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

In the matter of an appeal from the Judgment of the Court of Appeal under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 85/2021
SC(SPL)LA No. 376/2019
C.A. Writ Application No. 98/2012

1. H.K. Ajith Pushpakumara of No.63/9A, Sri Rathanapala Mawatha, Matara.
2. Hewa Babrandage Irangani of 18/142, Kajugahawatte Road, Hiththatiya ,Matara.
3. A.W.P. Shantha Pandithasekara of No.105, Tangalle Road, Weeraketiya.
4. Kankani Gamage Somapala Yapa of "Suriya Niwasa", Naotunna, Kekanadura.
5. Rathgodage Chiththaratna of Wasalawalawwa Waththa, Matara Road, Thihagoda.
6. Kandambige Wimal of "Kanthi", Hettiyawala, Puhulwella.
7. Gunasiri Dahanayaka of No. 25D/366, 3rd Cross Road, Dharmapala Mawatha, Pamburana Matara.
8. Premakumara Samarasinghe of No.142/5, Sujata Uyana, Elawella Road, Matara.

9. Kamani Indrani Dharmatilaka Seneviratne of No. 1/7, Galketiya Road, Galle.
10. G.H.B. Manil De Silva of No.193/3B, Galle Road, Dodanduwa.
11. Deepika Withanage of No.189/1, Elliot Road, Galle.
12. G.B.S. Bandula Silva of No.391B, Wackwella Road, Galle.
13. Ariyasena Weerasinghe of No. Matara Road, Unawatuna, Galle.
14. W. Karunaratne Wasantha of "Minipaya", Thawalama South, Thawalama.
15. Nihal Jayatunga of No.303/1, Kanampitiya Road, Galle.
16. K. Kanthi Nawaratne of Dehihena Road, Kiribathawila, Baddegama.
17. N.P.K.A.Induruwa Gamage of No.267A, Rabangewatte, Ginimallagaha.
18. Saman Priyantha Withanage of No. 251/4A, S.H. Dahanayaka Mawatha Richmond Hill, Galle.
19. K.G. Justin De Silva of Mataramba Unawatuna.
20. Rohana Uyangoda of No. 160/1A, Sri Piyaratana Mawatha, Galle.
21. Anura Jayantha Jayasekara of No.8/11G, Wekunagoda Road, Galle.
22. Ranjith Percy Wijayasinghe of No.1/27, Madapathala 2nd Lane, Galle.
23. Upali Wewelwala of No. 414, Hirimbura Road, Galle.
24. W.S. Sanath Ambawatta of

No. 178, Richmond Hill Road,
Galle.

25. K.G. Samarasekara of "Saman",
Yassaha, Walahanduwa.

26. P. Pathiranage Stephen of
Hikagahawatte, Godakanda,
Galle.

27. M.V.A.K. Matharachchi of
No. 844/B,
Athurugiriya Road, Homagama.

28. P.A.Chandrapala of No. 82/7,
Elliot Road, Galle.

29. D.P. Wickramasinghe of
No. 189/1, Elliot Road, Galle.

30. K.G. Wanigaratne of No. 05,
Asoka Mawatha, Madawalamulle,
Galle.

PETITIONER-APPELLANTS

Vs.

1(b) P.M.P. Udayakantha
Surveyor General of Sri Lanka,
Surveyor General's Department,
Colombo 05.

1 (c) S.M.P.B. Sangakkara
Surveyor General.

1(d) A.L.S.C. Perera- Surveyor General,

1(e) Mr. W.T.M.S.B. Tennakoon, Surveyor General

1(f) A. Dissanayake- Surveyor General,

1(g) W.S..L.C. Perera- Surveyor General

2(a) I.H.K. Mahanama,
Secretary, Ministry of Land and Land Development,

2(b) R.A.K.Ranawaka – Secretary.
Ministry of Land and Land Development,

2(c) W.A. Chulananda Perera -Secretary,

Ministry of Lands,

2(d) Somaratne Vidanapathirana,
Secretary, Ministry of Lands,
"Mihikatha Medura",
Land Secretariat,
No.1200/6, Rajamalwatta Avenue,
Battaramulla.

3. Land Survey Council,
Surveyor General's Department,
Colombo 05.

4(b) P.M.P. Udayakantha,

4(c) S.M.P.B. Sangakkara,

4(d) A.L.S.C. Perera,

4(e) Mr. W.T.M.S.B. Tennakoon,

4(f) A. Dissanayake

4(g) W.S.L.C. Perera

5(b) S.M.P.B. Sangakkara,

5(c) S.C.P.J. Dampegama

5(d) W.T.M.S.B. Tennakoon,

5(e) R. Palihakkara

5(f) U.M.A.B. Alahakoon.

6.(b) W.M.S. Weerasinghe,

6(c) A. Dissanayake,

6(d) N.J. Wijenayake,

6(e) K.K.S. Ratnayake,

6(f) F.L.Karunaratne

7(b) N.K. Wickramarachchi,

7(c) K.M.C. Kanthesingha,

7(d) W.S.S.A. Fernando,

8(c) N.A. Gunawardena,

8(d) R.L.K. Jayasundara.

9(a) K.A.K.L. Edirisinghe,

9(b) M.G. Nazoor.

10(a) J.M. Wijewardena - ceased to hold office (vacancy to be filled)

(4th to 10th Respondents are the Chairman and members of the Land Survey Council, Surveyor General's Department, Colombo 05.)

11. The Government Surveyors Association, No.10, Bambalapitiya Drive, Colombo 4.

12. K.S. Wijayawardena, No.170, Ruchirapura, Batuwandara, Madapatha.

RESPONDENT-RESPONDENTS.

BEFORE : **JAYANTHA JAYASURIYA, PC, CJ.**
K. KUMUDINI WICKREMASINGHE, J.
ACHALA WENGAPPULI, J.

COUNSEL : Faisz Musthapha P.C. with Thushani Machado for the Petitioner-Appellants in S.C. Appeal No. 85/2021

Dr. Romesh de Silva PC with Ruwantha Cooray and Thilini Vidanagamage instructed by Sanath Wijewardena for the Petitioner- Appellant in SC. Appeal No. 86/2021.

Sanjeewa Jayawardena, PC with Rajeev Amarasuriya instructed by Sanath Wijewardena for the Petitioner- Appellant in SC. Appeal No. 87/2021.

Dr. K. Kanag Iswaran PC with Razik Zarook PC, Rohana Deshapriya and Chanakya Liyanage for the 11th Respondent in SC. Appeal No85/21 and 4th Respondent in SC. Appeal No86/21 and

for the 18th , 19th , 21st , 23rd, 25th, 27th, 28th, 30th, 31st, 33rd . 36th, 38th – 42nd, 44th, 45th,59th, 61st, 63rd – 65th & 68th Respondents in SC. Appeal No. 87/21.

Manohara Jayasinghe DSG for the Hon. Attorney General.
R.C. Gooneratne for the 70th Respondent-Respondent in SC Appeal No. 87/21.

ARGUED ON : 04.03.2024, 12.06.2024, 13.06.2024, 26.07. 2024 and 05. 08.2024.

DECIDED ON : 22nd November,2024

ACHALA WENGAPPULI, J.

The dispute presented before this Court for its determination in SC Appeal Nos. 85, 86 and 87 of 2021, has arisen from the consolidated judgment pronounced by the Court of Appeal on 11.09.2019 in respect of three applications (CA Writ Application Nos. 98/2012, 682/2011 and 61/2012) that were filed before that Court.

The CA Writ Application No. 98/2012 is an application by which 30 Registered Licensed Surveyors (Petitioner-Appellants), who "*engage in the profession of private practice in surveying*", have sought *inter alia* to *quash* the decision of the 1st and 3rd Respondent -Respondents to issue Field Staff Circular No. 05/2011 of 25.11.2011 ("P3"), by issuance of a Writ of *Certiorari,* while also seeking to prohibit the said Respondent-Respondents from granting Annual Practising Licences to the officers, who are serving in the Survey Department to engage in private practice, in terms of the said Circular.

The Petitioner-Appellant in CA Writ Application No. 682/2011 is the Surveyors' Institute of Sri Lanka, a statutory body created by the Surveyors' Institute of Sri Lanka (Incorporation) Act No. 22 0f 1982, who also prayed for almost identical reliefs, as did by the Petitioner-Appellants in CA Writ Application No. 98/2012. The Surveyors' Institute of Sri Lanka filed another application before the Court of Appeal (CA Writ Application No. 61/2012), by which it sought a Writ of *Certiorari* to quash the decision of the Land Survey Council taken to issue Annual Practising Licences to the 12th to 70th Respondent-Respondents, who are named therein ("P14"), along with a Writ of *Prohibition* in prohibiting the said Respondent-Respondents from issuing Annual Practising Licences to serving officers of the Survey Department to engage in private practice.

In CA Writ Application No. 98/2012, the Petitioner-Appellants have named only 10 Respondent-Respondents in the caption to their petition, including the Surveyor General, Secretary to the Ministry of Lands and Land Development, the Land Surveyor Council and all of its members. During pendency of the said application before the Court of Appeal, the Government Surveyors' Association intervened and was added as the 11th Respondent- Respondent by the Court of Appeal on 16.10.2012. A Senior Superintendent of Surveyor, serving in the Survey Department, *K.S.K. Wijayawardane*, too has intervened and named as the 12th Respondent-Respondent on 16.10.2012, as he too was granted an Annual Practising Licence, after the issuance of the impugned Field Staff Circular.

The three Respondent-Respondents named in CA Writ Application No. 682/2011 are the Surveyor General, the Secretary to Ministry of Lands and Land Development and the Attorney General. The Government

Surveyor's Association and the Secretary of the Survey Department Staff Officers Union, *K.S.K. Wijayawardane,* too were added as the 4th and 5th Respondent-Respondents respectively on 13.03.2012, after their interventions were allowed.

It is clear from the pleadings that were tendered before the Court of Appeal by the Petitioner-Appellants in CA Writ Application Nos. 98/2012 and 61/2012, that they seek to challenge the validity of the Field Staff Circular No. 05/2011 dated 25.11.2011, issued under the hand of the Surveyor General. In addition, the Petitioner-Appellant in CA Writ Application No. 682/2011 sought to challenge the legality of the decision taken by the Land Survey Council (hereinafter referred to as "the Council"), at its 103rd meeting held on 09.02.2012 and under item 103.5 of the agenda, to grant Annual Practising Licences to officers of Sri Lanka Survey Service.

The relevant minutes indicate that the said issue was taken up for consideration by the Council and since the views expressed by the members of the Council were at variance, a vote was taken in terms of the law. Out of the seven of the Council members, four voted in favour of granting licences while the remaining three members voted against. Accordingly, the impugned decision was adopted by the Council by majority of votes. The members of the Council, who voted against the said decision too are named as Respondents.

In order to ensure clarity and consistency in the presentation of this judgment, the collective body of the Petitioner-Appellants, who espoused a common cause, shall be referred hereinafter as "the Petitioners" and the

multitude of Respondent-Respondents who resisted the same, are referred to as " the Respondents".

The Surveyor General, the Land Survey Council, the Government Surveyor's Association, and the 12th to 70th Respondents (in CA Writ Application No. 61/2012), have filed their individual Statement of Objections. Three members of the Council (7th, 8th and 9th Respondents in CA Writ Application No. 98/2012 and 6th, 7th and 8th Respondents in CA Writ Application No. 61/2012, respectively) who voted against the impugned decision of the Land Survey Council, also tendered their own Statements of Objections, supporting the Petitioners' claim. Hence, the claim of these three Respondents shall be considered along with that of the Petitioners, after they being separated from the rest of the other Respondents, who strongly opposed the three applications. Hence, the reference to "the Petitioners" in this judgment includes these three Respondents, whereas the reference "the Respondents" is used to denote all the remaining Respondents, who opposed the three applications of the Petitioners.

After affording a hearing to all the parties, the Court of Appeal, by its amalgamated judgment dated 11.09.2019, refused to grant relief to any of the Petitioners and proceeded to dismiss the three petitions. Therefore, the Petitioners have sought Special Leave to Appeal against the said judgment in three separate applications bearing numbers SC (Spl) LA Nos. 376/2019, 380/2019 and 382/2019, respectively.

On 14.10.2021, this Court, upon hearing the Petitioners as well as the Respondents, decided to grant Special Leave to Appeal against the said impugned judgment of the Court of Appeal on following questions of law,

and made them applicable to all three SC (Spl) L.A. Application Nos 376/2019, 380/2019 and 382/2019:

1. Whether or not Government Surveyors can do private practice in terms of Survey Act No. 17 of 2002 ?
2. Did the Court of Appeal err in law in failing to appreciate whether the issuance of the impugned circular is irrational and/or arbitrary and /or unreasonable ?
3. Did the Court of Appeal fail to consider the impact of the other Statues such as Land Registration Act, Title Registration Act and Partition Law when considering reasonableness of the impugned circular ?

4(a). Does the circular fall within the purview or provisions of Survey Act No. 17 of 2002 ?

4(b). If so, can the circular be challenged on the question of law formulated in Questions of Law Nos. 2 and 3 above?

After Special leave to Appeal was granted, the three SC (Spl) L.A. Application Nos 376/2019, 380/2019 and 382/2019 were renumbered as SC Appeal No. 85/2021, SC Appeal No. 86/2021 and SC Appel No. 87/2021, respectively. In view of the fact that the questions of law are common to all appeals, a consolidated judgment is pronounced by this Court in respect of the said three appeals, which shall be binding on all parties to SC Appeal No. 85/2021, SC Appeal No. 86/2021 and SC Appel No. 87/2021. It must be noted in this respect that most of the documents relied on by the Petitioners in their three petitions are common to all and,

in the circumstances, in making references to them in this judgment, rather than identifying them with the different markings given to them by each Petitioner, I have opted to refer to their description and content, in order to avoid any confusion or ambiguity.

On 04.03.2024, hearing of the three appeals was commenced before this Court and the learned President's Counsel for the Petitioners made their submissions, which continued for several days. At the conclusion of the submissions for the Petitioners, learned President's Counsel, learned Counsel and the learned Deputy Solicitor General for the Respondents also made their submissions, and an opportunity was provided for the Petitioners to make a concise reply.

Since I intend to refer to the submissions made by the learned President's Counsel for the Petitioners as well as the Respondents in detail as we progress along the judgment, at this moment of time, and for the purpose of setting out the main points that require consideration by this Court, I intend to make references to those submissions *albeit* briefly.

The Petitioners contend that the Court of Appeal erred in law, in its failure to appreciate whether the issuance of the impugned circular is arbitrary and unreasonable, for the reasons:

a. that the intention of the Parliament in the enactment of the Surveys Act No. 17 of 2002 was not to permit the surveyors serving in the Survey Department to engage in private practice,
b. that the Land Survey Council acted arbitrarily and unreasonably in arriving at its decision to grant Annual

Practising Licences to the surveyors serving in the Survey Department to engage in private practice, in view of the dichotomy that exists between Registered Surveyors and Registered Licensed Surveyors, as recognised by the said Act,

c. that the Circular falls outside the parameters of the Surveys Act No. 17 of 2002,
d. that the impugned circular granted blanket approval of Government Surveyors to engage in private practice, contrary to the provisions of the Establishments Code,
e. that the adverse impact of the impugned decision had on other statutes, such as Land Acquisition Act, Registration of Title Act and Partition Act, created by the impugned Circular,

The Respondents, defending the judgment of the Court of Appeal, contended that:

a. there are no legal impediments created by the Survey Act No. 17 of 2002, preventing the surveyors, who are serving in the Survey Department, to engage in private practice,
b. the Section 44 of the said Act must be construed in such a manner to give effect to the intention of the Legislature in permitting private practice,
c. the decision of the Council was reached in terms of the law and on the majority view,
d. the issuance of the Field Staff Circular is not *ultra vires* the powers of the Surveyor General,

e. the issuance of the said Circular was in recognition of the right to engage in lawful occupation in terms of Article 14(1)(g).

It is evident from the perusal of these multiple contentions presented by the Petitioners that they collectively challenge the validity of the Field Staff Circular No. 5/2011issued by the Surveyor General and the decision of the Council to issue Annual Practising Licences to registered surveyors, who are engaged in land surveying on behalf of the Government, along with questioning the validity of the decision-making process adopted by the relevant Respondents in relation to these two instances.

Therefore, I shall consider the validity of the issuance of the Field Staff Circular No. 5/2011 first and, thereafter, proceed to consider the validity of the proceedings of the Council, which culminated in the decision to issue licences to some of the Respondents, in the light of the line of reasoning adopted by the Court below in respect of these two issues.

The approval by the Secretary the Ministry of Lands and Land Development

One of the two main points that was urged quite strongly before this Court by the 1st to 3rd Respondents in their submissions defending the judgment of the Court of Appeal was that neither the Act nor the Establishments Code placed any fetters on the rights the Surveyors in Sri

Lanka Surveyor's Service to engage in 'private practice', who are registered surveyors, and employed in the Survey Department. Hence, it was submitted by the Respondents that the challenge mounted by the Petitioners to the legal validity of the Field Staff Circular No. 05/2011, which was issued with permission of the Secretary to the Ministry of Lands and Land Development in terms of the Establishments Code and, the decision of the Council to grant Annual Practising Licences to the members of the said Service in terms of the Survey Act, is totally misconceived in law. They further contended that the Petitioners have come before Court for a collateral purpose and acted in *mala fides* to advance the interests of private surveyors and thereby prejudice the rights of those who are legitimately entitled to obtain such a licence.

Before I proceed to examine the validity of the issuance of the Field Staff Circular, the Respondent's contention, that both the Survey Act and the Establishments Code place no fetters on their entitlement to private practice, should be examined first, in the light of the relevant provisions contained in the Act as well as the Code.

Of the two components of the said contention referring to the Act and the Establishments Code, it is prudent to start the examination of the provisions that are relevant to the issue as contained in that Code before proceeding to consider them in the Act. With that objective in mind, I now turn to refer to the relevant provisions of the Establishments Code.

Chapter XXX of the Establishments Code is titled " *Rights of Government over its Officers*", and Section 1:1 of that Chapter states that "*[T]he Government has total claim to the time, knowledge, talents and skills of its officers and their salary is fixed on that assumption, unless specifically provided*

for otherwise." It is therefore clear that the Code does not approve in principle that the public officers to make available their "*time, knowledge, talents and skills"* for other entities for a fee or reward, "*unless specifically provided for otherwise"*. The Establishments Code indicate the reason for such a limitation as it clarifies that the salary component of public officers was determined on the assumption that the "*… Government has total claim to the time, knowledge, talents and skills of its officers".*

But it must be noted that is not an absolute prohibition. There are exceptions made to this rule recognised by the Establishment Code itself. In relation to the instant appeals, Section 1: 4 of the Code becomes relevant. The said Section states that "*[T]he permission of the Secretary is required before an officer may undertake for a fee any work outside his normal official duties."* The process by which a public officer could undertake any work outside his normal official duties for a fee, is set out in Section 1:3. That Section states that "*[A]n officer may not undertake any service for a Local Government Body, Public Corporation or other body, or for any private party, without previously obtaining the sanction of the Secretary."*

The Respondents therefore placed reliance on a series of correspondence between the Surveyor General and the Secretary to the Ministry of Lands and Land Development, in order to impress upon the Courts of the legality of the process, which culminated with the issuance of the impugned circular under the hand of the Surveyor General, permitting them to engage in private practice.

These documents include:

a. Letter issued by the Minister of Lands and Land Development dated 29.06.2011 to the President of Government Surveyor's Union,
b. Letter dated 11.11.2011, issued by the Secretary to the Ministry of Lands and Land Development to the Surveyor General conveying that the Minister has granted permission to engage in private practice by making reference to a letter date 13.11.2011,
c. Recommendation addressed to the Minister of Lands and Land Development by the Secretary of that Ministry dated 13.11.2011,
d. Letter issued by the Secretary to the Ministry of Lands and Land Development dated 25.11.2011,
e. The Field Staff Circular No. 05/2011 of 25.11.2011 .

The Petitioners, on the other hand, accused the Secretary of the Ministry merely acted under the 'dictation' of his Minister in issuing the said letter. Therefore, they contended that the issuance of the said circular is tainted with an illegality, as the Secretary has failed to exercise the discretion conferred upon him by the Establishments Code in this regard and instead of exercising that discretion by himself, allowed himself to be subjugated to the dictates of his Minister by issuing the letter dated 25.11.2011.

The current dispute arose as a result of the claim made by the surveyors, who are employed in the Survey Department, asserting their entitlement to engage in 'private practice', whilst being in employment in the said Department. The surveyors, who already are engaged 'private practice' naturally opted to resist this claim. In the circumstances, it would offer some assistance to consider the dispute presented before us in its proper perspective, if the starting point, at which the surveyors in the

Survey Department claimed of their entitlement to engage in 'private practice', is traced.

Perusal of the pleadings before the Court below indicate that the agitation of the surveyors, who are employed in the Survey Department, seeking permission to engage in private practice, has a long history. In December 1991, the then Minister of Land, Irrigation and Mahaweli Development, by way of a memorandum addressed to the Cabinet of Ministers, sought its approval to grant such approval. At the time of presentation of the said Cabinet Memorandum, the Survey Ordinance was applicable to the affairs of all the surveyors, who are employed in the Survey Department as well as to the others, who already engaged in private practice. The Cabinet of Ministers have approved the said memorandum and, as a consequence of which, the Field Staff Circular No. 05/1992 – dated 05.02.1992, was issued by the then Surveyor General.

The validity of the issuance of the said Field Staff Circular by the Surveyor General (1st Respondent in that application) was challenged before the Court of Appeal by the Surveyors' Institute of Sri Lanka. The C.A. Application 336/1992 by which the said Institute sought to quash the said circular by way of a Writ of *Certiorari* and also sought to prevent the Surveyor General from calling for applications by way of a Writ of *Prohibition.* The Court of Appeal refused the application and accordingly the petition of Surveyors' Institute of Sri Lanka was dismissed. In challenging the said dismissal, the Institute obtained Special Leave from this Court, against the judgment of the Court of Appeal.

In the resultant appeal before this Court, bearing SC Appeal No. 60/94 (decided on 05.10.1994) , *Kulatunga* J, allowed the appeal of the

Surveyors' Institute of Sri Lanka on the premise that "… *the Field Staff Circular No. 05/92 dated 05.02.92 is ultra vires and its implementation is in excess of the 1st Respondent's power to grant annual licences to land surveyors under the Ordinance.*" Since the pronouncement of the said judgment, no attempt was made by the Surveyors, employed in the Survey Department, to explore the possibility of finding an alternative legally viable option to achieve their objective.

The new Survey Act was certified on 04.10.2002. After coming into operation, the Act repealed the Surveyors Ordinance, that governed all the affairs of land surveying, by Section 25(1)(a). The time gap of almost nine years that has elapsed between the enactment of the Act and the revival of the agitation for seeking permission to engage in private practice, which lead to the instant process of litigation, therefore becomes relevant. It appears from their conduct that the members of the union that it had accepted Act made no changes to the *status quo ante,* regarding the restriction imposed on its members to engage in private practice, subsequent to the pronouncement of the said judgment of this Court.

It is evident from the pleadings that the surveyors, who are employed in the Survey Department, make an attempt to revive their claim to engage in private practice only in the year 2011. That too was made by way of a trade Union action. The Minister of Land and Land Development then issues a letter addressed to the trade Union. The contents of that letter indicate that, in order to avert a prospect of a strike action by the surveyors of the Survey Department, the then Minister of Lands decided to issue a letter dated 29.06.2011 addressed to the President of Government Surveyors' Union. What is important to note in this letter is

that it indicates in no uncertain terms that it was the Minister who decided to grant permission for the members of that Union to engage in 'private practice'.

After these events that had taken place in the Month of June 2011, the Secretary to the Ministry, by his letter dated 13.11.2011, sought approval of his Minister for his approval to the surveyors, who are employed in the Survey Department, to engage in private practice. In that letter, the Secretary refers to a prior discussion they had with the Union and reminds his Minister of the fact that he (the Minister) has already approved the said request " *in principle*". The Secretary also refers to an opinion expressed by the Attorney General, and supports the decision already taken by the Minister, by adding that he personally verified from the Secretary to the Ministry of Health as to the basis on which the Government Medical Officers were granted permission to engage in private practice and found out that it has been granted with the approval of the Minister of Health. The Minister makes an endorsement, on his Secretary's request for permission, as "*approved*".

The said letter of the Secretary also refers to several areas of concern expressed by the Attorney General in his opinion on the question of permitting 'private practice' to surveyors in the Survey Department. The opinion of the Attorney General covered three aspects. First, it states that there is no express prohibition imposed by the Act for the surveyors in the Survey Department to engage in private practice. Secondly, the Attorney General was of the view that the entitlement to engage in private practice is subject to the conditions that are stipulated in the Letters of

Appointment issued to surveyors of the Department and also conform to the policy of the Government.

In relation to the issue under discussion, it must be highlighted that the clear advice given by the Attorney General was there must be a policy decision taken in this regard by the Government, meaning a decision taken by the Cabinet of Ministers, and not the Minister in charge of land and land development. This condition also presupposes that there was no policy decision made by the Government in granting permission to the surveyors of the Survey Department to engage in 'private practice'. It is rather strange that none of the parties thought it fit to produce a single letter of appointment issued to a surveyor, who is employed in the Survey Department, in their pleadings, and facilitating the Courts to have an understanding of the exact terms and conditions that are stipulated therein in relation to their scope of employment. If the contents of the Letters of Appointment support the Respondent's position, then it is obvious that they would have relied on them by bringing them to the notice of Court.

It must also be noted in this context that the Secretary, in informing his Minister of the basis on which the Government Medical Officers were permitted to engage in private practice by the Secretary to Ministry of Health, upon the concurrence of the relevant Minister, made a rather misleading statement to his Minister which even could be considered as contrary to the express provisions that contained in the Establishments Code that govern the issue of private practice of health professionals. This is because, the provisions contained in Section 1:4 were made inapplicable to them by that Code.

Section 1:5 of the Establishments Code states "*Sub-section 1:4 and 1:6 will not apply to cases authorised under Chapter IX of this Code and to officers of a Department (e.g., Health) who are governed by the regulations and instructions of that Department regarding private practice and consultation practice.*" Hence, in terms of the applicable provisions of the Establishments Code, the case of surveyors, who are employed in the Survey Department, could not be equated with that of the health professionals, as the applicable provisions of the Code, in relation to permitting private practice, are quite different to each other.

Now I turn my attention to the letter of the Secretary dated 11.11.2011, addressed to the Surveyor General, permitting the latter to issue the impugned circular. In the said letter, although dated 11.11.2011, the Secretary makes a reference to another letter dated 13.11.2011, which he himself authored. That is the letter on which the Minister has made an endorsement, "*approved*". It is on the strength of this letter only the Surveyor General issued the impugned Field Staff Circular No. 05/2011 dated 25.11.2011. How is the letter dated 11.11.2011 makes a reference to a letter issued two days later ?

The Secretary in the joint Statement of Objections, in which the 1st and 3rd Respondents too joined with him to affirm, offered no explanation for this strange mix up of dates. Whether the said inaccurate reference made to dates due to a genuine mistake made on the part of the Secretary or whether it is a result of a hurried attempt made to justify a decision already taken and implemented, could not be assessed properly for the purpose of expressing a definitive finding on either way.

What is important to note from examination of the contents of these correspondences is that the decision to grant approval to the surveyors employed in the Survey Department to engage in private practice was taken by the Minister and not by the Secretary, although it was said to be granted *"in principle"*. Nowhere in that letter the Secretary states that he approves the request of the surveyors serving in the Survey Department in terms of the Establishments Code, in spite of the fact that the Section in the Code speaks of a "*sanction*" by the Secretary. It is evident from these factors that the role played by the Secretary in the impugned decision-making process of granting approval is limited to summarising the details of a meeting the Minister already had with a trade union, and making enquiries from the Ministry of Health. It is not clear who sought the opinion of the Hon. Attorney General. The Secretary, in sending that letter out to the Surveyor General, has thereby acted as a mere conduit, after acting on the decision of his Minister, although states that he 'approves' the request.

This factor is, as rightly contended by the Petitioners, could easily be equated to a situation, in which the Secretary had acted under the dictation of his Minister. It is the Secretary who, in terms of Section 1:4 of the Establishment Code, should have taken the decision on the request/demand made by the Union of the surveyors, employed in Survey Department, to engage in private practice, but as the documentary evidence referred to above indicate that it was the Minister who in fact had taken that decision, when that Union had threatened him with an imminent strike action.

On the submission of the Petitioners that the Secretary acted on the dictation of his Minister, it is relevant to note that *De Smith's Judicial Review,* 8th Edition, states (at p.338) that "*[A]n authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person. In at least two Commonwealth cases, licensing bodies were found to have taken decision on the instructions of the head of Government who were prompted by extraneous motives.*" Learned author continues by adding that " *… it is enough to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those who are not entrusted with the power to decide.*" In this instance of course, there is no decision taken by the Secretary in terms of Section 1:4 of the Establishment Code at all, but as already noted, the decision was taken by the Minister, who was not entrusted with power to decide the issue.

There is another important aspect that arise from this set of circumstances, which also impinges on the validity of this decision. This decision of the Minister was taken during a discussion he has had with the relevant trade union and in the presence of ministry officials on 29.06.2011. The decision is primarily regarding the terms and conditions of employment applicable to the registered surveyors, who are employed in the Survey Department. They are public officers. But, by then, the 18th Amendment to the Constitution was in operation and the Article 55 of the Constitution was substituted with a new Article. The new substituted Article 55(1) was applicable at the time of the said decision taken by the Minister.

Article 55(1) reads as follows:

> *"[T]he Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal."*

There cannot be question whether the surveyors, who are employed in the Survey Department, should be permitted to engage in private practice is a decision that should be taken based on a policy. Therefore, that decision concerns a matter well within the scope of activity demarcated by Article 55(1) and should have been taken by the Cabinet of Ministers, and not by the Minister, in his capacity of being in charge of subjects of land and land development.

The Petitioners relied on the speech made by the then Minister of Lands, whilst presenting the Bill to the Parliament, as reported in the *Hansard* of 25.07.2002, in support of their contention that the new Act, in no way was intended to authorise the surveyors, who are employed in the Survey Department, to engage in private practice. The relevant part of the speech made by the Minister in Parliament, during which he made a reference to the question of private practice, was highlighted by the Petitioners before this Court.

The text of *Hansard* of 25.07.2002 the Parliament, which reads (at p. 1924), is as follows:

> " රජයේ මිනින්දෝරුවන්ට පෞද්ගලික අංශයේ වැඩ කරන්නට මෙහිදී කොහෙත්ම අවකාශයක් නැහැ. මෙහිදී වෙන්නෙ මීට පසුව පෞද්ගලික අංශයේ මිනින්දෝරුවන්ට රජයේ ව්‍යාපෘති සඳහා වැඩ කරන්න පුළුවන් වීමයි."

When a new enactment is brought in, replacing another, certain rules of interpretation apply. *Bindra,* (at p. 209) states " *[I]t is a well-settled*

rule of construction that when a statute is repealed and re-enacted, and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them in the repealed Act, because the Legislature is presumed to be acquainted with the construction which the Courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the Court as correctly reflecting the legislative mind."

Section 4 of the Surveyors Ordinance conferred authority on the Surveyor General to " *… grant annual licenses to practice as a land surveyor…".* Thus, the reference to the issuance of 'Annual Practising Licences' and permitting surveyors to engage in the 'practice' of land survey are common to the repealed and re-enacted statutes. In SC Appeal No. 60/94, *Kulathunga* J, declared the assumed power of the Surveyor General to permit his employees, who too are qualified surveyors, to engage in private 'practice' is *ultra vires* of his powers, overriding the view taken by the Court of Appeal that it is *intra vires*. In that matter, the Court of Appeal was of the view that a surveyor who currently serving in the Survey Department too is entitled to obtain an annual licence for private practice under Section 4 read with Section 6(1) of the Ordinance, on the basis that the words " *any person who has served in the Survey Department*" in paragraph 9 of the Schedule may not necessarily be limited to persons who had previously served and therefore ceased to hold such office.

Kulatunga J, went on to state that:

> " *[I] am satisfied that the effect of Section 18 is clearly to confine the persons exempted by Section 6 from the requirement of having to pass the examination, to persons mentioned in paragraph 9 of the*

Schedule who have ceased to hold office in the Survey Department. I agree that the Court below has misdirected itself by interpreting the Schedule independent of Section 6, in the result, it failed to consider the impact on Section 18 on Section 6."

Thus, it is clear that the pronouncement made by this Court in SC Appeal No. 60/94 is that only the surveyors, who ceased to hold office in the Survey Department could be considered to be permitted to engage in 'private practice' by issuance of a practicing license and not the surveyors, who are currently in its employment.

The Legislature, in enacting the Survey Act by repealing the Surveyors Ordinance, and if it intended to depart from the scheme that contained in the Ordinance in relation to the question of entitlement to 'private practice', in relation to surveyors, who are employed in the Survey Department, had the opportunity to provide specifically for that situation. This is because, this Court by its pronouncement already made it clear that the provisions of the Ordinance had no statutory provision to issue the Field Staff Circular No. 05/1992, although there too was no specific statutory provision to prohibit the Surveyor General from issuing such a Circular and thereby making a conferment of an opportunity on his officers to engage in private practice. That being the legal regime that was in place prior to the enactment of the Survey Act, if the Parliament was of the view that a reversal of that policy is needed, then it should have made that shift of policy by incorporating a statutory provision which enable the concerned authorities to grant such permission as a positive pronouncement of the Legislative policy. Certainly, in the absence of such a positive expression, it could not be reasonable to infer that the enactment

of provisions of the Survey Act in its current form is to mean that the Parliament intended to depart from its previous legislative policy on the question of 'private practice'. The reason for such an absence, coupled with the Minister's statement to Parliament on the issue, expressing a view contrary to what the Respondents contend as the Act intended, could reasonably be inferred to mean that there was no intention on the part of the Parliament to envisage a situation where the Act directly or indirectly permits such a course of action either by the Surveyor General or by the Land Survey Council.

Therefore, the Legislative scheme presented with the Survey Act, could safely be termed as representing the current policy of the Government as determined by the Cabinet of Ministers. When the Cabinet of Ministers approved the provisions of the Act in the form of a Bill , its approved of the text contained in that Bill, is an endorsement of the underlying policy considerations, on which it was originally drafted. If that original policy considerations should be deviated from, that shift of policy must originate from the Cabinet of Ministers itself. When the Parliament, by enacting that Bill into law, makes it the Legislative policy. Therefore, it is for the Parliament to make its intentions clear, if it were to deviate from that policy.

Even for the sake of argument, if it is to be assumed that the Secretary of the Ministry of Lands and Land Development had in fact granted permission to the surveyors, who are employed in the Survey Department to engage in private practice in terms of Section 1:4 of the Establishments Code, that permission in itself would not be sufficient for them to engage in private practice. Section 44(1)(b) of the Act states that

only a registered surveyor, who holds an Annual Practising Licence, may engage in the "*practice*" of land surveying for a fee or reward. Section 41 of the Act empowers the Council to grant Annual Practising Licences to those of who seeks to 'practice' land surveying, among the registered surveyors. Thus, it is with a licence only a registered surveyor could engage in the '*practice of land surveying*' and not on a Circular issued by his head of the Department.

Furthermore, in terms of the Establishments Code, there is no right, or an entitlement conferred on public officers to engage in private practice, whilst holding office. I have already referred to the fact that the relevant Secretary of the Ministry, under whom the particular officers are placed, is conferred with a discretionary power to decide, if such a request is made and that too in the instances where the attendant requirements that stipulated in the Code are satisfied. It is undoubtedly a privilege afforded to public officers and no officer could demand to engage in private practice as of right or as an entitlement during his tenure of office.

It is clear from the perusal of these statutory provisions contained in the Act that no registered surveyor, whilst engaged in land surveying on behalf of the Government, could '*practice*' land surveying for fee or reward without obtaining a valid Annual Practising Licence, even if he is permitted to "*undertake for a fee any work outside his normal official duties*" by the Secretary, in terms of Section 1:4 of the Establishments Code. The permission of the Secretary therefore would only be helpful to such a surveyor only to the extent to shield himself from any disciplinary proceedings for engaging in private practice, without obtaining prior sanction.

What the Petitioners of SC Appeal Nos. 85/2021 and 86/2021 have sought from the Court of appeal as a relief in their prayer was to quash the Field Staff Circular No. 05/2011, issued by the Surveyor General on 25.11.2011. In view of the reasoning contained in the preceding section of this judgment, I have already arrived at the conclusion that the 'permission' granted by the Secretary to the Ministry of Lands and Land Development by his letter dated 11.11.2011 has no legal validity. The Field Staff Circular No. 05/2011 was issued by the Surveyor General, only on the strength of that letter, as the said Circular made a reference to the letter of the Secretary dated 11.11.2011, which granted authorisation to the request to engage in 'private practice' made by the registered surveyors, who are employed in the Survey Department.

The extensive powers and functions that conferred on the Surveyor General are set out in Section 2 of the Act. However, there is no mention of any power or function by which the Surveyor General could permit his subordinate officers, who '*engage in land surveying*', to switch to '*practice in land surveying*'. Hence, there is no need to re-emphasis the fact that if the very letter of authority, on which the Circular was issued, has no validity in the eyes of law, as a consequence the circular issued on that letter of authority too loses its validity. Hence, in view of this reasoning the said Petitioners are entitled to have the said circular quashed.

Whether the Registered Surveyors and Registered Licensed Surveyors belong to two classes of surveyors

The remaining point of the two points urged by the Petitioners is that the dichotomy that exists between Registered Surveyors and Registered Licensed Surveyors, as recognised by the provisions of the said

Act, is a fundamental factor, which the Court of Appeal failed to consider in its proper perspective.

In Sri Lanka, surveying activities were statutorily regulated since the latter part of the 18th Century, as the Ordinance No. 15 of 1889 (Chapter 108), was enacted to provide for the licensing of Surveyors. This Ordinance continued to govern the surveying activities in this island for over two centuries, until it was repealed by the enactment of the Survey Act.

The Act, in turn provided an interpretation to the phrase *"land survey"* in Section 66 and used the same throughout in the text, which reads as follows:

(a) the determination or establishment for boundary purposes of the form, contour, position, area, shape, height, depth, or nature of any part of the earth or of any natural or artificial features, and the position, length and direction of bounding lines on, below, or above any part of the earth;

(b) the determination or establishment of the extent of any right or interest in land or in air space;

(c) the determination of the location of any feature relative to a boundary for the purpose of certifying the location of that feature; and includes;

(i) cadastral surveying;

(ii) compiling a network of any order of precision;

(iii) preparation of any plan or map; and

(iv) establishing photogrammetric ground controls,

for the purpose of the functions specified in paragraph (a), (b) and (c).

The term "*Cadastral survey*" too is defined in the said Section as any survey for the purpose of delineating, determining or defining the boundaries of any parcel of land or premises or any legal rights or interests attached thereto while the term, "*aerial survey*", is defined as the science of obtaining measurements by means of aerial photography. These multiple definitions provided by the Act do amply illustrate the full spectrum of activities, known as "*land surveying*". Being an island nation, it is superfluous to highlight the importance of the function defined as land surveying and its impact on the larger community of Sri Lankans. Hence, the necessity for the activities related to surveying to be regulated in a statutorily laid down scheme.

The Act, in its long title states *inter alia* that it is an Act to provide for the establishment of a Land Survey Council (hereinafter referred to as "the Council") to regulate the professional conduct of Surveyors, and accordingly the individuals who have acquired knowledge and skill of surveying were expected to conform to the scheme put in place by the Act, if they are to engage in land surveying in Sri Lanka.

A closer examination of the said reveals that a clear distinction could be identified in terms of the physical act of surveying. The phraseology used in the Act to denote one such form of activity is " … *to engage in land surveying"* (ඉඩම් මැනුම්කරණය), whereas the other activity referred to in the Act describes the same as " … *practice land surveying"* (ඉඩම් මැනීමේ වෘත්තිය). These distinct words used by the Legislature, "*engage in land surveying"* and "*practice land surveying",* in describing the otherwise identical acts of land

surveying to denote two distinct forms of surveying, needs further examination.

If one were " … *to engage in land surveying"*, in terms of Section 39(1) of the Act, he must first obtain registration with the Council and only after a Certificate of Registration is issued by that Council, he could "*engage in land surveying"*. It is imperative for such an individual to possess the qualifications specified in the Schedule to the Act, if he was to be grant with registration. Only such surveyors are termed as "registered surveyors". In Sections 2(q), 37(a), 37(d), 37(g), 37(h), 39(1), 39(2), 39(4), 41(3), 44(1)(q) and 47(1), are the places, where the phrase "*engage in land surveying"* was used in the text, could be found.

On the other hand, the phrase " … *practice land surveying"* could be found in Sections 37(c), 44(1)(b), 45(1)(b), 47(1)(e), 54(1) and, in Section 64(1)(e)(i) the phrase "*practices and surveying for fee or reward"* is used instead of the phrase " … *practice land surveying"* . Thus, the deliberate use of these two phrases to denote a common act of land surveying, should obviously be to serve a particular purpose, which the Legislature intended to achieve by the enactment of the Act.

In the interpretation Section (Section 66), the Act defines two categories of surveyors. First, it defines a "*registered surveyor*" as a person registered by the Council under this Act. Secondly, the Section also defines a " *registered licensed surveyor*" as a registered surveyor who was issued with an Annual Practising Licence. It is noted that in the second instance, a " *registered licensed surveyor*" is issued with an Annual "*Practising"* Licence, whereas a registered surveyor is only issued with a Certificate of Registration and that too is only to "*engage*" in land surveying. This is an

instance which could be taken as affording recognition to two different groups from the individuals, who have acquired the required qualifications in surveying, by highlighting a distinction between the two, is statutory terms.

In this regard, it is necessary that the statutory provisions that clearly set out the distinction between *"engage in land surveying"* and " … *practice land surveying",* are referred to as this stage and in its proper context.

I have already referred to Section 39(1) earlier on but wish to reproduce the subsection 39(4) at this stage too, as it sheds some light on this particular aspect as well. Section 39(4) reads thus:

> "*[T]he Council may, on an application received in that behalf by a person engaged in or proposing to engage in land surveying and on production of evidence of good character and payment of the prescribed fee, register such person where the Council is satisfied that such person has the qualifications and experience and skills to engage in land surveying*."

In contrast to the provisions contained in Section 39(1), and in relation to " … *practice land surveying",* Section 41(1) states:

> *"[E]very registered surveyor who is desirous of practising or attempting or professing to practise land surveying, shall apply to the Council for an annual practising licence".*

The manner in which an application of a registered surveyor to practise land surveying should be considered by the Council too is laid down in Section 41(2) as that subsection states:

> *"[T]he Council may on application received in that behalf by a registered surveyor accompanied by the prescribed fee, issue to such surveyor an annual practising licence where the Council is satisfied that he has followed the prescribed courses of study and training approved by the Council and acquired knowledge and skill to practise land surveying."*

Section 44(1)(b) in turn authorises any registered surveyor, who holds an Annual Practising License, in addition to a Certificate of Registration, that he may engage in the *'practice'* of land surveying.

In view of these explicit statutory provisions, it is clear that the qualifications one must satisfy, in order to be qualified to receive a Certificate of Registration by the Council to "*engage in land surveying*" and to be issued with an Annual Practising Licence to "*practice land surveying*", are quite different from one another. This differentiation seems to be in line with the Legislative scheme put in place by the Act by recognition of two groups, one as "*registered surveyors*" and the other as "*registered licensed surveyors*".

In connection with this division, the Petitioners contend that the Act expects the Council to maintain two separate registers, each of which the names of the registered surveyors and registered licensed surveyors are entered into. The Court of Appeal was not impressed with that contention as it had preferred to aligned with the view that the purpose of maintaining two registers was simply "… *because all the Registered Surveyors do not wish to and are not required to compulsorily register as Registered Licensed Surveyors".* I shall consider this contention, and the

conclusion reached by the Court of Appeal on it in detail, but at a later point of time.

It is also to be observed from a closer examination of the provisions of the Act that there exists a more significant difference between the activity that is termed as '*engage in land surveying*' from the '*practice of land surveying*'. This is due to the fact that Section 44(1)(b) states that the registered surveyors, who "*practice of land surveying*" and holds an Annual Practising Licence, are entitled to engage in the practice of land surveying " *… for fee or reward*". Thus, in addition to the differences that were already referred to in this judgment, it could be stated with certainty that the primary feature distinguishing between '*engage in land surveying*' from the '*practice of land surveying*' is the entitlement of the registered licensed surveyors to receive a fee or reward instead of a fixed monthly remuneration for carrying out their professional work. In fact, it is relevant to observe in this context and in terms of Section 64(1)(e)(i), the Act criminalises the conduct of any person (inclusive that of registered surveyors), who, not being a registered licensed surveyor, to engage in "*practices and surveying for fee or reward*".

In this backdrop of statutory scheme, it is appropriate at this stage to remind ourselves of the nature of the core issue between the Petitioners and the Respondents. That is whether the Act expressly prohibits the Council from granting Annual Practising Licence to registered surveyors, who are engaged in land surveying " *on behalf of the Government*", who would also be then able to "*practice land surveying*" for a fee or reward, whilst being employed in the Survey Department. This particular group of surveyors are registered surveyors, who could "*engage in land surveying*"

in terms of the applicable provisions of the Act and thereupon opted to "*engage in land surveying on behalf of the Government*" as public officers employed by the Survey Department and under the supervision of the Surveyor General, instead of choosing the option to "*practice land surveying"* for a fee or reward.

The Respondents, who very strongly resisted the applications filed by the Petitioners before the Court of Appeal and in the appeals pending before this Court, contended that Section 41 makes no such distinction between any registered surveyor, employed by the Survey Department, from any other registered surveyor who is not and, as such, the Council, upon an application received by any registered surveyor, irrespective of whether he is engaged in land surveying on behalf of the Government or not, could issue an Annual Practising Licence on such surveyor. Learned DSG, who appeared for the 1st to 3rd Respondents, during his submissions strongly stressed before this Court that the words "*every registered surveyor*" that appear in Section 41(1) is an unambiguous term used by the Legislature that supports the Respondent's contention.

Thus, the dispute presented before the Court of Appeal by the contesting parties for a determination could be narrowed down to read whether the Council is empowered to grant Annual Practising Licences to registered surveyors, who are engaged in land surveying " *on behalf of the Government*", in terms of Section 41(2).

It is already noted that the Petitioners claim that, in the absence of a positive power conferred by the statute to do so, the Council, in deciding to grant Annual Practising Licences to registered surveyors, who are engaged in land surveying " *on behalf of the Government*", acted *ultra vires* of

its statutorily demarcated scope of power. Refuting that claim, the Respondents (except the 7th, 8th, 9th and 11th Respondents) contended before that Court, in the absence of an express prohibition to the contrary, they are entitled to be issued with an Annual Practising Licences to commence their practice of land surveying for a fee or reward.

Registered Surveyors, who engage in land surveying on behalf of the Government

I have already adverted to the fact that the Petitioners have collectively contended that there exist several significant differences between the two groups of surveyors, consisting of registered surveyors in one and the registered licensed surveyor in the other, in support of their claim that the Council has acted *ultra vires*.

However, careful examination of the text of the Act also indicates that, in addition to the said two groups of registered surveyors, a third group of registered surveyors are recognised by the Legislature. This is indicative from the provisions of the Act which recognised a specified group of registered surveyors, who could be distinctly identified and separated from the rest. This was achieved by attaching a description to the nature of their engagement in land surveying to their title '*registered surveyor*'. In terms of the Act, all registered surveyors may engage in the act of land surveying. But in terms of certain Sections of the Act, the third group of registered surveyors too are engaged in the act of land surveying, but they are engaged in land surveying " *on behalf of the Government*", as employees of the Survey Department. The Act itself seek to carve out this subgroup from the rest of the registered surveyors by making repeated references to the said third group of registered surveyors, who are

engaged in land surveying on behalf of the Government. These instances shall be referred to once more in a more descriptive manner further down in this judgment at an appropriate stage.

In contrast to the contention of the Petitioners the Respondents claimed that the wording used by the Legislature in Section 44(1), amply demonstrate that it reflects a unified body of all 'registered surveyors', inclusive of the registered surveyors, who are in employment of the Survey Department.

The conflicting contentions that were advanced by the parties before us are primarily centred around the statutory provisions contained in Sections 41(1) and 44(1) of the Act, demanding that this Court considers them in relation to the dispute presented before the Court of Appeal.

Section 41(1) and its proviso reads as follows:

> *"[E]very registered surveyor who is desirous of practising or attempting or professing to practise land surveying, shall apply to the Council for an annual practising licence.*
>
> *Provided however, registered Surveyors in the Survey Department engaging in land surveying under the supervision of the Surveyor General, shall not be required to obtain an annual practising licence for the purpose of engaging in land surveying on behalf of the Government*."

Whereas Section 44(1) reads:

> *"[A] registered surveyor –*

(a) may engage in land surveys in the service of the Government and when authorised by the Surveyor General; or

(b) who holds a Annual Practising License, may engage in the practice of land surveying for fee or reward."

The proviso to Section 41(1) as well as Section 44 contain references to registered surveyors, who are engaged in land surveying in the service of the Government, while serving in the Survey Department. The said proviso reads " … *registered Surveyors in the Survey Department engaging in land surveying under the supervision of the Surveyor General, shall not be required to obtain an annual practising licence for the purpose of engaging in land surveying on behalf of the Government."* According to Section 44 (1)(a) a " … *registered surveyor … may engage in land surveys in the service of the Government".* This particular Section further expands the membership of the registered surveyors, who are engaged in land surveying on behalf of the Government by not restricting them only to such surveyors, but also to the registered surveyors who are engaged in land surveying on behalf of the Government, " … *when authorised by the Surveyor General."*

Upon perusal of the statutory provisions contained in the Act in its entirety, it was revealed that there are several other Sections that contain similar references to the registered surveyors, who are engaged in land surveying on behalf of the Government. Section 45(1)(c)(i), whilst dealing with professional misconduct of registered surveyors, states "*where such surveyor being an officer in the service of the Government has conducted the survey or certified the plan or map without exercising due care or caution*" is

guilty of professional misconduct. Similarly, in Section 54(b), in dealing with the registered surveyors who failed to comply with the requirements imposed in subsection 1 of that Section, states that "*a registered surveyor who is in the service of the Government has not complied with the requirements imposed under subsection (1) the Council may report such non-compliance to the Surveyor General for appropriate action".*

The instances in which a registered surveyor is guilty of committing professional misconduct are set out in Section 45. This Section commences with the words " … *a registered surveyor shall be guilty of professional misconduct, if he is found in any proceeding or appeal*", to have been negligent or failed to do any one or more of the specified acts as set out in the subsections (a) to (f). The Section made these different instances of professional misconduct that are specified therein applicable to all registered surveyors, a factor supports the Respondent's contention of 'unified' body of registered surveyors. Section 47 too supports that proposition.

However, in dealing with an instance where a registered surveyor alleged " … *to have certified as to the accuracy of any survey or any plan or map in relation to a survey",* the Section introduced two sub paragraphs by numbering them as (i) and (ii), where two different situations were described and provided with different remedial action. Section 45(1)(c)(i) deals with "*where such surveyor being an officer in the service of the Government has conducted the survey or certified the plan or map without exercising due care or caution",* whereas Section 54(1)(c)(ii) deals with four different situations (as set out in paragraphs "A" to "D") in which " *where such surveyor being a registered licensed surveyor.*"

In this instance, the Legislature has clearly recognised certain acts of professional misconduct that could be committed only by a registered surveyor, who is an "*officer in the service of the Government*", leaving out the rest of registered surveyors from the applicability of said sub-Section.

Section 54(1) is the Section by which the Council was conferred with the power to impose a requirement on the registered surveyors to attend specified courses, in order to gain specific experience, or take other appropriate action within a specified period for the purpose of maintaining and improving their knowledge and skills. Section 54(2)(a) states "*a registered surveyor who has been issued with an annual practising licence has not complied with any of the requirements*" the Council could resort to any one or more of the actions as set out in Section 54(2)(a)(i) to (iii). When such requirement not complied with by a "*registered surveyor who is in the service of the Government*", the Council could only report such non-compliance to the Surveyor General, requesting for appropriate action.

In relation to this instance, what needed to be highlighted is that Section 54, only deals with two groups of registered surveyors. The said Section, while dealing with registered surveyors, who were issued with Annual Practising Licences (for that reason, who are '*practicing*' in land surveying), also dealt with the registered surveyors, who are '*engaged*' in land surveying in the service of the Government, thus confirming once more the existence of two groups of registered surveyors out of the three. But Section 54 has left out the remaining group of registered surveyors (who do not engage in land surveying on behalf of the Government) from its applicability even though they too are engaged in land surveying. This omission seems to suggest that the Legislature would not have envisaged a

situation where there would be registered surveyors, other than the ones who are not engaged in land surveying on behalf of the Government (the pleadings indicate that there are over 700 such registered surveyors, who are in employment under Survey General). If it in fact the case is, then it too accrues to the benefit of the Petitioners, as it further supports the claim advanced by them. Be that as it may, it must be noted here that this instance too is consistent with the contention advanced by the Petitioners.

It is in this backdrop of legislative scheme; I now turn to consider the statutory provisions contained in Sections 41(1) and 44 once more, but in another perspective.

I shall proceed to consider Section 44(1) first, which reads as follows:

> "*A registered surveyor* –
>
> *(a) may engage in land surveys in the service of the Government and when authorised by the Surveyor General; or*
>
> *(b) who holds a Annual Practising Licence, may engage in the practice of land surveying for fee or reward*".

Plain reading of the said Section indicates that a surveyor, once issued with a Certificate of Registration by the Council, has three options to choose from if he wishes to pursue a career in land surveying. After becoming a registered surveyor by obtaining a Certificate of Registration, he could obtain an Annual Practising Licence and become a Registered Licensed Surveyor and thereafter start to practice the profession of land surveying for a fee or reward. He also has another option as he could also engage in land surveying in the service of the Government by being a

public officer. Thirdly, he could obtain an authorisation by the Surveyor General to engage in land survey under the latter's supervision. The distinction made by the statutory provisions, as I have already referred to earlier on in this judgment between "*engage in land survey*" and "*practice of land survey*", is retained in this Section as well.

The Court of Appeal was inclined to accept the contention advanced by the Respondents, and held in their favour on this point by stating that the word "*or*" that occurs in between the two subsections (a) and (b) of Section 54, should be taken as " … *a conjunction to link or connect two of more alternatives or possibilities",* particularly in view of the fact that Sinhala word used in the Act is "**නැතහොත්**", a word which could be translated into English to mean "*otherwise",* and the word "*otherwise*", is a conjunction, means "*if not*" or "*else*". However, the Court of Appeal, at any point of time, did not think it fit to consider these provisions in the light of the phraseology used in the Act, "*engage in land survey*" and "*practice of land survey*".

In the context under consideration, it is relevant to mention here that the Petitioners, in support of their contention made on the Section 44(1), also relied on the statutory provisions contained in Section 10(2), where the Act, repeats these identical wordings, indicative of clear recognition of the two groups, when it states that a Cadastral survey could be conducted by a registered surveyor in the Survey Department or by a registered surveyor who possesses an Annual Practising Licence in terms of Section 41.

Section 10(2) reads as follows:

"[A] cadastral survey for the purpose of the Registration of Title Act shall be conducted by a registered surveyor –

(a) who is in the Survey Department or:

(b) who possesses an Annual Practising Licence in terms of Section 41,

and who has obtained a Certificate of Accreditation in terms of section 11.

Examination of the Sinhala text reveals that the word used by the Legislature in enacting Section 10(2), used the word "හෝ" in the Sinhala text instead of using the word "නැතහොත්", as it did in Section 54. The word "හෝ ", which could be translated into English as "or", denotes the very word used in the English text of the Act, in relation to both these Sections.

The use of the word "නැතහොත්" in the Sinhala text of the Act makes no difference to the meaning of the Section 41(1). The *English- Sinhalese-Dictionary,* compiled by Rev. *Charles Carter* in 1902, (2nd Ed), offers Sinhalese language meaning to the English language word "or" denoting "නැතහොත්". The contention advanced by the 5th Intervenient Respondent in CA Writ Application No. 682/2011, stating that the word "or" could be read either disjunctively or conjunctively, in view of a pronouncement made in ***Stanton v Richardson*** (1875) 33 Law Times 193, was accepted by the Court of Appeal, in arriving at the conclusion that the word "නැතහොත්" used in Section to denote a conjunction. The dictionary meaning of the word "නැතහොත්" contradicts that conclusion and when compared with the similar provisions contained in Section 10, as it becomes clear that the said word represents instances where it was also used in a disjunctive sense.

Thus, it is clear that the scheme put in place by the Act did recognise the two groups as distinct from each other, despite the apparent similarity of the work they do, namely, land surveying.

In relation to the contention that had been placed before the Court of Appeal over the 'two' groups of registered surveyors, the Petitioners, in addition to Section 44(1), also relied on its proviso. The Petitioners claim that it is yet another instance where the Legislature retained the distinction it made between these 'two' groups, as in terms of that Section, the registered surveyors who engaged in land surveying on behalf of the Government are exempted from otherwise a mandatory requirement, imposed on other registered surveyors by the Act, namely the necessity to obtain an Annual Practising Licence, if they are to practice land surveying.

The Respondents, on the other hand, contend that Section 44 clearly contemplates a situation in which a registered surveyor in the service of Government, if issued with an Annual Practising Licence, too could engage in the practice of land surveying for fee or reward, as the Circular issued by the Surveyor General, merely outlines the conditions that are attached to the granting of such permission.

Learned DSG, in his submissions made before the Court of Appeal as well as this Court, contended that Article 14(1)(g) of the Constitution guarantees every citizen of the freedom to engage in any lawful occupation and this right could be restricted only on the grounds laid down in Article 17, and that too by in terms of "law", meaning an enactment of Parliament. In the absence of any statutory prohibition for a registered surveyor, who engaged in land surveying on behalf of the Government, to engage in 'private practice', after obtaining an Annual

Practising Licence from the Council, learned DSG argued that the Petitioners are not entitled to the reliefs they prayed from the Court of Appeal.

As already noted, Section 44(1)(b) empowers a registered surveyor, who hold an Annual Practising Licence, to engage in the practice of land surveying for fee or reward. Hence the imposition of several statutory requirements, imposed by Section 41(1) on such a registered surveyor, when compared with the ones related to a registered surveyor. If he is to apply for an Annual Practising Licence under that subsection from the Council and obtain one under Section 41(2), he must satisfy the Council that he had followed the prescribed course of study and training approved by it and have acquired knowledge and skill to practice land surveying.

Then the proviso states that "… *registered Surveyors in the Survey Department engaging in land surveying under the supervision of the Surveyor General, shall not be required to obtain an annual practising licence for the purpose of engaging in land surveying on behalf of the Government*".

The Respondents also rely on this proviso as the Petitioners did in support of their contention, but by presenting a converse position. The Respondents claim that the words "*registered Surveyors in the Survey Department engaging in land surveying under the supervision of the Surveyor General, shall not be required to obtain an annual practising licence for the purpose of engaging in land surveying on behalf of the Government*", in itself indicate that if they were to engage in the practice of land surveying, they too are obligated by law to obtain an Annual Practising Licence. The Court of Appeal was of the view that the "… *concession given to the Government Surveyors when engaging in land surveying on behalf of the Government cannot*

be interpreted to mean that Land Survey Council is prohibited from issuing Annual Practising Licence to Government Surveyors."

In dealing with this particular aspect of the provisions contained in Section 41(1) and its proviso, I would rather take the main Section for consideration first, before proceeding to deal with its proviso. The Section made it mandatory for every registered surveyor, who is desirous of practicing or attempting or professing to practice land surveying, to apply to the Council for an Annual Practising Licence. In this Section, the emphasis given by the Legislature to the act of '*practice land surveying*' preceded by insertion of the words "*… practicing or attempting or professing to …"*could not be ignored. In interpreting the Section, these words should be given due weightage deserve to them.

The '*practice*' of land surveying, unlike its counterpart '*engaging*' in land surveying, comes with more responsibilities attached to it. A registered surveyor, who was issued with an Annual Practising Licence, is termed as " *registered licensed surveyor*", and his name should appear in the Register of such surveyors. Section 45 describes certain acts that are specified therein as acts of professional misconduct that could be committed only by a Registered Licensed Surveyor. The said Section refers to four of such acts. With regard to registered surveyors, who are in the service of the Government, and for that reason, are engaged in land surveying under the supervision of the Surveyor General, there is only one such act that is specified in the Section. With these observations, I turn now to consider the proviso to Section 41(1).

It is the contention of the Respondents that the proviso of Section 41(1) recognises the entitlement of the registered surveyors, who are

engaged in land surveying on behalf of the Government to be issued with Annual Practising Licences and thereby enabling them to do private practice, as that Section specifically stated that they are excluded from the said requirement of obtaining such licences for the purpose of engaging in land surveying on behalf of the Government. I am not fully convinced of the legal validity of this contention.

The wording used in the proviso is clear. It states that, in order to come within the exception recognised by it, a registered surveyor must satisfy several requirements. He must "*engage*" in land surveying "*in the Survey Department*" and that too "*on behalf of the Government*". Such a surveyor also must come "*under the supervision of the Surveyor General*" . The Respondents, in presenting the said contention, seemed to have placed no significance to the important operative words in that statutory provision, namely " *engage in land surveying*", whereas Section 41(1) speaks of "*practising or attempting or professing to practise land surveying* " and not" *engage in land surveying*".

Bindra, in his work *Interpretation of Statues,* (9th Ed), while dealing with the topic "*Proviso*" states (at p.111) that "*[T]he duty of the Court also must be to give to the proviso, as far as possible, a meaning so restricted as to bring it within the ambit and purview of the Section itself. If a proviso is capable of a wide and a narrow connotation, and the narrower connotation brings it within the purview of the Section, then the Court must prefer the narrower connotation rather than the wider connotation of the two possible interpretations; the Court should prefer that one which brings it within the purview of the Section. The Court is not justified in construing a proviso as enlarging the scope of the*

enactment when it can fairly and properly be construed without attributing it that effect."

The said proviso does not extend the exception it created for the registered surveyors to be in the "*practice of land surveying*", in addition to their engagement of land surveying, as the Respondents contend. That exception is limited only to an engagement in land surveying and clearly not to recognise an entitlement to '*practice*' in land surveying for a fee or reward . Therefore, I am of the considered view that the contention of the Respondent on the proviso to Section 41(1) is not tenable. The proviso, in effect, is a re-statement of what Section 44(1)(a) already provides for. Section 44(1)(a) empowers a registered surveyor to engage in land survey in the service of the Government and as per Section 44(1)(b), should hold an Annual Practising Licence if he is to engage in the "*practice of land surveying for fee or reward*". Thus, when viewed in this perspective, the proviso seemed a superfluous statement of law. But then there is a principle of interpretation of statues to the effect that the Legislature does not waste its words. *Bindra,* (supra) states (at p. 195) that " *[A]n Act should be construed as to avoid redundancy or surplusage. It is no doubt true that as a general rule Legislatures may be presumed not to make a superfluous provision. But this presumption is not a strong presumption, and it is not uncommon to find the Legislature inserting superfluous provision under the influence of what may be abundant caution."*

In my view, the Legislature opted to insert the proviso under Section 41(1) in this instance, for a very valid reason. That reason is directly attributable to Sections 2(q) and 10(2)(b) of the Act. Section 2 specifies the powers and functions of the Surveyor General. Section 2(q) states that he is

"*… to ensure the maintenance of high professional standards among persons engaged in land survey activities in the Survey Department."* The words "*persons*" and "*land surveying activities in the Survey Department"* are, in this context, was inserted deliberately into the text by the Parliament for a purpose it had in its mind.

Instead of using the term "*registered surveyor*", the said Section uses "*persons*" encompassing a wider spectrum of individuals. Similarly, instead of using "*land surveying",* the Section uses "*land surveying activities in the Survey Department*". With the insertion of these words, the Legislature intended once more to denote a wider range of activities which meant to be covered by that Section, of course, inclusive of the activity of land surveying.

In addition, Section 10 also intended to provide for a similar situation. Section 10(2) states that:

> *"[A] cadastral survey for the purpose of the Registration of Title Act shall be conducted by, a registered surveyor –*
>
> *(a) who is in the Survey Department or:*
>
> *(b) who possesses an Annual Practising Licence in terms of section 41, and who has obtained a Certificate of Accreditation in terms of section 11."*

In terms of Section 2(e), the Surveyor General is conferred with power " *to establish and administer a system of accreditation for registered surveyors seeking to conduct surveys under the Registration of Title Act, No. 21 of 1998 and to maintain a register of the Surveyors issued with Certificates of Accreditation".* Hence, under Section 10(2)(b), Surveyor General could

permit a registered licensed surveyor to conduct a cadastral survey for the purpose of Registration of Title Act after granting him a Certificate of Accreditation, in addition to have such a survey conducted by a registered surveyor, "*who is in the Survey Department*". Since such a registered licensed surveyor conducts a cadastral survey on behalf of the Government, in terms of Section 2(g), which sets out the powers and functions of the Surveyor General, he is empowered " *to receive, approve and maintain, cadastral surveying records so as to facilitate the production of cadastral survey plans and maps and to serve as a comprehensive base for integration of land information*" and also "*to establish and administer a system of accreditation for registered surveyors seeking to conduct surveys under the Registration of Title Act, No. 21 of 1998 and to maintain a register of the Surveyors issued with Certificates of Accreditation*", in terms of Section 2(e).

When a registered surveyor, who was issued with an Annual Practising Licence by the Council, conducts a Cadastral survey, he is in fact '*practicing*' land surveying for a fee or reward, but is caught up within the term "*persons engaged in land survey activities in the Survey Department*", including those who may not hold any Annual Practising Licence. This results in a position where a registered licensed surveyor, is '*practicing in land surveying'* on behalf of the Government, not for a salary but for a fee or reward. In my view, the insertion of the proviso to Section 41(1) was made, perhaps to avoid any doubts that might arise, in view of certain practical issues that might crop up, in the implementation of the provisions contained in Sections 10(2)(b).

Another factor relied on by the Petitioners in support of their contention was the existence of two registers, one for the Registered

Surveyors and another for Registered Licensed Surveyors. Only a passing reference to this contention at this early stage of the judgment, but I intend to undertake a fuller consideration of this aspect further down.

It seemed that the Court of Appeal, in rejecting the said contention of the Petitioners, opted to take a restricted view to the purpose for which two registers are maintained. However, Section 42(1), whilst imposing a duty on the Council to "*maintain a register*" of all registered surveyors as well as of the registered licensed surveyors, it further imposes a duty on the Council to have these "*registers*" open for public inspection for a fee and also supply a certified copy of any entry to such a person, upon payment of the prescribed fee. The Act, in addition to these two registers, also contains specific provisions for the maintenance of another register. Section 2(e) of the Act confers power on the Surveyor General " … *to maintain a register of the Surveyors issued with Certificates of Accreditation.*" Hence, in view of the reasoning contained in the preceding paragraphs, I am inclined to agree with the contention of the Petitioners that the maintenance of separate registers for registered surveyors and registered licensed surveyors, depending upon their respective classifications in view of the work they are engaged with, tends to support that they were treated as surveyors who belong to two different groups.

Two sub-groups of Registered Surveyors

In view of the analysis contained in the preceding section of this judgment on several statutory provisions contained in the Act, a clear recognition of the two groups of registered surveyors could be identified as contended by the Petitioners. The distinction recognised by the Act between registered surveyors and registered licensed surveyors is further

consolidated by the merger of the two streams, which define the manner in which both these categories of surveyors conduct their survey activities. The registered surveyors are '*engaging*' in land surveying while the registered licensed surveyors are '*practicing*' in land surveying and that too for a fee or reward.

However, as already noted, the entire membership of the group of registered surveyors could be further bisected to form two subgroups from the terminology used in the text of the Act . The term "subgroup" is used here quite arbitrarily, but with the intention to avoid any confusion that might arise, in view of the already identified two groups of registered surveyors.

These two subgroups could be described as the registered surveyors, who are engaged in land surveying and, the registered surveyors, who are engaged land surveying on behalf of the Government. The second subgroup of registered surveyors are always referred to in the text of the Act, coupled with a tag line, which made them identified either with the Government or with the Survey Department. Following instances could be cited as examples of this particular feature, where the Act made specific reference to such registered surveyors:

i. a registered surveyor "*who is in the Survey Department*" (Section 10(2)(a),

ii. a registered surveyor "*in the Survey Department engaging in land surveying under the supervision of the Surveyor General*" and "*engaging in land surveying on behalf of the Government*" (proviso to Section 41(1)),

iii. a registered surveyor "*engage in land surveys in the service of Government*", (Section 44(1)(a)),

iv. a registered surveyors "*being an officer in the service of the Government*" (Section 45(c)(i)), and

v. a registered surveyors "*in the service of Government*" (Section 54(2)(b).

However, in recognising an exception to the rule contained in Section 41(1), the Legislature omitted to mention that a registered surveyor, who is in employment of the Survey Department and engaged in land surveying under the supervision of the Surveyor General, shall also be required to obtain an Annual Practising Licence, if he is desirous of practicing or attempting or professing to practise land surveying in terms of Section 41(1), but instead had opted to word the proviso to read that such a surveyor, "*shall not be required to obtain an annual practising licence for the purpose of engaging in land surveying on behalf of the Government*" (emphasis added).

Returning to the Section by which the Council was conferred with power to issue an Annual Practising Licence to a registered surveyor, the wording used in the construction of the Section 41 must be carefully examined. Section 41(1) reads thus, "*[E]very registered surveyor who is desirous of practising or attempting or professing to practise land surveying, shall apply to the Council for an annual practising licence.*"

It is correct to say that the said subsection speaks of "*every registered surveyor*" in its text. But it also important to note that these words are connected to the remaining part of the same sentence which reads "… *who is desirous of practising or attempting or professing to practise land surveying*".

This Section admittedly does not make any reference either directly or indirectly to registered surveyors, who are employed in the Survey Department. The over emphasis placed in that subsection to the word '*practice*' (as opposed to mere '*engage in land surveying'*) with the insertion of a series of words "*practising or attempting or professing to practise land surveying*" is, in my view, applies to registered surveyors, who are not employed elsewhere on a salaried employment, but are only desirous of "*practising or attempting or professing to practise land surveying*" on full time basis.

I find it relevant in this context to quote from *Bindra* (supra), who states (at p.196), that *"[I]t is a well settled principle of construction that words in a Statute are designedly used, and an interpretation must be avoided, which would render the provisions either nugatory or part thereof otiose. No part of the Statute can be just ignored by saying that the Legislature enacted the same not knowing what it was saying. We must assume that the Legislature deliberately used that expression, and it intended to convey some meaning thereby. It is not to be assumed that the Legislature has used words meaning nothing."*

Section 41(2), reads as follows:

> *"[T]he Council may on application received in that behalf by a registered surveyor accompanied by the prescribed fee, issue to such surveyor an Annual Practising Licence where the Council is satisfied that he has followed the prescribed courses of study and training approved by the Council and acquired knowledge and skill to practise land surveying."*

It necessarily follows that when the Council receives an application by a registered surveyor applying for an Annual Practising Licence, he

should be desirous of "*engage in land surveying*" by "*practising or attempting or professing to practise land surveying*". The Council is then empowered to issue an Annual Practising Licence to such a registered surveyor, if it is satisfied that he has followed the prescribed courses of study and training approved by the Council and acquired knowledge and skill to *'practise'* land surveying.

The conspicuous absence of any mention of the registered surveyors, who engage in land surveying on behalf of the Government, either in subsections (1) or (2) of Section 41 (except in the proviso) is of relevance as, already indicated, the Legislature has consistently maintained the identity of these three groups of surveyors, throughout the entire text of the Act. Even in the proviso, where a reference was made to a registered surveyor, the exception is limited to enable them only to "*engage in land surveying on behalf of the Government*", without an Annual Practising Licence.

The definition provided to the term the "*Surveyor General*" in Section 66 also consistent with the said scheme laid down by the Act. The definition states that the Surveyor General "*is a registered surveyor, who is the head of the Survey Department*". If the contention of the Respondents on this point is accepted as reflecting the correct presentation of the Legislative scheme formulated by the Act, it would create an absurdity since there is nothing to prevent the Surveyor General from applying for an Annual Practising Licence for himself from the Council, the very institution he presides over in his capacity as the Surveyor General, to engage in private practice. The words " *registered surveyor*" contained in the said definition therefore assumes greater significance in this context.

Reliance placed by the learned DSG, during his submissions, to Article 14(1)(g) of the Constitution, adds another dimension to the contention presented by the other Respondents.

It was his contention that if a person can generate an income by engaging in a lawful profession or a vocation, the same could be prohibited only by an express enactment. Therefore, it was his submission that since the Act had comprehensively dealt with the practice of land surveying in Sri Lanka, rather than prohibiting, it appears to have permitted the registered surveyors, who are engaged in land surveying on behalf of the Government, to engage in private practice. Learned DSG's submission is clearly based on the "rights-based approach" adopted by the Courts in interpreting legislation and in the instances where an exercise of administrative discretion is involved for them to be in conformity with the Fundamental rights.

Prof. *Craig,* in his book *Administrative Law* (5th Ed., at p.21) recommends " … *the creation of strong judicial presumption that legislation is not intended to interfere with these rights, combined with a more intensive, searching scrutiny which demands greater justification of the discretionary decisions impinging upon such important interests."*

The learned President's Counsel for the 11th Respondent (in SC Appeal No. 85/2021), made a reference to a judgment of this Court in ***Madurapperuma v Attorney General*** (SC (FR) Appln. No. 90/79 – decided on 05.02.1980), where almost an identical contention was placed for consideration by a petitioner who, being a public officer, by alleging infringement of his fundamental rights**.** The contention placed before this Court by the petitioner in that instance was, that he, being a Government

servant, is a citizen who enjoys the fundamental rights guaranteed to him under Article 14 in all its amplitude, subject only to the restrictions, if any, as may be prescribed by law in terms of Articles 15 and 16. Therefore, in the absence of such limitations, the Cabinet of Ministers could not, in terms of Article 55(4) of the Constitution, seek to restrict the scope of such rights by the provisions of the Establishments Code.

Sharvananda J (as he then was) was not impressed with that contention and stated that " … *when a citizen becomes a Public officer, he enters into employment-relationship with the State which subjects him to duties and obligations. Power is vested in the Cabinet of Ministers by Article 55(4) of the Constitution to prescribe and define such duties and obligations. Such prescription inevitably infringes on the citizen's fundamental rights and constricts their exercise Article 55(4) concerns a citizen in his character as a Public officer*". However, after the 17th amendment to the Constitution, and in terms of Article 55(3), subject to the provisions of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Public Service Commission, except for the Heads of Department.

His Lordship then added that such an employee " … *has no fundamental right to employment under the State, nor is he obliged to accept service under the State. If he does not choose to accept the modification of his fundamental freedoms which State service involves, he at liberty to retain his freedoms and give up his work. In such an event, the State has not deprived him of any of his freedoms*."

Learned President's Counsel for the Petitioner in SC Appeal No. 85/2011 too referred to a judgment (***Dr YP Singh v State of Uttar Pradesh***

AIR (1982) 439, which was pronounced after two years from the judgment of ***Madurapperuma v Attorney General*** (supra), but adopting an almost identical approach in determining against the entitlement of a "Government doctor", to engage in private practice, whilst being employed as a Government employee. The Court held, "*[O]nce he joins the Government service, he shall be subject to all terms and conditions of employment and rules and regulations governing the employment.*"

The resultant position is, that a registered surveyor who is engaged in land surveying on behalf of the Government, by being an employee of the Survey Department, could not be considered only in his capacity as a registered surveyor, but in addition to being conferred with that title on him, he ought to be considered as a registered surveyor, who is in employment of the Survey Department as a public officer and engaged in land surveying under the supervision of the Surveyor General on behalf of the Government. With the adoption of this view, a concomitant issue that arise for consideration is whether this subgrouping of registered surveyors, who are engaged in land surveying on behalf of the Government, is contrary to Article 12(1).

In ***Palihawadana v Attorney General*** (1979) 1 Sri L.R. 65, it was observed that "*[T]he principle underlying the guarantee in Article 12 is not that the same rules of law should be applicable to all persons within the Democratic Socialist Republic of Sri Lanka, or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in respect of privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and*

another if, as regards the subject matter of the legislation or administration, their position is substantially the same. As there is no infringement of the equal protection rule, if the law deals alike with all members of a certain class, the State has the undoubted right of classifying persons and placing those who are substantially similar under the same Rule of Law, while applying different rules to persons differently situated. The classification must not be arbitrary but should be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be attained."

A similar approach was adopted by *Sripavan J* (as he then was) in ***Senadeera and Others v Commissioner General of Labour*** (2013) 1 Sri L.R. 60 by reiterating (at p. 65) that the " … *right to equality means that among equals, the law should be equal and should be equally administered, thereby the like should be treated alike*". In this particular matter, the issue before this Court was whether the candidates selected through an Open Competitive Examination were similarly circumstanced as that of the candidates who are selected based on a Limited Competitive Examination. His Lordship, in the light of the principle enunciated in ***Ramupillai v Festus Perera, Minister of Public Administration, Provincial Councils & Home Affairs*** (1991) 1 Sri L.R. 11, by *Ranasinghe CJ* that "*… once such selections are made those taken in from such sources are integrated into one common class: that thereafter such appointees are "clubbed" together into a common stream of service and cannot thereafter be treated differently for purposes of promotion …*" proceeded to hold that (at p. 67)" … *[S]tate is free to decide the sources from which recruitments to the Public Service are to be made. The sources could be recruitment based on Open Competitive Examination as well as the Limited Competitive Examination. Once selections are made, they cannot thereafter be treated differently for purposes of their future promotions; that their genetic*

blemishes disappear once they are integrated into a common class known as Labour Officer, Grade II."

In relation to the three appeals pending before this Court, it must be observed that with the acquisition of the status "*registered surveyors*" after obtaining registration with the Council in terms of Sections 37(b) and 39(1), the qualified surveyors, depending on whether they '*engage in land surveying*' or '*practice land surveying'*, are clearly divided into two groups. Then there was a further subdivision of the registered surveyors, depending on whether they 'engage in land surveying' or whether they 'engage in land surveying on behalf of the Government'.

However, when such a "*registered surveyor*" has decided to join the Survey Department to engage in land surveying on behalf of the Government under the supervision of Surveyor General, for the purpose of 37(c) of the Act, such a surveyor could not be clubbed together as a registered surveyor along with the other group of registered surveyors, who have decided not to take up employment under the Government. In such circumstances, such a surveyor ought to be considered not only as a registered surveyor, but a registered surveyor, who is engaged in land surveying on behalf of the Government and therefore placed under the supervision of the Surveyor General. This is because such a registered surveyor, is not only placed under the disciplinary control of the Council, but being a public officer, is also placed under the provisions of the Establishments Code, in addition to the supervision of the Surveyor General, in terms of Section 2(q), which confers authority on him to ensure the maintenance of high professional standards in such a surveyor's activities in land surveying in the Survey Department.

It is therefore clear that, after obtaining registration with the Council and having acquired the legally recognised status of a "*registered surveyor*", such a surveyor could, depending on his personal inclination, could opt either to "*engage in land surveying*", or "*practice land surveying for fee or reward.*" If a registered surveyor, opts to engage in land surveying, then he has two options to choose from. He could either '*engage in land surveying on behalf of the Government,* under the supervision of the Surveyor General' or could simply '*engage in land surveying'*. This engagement in land surveying could be after obtaining employment in any other institution where land surveying is required. But being a registered surveyor only, he is prohibited from practising in land surveying for a fee or reward, in terms of Section 44(1)(b). When a registered surveyor accepts employment under some entity, be it a public or private, then his engagement in land surveying may also be subscribed by the conditions that are stipulated in his Letter of Appointment, in addition to the other statutorily laid down conditions.

The said re-grouping of the registered surveyors into these three distinct groups, as evident from the examination of the scheme formulated by the Act itself, depending on the manner in which they wish to employ themselves in their chosen field of expertise, could be termed as a classification not only based on an intelligible differentia and sanctioned by law but also a classification that satisfies the two tests applied by *Ranasinghe* CJ in ***Ramuppillai v Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others*** (1991) 1 Sri L.R. 11.

Mark Fernando J in ***Liyanapathirana and another v Peoples Bank and Others*** (1993) 1 Sri L.R. 358 held (at p. 361) "*[D]ifferentiation by reference to the classes to which they belonged, and service therein, was neither irrational nor unintelligible*". This was an instance where, among the employees who were similarly placed initially, 29 of them were subsequently promoted by applying the ethnic ratio, in terms of Public Administration Circular No. 15/90 issued on 9.3.1990. The petitioners did not challenge the said set of promotions. Thereafter Circular No. 4005191 dated 5.9.91 was issued calling for applications for promotion to Grade 111, Class 2 from officers who had completed one year of service after confirmation in Grade III, Class 3. While the said 29 employees, who had been promoted on the ethnic ratio could have satisfied this condition, the petitioners were not qualified. Therefore, the Court concluded that the petitioners had ceased to be in the same class as the 29 promoted employees.

This process of reasoning adopted by *Fernando* J applies to the instant appeals with equal force. The registered surveyors, when they have taken up appointment in the Survey Department to engage in land surveying on behalf of the Government, they have differentiated themselves from the rest of the registered surveyors who opted not to. Therefore, when the registered surveyors, who are already employed in the Survey Department, applied for Annual Practising Licences to practice land surveying for a fee or reward, they could not be treated similarly to registered surveyor, who opted not to take up such employment, as these two groups are not of similar status, in relation to their eligibility for the issuance of Annual Practising Licences. Hence, there is no infringement of equality principles.

In arriving at the finding to the question, whether the Council acted *ultra vires* in granting permission to registered surveyors, who engage in land surveying on behalf of the Government and under the supervision of Surveyor General, it becomes imperative that the statutory provisions contained in Section 37 and 41(2) are also examined in detail.

It is clear that the Council had its "*functions and duties*" specifically spelt out under Section 37, in addition to the "*powers*" conferred on it by Section 38. Section 37 (c) imposes a duty on the Council not only " *to receive applications from registered surveyors for the issue of Annual Practising Licences"* but also " … *to issue such licences to such surveyors where the Council is satisfied that such surveyors possess the knowledge and skill to practice the profession of land surveying*" if the applicable criterion are satisfied by such an applicant.

Section 41(1) imposes a requirement on a registered surveyor, "*who is desirous of practising or attempting or professing to practise land surveying, shall apply to the Council for an annual practising licence*."

Then Section 41(2) states *"[T]he Council may on application received in that behalf by a registered surveyor accompanied by the prescribed fee, issue to such surveyor an annual practising licence where the Council is satisfied that he has followed the prescribed courses of study and training approved by the Council and acquired knowledge and skill to practise land surveying*."

It is not necessary to specifically highlight the common denominator in all these Sections. What the Legislature had in its mind in enacting the said provision seems to be to provide for the manner in which a registered surveyor is recognised as a one, "*who is desirous of practising or attempting or*

professing to practise land surveying". Section 41(4) confers a title on such a registered surveyor as a "*registered licensed surveyor*".

None of the Sections referred to in the preceding paragraphs made any specific reference to a registered surveyor, who is engaged in land surveying on behalf of the Government and under the supervision of the Surveyor General, could also apply for an Annual Practising Licence to practise land surveying for a fee or reward and the Council could grant a licence to such an applicant. This is the premise on which the Petitioners have founded their challenge on validity of the decision of the Council. On the other hand, the Respondents, who resists the Petitioner's claim, rely on the fact that there is no express prohibition either for the Council to desist itself from granting such licences as the Sections merely referred to "*every registered surveyor*" without any qualification.

Clearly, Section 41(1) could be taken as the gateway through which each of the registered surveyors must pass through, in order to earn the title "*registered licensed surveyor*" from the Council. The placement of the proviso in Section 41(1), instead under any other Section of the Act, supports the view that Section 44(1) statutorily demarcates the boundaries within which each of the two groups should engage in their chosen field of expertise. If a registered surveyor, who wish only to engage in land surveying on behalf of the Government, he need not trouble himself with the process set out in Sections 41(1) and (2). Hence the words "*[E]very registered surveyor*" that contains in Section 41(1) is pivotal to the determination of the instant appeals.

In view of these statutory provisions, the question that arise for determination is whether the words '*every registered surveyor'* in Section

41(1) should mean to include the registered surveyors, who are engaged in land surveying on behalf of the Government and under the supervision of the Surveyor General, for granting of Annual Practising Licences?

If that Section is taken for consideration in total isolation from the rest of the provisions that are contained in the Act, the obvious answer to that question is a one in the affirmative. But the adoption of such an approach, in the determination of the said question, would not be in conformity with the accepted rules of interpretation of statutes.

Maxwell, in his work on this area of law (*Maxwell on The Interpretation of Statues,* 12th Ed.,), describes the Literal Rule of Interpretation of Statutes as follows (at p. 28): " *[I]f there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first instance, reference to cases.*"

Section 41(1) and 41(2), taken in isolation from the rest of the provisions contained in the Act and taken in its literal meaning, of course does not recognise any distinction between the registered surveyors engaged in land surveying and registered surveyors, who engaged in land surveying on behalf of the Government under the supervision of the Surveyor General. However, as *Maxwell* added a qualification to the application of the Literal Rule by stating "*[I]f there is nothing to modify, alter or qualify the language which the statute contains*" and in such a situation that Statute "*must be construed in the ordinary and natural meaning of the words and sentences*". I find that the issue to be determined by this Court with regard

to the provisions that are applicable in this context, qualifies to be taken as an instance where the first part of that statement of *Maxwell,* which states "*if there is nothing to modify, alter or qualify the language which the statute contains*" applies.

The judgment of the House of Lords in the matter of ***R v S of S for Health ex parte Quintavalle*** *(on behalf of Pro-Life Alliance)* [2003] 2 WLR 692, cited by the learned President's Counsel for the Petitioners in SC Appeal No. 86/2021, is helpful in this regard as it provides persuasive insight into the issue at hand. In that instance the issue presented before the House of Lords was whether live human embryos, created by cell nuclear replacement (CNR), falls outside the regulatory scope of the Human Fertilisation and Embryology Act 1990 and whether licensing the creation of such embryos is prohibited by section 3(3)(d) of that Act. That issue is similar to the one that has arisen in the instant appeals for determination, as here too the contentious issue is, in the absence of a specific provision that enabled the Council to grant Annual Practising Licence to a '*registered surveyor*', who is engaged in land survey on behalf of the Government and under the supervision of the Surveyor General, in terms of Section 41(2). In both these situations, there is no express statutory provision by which such permission could be granted or imposed a clear and unambiguous prohibition.

Lord *Bingham* described the resultant situation as follows:

> "*Such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the Courts, or at any rate the*

> *appellate Courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision."*

In my view, the issue that this Court is now grappling with could be aptly described as a *" … situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision" a*s Lord *Bingham* has termed it. I have already concluded that the underlying policy on which the Survey Act was drafted and then enacted into law by the Parliament had no such intention and therefore such an eventuality could not have been foreseen by it and that provides an explanation as to why there is no express provision.

Owing to the clear classification adopted by the Legislature in recognising the different groups of registered surveyors, depending on the manner how they survey land, the literal rule of interpretation of statutes could not be applied to the two Sections for such a course of action would lead to create several inconsistencies with the other provisions contained in the Act. In order to overcome such a situation *Maxwell* (ibid) refers to a presumption against intending what is inconvenient or unreasonable in determining the Legislative intent. Learned author states (at p. 199) *"[I]n determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears*

to be most in accord with convenience, reason, justice, and legal principles should, in all cases of doubtful significance, be presumed to be the rue one."

In this regard, he further stated (at age 208) that "*[I]f the Court is to avoid a statutory result that flouts common sense and justice it must do so not be disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed Parliamentary concern for common sense and justice. But the possibility of injustice which leads the Court to adopt a particular construction must be real one: if the injustices suggested in arguments are purely hypothetical, and may never or only rarely occur in practice, the Court will remain unmoved."*

It is most appropriate to cite Lord *Bingham* from ***R v S of S for Health ex parte Quintavalle*** (supra) once more in relation to the suitability of the application of the literal rule in such circumstances. His Lordship states that:

> *"[T]he basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined, and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the Court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or*

> *remove some blemish, or effect some improvement in the national life. The Court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So, the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment*".

Certainly, in the light of the applicable principles and in fulfilling the task of providing an interpretation to the relevant statutory provisions, I am of the view that the contentions that were advanced by the Petitioners before this Court as well as the Court below, and are already referred earlier on in this judgment, could not be summarily rejected by equating them to an instance where "*the injustices suggested in arguments are purely hypothetical, and may never or only rarely occur in practice*", for this Court to remain unmoved, as *Maxwell* states.

The principle of law that the prohibition must be expressly provided

Upon perusal of the judgment of the Court of Appeal it is revealed that, in arriving at its conclusion that the complaint presented before that Court by the Petitioners to have the circular struck down on the basis of *ultra vires* has no valid legal basis, that Court has acted on the principle that in the absence of an express prohibition imposed by the Act on the Council, due to which it was prevented from granting Annual Practising Licences to registered Surveyors, who are serving in the Surveyor Department, such a licence could legally be issued. The Court states in this context that " *[I]f the legislature intended not to issue Annual Practising Licences for the Government Surveyors to engage in private practice, then it should have been expressly stated in the Act, and not vice versa. Nowhere in the*

Act does not say that a Government Surveyor is prohibited from obtaining an Annual Practising Licence. It is well accepted principle that prohibitions cannot be presumed" (emphasis original).

The Court of Appeal, thereupon, inserted a quotation from the judgment of ***Hevavitharana v Themis de Silva*** (1961) 63 NLR 68, in support of the approach it had taken in determining the Petitioner's applications. That was an instance where *Tambiah J* stated (at p. 72) that the "*[C]ourts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed."*

In the impugned judgment of the Court of Appeal, it was held that issuance of the Field Staff Circular No. 05/2011 by the Surveyor General is not *ultra vires* of his powers. In arriving at this conclusion, that Court considered the contention that the dichotomy that claims to exist between the '*registered surveyors'* and *'registered licensed surveyors'* had no valid basis. Thereupon, the Court, in holding that the said issuance of the impugned circular was *intra vires,* primarily acted on the premise that "*[I]t is well accepted principle that prohibitions cannot be presumed*".

With due respect to the line of reasoning adopted by the Court below, I am not so convinced of it's legal validity, particularly in the utilisation of the principle that had been laid down by ***Hevavitharana v Themis de Silva*** (supra) in an instance where the Petitioners sought a Writ of *Certiorari*, seeking to quash a circular, the issuance of which is an act allegedly in *ultra vires*. Clearly, the issue before the Court was not of an

instance where a *lacuna* was discovered in the procedural aspect in granting of Annual Practising Licences, but of *vires* of the authority, which granted the impugned licences.

The issue presented by ***Hevavitharana v Themis de Silva*** (supra) before the then Supreme Court was whether a trial Court could exclude a separate land, wrongly included by a plaintiff, as being part of the *corpus* of a partition case. In delivering the judgment, *Tambiah* J, stated (at p. 71) that " *… it is not the intention of the legislature in passing the Partition Act that the Court should partition any lands other than those that came within the ambit of section 2 of the Act"* and proceeded to reject the contention that Section 26 of the Partition Act makes no provision for excluding from a partition action, any part of the land to which the action relates. The Court held that the said Section "*… does not exhaust all the orders which a Court could make, in our view the Court has the inherent power, under section 839 of the Civil Procedure Code, to make an order excluding a lot which has been wrongly included in the corpus*". It is in this context, his Lordship found it apposite to reproduce the pronouncement made by *Mahmood*, J., in ***Narsingh Das v. Mangal Dubey*** (1883) 5 *Allahabad* 163, (at p. 172) to the effect that the "*[C]ourts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed*."

It is clear from the text, that this pronouncement was made by *Mahmood*, J., in relation to an interpretation that should be given to a provision contained in the Civil Procedure Code of India. The judgment of

Hevavitharana v Themis de Silva (supra) too dealt with a situation in which an interpretation of a procedural law provision was involved. The judgments that I came across of having acted on the principle referred to in ***Hevavitharana v Themis de Silva*** are indicative of the fact that the superior Courts have acted on that principle only when they were confronted with the task of determining some aspect of a statutory provision laying down a procedure, either in the Civil Procedure Code or of the Partition Law, which necessitated a judicial interpretation. The judgments of ***Dionis v William Singho and Others*** (1973) 77 NLR 103, ***Seneveratne v Abeykoon*** (1986) 2 Sri L.R. 1, ***Ratnasingham v Dissanike and Others*** (1998) 1 Sri L.R. 8, ***Martin Silva and Another v Central Engineering Consultancy Bureau and Another*** (2003) 2 Sri L.R. 228 and ***Aryaratne v Laksiri Fernando*** (2004) 1 Sri L.R. 184, are some of these instances.

However, even in relation to the task of interpretation of procedural laws, this principle could not be taken as a one which has universal application. The judgment of ***Ratnasingham v Dasanaike and Others*** (1998) 1 Sri L.R. 8, indicates that when the petitioner of that application relied on the principle that "*every procedure is to be taken as prohibited unless it is expressly provided for by the Code*" (per ***Hevavitharana v Themis de Silva*****)** in support of his contention that the District Court had jurisdiction to grant probate of a last will which dealt exclusively with movable property abroad, *Mark Fernando* J was of the view that " … *simply because there is no such provision, to adopt the 'interpretation' for which the petitioner contends, would be to do what the House of Lords condemned in* ***Magor & St. Mellons RDC v. Newport Corp*** *(1951) 2 All ER 839, (at p. 841)* "*… what the*

legislature has not written, the Court must write. This proposition cannot be supported. It appears to me a naked usurpation of the legislative function under the thin guise of interpretation, and it is less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act".

I am therefore fortified in my view that the principle that enunciated by *Mahmood*, J., in ***Narsingh Das v. Mangal Dubey*** (1883) that every procedure is to be understood as permissible until it is shown to be prohibited by law, is relevant where an issue concerning an interpretation that should be given to a statutory provision laying down a procedural aspect and not to an instance where the Court was called upon the determine the *vires* of an act of a body, created by a Statute. In this regard, I think it is important to reproduce the pronouncement of *Mahmood*, J., as referred to above once more, but inclusive of few more sentences that precedes and follows the often-quoted section of that judgment, which would clearly illustrate the point.

His Lordship stated thus:

> " *… according to my view of the rules of construction applicable to statues like the Civil Procedure Code, the Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. As a matter of general principle, prohibitions cannot be presumed; and in the present case, therefore, it rests upon the defendants to show that the suit in the form in*

which it has been brought is prohibited by the rules of procedure applicable to the Court of Justice in India."

Thus, it is my considered view that the principle of law, every procedure is to be understood as permissible until it is shown to be prohibited by the law, is clearly not the correct one to be acted upon in relation to the applications before the Court of Appeal. In the circumstances, a question necessarily arises as to what then is the principle of law on which the Court of Appeal should have acted on in determining the *vires* of the impugned Act?

The nature of the relief sought by the Petitioners before the Court of Appeal is helpful to find an answer to this question. The Petitioners in CA Writ Application No. 61/2012, sought *inter alia* a mandate in the nature of a Writ of *Certiorari*, quashing the decision of the Land Survey Council taken on 09.02.2012, marked as "P14" to grant Annual Practising Licences to the 12th to 70th Respondents named therein, along with a Writ of *Prohibition* prohibiting said Respondent-Respondents from issuing Annual Practising Licences to serving officers of the Survey Department to engage in private practice. while in CA Writ Application Nos. 682/2011 and 98/2012 the Petitioners sought to quash the Field Staff Circular No. 05/2011. Thus, the decisions that were being impugned before the Court of Appeal relates to the minutes of the Land Survey Council, containing its decision to grant Annual Practising Licences to the 12th to 70th Respondent, as adopted by the majority of votes by that Council, at its 103rd meeting held on 09.02.2012 and the issuance of the said Circular by the Surveyor General.

Decision of the Land Survey Council

The validity of the issuance of the said Circular is already considered along with the provisions contained in the Establishments Code and the letter dated 11.11.2011 issued by the Secretary to the Ministry of Lands and Land Development, during early part of this judgment. Hence, at this stage, it is proposed to consider the challenge mounted by the Petitioners of CA Writ Application No. 61/2012 on the *vires* of the impugned decision taken by the Land Survey Council.

The Land Survey Council was established by Section 26(1) of the Act. Section 37 specifies the functions and duties of the Council, while Section 38 specifies its powers. Thus, the Land Survey Council is clearly a statutory body created by statute and conferred with powers and functions also by specific statutory provisions governing its nature and extent.

Reverting to the determination made by the Court of Appeal, when it stated " *[I]f the legislature intended not to issue Annual Practising Licences for the Government Surveyors to engage in private practice, then it should have been expressly stated in the Act, and not vice versa. Nowhere in the Act does not say that a Government Surveyor is prohibited from obtaining an Annual Practising Licence. It is well accepted principle that prohibitions cannot be presumed",* it is relevant to quote from a judgment of the Court of Appeal (***Liyanage and Others v Gampaha Urban Council and Others*** (1991) 1 Sri L.R. 1), in which an approach, converse to the one taken by that Court in the instant appeals, was taken but on a sound legal principle.

The issue to be decided by the Court of Appeal in that particular instance was whether the *Gampaha* Urban Council has exceeded its power conferred by the statute, in establishing a weekly fair on Market Street. *SN Silva J* (as he then was) considered the *vires* of the Council in establishing a

weekly fair, in terms of the statutory provisions contained in the Urban Council Ordinance. After an exhaustive analysis of English authorities and authoritative texts on this point, inclusive of *Wade* on *Administrative Law,* his Lordship expressed the view that (at p.7) " *[A]n authority (Corporation) established by statute such as an Urban Council has, in law, a status, objects, powers, functions and duties, only as provided in the constituent statute or in any other statute. Beyond these it is legally incapable of doing anything".*

In the judgment of this Court of ***Ven. Ellawala Medananda Thero v District Secretary, Ampara and Others*** (2009) 1 Sri L.R. 54, *SN Silva* CJ re-affirmed the said principle by inserting a quotation from his earlier judgment (at p. 66) which states that "*[A]nything purported to be done, by the Council, in excess of what is permitted by the statutory provisions will be considered as wholly invalid in law, on the application of the doctrine of ultra vires. However, in construing the relevant statutory provisions the Court will bear in mind the need to promote the general legislative purpose underlying these provisions and consider whether the impugned act is incidental to or consequential upon the express provisions. If it is so considered necessary, the impugned act will not be declared ultra vires*."

This principle of law, acted on by his Lordship in both these instances, is further clarified by *Wade* (10th Ed, at p. 179) in stating " *[W]hen the question arises whether a public authority is acting lawfully or unlawfully, the nature and extent of its power or duty has to be found in most cases by seeking the intention of Parliament as expressed or implied in the relevant Act."* It further stated (ibid, at p.180) " *… it must be remembered that the Courts intervene only where the thing done goes beyond what can fairly be treated as incidental or consequential."*

In an instance where the same principle, which the Court of Appeal acted on, in determining the three applications before it, was applied by Sir *Robert Megarry* VC, (in ***Malone v Metropolitan Police Commissioners*** [1979] Ch 344), by permitting telephone tapping by the police, on the basis that " … *if such tapping can be carried out without committing any breach of the law, it requires no authorisation by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful" as* England " … *is not a country where everything is expressly permitted; it is a country where everything is permitted except what is expressly forbidden".* That decision was interfered with by European Court of Human Rights in ***Malone v UK*** 7 EHRR 14, by stating that "… *the interference resulting from the existence of the practice in question was not 'in accordance with the law' ",* for the purpose of Article 8. Apparently, the Interception of communications Act 1985 was introduced in England to provide the statutory framework for telephone tapping.

De Smith, in his authoritative text on *Judicial Review* (8th Ed), having posed the question (at p. 256), " … *to what extent is Government permitted to achieve its aims by ' extra-statutory' means ?",* proceeded to answer the same (at p. 257) by stating:

> " *[W]hile central Government must be able to carry out incidental functions that are not in conflict with its statutory powers, it is wrong to equate the principle pertaining to private individuals-that they may do everything which is not specifically forbidden-with the powers of ministers, where the opposite is true. Any action they take must be justified by a law which 'defines its purpose and justifies its existence'. The extension of Ram doctrine beyond its modest initial*

> *purpose of achieving incidental powers should be resisted in the interest of the rule of law."*

It is common ground that the Survey Act has failed to indicate the legislative intent unambiguously to grant Annual Practising Licences to registered Surveyors, who are currently employed in the Surveyor Department with an express provision of law. Thus, in the absence of a specific provision, by which the Council is conferred with authority to issue Annual Practising Licences, the impugned decision must therefore be termed as a decision taken *ultra vires* of the powers of the Council. The question whether granting such licences to this specific group of registered surveyors (as contended by the Petitioners), in such circumstances, are caught up within the term "*incidental to or consequential"* to the powers conferred on that Council, though need not be considered in detail, but for the sake of completeness, shall be addressed next.

In ***Ven. Ellawala Medananda Thero v District Secretary, Ampara and Others*** (supra), this Court stated that "… *in construing the relevant statutory provisions the Court will bear in mind the need to promote the general legislative purpose underlying these provisions and consider whether the impugned act is incidental to or consequential upon the express provisions. If it is so considered necessary, the impugned act will not be declared ultra vires."* I am in respectful agreement with the underlying principle on which his Lordship acted upon, for it is perfectly in line with contemporary public law principles, which I have already referred to earlier on in this section.

Now I proceed to consider the legality of the impugned decision taken by Council to issue Annual Practising Licences to some of the

Respondents, in the light of the principle of law acted upon by this Court in the case referred to in the immediately preceding paragraph.

In dealing with this issue, I prefer to consider the nature of the proceedings before the Council that has taken place, before the impugned decision was taken by that Council.

Item No. 103.5 of the minutes of the 103rd meeting of the Land Survey Council held on 09.02.2012, is regarding the issue of " *Annual Practising Licences – 2012*". The relevant section of the minutes of the Council on this item reads thus:

> " *Considering the AC Writ 682/2011 received by LSC during the 101st meeting issuing licenses to SLSS officers were postponed until getting AG's advice. AG was informed all history about the issuance of license to SLSS officers, and LSC received advice saying the LSC can proceed until getting writ. Hence, Chairman/LSC has asked about the Council members views regarding giving licenses to SLSS officers.*
>
> *The SISL appointed Council members made their views against giving licenses to SLSS officers. … due to the different views from the Council members on this issue, Chairman/LSC requested voting from the Council members, and then, four votes were received in favour of giving license to SLSS officers and three votes (from the SISL appointed members) were received against giving license."*

The minutes of the Council in relation to item 103.5 indicate what it considered under that item. The minutes do not indicate that the Council was to consider applications submitted by the 'registered surveyors', who

are desirous of practicing or attempting or professing to practise land surveying and made requests to the Council for issuance of Annual Practising Licences for the year 2012, during that meeting, as per its mandate. Instead, the minutes indicate the issue considered by the Council was whether it could grant Annual Practising Licences to officers of the SLSS (Sri Lanka Survey Service).

It could well be that the Council was aware that the officers of SLSS are not only registered surveyors, but they also fall into the subgroup of registered surveyors, who are employed in the Survey Department and under the control of the Surveyor General engaged in land surveying on behalf of the Government, as recognised by the Act itself. Thus, in my view the Council had acted in excess of its functions, as set out in Section 37(c) and 41(1) when it accepted their applications for the purpose of issuing Annual Practising Licences, as the officers of SLSS could not be taken as registered surveyors who are " *… desirous of practicing or attempting or professing to practise land surveying".* There can be no doubt that the officers of SLSS are public officers, whose salaries are paid by the Government and are engaged in land surveying on behalf of the Government, during office hours of all working days of the week.

Moreover, there is no assessment made by the Council that each of these officers could therefore be considered as registered surveyors who are " *… desirous of practicing or attempting or professing to practise land surveying"* but it opted to act merely on their request for permission to do 'private practice'.

Thus, in the absence of any reference to the said group of registered surveyors either in Section 41(1) or 41(2), the Council had no power

conferred upon it by Section 41(2) to grant Annual Practising Licence to the members of that group and, in this particular instance, by arriving at a decision, to issue Annual Practising Licences to them, had acted *ultra vires* of its powers and functions.

In addition, another factor contributed to the arbitrariness of the Council in making the impugned decision. In terms of Sections 37(c), 41(1) and 41(2), it is a function of the Council to receive applications from registered surveyors for the issuance of Annual Practising Licences. These Sections further imposes several criteria, which must first be established to the satisfaction of the Council by such an applicant before the Council making a decision. Section 37(c) states that if the Council is "*satisfied that such surveyors possess the knowledge and skill to practice the profession of land surveying*" only it could issue such licenses. If such surveyors have applied for licenses from the Council in terms of Section 41(1), it may issue them with such licenses, if it is "*satisfied that he has followed the prescribed courses of study and training approved by the Council and acquired knowledge and skill to practice land surveying*", per Section 41(2).

It could well be that the officers of SLSS may have acquired the prescribed qualifications or experience the Sections speak of, but in addition they also must have the " *ability and skills to practice land surveying*" is another requirement that should have been taken into consideration by the Council before making a decision. Instead of assessing merits of each applicant to satisfy itself that they had such "*ability and skill",* the Council had decided to take that factor for granted as if those applicants have automatically fulfilled that requirement *en bloc*. Even if this Court was to accept the contention of the Respondents for

argument's sake that the Council had the power to grant Annual Practising Licence to them, the relevant minutes of the Council however made no indication that it was satisfied itself that the applicants, who applied seeking issuance of such licenses, have fulfilled the statutory requirements imposed by Sections 37 and 41.

The impugned decision of the Council is therefore clearly be termed as act ultra vires of its statutory powers and functions, in view of the principle of law laid down in ***Ven. Ellawala Medananda Thero v District Secretary, Ampara and Others*** (supra) which states that "*[A]n authority (Corporation) established by statute … has, in law, a status, objects, powers, functions and duties, only as provided in the constituent statute or in any other statute. Beyond these it is legally incapable of doing anything*". Application of this principle is subjected to an important qualification referred to by *SN Silva* CJ by stating that "*[H]owever, in construing the relevant statutory provisions the Court will bear in mind the need to promote the general legislative purpose underlying these provisions and consider whether the impugned act is incidental to or consequential upon the express provisions. If it is so considered necessary, the impugned act will not be declared ultra vires*."

In relation to the instant appeals, the question of whether the impugned decision taken by the Council could be termed as an act which is "*incidental to or consequential upon the express provisions*" does not arise for consideration due to the reason that , if a particular act is to be considered incidental or consequential upon an express provision of law, there must be a statutory provision that specifies and confers that power on that public body and if in the exercise of that power, anything that is "*incidental to or consequential upon the express provisions*" could have been permitted. In

the case of ***Liyanage and Others v Gampaha Urban Council and Others*** (supra) the necessity to consider whether the impugned act could be considered as an instance of exercising statutory power, "*is incidental to or consequential upon the express provisions*" arose because the law expressly conferred authority over the Council to conduct a weekly fair and, when it permitted such a fair on a public street causing obstruction to traffic, only it was ruled acted in *ultra vires.*

The Conclusion

In the absence of an express provision of law to grant Annual Practising Licences to registered surveyors, who are engaged in land surveying on behalf of the Government, there cannot be any acts that could be permitted as "*incidental to or consequential*", which would be then lie outside the scope of the enabling provision. Hence, the Petitioners are entitled to have the impugned decision of the Council, and the issuance of the Field Staff Circular by the Surveyor General, quashed by way of a Writ of *Certiorari* and prevent the relevant Respondents from taking any further action on that decision of the Council and on the said Circular by issuance of a Writ of Prohibition.

The contention presented before this Court by the Respondents that, in the absence of an express provision prohibiting granting such licenses, the decision of the Council ought to be considered as *intra vires*, could be construed as an instance where they have relied upon the proposition "*… what the Legislature has not written, the Court must write.*" In this context, its apt to reproduce the very quotation inserted by *Mark Fernando J* in the judgment of ***Ratnasinham v Dasanaike and Others*** (supra) which reads:

"This proposition cannot be supported. It appears to me a naked usurpation of the legislative function under the thin guise of interpretation, and it is less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act".

In view of the reasons, which I have set out in detail and contained in the preceding paragraphs of this judgment, the questions of law that were to be determined by this Court on the instant appeals are answered as follows:

1. Whether or not Government Surveyors can do private practice in terms of Survey Act No. 17 of 2002? No
2. Did the Court of Appeal err in law in failing to appreciate whether the issuance of the impugned circular is irrational and/or arbitrary and /or unreasonable? Yes.
3. Did the Court of Appeal fail to consider the impact of the other Statues such as Land Registration Act, Title Registration Act and Partition Law when considering reasonableness of the impugned circular? Not all the Acts referred to by the Petitioners.

4(a). Does the circular fall within the purview or provisions of Survey Act No. 17 of 2002? No.

4(b). If so, can the circular be challenged on the question of law formulated in Questions of Law Nos. 2 and 3 above? Yes.

This Court, therefore, proceeds to make the following orders:

1. The petitioners of CA Writ Application Nos. 98/2012 are entitled to the reliefs prayed for in paragraphs (c) and (d) of the prayer to the petition dated 01.04.2012 by issuance of Writs of *Certiorari* and *Prohibition* quashing and implementing the Field Staff Circular No. 05/2011 dated 25.11.2011.

2. The Petitioner of CA Writ Application Nos. 682/2011 is entitled to the reliefs prayed for in paragraphs (b) and (c) of the prayer to the petition dated 15.12.2012, by issuance of Writs of *Certiorari* and *Prohibition* quashing and implementing the Field Staff Circular No. 05/2011 dated 25.11.2011.

3. The Petitioner of CA Writ Application Nos. 61/2012 is entitled to the reliefs prayed for in paragraphs (b) and (c) of the prayer to the petition dated 27.02.2012, by issuance of Writs of *Certiorari* and *Prohibition* quashing the decision of the Land Survey Council dated 09.02.2012 to grant Annual Practising Licences to the 12th to 70th Respondents (named in the caption to the said application) and prohibiting the 1st to 9th Respondents (also named in the said caption) from issuing such licenses to surveyors, who are employed in Survey Department, to engage in private practice.

4. The consolidated judgment of the Court of Appeal pronounced on 11.09.2019 in relation to CA Writ Application Nos. 682/2011, 61/2012 and 98/2012, is hereby set aside.

5. The corresponding appeals of the Petitioners in SC Appeal Nos. 85/2021, 86/2021 and 87/2021 are accordingly allowed.

6. Parties will bear their costs.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ.

I agree.

CHIEF JUSTICE

K. KUMUDINI WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT