis that it violates Article 12(1), 12(2) and 14 of the Constitution in judicial review proceedings in the Court of Appeal under Article 140 of the Constitution.

The petitioner also contended by the provisions of the CFA mentioned above the sovereignty of the People was alienated and it violates Articles 1, 2, 3, 4, and 157A of the Constitution. These Articles provides for the '**State**' and '**Sovereignty**'.

In *Blackburn* v *Attorney-General*[6] Lord Denning M.R. quoted with approval an article by Professor H.W.R. Wade ("The Basis of Legal Sovereignty") in the Cambridge Law Journal, 1955, at p. 196 in which he said that "sovereignty is a political fact for which no purely legal authority can be constituted....".

In Administrative Law Ninth Edition at page 9 the learned authors H.W.R. Wade & C.F. Forsyth stated:

> "The most obvious opportunities for theory lie on the plane of constitutional law. Does the law provide a coherent conception of the state? Is it, or should it be, based on liberalism, corporatism, pluralism, or other such principles? What are its implications as to the nature of law and justice? More pragmatically, should there be a separation of powers, and if so how far? Is a sovereign parliament a good institution? Is it right for parliament to be dominated by the government? Ought there to be a second chamber? The leading works on constitutional law, however, pay virtually no attention to such question, nor can it be said that their authors' understanding of the law is noticeably impaired. The gulf between the legal rules and principles which they expound, on one hand, and political ideology on the other hand, is clear and fundamental, and the existence of that gulf is taken for granted."

Judicial review could be based upon the legal rules which regulate the use of governmental power.The challenges are based on the elementary concept of illegality, irrationality, proportionality and procedural impropriety. The petitioner cannot complain to this Court in judicial review proceedings that the CFA alienated the Sovereignty of the People or violates the concept of State as the concept of State and Sovereignty are political ideology and no purely legal authority can be constituted. Therefore the challenge of the petitioner that the CFA is in violation of Article 1,2,3,4 and 157A cannot be maintained in this proceeding.

The Court when considering the issue of notice on the respondents has to consider whether the petitioner has at least an arguable case to seek writ of *Certiorari* or writ of Prohibition in relation to CFA or parts of CFA. In this regard I have considered the merits of the petitioner's application. Now I proceed to consider a

more fundamental question that is whether the CFA itself is amenable to judicial review.

The 1st, 26th and 28 to 60th respondents submitted that the very nature of the said agreement although the word 'agreement' is used the nature and its forms differs drastically to that of an agreement or contract as understood in a sense as enforceable by a Court. The subject matter itself is that of policy on a political issue, the nature and the context of which is outside the judicial space. The preamble of this agreement sets out the intention of the parties. The short and simple definition that can be given to the CFA is that it is a value decision attached to efforts to resolve a conflict. This demonstrates that there are certain qualitative considerations that would be taken into account in arriving at this value judgment. A *prima facie* reading of the preamble and the contents of the CFA clearly points out that the ingredients that may have gone into the decision to enter into the CFA are beyond the realm of judicial review. The 3rd to 25th respondents also submitted that the present application involves a political question which is not amenable to judicial review and they relied on the following cases in support of their contention; *Premachandra* v *Major Montague Jayawickrema,*(7) *Baker* v *Carr*(8) and *But Nath* v *State of West Bengal.*(9)

From the preamble of the CFA it is clear that this document is a policy document on a political issue. It is axiomatic that the contents of a policy document cannot be read and interpreted as statutory provisions. Too much of legalism cannot be imported in understanding the scope and meaning of the clauses contained in policy formulations.

The Supreme Court of India in *BALCO Employees Union (Regd.)* v *Union of India and others*(10) quoted with approval the following observations made in the majority decision in *Narmada Bachao Andolan* v *Union of India and others.*(11)

> "While protecting the rights of the people from being violated in any manner utmost care has to be taken that the court does not (SIC) its jurisdiction. There is, in our constitutional framework a fairly clear demarcation of powers. The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction.

At the same time, in exercise of its enormous power the Court should not be called upon to or undertake governmental duties or functions. The Courts cannot run the Government nor can the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the Constitution casts on it a great obligation as the sentinel to defend the values of the Constitution and the rights of Indians. The Courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words, the court itself is not above the law.

In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not *mala fide*, it will not be in public interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such policy decision".

and held: "In a democracy it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic

policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or *mala fide*, a decision bringing about change cannot *per se* be interfered with by the Court."

The government is free to formulate its own policy and it is in public interest the Courts will not go into and investigate these policy decisions unless it is illegal, contrary to law or *mala fide*. But on the other hand the Court will not consider the illegality or *mala fide* of a policy decision unless the said decision provides legal consequences or legal impact. The Court has nothing to do with mere decision of policy. For a policy decision to have legal consequences or legal impact that policy decision should have been taken either by invoking a statutory provision or statutory power should have been conferred on the said decision. It is pertinent to note that neither statutory provision had been invoked nor statutory power had been conferred on the CFA.

H.W.R. Wade & C.F. Forsty in Administrative Law Ninth Edition at page 345 the authors stated:

"A necessary corollary is that, as usual throughout administrative law, **we are concerned with acts of legal power, i.e. acts which, if valid; themselves produce legal consequences** (emphasis added). Courts of law have nothing directly to do with mere decisions of policy, such as decisions by the government that Britain shall join the European Communities (even though a treaty is concluded) or that grammar schools shall be replaced by comprehensive schools. **Such decisions have no legal impact until statutory powers are conferred or invoked. But as soon as Parliament confers some legal power it becomes the business of the courts to see that the power is not exceeded or abused**" (emphasis added).

In *Blackburn* v *AG (supra)* Mr. Blackburn challenged an agreement in judicial review proceedings for a declaration that the said agreement is *ultra viras* and null and void on the basis that the said agreement entered into by the Government affects the sovereignty of the British Nation. Lord Denning delivering the Judgment held: *"that the said application is premature as the said agreement has no legal consequence and the Court consider the legality of the agreement only after the Parliament confers legal power on the said agreement."*

CFA is a mere decision of policy to build confidence between parties to find a negotiated solution to the ongoing ethnic conflict in Sri Lanka ; as there is no statutory power conferred on the CFA or invoked on the formulation of the CFA it has no legal consequences or legal impact. Therefore it cannot be tested in Court for its legality and hence the CFA is not amenable to judicial review. Even a party to this agreement or a person who has sufficient interest in this agreement cannot seek a Public law remedy for the enforcement of the provisions of the CFA or to quash or prohibit a decision taken to violate any of the provisions of the CFA. Similarly the petitioner also cannot make an application for a writ of *Certiorari* or Prohibition to quash, or prohibit the operation of the said Cease Fire Agreement.

In the first part of my Order I have analysed the merits of this application and I have held that this application has no legal basis. In the second part of my Order I have analysed whether the CFA is justiciable and I have held that the CFA is not justiciable. As there is no legal basis for this application and as it is misconceived in law this Court refuses to issue notice on the respondents.

Notice refused.