WEERAWANSHA AND OTHERS
vs.
ATTORNEY-GENERAL AND OTHERS

SUPREME COURT,
S. N. SILVA, CJ
FERNANDO, J AND
AMARATUNGA, J
SC FR 228/2005 WITH
SC FR 229/2005
SC FR 230/2005
8TH AND 12TH JULY, 2005

Constitutional Law - Memorandum of Understanding for Tsunami Operation Management Structure - Power of President and Government to sign the MoU - Articles 12(1) and 12(2) of the Constitution - Grant of part interim relief against exercise of governmental powers contrary to the Constitution - Articles 149(1) and 154 of the Constitution - Siting of an important Committee in Kilinochchi.

The petitioners who are members of the Janatha Vimukthi Peramuna and Members of Parliament, some of whom had been Ministers or Deputy Ministers complained that the Agreement between the Government and the LTTE (MoU) for a Tsunami Operation Management Structure is violative of Articles 12(1) and 12(2) of the Constitution, the Supreme Law of the land and the rights of voters and the people of Sri Lanka. The 3rd respondent (in FR 228 and 229) who was the 2nd respondent in FR 230 was the Secretary, Ministry of Relief, Rehabilitation and Reconstruction. He signed the MoU for and on behalf of the Government.

The MoU was mainly designed to provide relief to coastal communities in the Tsunami Disaster Zone (TDZ) constituting of Amparai, Batticaloa, Jaffna, Kilinochchi, Mullaitivu and Trincomalee District and any additional lands which may be brought in by the High Level Committee.

The MoU provides for a management structure at three levels (i) the High Level Committee consisiting of a member representing the Government one nominee of the LTTE and one nominee of the Muslim Parties. That Committee lays down the policy regarding the allocation of donor funds. (ii) Regional Committee consisting of two nominees of the Government, five LTTE nominees and three nominees of Muslim Parties. Decisions have to be of consensus or by majority vote ; where the decision is prejudicial to a minority a 2/3 majority is required. The seat of the Regioinal Committee is Killinochch. That Committee is charged with the implementation of relief. The funds (foreign and local are deposited in a "Regional Fund" under a custodian jointly appointed by the Government and the LTTE to assist in the operation of relief (*vide* Clauses 6 and 7 of MoU). The fund would serve the 6 Districts referred to. (iii) District Committees which according to the MOU have already been established and are functioning. They shall continue their work in identifying the needs of the respective Districts.

The petitioners sought a declaration that the MoU infringed Article 12(1) and 12(2) of the Constitution and is void particularly as the Committees are not authorized by law and in particular since the Regional Committee exercises Governmental powers contrary to Articles 149(1) and 154 of the Constitution. They also challenged the authority of the 3rd respondent Secretary, to sign the MoU and the power of the President in that regard. They further complained that the establishment of the Regional Committe in Kilinochchi was unconstitutional in that Kilinochchi is an exclusively LTTE controlled area to which other communities had no free access. They also alleged that the LTTE had no legal standing to sign the MoU, being a terrorist organization.

The petitioners applied for a stay of the MoU, pending hearing and determination of the applications.

HELD :

(1) The MoU was placed before Parliament ; and there is no evidence that the Cabinet of Ministers was not apprised of it. If there was default in

that respect, it is for the Cabinet of Ministers and not for the court to rule on that matter.

(2) The MoU with the LTTE was valid especially in the context of the ceasefire agreement on 23.02.2002.

(3) The President was empowered by the Constitution to enter into or authorize the MoU in terms of Articles 4(b) and 33 of the Constitution.

(4) The Committee structure under the MoU is lawful even though it is not supported by a specific law. In this connection, the strict theory of positivism by Austin is untenable as explanined by Prof. H. L. A. Hart who departed from Austin's theory.

(5) As such the petitioner failed to make out a *prima facie* case for a stay of the entire MoU. But they succeeded in demonstrating that powers of the Regional Committee are govenmental and the provision for a "Regional Fund" and its administration are contrary to Article 149(1) and 154 of the Constitution as the powers are not subject to central control and audit by the Auditor General. These arrangements are ultra vires and infringe rights under Articles 12(1) and 12(2) of the Constitution. The establishment of the Regional Committee in Kilinochchi is also unconstitutional.

(6) The MoU may, therefore, be implemented after removing the illegalities pointed out by court, by depositing funds in an account with a custodian appointed according to law. Parties may also agree on a different site for the Regional Committee, other than Kilinochchi.

Cases referred to :

1. *Billimoria vs. Minister of Lands and Mahaweli Development* (78-79)1 Sri LR 10
2. *Jinadasa vs. Weerasinghe* 31 NLR 33

APPLICATION for relief for infringement of fundamental rights.

H. L. de Silva, P. C. with S. L. Gunasekara, Gomin Dayasiri and Manoli Jinadasa for petitioners in SC (FR) 228/05

S. L. Gunasekara with Gomin Dayasiri and *Manohara de Silva* for petitioners in SC (FR) 230/05

Gomin Dayasiri with Manoli Jinadasa for petitioners in SC (FR) 230/05

K. C. Kamalasabayson, P. C. Attorney-General with *P. A. Ratnayake, P. C.* Additional Solicitor General, *D. Dias Wickramasinghe,* Senior State Counsel and *Viraj Dayaratne,* State Counsel for 1st respondent (Attorney-General)

R. K. W. Goonesekera for 3rd respondent in SC (FR) 228/05

Nigal Hatch P. C. with *K. Geekiyanage* for Secretary, Ministry of Relief, Rehabilitation and Reconstruction (2nd respondent) in SC (FR) 230/05

Cur.adv.vult

15th July, 2005

SARATH N. SILVA, C. J.

The thirty-nine Petitioners in these applications are Members of Parliament. They are from a single political party, the Janatha Vimukthi Peramuna (J. V. P.) and successfully contested the general election in April, 2004, as nominees of the United Peoples Freedom Alliance (UPFA) being an alliance entered into by certain political parties including the JVP. The Petitioners have been constituents of the UPFA Government formed after the general election. The 2nd to 5th Petitioners were Ministers and Members of the Cabinet of Ministers. The 6th to 9th Petitioners have been Deputy Ministers.

The Petitioners have filed these applications alleging an infringement of their fundamental rights guaranteed by Articles 12(1) and 12(2) of the Constitution. It is contended that while the impugned executive or administrative action infringes the fundamental rights of the Petitioners directly, such action generally affects the rights of their voters and of the People of Sri Lanka.

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 24.06.2005 by the 3rd Respondent, 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 for and on behalf of the Liberation Tigers of Tamil Elam (LTTE).

The preamble to the MoU refers to the tsunami that struck Sri Lanka on 26.12.2004, which destroyed human life and property on an unprecendented scale. It recites the need for all communities to co-operate on humanitarian grounds to ensure an equitable allocation of "post-tsunami funds" to all affected areas. It is further stated that in recognition of the urgent need and in a spirit of partnership the GOSL and LTTE have resolved to work together in good faith and use their best efforts to deliver relief to the coastal communities in the six Districts *viz.* Ampara, Batticaloa, Jaffna, Kilinochchi, Mullaitivu and Trincomalee.

The MoU provides for a management structure at three levels of a :

(i) High Level Committee ;
(ii) Regional Committee ; and
(iii) District Committees.

These Committees have to address the concerns of the persons in the Tsunami Disaster Zone (TDZ) defined as an extent upto 2 kilometers landwards from the mean low water line of the tsunami affected area within Sri Lanka.

The purview of the High Level Committee appears to extend to the entirety of the TDZ and clause 2(d) of the MoU empowers the Committee

to bring within the TDZ additional land area affected, provided that such areas have been directly impacted by the tsunami or directly affected by the displacement and resettlement of persons as a result of the tsunami. This Committee comprises of three members :

(i) One nominee of GOSL ;
(ii) One nominee of the LTTE ;
(iii) One nominee of the Muslim parties.

Decisions of the Committee have to be based on consensus. According to clause 5(b) the main function of the Committee is to formulate policies for the equitable allocation and disbursement of donor funds in the TDZ, based on needs assesssments that are submitted to the Committee and guided by the principle that funds should be allocated in proportion to the number of affected persons and the extent of damage.

At the next level is the Regional Committee (Clause 6 of the MoU). The geographic scope of this Committee is the area of the TDZ in the six districts mentioned above. The functions of the Regional Committee include the development of strategies for the implementation and prioritization of post-tsunami relief, project approval and management in respect of projects for post-tsunami relief, rehabilitation, reconstruction and development ; the over-all monitoring of projects and fund management as provided in Section 7. This section provideds for the establishment of a Post-Tsunami Coastal Fund for the six districts to be called the "Regional Fund". The fund consists of "unspecified (program)" and "secretariat funds". The "unspecified (program)" funds consist of exclusively of foreign funds, whilst "secretariat funds" consist both foreign and local funds.

It is provided that parties meaning, the GOSL and the LTTE shall appoint a suitable multi-lateral agency to be the Custodian of the Regional Fund. The purpose of the Regional Fund shall be to expeditiously make funds available following the approved procedures to facilitate and accelerate relief, rehabilitation, reconstruction and development of tsunami affected areas of the six districts referred to above.

It futher provides that the parties meaning the GOSL and LTTE and the Custodian shall agree on a mechanism for the establishment and operation of the Regional Fund.

According to section 6(c), the Regional Committee will consist of (i) Two members nominated by the GOSL (ii) Five members nominated by the LTTE one of whom shall serve as Chairperson (iii) Three members nominated by the Muslim parties.

The decision making process given in clause 6(e) is that they will be based on consensus and in the event that a consensus cannot be reached by a simple majority.

It further provides that if the decision has an adverse effect on a minority group as acknowledged by at least two members of the Regional Committee, the decision will require the approval of 2/3 majority. In the event a proposal from a District Committee does not get a simple majority and if required by two members the rejection of such request will require 2/3 majority. In terms of section 6(f) the Regional Committee shall be located in Kilinochchi.

At the next level are District Committees, provided for in section 8. The functions of each District Committee is to identify the needs of the TDZ within the District Prioritization of needs, the submission of recommendation to the Regional Committee and monitoring and reporting on progress to the Regional Committee. There is no specific provision with regard to the composition of a District Committee and section 8(c) states that the Committee "already established and well functioning shall continue their work"

The Petitioners contend that the entering into of the MoU, the management structure of P-TOMS, and the respective powers and functions constitute an infringement of their fundamental rights guaranteed by Article 12(1) of the Constitution, for the following reasons :

(i) The 3rd Respondent does not have any authority to enter into the MoU for and on behalf of the Government of Sri Lanka ;
(ii) The MoU does not specify that the 3rd Respondent has been authorized by the President in this matter and in any event, even the President cannot grant such authority on her own responsibility in view of the provisions of Articles 42 and 43 (1) of the Consitution.
(iii) There is no legal basis to enter into the MoU with the LTTE, which is not an entity recognized by law and which is identified with terror, violence, death and destruction.
(iv) The powers and functions of the Committee especially that of the Regional Committee are governmental in nature and content and cannot be validly conferred on such Committee in the manner contemplated in the MoU.
(v) The foreign funds committed by the donors to carry out tsunami relief through the Government, from part of the funds of the Republic and should be disbursed and accounted for in the manner provided in the Constitution and the applicable laws and procedure. The provisions in the MoU for the Regional Fund and its management by the Regional Committee are inconsistent with these legal requirements.

On the basis of the foregoing it is contended that the MoU set up a structure and lays down procedures that are contrary to the rule of law and deny the Petitioners equal protection of law as guaranteed by Article 12(1) of the Constitution.

It is further contended that the MoU with special provisions in relation to six districts only of the TDZ with the establishment of a Regional Committee and a Regional Fund, discriminate against citizens in the area outside their districts who have been equally or worse affected by the tsunami, on the basis of place of birth and residence and as such the fundamental rights guaranteed by Article 12(2) of the Constitution is infringed.

The matters drawn in issue by the Petiontioners in relation to :

(i) The ambit of Executive power of the President ;
(ii) The MoU ex-facie agreed and accepted by the Government and the LTTE ;
(iii) Structure intended to be set up under the MoU in the form of Committees and their composition ;
(iv) The powers and functions of the Committees and the financial arrangements.

are indeed unique and unprecedented in every respect.

The final relief sought by the Petitioners is that the MoU be declared void and invalid in law as being an infringment of their fundamental rights guaranteed by Article 12(1) and 12(2) of the Constitution. They have sought interim relief to restrain the Respondents from taking any steps to implement the MoU pending the final determination of these applications.

From the Petitioners' perspective, if the impugned executive or administrative action is continued pending the final determination of these applications, which would necessrily take considerable time, the final relief would be of no avail. On the other hand, as contended by Counsel for the 1st - 3rd Respondents, if the MoU is not implemented forthwith, urgent humanitarian assistance could not be granted to people of this country, especially in the six districts referred to, who have suffered and continue to suffer, untold hardship and tragedy from the natural disaster that befell them. In this connection, it cannot be disputed that the interest of these helpless people should be borme firmly in mind.

As regards the matter of granting interim relief, I think it appropriate to refer to the provisions of Article 126(4) of the Constitution, which sets out the powers of the Court to grant relief in the exercise of its jurisdiction for the protection of fundamental rights.

Article 126(4) reads as follow :

"The Supreme Court shall have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances"

It is implicit in any provision conferring power that such power should be exercised according to law. This is the basic premise of legality which would necessarily be attached to the exercise of power. If the element of legality is read into Article 126(4) the provision would read as follows :

"The Supreme Court shall have power to grant such relief or make such directions, *according to law* as it may deem just and equitable in the circumstances.

The words in italics have been included by way of interpretation as concomitant of the power to grant relief. Accordingly the relief granted by this Court should have the effect of converting the illegality, if any, which constitutes the infingement, to a situation of legality, in a manner that is just and equitable in the circumstances of the case.

It has been contended that these applications have been filed in the public interest. Therefore the just and equitable effect of the relief granted should permeate the entirety of the public interest drawn in issue and necessarily include the interests of the victims of the tsunami in the six districts referred to above. The observations made above with regard to the relief that may be granted in these applications would in my view apply with equal force to the matter of granting interim relief. However, an interim order cannot encompass the entirety of the relief that may be considered at the end of the case since an interim order does not follow upon a full adjudication of the matter.

An interim order is generally referred to as "Stay Order" because it is primarily intended to preseve that status quo that prevailed prior to intervention of the impugned action. The Court cannot be unmindful of the consequences that may necessarily follow from such an order. In view of these ramifications, it is appropriate at this stage to consider the basis and the criteria generally applicable to the granting of interim relief.

In the case of *Billmoria vs Minister of Lands, and Mahaweli Development*[1]. this court considered the aspects relevant to an interim order to stay all proceedings in an acquisition of land under the Land Acquisition Act. Samarakoon C. J. at page 13 made the following observations:

".....In considering this question we must bear in mind that a stay order is an incidental order made in the exercise of inherernt or implied powers of Court. Without such power the Court's final orders in most cases would if the Petitioner is successful be rendered nugatory and the aggrieved party will be left holding an empty decree worthless for all purposes"

I would describe this observation as setting out the object or purpose for which interim relief is granted. It is to prevent the injustice that would otherwise result to the party invoking jurisdiction if the final relief obtained by him is of no avail since the impuged illegality has by then run its course to an extent that may be considered as irretrievable or irremediable. Counsel for the Petitioners contended, as noted above, that the MoU has a limited span of operation and if the Management Structure provided for is established and become functional whatever final relief they may obtain would be of no avail.

The Petitioners who have been constituents of the Government some holding Ministrial portfolios contend that they have been kept in the dark as to the terms of the MoU, which was made public only as a fait accompli. The contention of Mr. R. K. W. Goonesekera, for the 3rd Respondent is that the MoU culminated a process of "germination" that spanned several months. Whilst this contentioin may be correct, considering the submission of the Petitioners that they being an integral part of the Government were kept in the dark, it has to be surmised that the "germination" referred to did not take place in the public domain. Be that as it may the Court has to note that transparency being an essential component of good governance has not been there in the process of "germination" referred to by Mr. Gunasekara. The submission of the Petitioners is that the MoU hatched in secrecy with its manifest illegalities amounting to an infringement of their fundamental rights should not be allowed to run its course pending as adjudiction of their rights by this Court. These consideration bring the Petitioners case for interim relief fairly withn the dicta in Billimoria's case provided they satisfy the criteria applicable to grant interim relief.

In considering the nature and the extent of the interim relief to be granted it is relevant to advert to the criteria generally applicable to the grant of interim relief. The criteria that is generally applicable is to be discerned from the judgments of this Court constituting precedents that date to the judgment in the case of *Jinadas vs. Weerasinghe*[2]. The criteria fall under 3 different heads. I would summariase the criteria under the following heads :

(i) **Prima Facie Case**

The party seeking interim relief should make out a strong *prima facie* case of an infringement or imminent infringement of a legal right. That, there is a serious question to be tried in this regard with the probability of such party succeding in establishing the alleged ground of illegality.

(ii) **Balance of Covenience**

Under this head the main factor to be considered is the uncompensatable disadvantage or irreparable damage that would result to either party by granting the interim relief or the refusal thereof.

(iii) **Equitable Considerations**

This involves the consideration of the conduct of the respective parties as warrants the grant of interim relief.

The alleged infringement relates to the MOU which provides a management structure with functions and powers assigned to Committees at three levels and in examining the criteria set out above the question to be considered is whether the Petitioners have established a strong prima facie case in respect of the entirety of the MOU or in respect of any clearly

severable part or parts of the MOU. If so, the interim relief has to be restricted to such parts only.

The criteria generally described as balance of convenience and equitable consideration would encompass the matters stated above with regard to the relief that may be granted for the protection of fundamental rights, as set out in Article 126(4), and considered in the preceding section of this judgment. On the basis of the analysis, it would be necessary to consider the disavantage and damage in relation to both parties. Since the MOU is intended to deliver urgent humanitarian assistance to the persons who suffered from the tsunami in the six districts referred to above, if there are any parts of the MOU in respect of which the Petitioners establish a strong prima facie case, it is incumbent on this Court to take the further step of converting the alleged illegality in respect of which a strong prima facie case has been made to a situation that is legal and according to law and thereby ensure that the interim relief would not result in undue hardship to the persons who suffered from the tsunami in these districts.

In the background stated above I would now examine the matters drawn in issue by the Petitioner and itemized as (i) and (ii) above, relating to the ambit of the executive power of the President and whether the M.O. U. could have been validly entered into for the objectives as set out in the preamble.

Mr. H. L. de Silva, P. C. contended that although the President is identified in Article 4(b) as the single authority to exercise the executive power which forms part of the sovereignty of the People, the exercise of such power by the President is circumscribed by the provisions of Articles 42 and 43(1) of the Constitution. These Articles read as follows :

42. "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Consitution and any written law, including the law for the time being relating to public security.

43. (1) There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament.

On a careful scrutiny it is seen that Article 42 specified the responsibility of the President to Parliament for the due exercise, perfomance and discharge of the powers and duties under the Constitution and the law. Article 43(1) similarly lays down the collective responsibility of the Cabinet of Ministers to Parliament in respect of the direction and control of Government. These two provisions relating to responsibility and answerability for the exercise of executive power. The fact that these provisions lay down the element of answerability bring home the point that the exercise, performance and discharge of executive power and

functions is primarily vested with the President. The stage at which answerability arises is upon the exercise of power. It could not be contended on the basis of these provisions that the President should consult or seek prior concurrence of either the Parliament or Cabinet of Ministers for the exercise of Governmental power. However, the element of responsibility and answerability postulates that the President, where it is necessary may seek the concurrence of the Cabinet of Ministers and of Parliament.

In this instance the MOU 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 default in these respects on the part of the President, they are matters for immediate concern of the Cabinet of Ministers and Parliament and not of this Court.

Counsel for the Respondents contended that the ambit of executive power of the President should be considered in the light of the provisions of Article 4(b) and 33 of the Constitution. The relevant provisions of Article 33 which specifically deals with the powers and functions of the President reads as follows :

In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitution, the President shall have the power—

(a) .....
(b) .....
(c) .....
(d) .....
(e) .....
(f) *to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, customs or usage he is required or authorized to do.*

These provisions in my view confer on the President not only specific powers but also a residuary power, in respect of functions that broadly come within the realm of the executive, It cannot be disputed that as Head of the State, Head of the Executive, and of the Government, being the description of the status of the President in Article 30(1), in appropriate circumstnaces the President may lawfully act on behalf of the Republic and enter into agreements and arrangements that may be necessary to carry out essential Governmental functions.

The preamble to the MoU sets out the basis on which it was entered into, being the need to provide urgent humanitatian assitance to the persons who have extensively suffered on an unprecedented scale from the tsunami that struck Sri Lanka in December 2004. As Head of the Executive and of

the Government it is the duty of the President to ensure that essential relief and assistance for rehabilitation, reconstruction and development be made available to the persons who have thus suffered. Hence in my view there is no illegality in the President entering into a MOU for the objectives and reasons set out in the preamble. The Petitioners have failed to make out a strong prima facie case in respect of matters (i) and (ii) drawn in issue by them.

Mr. S. L. Gunasekara, contended that it is illegal to enter into the MOU with the LTTE which he described as a terrorist organization 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 objectives and reasons stated in the preamble, the other party to the MOU is not an entity recognized in law and should not be so recognized due to antecedent illegal activities of the organization.

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 Organization that he seeks to represent beyond the pale of law. We have to also to bear in mind that already a Ceasefire Agreement has been entered into on 23.02.2002 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 for the purpose of rendering humanitarian assitance as contemplated in the preamble to the MOU. The Petitioners have failed to establish a strong prima facie case in respect of this matter as well. In the result the Petitioners have failed to make out a strong prima facie case on any ground that warrants interim relief as to the entirety of the MOU.

From this point, I have to examine the submissions with regard to the specific provisions of the MOU in relation to the Committees and their respective powers and functions.

The basic submisison of the Counsel for the Petitioners in this regard is that the three Committees proposed to be set up as the Operational Management Structure would not derive authority from any law that is applicable. The Respondents' reply is that these Committee are adhoc structures intended solely to ensure the effective disbursement of post-tsunami relief in the six districts referred to above. The Respondents have not identified the provisions of any statute or any other applicable law on the basis of which the Operational Management Structures are being set up. Considering the objectives as set out in the preamble to the MOU and the fact that the structure is set up to facilitate the disbursement of

urgent humanitarian assistance, it would not be ncecessary, in my.view to derive any specific authority from a statute, as contemplated by the Petitioners. The submission of the Petitioners that even in such circumstances the Structure sought to be established should dervie authority from a statute imposes an undue rigidity to a process that must retain a degree of flexibility to ensure that all persons who have been affected are adequately cared for.

In this connection I would refer to a relevant passage from a book on Jurisprudence under the title the "Concept of Law" by Professor H. L. A. Hart. In this book, regarded as a leading work on Jurisprudence, Hart has departed from the strict theory of positivism expounded by Austin that authority should flow down from a clearly defined sovereign body which would in this instance be the legislature. Hart has posed the difficulties that would result in strict legality to cover every situation that may arise, as follws :

".....if the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provisions could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence.

Plainly this world is not our world : human legislators can have no such knowledge of all the possible combination of circumstances which the future may bring....."

(Concept of Law — H. L. A. Hart — 2nd Ed. Page 128)

Hart has continued the analysis and postulated what he described as the open texture of law stated at page 135—

"The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case....."

The tragedy brought about by the tsunami, the human suffering and the loss of property could not have been anticipated in its full dimension in any preceding statute. Furthermore, the matter of reaching the persons who have been affected by this tragedy in certain parts of the six districts referred to is compounded by the presence of LTTE with which organization a Cease-fire Agreement has been entered into as noted above. This combination of circumstances necessarily lead to a situation where an arrangement.could be made by the Head of Government to ensure effective distribution of humanitatrian aid. The Management Structure set up in

MOU has to be primarily seen in this light. In the Circumstances in so far as the Management Structure is not reposed with any power that would impinge on the rights of the people or detract from the normal and statutory functions of Government and of financial control. there would be no basis to restrain the functions of the structure by way of an interim order issued by this Court.

Counsel for the Petitioners, when narrowed down to this issue, quite rightly viewed the matter in the light stated above and did not move for any interim relief in respect of the High Level Committee and the District Committee, since their functions are purely to assist the Governmental authorities on whom the final responsibility lay. However, they urged strongly that interim relief be considered in relation to the Regional Committee which is in terms of the MOU, vested with Governmental powers and control in relation to public finance. In this connection it is to be seen section 6(b)(ii) and (b)(iv) deal specifically with Governmental functions and management of public finance. Section 6(b) (ii) reads as follows :

"Project approval and management, with respect of projects for post-tsunami relief, rehabilitation, reconstruction and development;

This is necessarily a function that comes within the executive to be handled by the Ministry of which the 3rd Respondent, is the Secretary, in accordance with the provisions that have been laid down in applicable law and procedures.

Sub-section (iv) reads as follows :

"Fund management, with respect to the fund specifically defined in Section 7"

The provisions of section 7 which establish the Regional Fund have been reproduced before. The Fund consists of foreign funds and secretariat funds, including both foreign and local funds. It is clear from the provisions of the MOU that the foreign funds referred to are the donations to be received by Sri Lanka from multi-lateral and bi-lateral donors. These funds when received by the country should in terms of Article 149(1) of the Constitution be paid into the Consolidated Fund and be disbursed in terms of the Constitution and the applicable law. Expenditure from this fund would be subject to audit by the Auditor General, as provided for in Article 154 of the Constitution. These are salutary safeguards included in respect of public finance to ensure transparency in the matter of disbursement of funds and proper accountability. Multi-lateral and bi-lateral donors being fully committed to the rule of law, transparency and good governance would necessarily insist that funds committed by them magnanimously for a humanitarian objective be properly dealt with and accounted for in this country, according to the applicable law. The provisions in section 7 read with 6(b)(iv) are plainly inconsistent with the Constitution

and applicable law. Thus the Petitioners have in my view established a strong *prima facie* case for interim relief in respect of section 6(b)(ii) and 6(b)(iv) and section 7 of the MOU. A question now arises as to whether any measures could be imposed by this court to convert the situation of a *prima facie* illegality referred to above to one of legality so that it would be just and equitable from the perspective of all parties concerned.

In this connection it is relevant to note that section 6(i) coming within the purview of the Regional Committees provides for a Project Management Unit (PMU) to be established to manage the projects approved by the Regional Committee. When the operation of section 6(b)(ii) with regard to project approval and management by the Regional Committee is stayed, necessarily the provisions of sub-paragraph (i) would have no effect. However, considering the objectives as set out in the preamble it would be necessary to establish a Project Management Unit that would exercise the Governmental functions in respect of projects for relief, reconstruction, rehabilitation and development in these districts. Therefore the 2nd and 3rd Respondents are at liberty to establish a Project Management Unit in accordance with applicable procedures. The unit so established would take into account the measures recommended by the Regional Committee in terms of section 6(b)(i) and the Regional Committee would retain its functions in terms of section 6(b)(iii) of overall monitoring of projects to ensure that relief is equally received by all persons who have been affected by tsunami.

A specific submission has been made with regard to the provisions of section 6(f) being the location of the Regional Committee. It is provided that the Regional Committee shall be located at Kilinochchi. Counsel for the Petitioners contended that persons from certain part of the six districts referred to would not have easy access to Kilinochchi. This matter was not disputed by Counsel for the Respondents. The safeguards contained in the decision making process set out in section 6(e) to be effective to any "minority group" the members of the Committee should have no fears with regard to the proper exercise of their choice. The Petitioners' contention of the lack of such an environment of freedom in the designated place cannot be disputed. In the circumstances the Petitioners have made out a strong *prima facie* case in respect of section 6(f). Accordingly interim relief is granted restraining the operation of this provision. The parties would be at liberty to decide on a suitable site to locate a Regional Committee on the basis of the criteria set out below :

(i) That the place be centrally located within the TDZ of the six districts referred to ;
(ii) That all persons from every part of the TDZ of these districts should have free and unhindered acces to such location

The criteria set out above would result in the illegality referred to above being converted to situation according to law.

The findings stated above are summarized as follows :

(i) an interim order is not granted in respect of the entirety of the MOU referred to and the Structure as provided in the MOU consisting of Committees may be established and become functional subject to the restrictions as are imposed by this judgment ;

(ii) the operation of Sections 6(b)(ii), 6(b)(iv), 6(b)(f), 6(l) and 7 of the MOU are stayed pending the final determination of this application ;

(iii) the funds both foreign and local intended to be deposited in the Regional Fund as provided in Section 7 may instead be dealth with according to the provisions of the Constitution and deposited in a separate account with a Custodian to be designated, if lawfuly authorized ;

(iv) the location of the Regional Committee may be decided on by the parties in compliance with the criteria that has been stated ;

(v) a Project Management Unit (PMU) may be set up in lieu of the Unit provided for in Section 6(l) by the relevant Ministry in accordance with the applicable procedure. Such Project Management Unit would be at liberty to coordinate and implementation the project with the District Committee, the Regional Committee and the High Level Committes as provided in the MOU.

The foregoing will be operative till the final determination of these applications.

FERNANDO, J - I agree,

AMARATUNGA, J- I agree,

Relief granted partly by limited stay orders.