ABEYWARDENE
V.
INSPECTOR GENERAL OF POLICE AND OTHERS

SUPREME COURT.
BANDARANAYAKE, J., FERNANDO, J., AMERASINGHE, J.
S. C. APPLICATON NO. 92/91.
JULY 23, 24, 25, 1991.

Fundamental Rights – Constitution, Articles 12(1), 12(2) and 14(1)(g) - Emergency (Prohibition of Importation of Instruments and Appliances for Gaming) Regulations No. 1 of 1991 - Emergency (Games of Chance) Regulation No. 1 of 1991 - Seizure of Jackpot Machines – Discrimination - Freedom to do business.

The petitioner owned jackpot machines or jackpots, which were installed and operated in various parts of the country, in shops and eating houses to which the public had access. The jackpot machines were imported whole or assembled from imported components. The imports were on the basis of import licences issued by the Controller of Imports and Exports. On about 01 June 1991 the Police, acting in terms of powers vested in them by the Emergency (Prohibition of Importation of Instruments and Appliances for Gaming Regulations No. 1 of 1991, and the Emergency (Games of Chance) Regulations No. 1 of 1991 seized and took away the Jackpot Machines. The petitioner's complaint of infringement of fundamental rights was entertained only in respect of the alleged violations of Articles 12(1), 12(2) and 14(1) (g) of the Constitution.

Held:

(1) What Article 12(1) guarantees is equal justice, that is, that every person from the President downward, is subject to the law, and that among equals, the law should be equal and should be equally administered, the like being treated alike, and that, subject to this, all persons should be entitled to pursue their happiness and enjoy their property, and have equal access to the Courts in Sri Lanka for the protection of their persons and property.

(a) There was here no complaint of unequal treatment between jackpot owners.

(b) Instruments or appliances used by lotteries conducted by the State and public corporations, unlike instruments and appliances used by others like the petitioner for playing games for stakes, being exempted from seizure does not amount to a denial of equality because the distinction is not between private persons, but between the State, including State sponsored institutions, and private persons.

(c) The petitioner was engaged in one of those pernicious forms of gaming that placed public order and security in jeopardy. The State lotteries were not engaged in such activities. The differentiation between persons like the petitioner and the State lotteries is, therefore, quite intelligible.

(d) The object of the Regulations was the preservation of public security and public order and not the eradication of gaming. The Regulations were intended to eliminate specified forms of gaming which were regarded by the President, on the basis of information placed before him by the Inspector-General of Police, as being particularly harmful because they threatened public security and the preservation of public order.

Per Amerasinghe, J.:

"Article 12 of the Constitution does not require that a legislative classification should be scientifically perfect or logically complete..... A State need not, in order to meet the requirements of equal protection, provide for abstract symmetry in its legislation, but may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience.....I am bound to assume that those who enact the laws of this country,..... understand and correctly appreciate the needs of the people and that the laws are directed to problems made manifest by experience and the discriminations are based on adequate grounds. Those who make the law are free to recognize degrees of harm and to confine the restrictions to those cases where the need is deemed to be the greatest..... That belongs to the realm of legislative policy. It is not a matter for us. All I need say in that connection is this. It is a generally recognized, basic principle of law that a piece of legislation is not bad merely because the legislature selects one or some evil things for elimination while other evils may, in the opinion of certain persons be equally in need of similar attention. Moreover the State may choose to deal with different persons and things or geographical areas at different times owing to the exigencies of convenience, even though this might necessarily impose varying burdens."

Per Amerasinghe, J.:

"The making of laws in the interests of national security, public order and the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society, necessarily involves classification, differentation and curtailment of individual rights and freedoms. It must almost always result in some inequality. But that is not enough.

So long as the classification is founded upon an intelligible differentia which distinguishes persons or things that are grouped together from those who are left out of the group, and so long as the differentia have a relation to the object sought to be achieved by the legislation, the discriminatory legislation is not in violation of Article 12 of the Constitution and is valid, even though it might trench upon the freedom of a citizen."

(e) Regulation, rather than elimination seems to be the prevailing legislative policy. The State lotteries are expressly excluded by Regulation 4 of the Emergency (Games of Chance) Regulations. Therefore such lotteries are, whether this be personally agreeable or not, lawful. However, even assuming that they are not lawful, it is not open to the petitioner to claim therefore, that as a matter of equality, he too should be permitted to engage in an unlawful activity.

Per Amerasinghe, J: "Article 12 of the Constitution guarantees equal protection of the law and not equal violation of the law. One illegality does not justify another illegality."

(f) There is a clear nexus between the Regulations and their purpose. There is also a recognizable and evident connection between the proclaimed reasons for the state of emergency and the Emergency (Prohibition of Importation of Instruments and Appliances for Gaming) Regulations No. 1 of 1991 and the Emergency (Games of Chance) Regulations No. 1 of 1991. The decisions as to whether there is a state of emergency and what regulations may be considered necessary or expedient to deal with such a situation is a matter for the President and not the courts of law.

(g) There was nothing at all in the newspaper reports to show personal hostility to the Petitioner either on the part of the President, the members of the Government or the administration including the police. Nor is there any indication in the news items even remotely suggesting that the Regulations were designed to particularly affect the petitioner's business as an act of revenge or for any other reason. There was no proof of lack of bona fides or discrimi-

nation on political grounds. A Government is entitled to deal with problems according to its own timetable.

(h) Now that Jackpots are illegal the petitioner cannot invoke the protection of Article 14(1)(g). He has no fundamental right to conduct unlawful gaming.

Per Amerasinghe, J: "A person who comes before this Court for just and equitable relief under article 126(4) of the Constitution must in his act of supplication show the Court clean hands into which relief may be given."

Cases referred to:

1. *State of U.P. v. Deoman* AIR 1960 S.C. 1125
2. *Lal Chand v. Union of India* AIR 1956 Ajmer 10
3. *State v. Shanker* AIR 1958 All 432
4. *Madhya Pradesh Mineral Industries Association v. Regional Provident Fund Commissioner* AIR 1959 Bom. 60
5. *P & O Steam Navigation Co. v. Secretary of State* 1968 – 69 5 Bomb HCR App. 1
6. *Seshadri v. Second Additional I.T. Officer, Salaries Circle, Madras* AIR 1954 Mad 806
7. *Shiv Prasad v. Punjab State* AIR 1957 Punj 150
8. *Manohar Lal v. State* AIR 1956 Pepsu 14, 16
9. *Amraoti Electricity Supply Co. v. N. H. Majumdar* AIR 1953 Nag. 35
10. *Secretary to the Government Public Works and Transport Department AP v. Adoni Ginning Factory* AIR 1959 Andh. Prad. 538
11. *Sheoprasad v. State of M.P.* AIR 1955 Nag. 177
12. *Motilal v. U.P. Government* AIR 1951 All 257
13. *Firm Jaswant Bai v. Sales Tax Officer* AIR 1955 All 585
14. *General Motor Bus Service, Tonk v. Regional Transport Authority, Jaipur* AIR 1955 Raj 14
15. *Saghir Ahamed v. The State of U.P.* AIR 1954 SC 728, 740
16. *Chadami Lal v. General Manager, Western Railway* AIR 1962 All 159, 163
17. *Madden v. Kentucky* 1940 309 US 83
18. *Chandrajit Lal v. Union of India* AIR 1951 SC 41
19. *State of Bombay v. F.N. Balsara* AIR 1951 SC 318
20. *Champakam Dorairajan v. State of Madras* AIR 1951 Mad 120
21. *Chowdhury v. Union of India* AIR 1951 SC 41
22. *Kanthi Raning v. State of Saurashtra* AIR 1952 SC 123
23. *Lachhmandas v. State of Bombay* AIR 1952 SC 235
24. *Kedar Nath v. State of West Bengal* AIR 1953 SC 404
25. *Sakhi Chand v. Central Co-operative Bank* AIR 1955 Pepsu 129, 132

26. *Ramkrishna Dalmia v. Justice Tendolkar* AIR 1958 SC 538
27. *Moti Das v. Sahi* AIR 1959 SC 942
28. *Barbier v. Connolly* (1885) 113 US 27
29. *Saghir Ahamad v. State of U.P.* AIR 1954 SC 728
30. *Sakhichand v. Central Co-operative Bank* AIR 1955 Pepsu 129
31. *Tilakram Rambaksh v. Bank of Patiala* AIR 1959 Punj 440
32. *Manna Lal v. Collector of Jhalwar* AIR 1961 SC 828
33. *Lachhman Dass and Nand Ram Tulsi Ram v. State of Punjab* AIR 1963 SC 222
34. *State of Rajasthan v. Mukan Chand* AIR 1964 SC 1633
35. *Skinner v. Oklahoma* (1942) 316 US 535
36. *Qureshi v. State of Bihar* AIR 1958 SC 731
37. *Moti Das v. Sahi* AIR 1959 SC 942
38. *Lochner v. New York* (1905) 198 US 45
39. *The State of Bombay v. RMD Chamarbaugwala* 1957 AIR SC 699, 719
40. *C.W. Mackie & Co. Ltd. v. Hugh Molagoda, Commissioner-General of Inland Revenue and Others II* 1986 1 Sri LR 300, 309 - 310, 311
41. *T. Venkatasubbiah Setty v. Corporation of the City of Bangalore and others* AIR 1968 Mysore 251, 256
42. *Ram Prasad v. Union of India* AIR 1978 Rajasthan 131
43. *Chief Commissioner v. Kitty Puri* AIR 1937 Delhi 148, 153
44. *Narain Dass v. Improvement Trust* AIR 1972 SC 861, 871
45. *Yasapala v. Ranil Wickremasinghe and others* (1980) 1 FRD 143, 159-60
46. *Lipton Ltd. v. Ford* 1917 2 KB 647
47. *Attorney-General for Canada and another and Hallet Carey Ltd. & another 1952 AC 427*
48. *Mugler v. State of Kansas* (1887) 123 US 273, 296-297
49. *Munn v. Illinois* 94 US 124
50. *Bhagat Singh v. Emperor* AIR 1931 PC 111
51. *Reference as to the Validity of Certain Chemical Regulations* [1943] SCR 13
52. *Carltona Ltd. v. Commissioner of Works and others* 1943 2 All ER 560, 564
53. *State of West Bengal v. Anwar Ali* AIR 1952 SC 75
54. *Krishnachandra and others v. State of Madhya Pradesh* AIR 1965 SC 307
55. *Stone v. Mississippi* 101 US 814
56. *Beer Co. v. Massachnselts* 97 US 32
57. *Malekotla v. Mohd. Mustaq* 1960 A. Punj 18
58. *Boota Singh v. State* 1961 A. Punj 21
59. *U.P. v. Kartar Singh* 1964 SCR 679
60. *Rewata Thero v. Horalala* (1939) 14 CLW 155, 156

APPLICATION for infringement of fundamental rights.

R. Weerakoon, with *Kusal Subasinghe* and *E. L. Tirimanne* for Petitioner.

Sunil de Silva P.C., Attorney - General with *Tilak Marapone*, Solicitor-General, *Upawansa Yapa*, Deputy Solicitor-General and *Kalinga Indatissa* State Counsel for Respondents.

Cur.adv.vult.

October 23, 1991.

AMERASINGHE, J.

The Petitioner owned instruments or appliances, commonly described as *Jackpot Machines* or *Jackpots*. They were installed and operated in various parts of the country in shops and eating houses to which the public had access. The *Jackpot Machines* were imported whole or assembled from imported components. The imports were on the basis of import licences issued by the Controller of Imports and Exports. On or about June 1, 1991, the police seized and took away the *Jackpot Machines* to Police Stations. The police acted on the basis of the powers given to them by the Emergency (Prohibition of Importation of Instruments and Appliances for Gaming) Regulations, No. 1 of 1991 which were made by the President under section 5 of the Public Security Ordinance (Chapter 40) and published in Gazette Extraordinary No. 664/9 - 1991 on 31 May, 1991. The Regulations authorized the seizure of specified kinds of instruments and appliances used for gaming. By the Emergency (Games of Chance) Regulations No. 1 of 1991 made by the President under Section 5 of the Public Security Ordinance (Chapter 40) and published in Gazette Extraordinary No. 665/13-1991 on 6 June 1991, among other things, certain categories were excluded from the definition of "playing of a game for stake."

On 17 June, 1991, the Petitioner applied, by a petition under Article 126 of the Constitution, for a declaration that his fundamental rights under Articles 12 (1), 12 (2), 12 (6) and 14 (1) (g) had been violated and for relief and redress in the form of a return of the confiscated machines, for compensation for any loss or damage to such confiscated machines and compensation for losses caused by the alleged unlawful interference with his business.

Article 12 has four sub-sections: There is no such thing as Article 12(6) in the Constitution. Leave to proceed was, therefore, granted only in respect of the alleged violations of Articles 12(1), 12(2) and 14(1) (g) of the Constitution.

Article 12(1) provides that "All persons are equal before the law and are entitled to the equal protection of the law". With regard to Article 12(1), Mr. Weerakoon said that his case rested principally on the denial of equal protection of the law and not on the violation of the guarantee of equality before the law.

Article 12(1) of our Constitution is based on Article 14 of the Indian Constitution, and although some Judges (e.g. *Subba Rao, J.* in *State of U.P. v. Deoman* (1) have, from time to time, sought to distinguish between "equality before of the law" as being a negative concept and "equal protection of the law" as being a positive concept, it is not necessary for the purposes of this case to consider the differences, if any. Indeed, the Fourteenth Amendment of the Constitution of the United States of America, upon which the Indian Article is based, uses the words "equal protection of the laws" and makes no reference to "equality before the law." In essence, I think, what Article 12 (1) guarantees is equal justice, that is, that every person, from the President downward, is subject to the law, and that among equals, the law should be equal and should be equally administered, the like being treated alike, and that, subject to this, all persons should be entitled to

pursue their happiness and enjoy their property, and have equal access to the Courts of Sri Lanka for the protection of their persons and property.

There is no complaint with regard to equal access to the Courts.

Learned Counsel for the Petitioner admitted that *Jackpot Machines* belonging to all persons whomsoever had been taken away in a manner similar to the way in which the Petitioner's machines had been removed. And so, there was no complaint of unequal treatment between *Jackpot* owners.

The Petitioner, however, complained that, while the Emergency (Prohibition of Instruments and Appliances for Gaming) Regulations No. 1 of 1991 permitted the forfeiture of instruments and appliances used for the purpose of gaming, Regulation 4 of the Emergency (Games of Chance) Regulations No. 1 of 1991 removed "the conduct of any lottery by the State or a public corporation..." from the definition of "playing of a game for a stake." In this way, instruments or appliances used by lotteries conducted by the State and public corporations, unlike instruments and appliances used by others, like himself, for playing games for stakes, were exempted from seizure. This, the Petitioner said, was a denial to him of the equal protection of the law guaranteed by Article 12 (1) of the Constitution.

Regulation 4 of the Emergency (Games of Chance) Regulations not only exempts lotteries conducted by the State or by public corporations, but also those "under the authority of a licence issued under the Lotteries Ordinance." The Petitioner in his petition, and Mr. Weerakoon on his behalf, were only concerned with the distinction drawn between the State, including State-sponsored institutions, and private persons.

The law, Mr. Weerakoon said, must be the same for all persons, be it the State or others. Moreover, among equals, like must be treated alike. In paragraphs 4 and 13 of the Peti-

tion, and during the argument before us, it was said that the lotteries run by the State known as *Sevana*, *Saturday Fortune* and *Mahajana Sampatha* were forms of gambling, and if one form of gambling was prohibited, other forms too must, as a matter of equality, be prohibited. "The gaming principle", the Petitioner said, was the "same" for all, whether gambling was conducted under State auspices or otherwise.

Mr. Weerakoon proceeded on the basis that the public corporations engaged in one or more of the lotteries referred to in the petition were conducting State lotteries. Assuming, for the limited purposes of this case, that all the lotteries referred to by the Petitioner are, as Mr. Weerakoon submits, State lotteries, the first question then is whether the State is a *person*. Article 12(1) says that all *persons* are equal before the law and entitled to the equal protection of the law, and, therefore, in order to support an allegation of unequal treatment between persons, it must be established that the distinction was between persons.

According to some authorities, the word "persons" in the Article of the Constitution guaranteeing equality ought not to mean or include the State. [e.g. see *Lal Chand v. Union of India* (2), *State v. Shanker* (3), *Madhya Pradesh Mineral Industries Association v. Regional Provident Fund Commissioner* (4)]. This is said to be obviously so where the State is acting in, what Sir Barnes Peacock, CJ in *P. & O. Steam Navigation Co. v. Secretary of State* (5) referred to as, its "sovereign" capacity. For instance, this would be the case in the matter of taxation, (cf. *Seshadri v. Second Additional I.T. Officer, Salaries Circle, Madras* (6) or the imposition of licence fees, (cf. *Shiv Prasad v. Punjab State)* (7), or the recovery of State dues (cf. *Manohar Lal v. State)* (8) or exercising powers under public security legislation, (cf. *Amraoti Electricity Supply Co. v. N. H. Majumdar)* (9) or in the exercise of its power to raise the standard of living of the people, in general, and creating a favourable climate for the pursuit of happiness

and for the development of the human personality, (cf. *Secretary to the Government Public Works and Transport Department A.P. v. Adoni Ginning Factory* (10), and, perhaps, where the matter is at least incidental to such an ordinary function of government. (cf. *Sheoprasad v. State of M.P.)* (11).

It may be argued that, in conducting lotteries, the State is not exercising a sovereign function or one that is incidental to a traditional function of government and that, therefore, in the case before us, since the State has descended into an area of competition with private persons like the Petitioner, the State must be treated like any ordinary person engaged in similar activities. There is some authority in support of such a view. (E.g. see per *Agarawala, J. and per Malik CJ in Motilal v. U.P. Government* (12) *Firm Jaswant Bai v. Sales Tax Officer* (13) *General Motor Bus Service, Tonk v. Regional Transport Authority, Jaipur* (14).

However, Mukherjea, J. in *Saghir Ahamad v. The State of U.P.* (15) rejected the argument that the State ceases to function as a State as soon as it engages in a trade like an ordinary citizen.

The matter was discussed by *Srivastave, J.* in *Chadami Lal v. General Manager, Western Railway* (16) who indicated that the question was not free from difficulty. And since the matter was not argued, his Lordship did not express any opinion on that question. Nor was the matter argued before us and, therefore, I do not express any opinion on the question whether, when the State engages in activities that are not traditionally within the exercise of its sovereign powers or incidental thereto, the State remains a unique, and for the purposes of Article 12 (1) of the Constitution, an incomparable entity.

But this does not end the matter. Admittedly, Regulation 4 differentiates between the State and others. But this does not necessarily make the Regulation otiose and invalid. The State necessarily has the power of what is known as "classification".

and, under that power, it has the greatest freedom to make distinctions between persons and things. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. (See *Madden v. Kentucky* (17). A legislative authority, *as Patanjali Sastri, J. observed in Charanjit Lal v. Union of India* (18) is

> "empowered to make laws on a wide range of subjects must of necessity have the power of making special laws to attain particular objects and must, for that purpose, possess large powers of distinguishing and classifying the persons or things to be brought under the operation of such laws, provided the basis of such classification has a just and reasonable relation to the object"

which the legislating authority has in view. The power to make discriminatory legislation in relation to the advancement of women, children and disabled persons is expressly given in Article 12 of the Constitution itself. But the power to differentiate is not limited to those categories. With regard to the exercise of its "police powers", the State has a wide discretion which is not taken away by the Articles of the Constitution guaranteeing the fundamental right to equality (Article 12). The fundamental right to freedom from arbitrary arrest and detention (Article 13 (1) & (2) and the fundamental right to freedom of assembly, association, to form and join a trade union, to manifest his religion or belief, to promote his culture, to use his own language, to engage in any lawful occupation, profession, trade, business or enterprise, to move about freely and to choose his residence and to return to Sri Lanka (Article 14), are all, in terms of Article 15 (7) of the Constitution,

> "Subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society."

For the purpose of Article 15(7) of the Constitution, "law" includes regulations made under the law for the time being relating to public security.

The making of laws in the interests of national security, public order and the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society, necessarily involves classification, differentiation and the curtailment of individual rights and freedoms. It must almost always result in some inequality. But that is not enough. (Cf. *State of Bombay v. F. N. Balsara AIR* (19).So long as the classification is founded upon an intelligible differentia which distinguishes persons or things that are grouped together from those who are left out of the group, and so long as the differentia have a relation to the object sought to be achieved by the legislation, the discriminatory legislation is not in violation of Article 12 of the Constitution and is valid, even though it might trench upon the freedom of a citizen. (Cf. per *Viswanatha Sastri, J.* in *Chamakam Dorairajan v. State of Madras* (20), *Chowdhury v. Union of India* (21) per *Mukerjea, Das and Petanjali Sastri JJ* in their judgments in *Kanthi Raning v. State of Saurashtra* (22) *Lachhmandas v. State of Bombay* (23), *Kedar Nath v. State of West Bengal* (24), *Sakhi Chand v. Central Co-operative Bank (25) Ramkrishna Dalmia v. Justice Tendolkar (26) Moti Das v. Sahi* (27) *Chadmi v. General Manager, Western Railway (supra)*

So long as the legislation is in conformity with those principles, the unfortunate consequences for particular individuals, like the Petitioner in this case, are of no consequence. As it was observed in *Barbier v. Connolly* (28) the equality provision was not designed to interfere with the "police power" of the State, viz.,

> "to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity... Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to

impose unequal or unnecessary restrictions upon any one, but to promote with as little individual inconvenience as possible, the general good."

Even assuming that the State has no incomparable and unique position when it descends into areas of activity shared with others, it may, in using its powers of classification, legitimately place itself in a separate class and accord itself preferential treatment without violating the equality principle. (See *Saghir Ahamad State of U.P.* (29) - *transport. Cf. Sakhichand v. Central Co-operative Bank* (30) - banking; *Tilakram Rambaksh v. Bank of Patiala* (31); banking; *Manna Lal v. Collector of Jhalwar* (32) banking; *Chandami Lal v. General Manager, Western Railway (supra) Lachhman Dass and Nand Ram Tulsi Ram v. State of Punjab* (33); banking (but see the dissenting judgment of Subba Rao, J. at paras. 57-58). There must, however, be a rational connection between the differentiation and the object sought to be achieved by the legislation. Otherwise, the legislation will be in violation of Article 12 (1) of the Constitution. (Cf. *State of Rajasthan v. Mukan Chand* (34).

In terms of Regulation 4 of the Emergency (Games of Chance) Regulations No. 1 of 1991 the State has distinguished between itself and others engaged in the provision of facilities for gambling. There are, I think, quite understandable reasons for differentiating between State lotteries and others, like the Petitioner. And I am also of the view that there was a rational nexus between the differentiation and the object sought to be achieved by the Regulations.

Why do I say this? Look at the evidence placed before us by the Inspector-General of Police.

According to the affidavit of the Inspector-General of Police, the Regulations in question were made by the President under section 5 of the Public Security Ordinance (Cap. 40) on his recommendations. Why? The Inspector-General of Police states in his affidavit that the Police had received numerous

requests from members of the public, school principals and various religious dignitaries to prevent the use of instruments and appliances for unlawful gaming. The places where they were installed and operated had become centres of criminal activity and vice. The activities in these places of gaming were also linked to trafficking in narcotics, terrorism, pornography, and prostitution. These illegal activities, he said, had an international dimension as a result of certain foreigners collaborating with local persons involved in the gaming business. The free flow of foreign exchange had not only supported terrorist activities, but it had also placed the national economy in peril.

The Petitioner was engaged in one of those pernicious forms of gaming that placed public order and security in jeopardy. The State lotteries were not engaged in such activities. The differentiation between persons like the Petitioner and the State lotteries is, therefore, quite intelligible.

The nexus between the object of the Regulations and the differentiation is equally clear. There was a clearly visible, and indeed a perfectly rational, relation between the differentia and what seems to me to be the object sought to be achieved by the Regulations. What was the object of the Regulations? According to Mr. Weerakoon, it was the eradication of gaming.

Mr. Weerakoon was mistaken with regard to the object of the Regulations. The object of the Regulations was the preservation of public security and public order and not the eradication of gaming. This is very clear when the Regulations are read with the Proclamation bringing into operation Part II of the Public Security Ordinance, and thereby vivifying section 5, which then enabled the President to make the Regulations. The Regulations were intended to control the business of gaming. The control of certain forms of gaming by certain persons was a *means to the end of achieving those purposes that are ascertainable by reading the Regulations with the Proclamation,* and not the object of the Regulations. The fact that only

certain types of gaming were prohibited is an indication that the intention of the Regulations was not simply the eradication of gaming. Nor was it merely a measure of control of gaming in general. The Regulations were intended to eliminate specified forms of gaming which were regarded by the President, on the basis of information placed before him by the Inspector-General of Police, as being particularly harmful because they threatened public security and the preservation of public order. A perusal of the affidavit of the Inspector-General of Police filed by the Attorney-General in these proceedings removed any doubt one may have on the matter.

Mr. Weerakoon said that the Regulations should cover *all* forms of gaming in order to be valid in terms of Article 12 of the Constitution. The Petitioner cannot insist on this. Article 12 of the Constitution does not require that a legislative classification should be scientifically perfect or logically complete. (See *Kedar Nath v . State of West Bengal) (24). A State need not, in order to meet the requirements of equal protection, provide for abstract symmetry in its legislation, but may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. (See Skinner v. Oklahoma* (35). I am bound to assume that those who enact the laws of this Country, including Regulations under the Public Security Ordinance, understand and correctly appreciate the needs of the people and that the laws are directed to problems made manifest by experience and that the discriminations are based on adequate grounds. Those who make the law are free to recognize degrees of harm and to confine the restrictions to those cases where the need is deemed to be the greatest. (See per *Fazl Ali, J.* in *State of* Bombay v. F. N. Balsara *(supra;)* Ram Krishna Dalmia v. Justice Tendolkar (26). That belongs to the realm of legislative policy. It is not a matter for us. All I need say in that connection is this: It is a generally recognized, basic, principle of law that a piece of legislation is not bad merely because the legisla-

ture selects one or some evil things for elimination while other evils may, in the opinion of certain persons, be equally in need of similar attention. Moreover, the State may choose to deal with different persons and things or geographical areas at different times owing to the exigencies of convenience, even though this might necessarily impose varying burdens. (See *Qureshi v. State of Bihar* (36); *Moti Das v. Sahi* (37); *Chadmi Lal v. General Manager, Western Railway* (16). Legislation may be, what *Holmes, J. in Lochner v. New York* (38) described as an "installment" of a general regulation of the matter.

Asked whether the legislation in question was an installment on the way to the total elimination of all forms of gambling, the Attorney-General said that he had no instructions on that matter.

Regulation, rather than elimination seems to be the prevailing legislative policy, as indeed it seems to have been the case since the Gaming Ordinance was enacted in 1889. While most religious teachers and many learned Judges in various countries have disapproved of gambling, in all its myriad, countless forms, a few ancient sages like Yajnavakya and Kautilya, have advocated *control* rather than eradication. Indeed, although Chief Justice Das in *The State of Bombay v. R. M. D. Chamarbaugwala* (39) condemned gambling in the strongest terms, his Lordship observed that Kautilya, "as a practical person that he was, not averse to the State earning some revenue" from gambling. The State lotteries are expressly excluded by Regulation 4 of the Emergency (Games of Chance) Regulations from the definition of "playing of a game for a stake", and, therefore, such lotteries are, whether this be personally agreeable or not, lawful. However, even assuming that they are not lawful, it is not open to the Petitioner to claim, therefore, that *as a matter of equality*, he too should be permitted to engage in an unlawful activity. Article 12 of the Constitution

guarantees equal *protection* of the law and not equal *violation* of the law. One illegality does not justify another illegality. (See per *Sharvananda, CJ in C. W. Mackie & Co., Ltd. v. Hugh Molagoda, Commissioner-General of Inland Revenue and others* (40). See also the decisions in *T. Venkatasubbiah Setty v. Corporation of the City of Bangalore and others* (41) per Chandrashekar, J: *Ram Prasad v. Union of India* (42) per Shrimal, J at p. 132 para. 6; *Chief Commissioner v. Kitty Puri* (43) para, 13 per Deshpande, J: and *Narain Dass v. Improvement Trust* (44) per Dua, J.)

The Petitioner challenged the validity of the Regulations. In paragraph 9 (a) of his petition, he states that the Regulations are "ultra vires the *Public Security Ordinance* (Chapter 40) in that the said Ordinance as amended by subsequent legislation does not provide for the making of Regulations under the said Ordinance for the matters and purposes set out in the Emergency Regulations. "On that aspect of the matter, I must say this at once: In terms of Article 15(7) of the Constitution, I must presume the constitutional validity of the Regulations, as being "law", declared as they are to be concerned with public security. In the circumstances, the burden is upon the Petitioner, who attacks the Regulations, to show that there has in fact been a transgression of the Constitution. (Cf. *Ram Krishna Dalmia v. Justice Tendolkar*, (26).

Mr. Weerakoon submitted that the subject of the Regulations was gaming. Gaming was not, he said, an appropriate matter to be dealt with by Emergency Regulations made under the Public Security Ordinance. Emergency Regulations, he said, can only be used to "normalize" a situation when there was a riot or rebellion or something of that nature. Citing the decisions in *Yasapala v. Ranil Wickremasinghe and others* (45); *Lipton Ltd. v. Ford* (46); and *Attorney-General for Canada and another v. Hallet & Carey Ltd. & another* (47). Mr. Weerakoon submitted that the regulations were not "reasonable" and "relevant" from "the perspective of the declared

emergency situation" and that there was no "rational relationship between the proclaimed reasons for the emergency and the object of the Regulations" and, therefore, the Regulatations must be struck down.

Section 2 (1) of the Public Security Ordinance (Cap. 51) provides as follows:

> Where, in view of the existence or imminence of a state of public emergency, the President is of opinion that it is expedient so to do in the interest of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, the President may, by Proclamation published in the Gazette, declare that the provisions of Part II of this Ordinance shall, forthwith or on such date as may be specified in the Proclamation, come into operation throughout Sri Lanka or in such part or parts of Sri Lanka as may be so specified."

On 14 May 1991, the President, by Proclamation, brought into operation Part II of the Public Security Ordinance. That Proclamation, published in Gazette Extraordinary No. 662/2-1991 of May 14, 1991, was as follows:.

> "Whereas I am of opinion that by reason of a state of public emergency in Sri Lanka it is expedient so to do in the interest of public security, the preservation of public order and the maintenance of supplies and services essential to the life of the community: know ye that I Ranasinghe Premadasa, President, by virtue of the powers vested in me by section 2 of the Public Security Ordinance (Chapter 40 as amended by Act No. 8 of 1959, Law No. 6 of 1978 and Act No. 20 of 1988) do by this Proclamation declare that the provisions of Part II of that Ordinance shall come into operation throughout Sri Lanka on the 14th day of May 1991."

In accordance with section 2 (4) of the Public Security Ordinance, the Proclamation was duly approved by Parliament on 23 May,1991. A notification to that effect was published in Gazette Extraordinary No. 665/27 - 1991 on June 6,1991.

Part II of the Public Security Ordinance which the Proclamation brought into operation deals with the subject of Emergency Regulations, including section 5, which empowers the

President to make emergency regulations. Section 5 (1) of the Public Security Ordinance states as follows:

> "The President may make such regulations (hereinafter referred to as "emergency regulations") as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community".

I am unable to agree that Emergency Regulations may be made under the Public Security Ordinance only in the circumstances suggested by Mr. Weerakoon. The plain meaning of the section 5 makes it obvious why I must hold Mr. Weerakoon's restricted interpretation to be entirely unacceptable. The President may not only, as Mr. Weerakoon suggests, make Regulations to quell a riot or rebellion, but he may make any Regulations as appear to him necessary or expedient in the interests of public security and the preservation of public order. This, it was held in *Yasapala's Case* (supra) at p.159, included measures to prevent an anticipated breach of public order. In terms of section 5 of the Public Security Ordinance, the President may also make such Regulations as appear to him necessary and expedient for "the suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential to the life of the community." In *Yasapala's Case* (supra) it was held by Sharvananda, J. (as he then was) that the words in section 5 were "not words of limitation" and that

> "the enumeration of the purposes outlined in section 5 is a compendious means of delegating full power of making Emergency Regulations. The power to make Emergency Regulations for the purposes indicated in section 5 is a power to enact any kind of Regulation to deal with the exigencies of the emergency. Section 5 confers on the President plenary powers of making Emergency Regulations. The gamut of the power extends to even superseding existing law."

Mr. Weerakoon submitted that the need for, and the appropriateness of the regulations had to be seen from the

"perspective of the emergency situation" and the question of public order and security, and these were not matters for the President alone to judge. The proclaimed reasons for the state of emergency must in fact exist and there must, he said, be a "rational and proximate" connection between the Regulations and the reasons for the proclamation of a state of emergency. In support of this argument, Mr. Weerakoon cited the following words of Sharvananda, J. in *Yasapala's Case* (supra) at pp. 159-160:

> "As stated earlier, the reasonableness of a regulation will have to be judged from the perspective of the emergency situation and the information which the President was possessed of in regard to that. The relationship between the impugned regulation and the purpose of the regulation must, of course, be rational or proximate. If the regulation is one that is reasonably capable of being a regulation for securing public order, that will be sufficient"

I do not think that Mr. Weerakoon's suggestion that the reasons for a proclamation of a state of emergency and the appropriateness of the Regulations must be objectively decided is supported by the observations of Sharvananda, J. which he quoted. His Lordship had earlier, at p. 154-156, explained that the test is "a subjective one" and that the

> "President's belief in the necessity or expediency of Emergency Regulations is conclusive of its validity. His belief that the Emergency Regulations will achieve the object of counteracting the emergency is sufficient justification for the Regulation... The test of the need of the Regulations is a subjective one. The words are "as appear to be necessary or expedient" and not "as may be necessary", which is objective. The President is made the sole judge of the necessity of the Regulations... The President having deemed necessary or expedient to make the said Regulations, it is not for this Court, in the absence of evidence of bad faith, to review what the President has done. Nor is it competent for the Court to examine whether the Regulation was reasonable in the circumstances or likely to achieve the object of defusing the emergency. It is not the objective fact but the subjective opinion of the President that it is necessary or expedient to pass a regulation that is a condition of the regulation-making power. In the absence of averments of bad faith or ulterior motive, the jurisdiction of the Court is

excluded. Quick decision and effective action must be the essence of those powers and the exercise of them must be left to the subjective satisfaction of the President charged with the duty of maintaining law and order. To make the exercise of those powers justiciable and subject to judicial scrutiny will defeat the very purpose of those Regulations."

At p. 156, Sharvananda, J. does state that the Court may determine "the connexion (sic.) between the power to exercise and the purposes described by statute." However, I believe his Lordship, following the observations of Lord Radcliffe in *Attorney-General for Canada v. Hallet & Carey Ltd.* (47) (supra) at p.450, was merely emphasizing the need for a nexus between the Regulations and its general objectives so as to obviate the interpretation of the words in section 5 (1) of the Public Security Ordinance empowering the President to make such regulations "as appear to him to be necessary or expedient" to mean that the President may do whatever he may feel inclined. In that connection, as Sharvananda, J. observes at p.160, all that needs to be established is that "the regulation is one that is reasonably capable of being a regulation for securing public order"

I have already said that there was a clear nexus between the Regulations and their purpose. Mr. Weerakoon said that there should be a connection between the Regulations and the reasons for the proclamation of the state of emergency. Having regard to the affidavit of the Inspector-General of Police, I am equally satisfied that there was a recognizable and evident connection between the proclaimed reasons for the state of emergency and the Emergency (Prohibition of Importation of Instruments and Appliances for Gaming) Regulations No. 1 of 1991 and the Emergency (Games of Chance) Regulations No. 1 of 1991.

In every civilized society, public security and public order must be regulated by some authority. As was said in *Mugler v. State of Kansas* (48), following *Munn v. Illinois* (49) :

"While power does not exist with the whole people to control rights that are purely and exclusively private, government may require each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. But by whom, or by what authority is it to be determined whether the use of property will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of a few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety."

Where a public emergency exists or is imminent, our legislature has, through the Public Security Ordinance, conferred special powers on the President. Section 2(1) of the Public Security Ordinance makes it clear that the person who must decide that there is a state of emergency is the President. And section 5 (1) gives the President the power to make such emergency regulations "as appear to him to be necessary or expedient in the interests of public security and the preservation of public order... " Subject to the provisions of section 2(4) of the Public Security Ordinance, which states that a Proclamation of a state of emergency shall expire after a period of fourteen days unless the Proclamation is approved by Parliament, it is the President alone who is empowered to decide whether there is an emergency and the law gives him the amplest possible discretion with regard to the emergency regulations he may make to effectively deal with the situation. (Cf. per *Sharvananda, J.* in *Yasapala's Case* (supra) at pp. 155-157).

In *Bhagat Singh v. Emperor* (50) the Court had to decide on the validity of ordinances promulgated by the Governor-General in the exercise of his powers under section 72 of the Government of India Act for the peace, order and good government of British India. Viscount Dunedin in delivering the judgment of the Privy Council said at pp. 111-112:

> "The petitioners ask this Board to find that a state of emergency did not exist. That raises the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the ordinances....It was next said that the ordinances did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that."

The decision as to whether there is a state of emergency and what regulations may be considered necessary or expedient to deal with such a situation is a matter for the President and not the Courts of law. Whether in proclaiming a state of emergency or in making emergency regulations the President has acted reasonably and in a rational, sensible or agreeable manner are not matters for our consideration. It is not for me to decide whether a President's judgment in proclaiming a state of emergency is sound or foolish or absurd or whether the steps he has taken by way of emergency regulations are extravagant or inappropriate.

In *Lipton Ltd. v. Ford* (46), acting under the Defence of the Realm Regulations, a quantity of raspberries had been requisitioned for the use of the powers given for securing the public safety and defence of the realm. At p. 654 Atkin, J said:

> ".....it was further contended that taking possession of a crop of raspberries could not be necessary for the public safety or defence of the realm. I do not think that those arguments are well-founded. I think that all that I have to see is whether the regulation is one that is reasonably capable of being a regulation for the public safety and defence of the realm. If it is, I do not think the Court is entitled to question the discretion of the Executive to whom Parliament has entrusted powers in such wide terms."

In *Attorney-General for Canada* and *Another* v *Hallet & Carey Ltd.* and *Another* (47), in the ostensible exercise of the powers conferred on the Governor in Council by the National Emergency Transitional Powers Act 1945 of Canada, by an Order in Council, all oats and barley in commercial positions in Canada, with certain specified exceptions, were vested in the Canadian Wheat Board. The Privy Council held that it was not competent for the courts to canvass the considerations which had led the Governor in Council to deem it necessary to effect the vesting, or to ascribe to the Order in Council a purpose other than that which it professed to serve; the measures authorized were such as the Governor in Council, not the courts, deemed necessary or advisable. Lord Radcliffe, who delivered the judgment of the Privy Council, said at p.444:

> "The validity of the vesting provision of the Order in Council has been attacked on several grounds. It has been said that its "real purpose was not to carry out any of the purposes specified in the Act of 1945 but to confiscate the profits that would otherwise have been made by a certain class of owners of barley or to exact an impost from them. It has been said that the order was not in fact necessary or related to any of the purposes of the Act and was therefore not a valid exercise of the powers which the Act conferred. It has been said that the order was invalid because it discriminated against some out of the whole body of citizens or barley owners and that the authority given by the Act did not extend to the making of such discrimination. All these are views that found favour with one or more of the Court of Appeal for Manitoba, and they constitute a different class of objection from those which are more properly related to the construction of the enabling Act itself, for however expressed, they are in reality an attempt by the Court to take over into its own hands the functions which have been entrusted by Parliament to the Governor in Council. This is, in their Lordships view, an inadmissible proceeding."

Later, at p.445, Lord Radcliffe quotes with approval the following words of Chief Justice Duff in *Reference as to the validity of certain Chemical Regulations* (51) —

> "I cannot agree that it is competent to any court to canvass the considerations which have or may have led him to deem such regulations necessary or advisable for the transcendent objects set forth..... The

words are too plain for dispute: the measures authorised are such as the Governor-General in Council (not the Courts) deems necessary or advisable."

In *Carltona Ltd. v. Commissioners of Works* and Others (52) Lord Greene, MR at p. 564 said:

"It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament which authorizes this regulation, commits to the executive the discretion to decide and with that discretion if bona fide exercised no court can interfere. All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction."

The Petitioner questioned the bona fides of the President in making the Regulations and he made on oblique attack on the validity of the Regulations while dealing with the question of the alleged infringement of his rights under Article 12 (2) of the Constitution. Although it is not incumbent upon a Petitioner who complains of a violation of Article 12 of the Constitution to assert and prove that, in making the law in question, the legislating authority was actuated by a hostile or inimical intention against him or a class to which, he belonged (*State of West Bengal v. Anwar Ali*) (53) the Petitioner, because he had other things in view, in paragraphs 14,15,16 and 17 of his petition, alleged that the Regulations had been made so as to affect his business on account of his political opinions. Since he had been discriminated against on account of his political views, there was, he said, a violation of Article 12(2) of the Constitution which provides, among other things, that no citizen shall be discriminated against on the ground of

political opinion. And if the discriminatory regulations had been motivated by vindictive considerations, rather than the interests of the community, then, in terms of the law as laid down in *Yasapala's Case (supra)* and *Carltona Ltd. v. Commissioner of Works & others (supra)*, requiring bona fides, the Regulations should be regarded as invalid:

The Petitioner alleged that, although he had earlier been a supporter of the United National Party, yet at the most recent Presidential Election, he had not supported that Party's candidate, namely, the incumbent President. (The Regulations in question, it will be noticed, were made by the President). The Petitioner also suggested that the Regulations affecting his business were made because he had helped the Minister of State, the late Mr. Ranjan Wijeratne, with information concerning the illegal activities of a man named Joe Sim, who was therefore deported. Sim, a citizen of Singapore, it was alleged, "enjoyed a high level of patronage and support from the Government and members and Ministers of the Government and persons in the administration including the police". A number of newspaper reports were filed with his Petition and read in Court. However, in my opinion, there was nothing at all in them to show personal hostility to the Petitioner either on the part of the President, the members of the Government or the administration, including the police. Nor was there any indication in these news items even remotely suggesting that the Regulations were designed to particularly affect the Petitioner's business as an act of revenge or for any other reason. The Petitioner states that action against Casinos were taken after the *Jackpot* operation, to enable the Government to repel the charge of discrimination. A Government is entitled to deal with problems according to its own time-table. If it did take action against some forms of gambling, other than those conducted with *Jackpots,* it is evidence of good faith on the part of the Government rather than of arbitrary discrimination against the Petitioner and other owners of *Jackpots.*

The Petitioner states in paragraph 9 (b) of his petition that the Regulations were

> "obnoxious to the 13th Amendment to the *Constitution of the Democratic Socialist Republic of Sri Lanka* in that the subject of betting and gambling is exclusively allotted to the sphere of powers of Provincial Councils in the transfer of political and administrative power under the Constitution."

During the course of his submissions on that matter, Mr. Weerakoon accepted the suggestion of my brother, Fernando, J. that section 3A of the Gaming Ordinance (Cap. 59) concerned the prohibition of importation into Sri Lanka of instruments or appliances that may be used for the playing of any game of chance or of mixed chance and skill. It was *at least* as much a Customs and Import Control matter as it was a matter concerning gaming. Indeed, section 3A (2) expressly states that the provisions of section 3A

> "shall be read and construed as one with the Customs Ordinance, and, for the purpose of the application of that Ordinance, any instrument or appliance the importation of which is prohibited by Order made under sub-section (1) shall be deemed to be goods the importation of which is prohibited by enactment."

Therefore, it was not a matter exclusively reserved for the Provincial Councils. His submission that the word "Minister" in section 3A of the Gaming Ordinance, meant the Provincial Council Minister responsible for the subject of gaming in view of the allocation of the subject of gaming to Provincial Councils in terms of the 13th Amendment to the Constitution, could not be sustained.

In paragraph 10 of his petition, the Petitioner states that—

> "the Proclamation of Emergency under which the said Regulations have been made has not been approved by a Resolution of Parliament as required by section 2 (b) of the *Public Security Ordinance*. Petitioner annexes hereto marked C1 the first and last pages of the Hansard of 23 May 1991 which is the day Parliament considered the Proclamation made on 14th May, 1991. The annexure shows that the resolution moved for the approval of the said Proclamation had failed to get a 2/3 majority of a House of 225 members."

As for the averment in paragraph 10 of the Petition, that the Regulations had not been duly passed by Parliament, it was totally abandoned by Mr. Weerakoon. In the absence of evidence to the contrary, I must presume that what was required to be done was properly done. *Omnia praesumunter rite esse acta.*

The Petitioner complained in paragraph 12 of his Petition that by the seizure and confiscation of the instruments and appliances used in his business, he was unable to engage in his lawful occupation, trade, business or enterprise. This, he said was in violation of Article 14(1)(g) of the Constitution. Article 14(1)(g) provides that every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession,trade, business or enterprise.

Article 14(1)(g) is based on Article 19(1)(g) of the Indian Constitution which provides that "All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business." Although that Article does not expressly confine the occupation, trade or business" to *lawful* activities, the Courts have consistently held that the Constitution only protects the right to lawful occupations. Gambling, for instance, has been held in India to be an unmitigated evil and that legislation to root out gambling was in the public interest and valid. There could be no "trade" or "business" in gambling which was entitled to the protection of Article 19(1)(g) of the Indian Constitution, which corresponds to Article 14(1)(g) of our Constitution. (See *State of Bombay v. R. M. D. Chamarbaugwala* (39); *Krishnachandra and Others v. State of Madhya Prades* (54). Since gambling is not absolutely prohibited in Sri Lanka, we may assume that those forms of gambling that are permitted may constitute "trade" or "business". However, transacting *Jackpot* business, is not something which is entitled to the protection of the Constitution because it is now declared to be unlawful.

Admittedly, it was not *always* unlawful. Mr. Weerakoon addressed us at length on the vicissitudes of *Jackpot* machines in the context of the law and law enforcement relating to gaming in Sri Lanka in an effort to sandpaper the sensitive conscience of this Court with the fact that the Petitioner had imported the confiscated machines, at an enormous cost, with the leave and licence of the Controller of Imports and Exports, at a time when it was lawful to operate such instruments or appliances. The Attorney-General responded to this by stating that the Regulations provided for the payment of compensation for confiscated instruments and appliances in the circumstances specified therein.

Section 3A (1) of the Gaming Ordinance provides that –

> "The Minister may, by Order published in the Gazette, prohibit the importation into Sri Lanka of any instrument or appliance that may be used for the playing of any game of chance or of mixed chance and skill."

Section 3B prohibits the possession or manufacture of any instrument or appliance the importation of which is prohibited by Order made under subsection (1) of section 3A. A person who contravenes that provision is declared to be guilty of an offence punishable with a fine or imprisonment or both fine and imprisonment.

Whether an instrument or appliance falls within the description of a prohibited instrument or appliance is to be conclusively determined by a certificate under the hand of the Government Factory Engineer. (Section 3C).

Section 22 (3) of the Gaming Ordinance provides that "unlawful gaming" includes

> "the act of playing, in any place whatsoever whether for a stake or not, a game of chance or of mixed chance and skill with any instrument or appliance the importation of which is prohibited by Order made under subsection (1) of section 3A, whether or not such instrument or appliance is one that has been actually imported into Sri Lanka and whether or not it is one the importation of which into Sri Lanka has been before the coming into force of that Order."

On July 12th, 1957, the Minister made an Order under section 3A, published in the Gazette of July 19, 1957, prohibiting the importation of certain instruments and appliances. These expressly included *Jackpots*. On 5th December 1961, the Minister made an Order under section 3A rescinding the Order of 1957 and prohibiting the importation of the following instruments or appliances:

> "(a) Any instrument or appliance which when operated in any manner whatsoever after any person inserts therein a coin or any such token or other device as may be provided by the person in charge of that instrument or appliance upon the payment or delivery to him of any money or other thing of value by the first mentioned person, emits or does not emit any money or other thing of value to which, by express or implied agreement between the two aforesaid persons, the first mentioned person becomes entitled to.
>
> (b) Any instrument or appliance, which when operated in any manner whatsoever, after any person pays or delivers any money or other thing of value to the person in-charge of the instrument or appliance produces a result which by express or implied agreement between the two aforesaid persons, entitles or does not entitle the first mentioned persons to receive any money or other thing of value".

On 5th March 1987, the Minister, by Order made under section 3A and published in the Gazette Extraordinary dated April 3, 1987, amended the 1961 Order by stating that nothing in the 1961 Order "shall apply to, and in relation to, the importation into Sri Lanka of Jackpots."

On 22nd September 1987, the Minister made Order under section 3A, published in the Gazette Extraordinary of December 8th 1987, rescinding the 1961 Order.

On 31 May, 1991, the President made the Emergency (Prohibition of Instruments and Appliances for Gaming) Regulations No. 1 of 1991 under section 5 of the Public Security Ordinance. These Regulations were published in the Gazette Extraordinary of May 31, 1991. Regulation 2 provided that

> "The importation into Sri Lanka of any such instruments or appliances for the playing of any game of chance or the playing of any game

of mixed chance and skill as is specified in the schedule hereto shall be deemed, for all purposes and with effect from the date on which this regulation comes into force, to have been prohibited by an Order made under subsection (1) of section 3A of the Gaming Ordinance (Chapter 46) and approved by Parliament under subsection (3) of session 3 of that Ordinance."

The Schedule described the prohibited instruments and appliances in exactly the same terms used in the 1961 Order.

On June 6th, 1991, the President, acting under section 5 of the Public Security Ordinance, made the Emergency (Games of Chance) Regulations 1 of 1991. These Regulations were published in the Gazette Extraordinary of June 6, 1991. These Regulations, inter alia, made the playing of a game for stake an offence and exempted State and public corporation lotteries from the definition of "playing of a game for stake."

It would appear that, except during the period March 5th, 1987, 31st May, 1991, *Jackpot* machines had been prohibited from importation and that their use at other times was unlawful in terms of the Gaming Ordinance. In the circumstances, the Petitioner cannot, in my opinion, properly claim, as he does in paragraph 2 of his Petition, that he has for twenty three years been engaged in lawful gaming if *Jackpots* constituted his only business. Nor can he complain that he has been prevented from carrying on a "lawful" occupation, trade, business or enterprise since May 31, 1991. There was a short period during which he might have been justified in operating *Jackpots*. and claiming the protection of Article 14 (1) (g) of the Constitution. But there was no assurance that his good fortune would continue indefinitely. No such assurance could ever be given. In *Mugler v. State of Kansas* (48), the Supreme Court had to deal with two cases. At a certain time, it was lawful to make liquors in the State of Kansas. During that time, the defendant, who had been engaged in brewing, had made extensive improvements peculiarly adapted to such business. The State of Kansas then prohibited and made it an offence to manufacture and sell intoxicating liquor within that

state except for medical, scientific and mechanical purposes. It was held that the legislation did not deprive him of any right, privilege or immunity as a citizen of the United States or deprive him of life, liberty or property without due process within the meaning of the 14th Amendment to the American Constitution. Mr. Justice Harlan, delivering the opinion of the Supreme Court, said at p. 301, as follows:

> "It is true, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under any obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, (56), the supervision of public health and the public morals is a government power, "continuing in its nature", and to be dealt with as the special exigencies of the moment may require", and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in *Beer Co. v. Massachusetts*, (57) "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

Operating as he was, in a sort of twilight area of activity, the Petitioner might have known, and in any case, ought to have known, having regard to the varying status of *Jackpots* that legislative policy might change once again. He took a risk. A calculated risk, perhaps, knowing very well that the Government might change its mind as it had done before. The Government did change its mind. It was entitled to do so. And like many a *Jackpot* player, I suppose, the Petitioner ventured and lost. In this case, the prohibition of the *Jackpot* business was not a matter of mere whim or fancy. It was not a matter of caprice. There were, as it clearly appears from the affidavit of the Inspector-General of Police, sufficient reasons for the making of the Regulations in question.

And now that *Jackpots* are illegal, I hold that the Petitioner cannot invoke the protection of Article 14(1)(g). He has

no fundamental right to conduct unlawful gaming for the same reasons that no keeper of a brothel *(Malekotla v. Mohd. Mushtag* (57) or a dealer in smuggled goods *(Boota Singh v. State* (58) or a dealer in adulterated foodstuffs *(U.P. v. Kartar Singh* (59) can claim a fundamental right to do his business. Crime may generate income, and I am told that some forms of crime are extraordinarily lucrative. However, it does not, thereby become an occupation, profession, trade, business or enterprise which the law must recognize and protect.

Moreover, a person who comes before this Court for just and equitable relief under Article 126 (4) of the Constitution must in his act of supplication show the Court clean hands into which relief may be given. The Supreme Court, as Chief Justice Sharvananda said in *C. W. Mackie v. Hugh Molagoda, Commissioner-General of Inland Revenue and Others* (40) "cannot lend its sanction or authority to any illegal act. Illegality and equity are not on speaking terms" For the reasons stated, if I might borrow some words from *Mr. Justice Nihill in Rewata Thero v. Horatala* (60), "He who seeks equity should come with clean hands". In that case, the hands of the defendant were described by Justice Nihill as being "very dirty indeed."

I have carefully considered each and every word the Petitioner has said in his petition; and , with equal care, every submission of his counsel, from this angle and that. More than that, I cannot do. Yet, for the reasons stated in my Judgment, I make Order dismissing the Petitioner's application. I make no Order with regard to costs.

Bandaranayake, J. — I agree.

Fernando. J, — I agree.

Application dismissed.