AMENDED PETITION

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

In the matter of an Application under Article 126, read with Articles 17, 3, 4, 105 and Chapters III and VI of the Constitution of the Democratic Socialist Republic of Sri Lanka, together with an Application under Article 132, read with Articles 118 and 123 of the Constitution

Nihal Sri Ameresekere
167/4, Vipulasena Mawatha
Colombo 10.

Petitioner

SC FR Application No. 534/2011

Vs

1. Hon. Attorney General, as representing the Minister of Finance, Mahinda Rajapakse,
   in terms of Article 35 of the Constitution
   Attorney General's Department
   Colombo 12.

2. Basil Rajapaksa, M.P.
   Minister of Economic Development
   Ministry of Economic Development
   No. 464 A, T.B. Jayah Mawatha
   Colombo 10.

3. P.B. Jayasundera
   Secretary, Ministry of Finance &
   Secretary to the Treasury and Secretary Ministry of Economic Development
   The Secretariat
   Colombo 1.

4. G.L. Peiris, M.P.
   Minister of External Affairs
   Ministry of External Affairs
   Republic Building
   Colombo 7.

5. C.R. de Silva, P.C.

Former Hon. Attorney General
C 83, Gregory's Avenue
Colombo 7.

6. Mohan Peiris, P.C.
Former Hon. Attorney General,
and now Advisor to the Cabinet of Ministers
3/14 D, Kynsey Road
Colombo 8.

7. Rauf Hakeem, M.P.
Minister of Justice
Superior Courts Complex
Colombo 12.

8. Suhada Gamalath
Secretary, Minister of Justice
Superior Courts Complex
Colombo 12.

9. Chamal Rajapaksa, M.P.
Hon. Speaker of the Parliament
Sri Jayewardenepura
Kotte.

10. Hon. Attorney General,
in terms of Article 134 of the Constitution
Attorney General's Department
Colombo 12.

Respondents

TO: HER LADYSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS AND LADYSHIPS THE OTHER HONOURABLE JUSTICES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

On this 16th day of December 2011

The **Amended Petition** of the **Petitioner** above-named, appearing in person, states as follows:

1. The Petitioner is -

   a) a citizen of the Democratic Socialist Republic of Sri Lanka (hereinafter sometimes referred to as the "**country**")

      *A true photostat copy of the National Identity Card of the Petitioner is annexed marked **"X1",** pleaded as part and parcel hereof.*

   b) a Member of the
      - Institute of Chartered Accountants, Sri Lanka,
      - Chartered Institute of Management Accountants, UK.
      - Institute of Certified Management Accountants, Australia
      - Association of Certified Fraud Examiners, USA
      - International Consortium on Governmental Financial Management
      - International Association of Anti-Corruption Authorities

   c) a Consultant exposed to both the private and public sectors

d) a public interest activist, who has appeared in person and made submissions before Your Ladyships' Court, in Fundamental Rights Applications filed in the national and public interest, and likewise in Bill Challenges under Article 121 of the Constitution and a Reference made under Article 129 of the Constitution, *viz*;

- SC (SD) Nos. 22 & 23/2003 – challenges to Amendments to the 'Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990', and 'Debt Recovery (Special provisions) Act No. 2 of 1990', resulting in the said Amendments being struck down by Your Ladyships' Court, *inter-alia,* as ***'harsh, oppressive and unconscionable'*****, denying equality guaranteed under Article 12(1) and also denying the right of access to the judiciary in contravention of Article 105(1) of the Constitution**.

- SC Opinion No. 1/2004 – on Inland Revenue (Special Provisions) (Amendment) Acts Nos. 10 & 31 of 2003, *inter-alia*, as a consequence Your Ladyships' Court opined the said Laws, as ***'inimical to the rule of law, violative of the 'Universal Declaration of Human Rights and International Covenant on Civil & Political Rights', and that it had defrauded public revenue, causing extensive loss to the State***.'

- SC (FR) Application No. 158/2007 *re* – the privatisation of Sri Lanka Insurance Corporation Ltd., ***annulled*** by Your Lordships' Court, as '***wrongful, unlawful and illegal'***

- SC (FR) Application No. 209/2007 *re* – the privatisation of Lanka Marine Services Ltd., ***annulled*** by Your Lordships' Court, as '***wrongful, unlawful, illegal and fraudulent'***

- SC (SD) No. 3 of 2008 – challenge to the Appropriation Bill 2008, and which **was determined by Your Ladyships' Court to be inconsistent with the Constitution, directing that *Rs. 738 Bn., debt service payments which had not been disclosed in the total expenditure of Rs. 980 Bn., be disclosed giving a separate Schedule to the Appropriation Bill; and further observing that the Secretary to the Treasury had been operating a 'budget of his own' expending 'Development Activities' monies for items of expenditure 'far removed' from 'Development Activities', resulting in Your Ladyships' Court directing that such expenditures be reported to Parliament deemed as Supplementary allocations*.**

  Article 151 of the Constitution stipulates thus:

  " 151. (1) Notwithstanding any of the provisions of Article 149, Parliament may by law create a Contingencies Fund for the purpose of providing for urgent and unforeseen expenditure. Special provisions as to Bills affecting public revenue. Auditor-General.

  (2) The Minister in charge of the subject of Finance, if satisfied-

  (a) that there is need for any such expenditure, and
  (b) that no provision for such expenditure exists, may, with the consent of the President, authorize provision to be made therefor by an advance from the Contingencies Fund.

  (3) As soon as possible after every such advance, a Supplementary Estimate shall be presented to Parliament for the purpose of replacing the amount so advanced."

2. a) 1st Respondent is the Hon. Attorney General, named in terms of Article 35 of the Constitution, as representing the Minister of Finance.

b) 2nd Respondent is the Minister of Economic Development.

c) 3rd Respondent

i) is the Secretary, Ministry of Finance & Secretary to the Treasury and Secretary, Ministry of Economic Development,
ii) was former Deputy Secretary to the Treasury
iii) was former Chairman of the Public Enterprises Reform Commission (PERC), responsible for several privatisation transactions carried out, including those annulled by Your Ladyships' Court in SC (FR) Application Nos. 158/2007 and 209/2007 referred to above.

d) 4th Respondent is the Minister of External Affairs, and former Minister of Justice & Deputy Minister of Finance.

e) 5th Respondent is a former Attorney General.

f) 6th Respondent is a former Attorney General, and now Advisor to the Cabinet of Ministers.

g) 7th Respondent is the Minister of Justice.

h) 8th Respondent is the Secretary, Minister of Justice.

i) 9th Respondent is the Hon. Speaker of Parliament.

j) 10th Respondent is the Hon. Attorney General, noticed in terms of Article 134 of the Constitution.

3. a) Articles 53, 61 and 107 stipulate that selected public officers referred to therein **shall not enter upon such public office**, until the oath or affirmation set out in the Fourth Schedule to the Constitution *to uphold and defend the Constitution,* is subscribed to.

b) Article 63 stipulates that **no member shall sit or vote in Parliament,** until the oath or affirmation *to uphold and defend the Constitution,* is subscribed to.

c) In such context, the breach of such oath or affirmation by a person, who has on the foregoing premise **entered upon selected or elected public office**, *would render such person to have abdicated or vacated such public office*.

4. The Petitioner files this Application

a) for Your Ladyship the Chief Justice to consider, as to whether the questions involved are of general and public importance, warranting the matter to be heard by a Bench comprising 5 or more Judges of Your Ladyship's Court to review and consider, as to whether the **Determination ("X6(a)")** made by Your Ladyship's Court under Article 123 of the Constitution on an Application made under Article 122(1) of the Constitution, on an Urgent Bill titled –

"An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets",

is ***per-incuriam*,** and **not in conformity with** and/or ***ultra-vires*** the stipulations in Article 123(3) of the Constitution.

b) for himself and for and on behalf of and in the interest of the people of the country, exercising constitutional rights to oppose the *alienation* of the *sovereignty* of the people, which is *inalienable,*

to secure and advance the fundamental rights of the people guaranteed by the Constitution, and to uphold and defend the Constitution, as a fundamental duty in terms of Article 28(a) of the Constitution, which *inter-alia* stipulates that the exercise and enjoyment of rights and freedoms, is *inseparable* from the performance of fundamental duties and obligations.

c) as a Shareholder / Stakeholder of Hotel Developers (Lanka) PLC, *described as the only 'Underperforming Enterprise'* under Schedule 1 to the Bill titled

"**Revival of Underperforming Enterprises & Under-utilised Assets" ("X6(b)")** dated **8.11.2011** and tabled in Parliament on **8.11.2011**,

together with Supreme Court Determination **("X6(a)")** on a Bill titled **"An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets",** also tabled in Parliament on **8.11.2011**.

The aforesaid Bill with 15 Committee Stage Amendments, has been passed by Parliament on **9.11.2011**, and certified into Law by the Speaker, 9th Respondent, expeditiously on **11.11.2011** and therefore the said Bill is hereinafter referred to as the '**Law**'.

5. The Petitioner states that

a) the 2nd Respondent, Minister of Economic Development, as portrayed in the *media* and as per the proceedings in Parliament had espoused the enactment of the said Law, and is causing the implementation of the provisions thereof.

b) the 7th Respondent, Minister of Justice, with the Departments of the Attorney General and Legal Draftsman, and the Sri Lanka Law Commission *coming under his purview*, would be responsible to ensure that due and proper procedure is adhered to in the enactment of legislation, without the *usurpation* of any duties and functions under such Departments, and/or *sans* the *subversion* of such process.

c) i) the 7th Respondent, Secretary, Minister of Justice, with the Departments of the Attorney General and Legal Draftsman, and the Sri Lanka Law Commission *coming under his supervision ad direction,* would be responsible to ensure that due and proper procedure is adhered to in the enactment of legislation, without the *usurpation* of any duties and functions under such Departments, and/or *sans* the *subversion* of such process.

ii) As *revealed* by the Determination **("X6(a)")** of your Ladyship's Court there have been 13 *drafting errors* to be corrected in the Bill.

iii) the 7th Respondent, Secretary, Minister of Justice, when queried by the Petitioner, made the Petitioner understand that he was *unaware,* as to how and by whom the said Law came to be enacted.

6. a) The Petitioner states that

i) he is not against the policy and objective of the Government, that privatized public enterprises must be held responsible and accountable to achieve the objectives of such privatizations; and

ii) lawful action ought be taken for any breaches thereof, including, *vis-à-vis,* any perverseness of privatisations, which have been detrimental to public interest and/or has caused losses to the people.

b) In this regard, as PERC Chairman in 2004, the Petitioner initiated a 'review' of all privatizations carried out from 1986 to 2004, and identified to the extent possible, the 'post-privatization issues' and 'post-privatization litigations', as borne out by the PERC Annual Report 2004, submitted to Parliament. ***Nevertheless, PERC was closed thereafter in or about 2008***.

*True copy of the relevant pages of the PERC Annual Report 2004 submitted to Parliament is annexed marked **X2**, pleaded as part and parcel hereof*

c) In fact, it is such investigations into the privatizations of SLIC and LMSL, which led to the adverse COPE Reports thereon in 2007, resulting in SC (FR) Application Nos. 158/2007 and 209/2007, wherein Your Ladyships' Court *annulled* these privatization as *wrongful, unlawful, illegal and fraudulent*, **after *inter-partes* Hearings**.

d) Whereas '**certain'** institutions **have been *arbitrarily*** and ***unilaterally*** **listed** *sans* any evaluation and/or investigative evidence, *inter-alia*, as failed privatisations / transactions, 'Underutilised Assets' and/or 'Underperforming Enterprises', *violating norms of natural justice*, and the right to have been heard and denying equality enshrined under Article 12(1) of the Constitution, and denying access to the judiciary in terms of Article 105(1) of the Constitution.

e) Such *arbitrary* and *unilateral* **listing** of '**certain'** institutions not founded on and far removed from '***intelligible differentia'*** and without a proper evaluation process and/or survey **would have left out other similar institutions,** *thereby infringing upon the right to equality enshrined in the Constitution*.

f) But those persons, who had perpetrated such privatisations and/or transactions and had failed to monitor their performance to protect the public interest had not been arraigned before the law and/or been dealt with, but permitted to continue to hold public office and/or be given further State Contracts.

g) The very process aforesaid tantamounted to the *alienation* of the *sovereignty* of the people, which is *inalienable* as morefully set out herein.

h) **Article 17 of the United Nations Universal Declaration of Human Rights, which entered into force in 1948, and to which Sri Lanka is a party, stipulates as follows:**

"Article 17 (1)

(1) Everyone has the right to own property alone as well as in association with others
(2) No one shall be arbitrarily deprived of his property "

The aforesaid Article 17 has been blatantly and flagrantly breached.

7. Petitioner having noted reference to certain parts only of the Directive Principles in Chapter VI of the Constitution, both in the aforesaid Bill and the aforesaid Determination, sets out below the Directive Principles of State Policy and Fundamental Duties in full, **respectfully stating that the entirety thereof ought be taken into reckoning**: (*Emphasis added*)

Directive Principles of State Policy

"27. (1) **The Directive Principles of State policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society**.

(2) **The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include**-

(a) **the full realization of the fundamental rights and freedoms of all persons**;

(b) the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life;

(c) the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities;

(d) the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and co-ordinating such public and private economic activity towards social objectives and the public weal;

(e) the equitable distribution among all citizens of the material resources of the community and the social product, so as best to subserve the common good;

(f) **the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralised in the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka;**

(g) raising the moral and cultural standards of the People, and ensuring the full development of human personality; and

(h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels.

(3) The State shall safeguard the independence, sovereignty, unity and the territorial integrity of Sri Lanka.

(4) **The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.**

(5) The State shall strengthen national unity by promoting co-operation and mutual confidence among all sections of the People of Sri Lanka, including the racial, religious, linguistic and other groups, and shall take effective steps in the fields of teaching, education and information in order to eliminate discrimination and prejudice.

(6) **The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation**.

(7) The State shall eliminate economic and social privilege and disparity, and the exploitation of man by man or by the State.

(8) The State shall ensure that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment.

(9) The State shall ensure social security and welfare.

(10) The State shall assist the development of the cultures and the languages of the People.

(11) The State shall create the necessary economic and social environment to enable people of all religious faiths to make a reality of their religious principles.

(12) The State shall recognize and protect the family as the basic unit of society.

(13) The State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination.

(14) The State shall protect, preserve and improve the environment for the benefit of the community.

(15) **The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, and <u>shall endeavour to foster respect for international law and treaty obligations in dealings among nations</u>**."

Fundamental Duties

"28. **The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka**-

(a) **to uphold and defend the Constitution and the law**;

(b) to further the national interest and to foster national unity;

(c) to work conscientiously in his chosen occupation;

(d) **to preserve and protect public property, and to combat misuse and waste of public property**;

(e) **<u>to respect the rights and freedoms of others</u>**; and

(f) to protect nature and conserve its riches."

Principles of State Policy and Fundamental Duties *<u>not justiciable</u>*

"29. **<u>The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal</u>. *No question of inconsistency with such provisions shall be raised in any court or tribunal*.**"

8. The Petitioner relies on the following '*dicta*' cited from the Judgment dated 3.8.2009 delivered in SC (FR) Application No. 352/2007 by His Lordship the former Chief Justice J.A.N. De Silva, with Her Ladyship Justice Shiranee Tilakawardene and His Lordship Justice K. Sripavan agreeing. (*Emphasis added*)

   "As is made amply clear by subsection (4) of Article 126, inherent to the effective supervision of matters pertaining to Fundamental Rights is the ability and power of the Supreme Court to administer relief and make directions **so long as such relief and directions are "just and equitable**" - a simple and unqualified two-word threshold clearly meant **to give the broad discretion and power required of the Supreme Court to effectively address the <u>infinitely myriad ways in which fundamental rights can be violated</u>.**

   It is important to recognize, then, that the **Supreme Court's broad powers over matters of Fundamental Rights stem, not from an overzealous interpretation of judicial power, but from an understanding of the very nature of these matters for which the Court has been empowered to protect**.

   Fundamental Rights applications **are <u>qualitatively different</u> from other types of appeals heard before this Court and <u>warrant greater latitude in their consideration</u> and to grant redress in order <u>to encompass the equitable jurisdiction</u> exercised in these applications**."

9. A 7 Member Bench of Your Ladyships' Court, presided by His Lordship then Chief Justice, Sarath N. Silva, and His Lordship former Chief Justice J.A.N. De Silva, and Your Ladyship the Chief Justice Shirani Bandaranayake, and Their Lordships Justices S.W.B. Wadugodapitiya, A. Ismail, P. Edussuriya and H.S. Yapa, on the aborted 18th and 19th Amendments to the Constitution, *inter-alia*, determined in October 2002, as follows: (*Emphasis added*)

   - **"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, <u>it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective</u> -** *(Cited from Indian Judgment)* "
   - "It had been firmly stated in several judgments of this Court that **<u>'rule of law' is the basis of our Constitution</u>"**.
   - "A.V. Dicey in Law of the Constitution postulates that 'rule of law' which forms a fundamental principle of the Constitution has three meanings one of which is described as follows:-

     'It means, in the first place, **<u>the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative, or even of wide discretionary authority on the part of the government</u>**. Englishmen are ruled by the law, and by the law alone .... ' "

   - **"<u>The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution</u>"**
   - **"We have to give effect to this provision <u>according to the solemn declaration made</u> in terms of the Fourth Schedule to the Constitution <u>to "uphold and defend the Constitution</u>" "**

10. The Petitioner reiterates

   a) Articles 3 and 4 of the Constitution of the country enshrining that the ***<u>sovereignty</u>* <u>is in the people</u>**, and is ***inalienable*** and that the *sovereignty* of the people shall be exercised by the

      - legislative power **of the people**,
      - executive power **of the people**, and
      - the judicial power **of the people**

b) Article 4(d) mandates that fundamental rights shall be respected, secured and advanced by **all organs of Government** i.e. legislature, executive and judiciary, (i.e. *including all those who had taken an Oath to uphold and defend the Constitution*), and **shall not be abridged, restricted or denied,** *except as provided for in Article 14 of the Constitution.*

c) The interpretation of the foregoing Articles 3 and 4 of the Constitution had been comprehensively dealt with in the Determinations made in October 2002 by the aforesaid 7 Judge Bench of Your Ladyships' Court, on the aborted 18th and 19th Amendments to the Constitution, and the following further *extracts* are cited therefrom: (*Emphasis added*)

- "Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that **any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution"**.

- "It necessarily follows that the balance that had been struck between the three organs of government in relation to the **power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained**"

- "**The transfer of a power which attributed by the Constitution to one organ of government to another; or the relinquishment or removal of such power, would be an alienation of sovereignty inconsistent with Article 3 read with Article 4 of the Constitution"**

- "**The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, <u>in trust for the People</u>**. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the 'trust" that is implicit in the conferment of power has been stated as follows:

  'Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way with Parliament when conferring it is presumed to have intended" – (Administrative Law 8th Ed. 2000 – H.W.R. Wade and C.F. Forsyth p, 356) ' "

11. Attention of Your Ladyships' Court is very respectfully drawn to the following:

a) **<u>It is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law, and thereby making the 'rule of law', *the very basis of the Constitution*, meaningful and effective</u>**

b) **<u>Thus its stands to logical reason, that the judiciary, itself, must in the first instance, strictly operate within the limits of the law, upholding the 'rule of law'</u>**.

c) The Constitution does not attribute any ***<u>unfettered</u>*** **discretion or authority** to any organ or body established under the Constitution.

d) The foregoing would apply with equal force to the **Cabinet of Ministers**, a body established under the Constitution, and also to public functionaries, **<u>including the Respondents</u>**.

True copies of the Determinations on the aborted 19th & 18th Amendments to the Constitution made in October 2002 by a 7 Judge Bench of Your Ladyships Court are annexed marked ***"X3(a)"*** *and* ***"X3(b"),*** *pleaded as part and parcel hereof*

12. a) The Petitioner in 2003, as a citizen, was denied being heard in a challenge to an *all-encompassing* amnesty granted by Inland Revenue (Special Provisions) Act No. 10 of 2003, since he had not filed his challenge, *within the narrow period of 7 days stipulated in Article 121 of the Constitution*, during which period the Bill was not available to the public, whereby it was *impossible* to have been so challenged.

b) Subsequently the Petitioner, *within the stipulated period of 7 days*, challenged under and in terms of Article 121 of the Constitution, the Inland Revenue (Special Provisions) (Amendment) Bill gazetted on 11.7.2003, which sought to **re-enact** the same provisions of the Inland Revenue (Special provisions Act No. 10 of 2003, to be applicable for a further period of time and for a another group of people. A 3 Judge Bench of Your Ladyships' Court in SC (SD) Nos. 20 & 21/2003 made the Determination on 7.8.2003, *assisted by the Attorney General,* ***who supported such position****,* that ***none of the provisions of the Bill were inconsistent with any provisions of the Constitution***.

c) Subsequently, before the said Bill became Law, the Petitioner made an Application for a review and re-examination by a Fuller Bench of Your Ladyships' Court, and the said Application was referred to Their Lordships the 3 Judges, who delivered the aforesaid Determination, who had minuted the view that '***no useful purpose would be served in a further hearing***'.

d) Consequently, the Petitioner persuaded President Chandrika Bandaranaike Kumaratunga to refer the said Law under Article 129 of the Constitution, for an Opinion of Your Ladyships' Court.

At a public hearing thereon, *the Petitioner appearing in person made extensive submissions*. Consequently, the foregoing Determination by the 3 Judge Bench, *that none of the provisions of the Bill were inconsistent with the Constitution* **was completely overturned,** with a 5 Judge Bench of Your Ladyships' Court, presided by His Lordship then Chief Justice Sarath N. Silva and comprising His Lordship former Chief Justice J.A..N. De Silva, and Your Ladyship, Chief Justice Shirani A Bandaranayake, and Their Lordships Justices H.S. Yapa, and Nihal Jayasinghe, pronounced the provisions of the said Act , *inter-alia*, (*Emphasis added*)

- to be '**inimical to the rule of law'**, and
- to have '**violated the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights'**, and
- in terms of which '**amnesties had been granted to those who had contravened laws, and thereby defrauded public revenue causing extensive loss to the State'**.

e) On the wave of public opinion on the foregoing, the People's Alliance having won the General Election of April 2004, promptly presented a Bill to repeal the obnoxious features of the foregoing perverse Law. A 3 Judge Bench of Your Ladyships' Court in SC (SD) No. 26 of 2004, *assisted by the Attorney General*, ***who took a diametrically opposite stance to what was taken before****,* endorsed the aforesaid castigations made by the 5 Judge Bench.

True copies of the Opinion dated 17.3.2004 in SC Reference No. 1/2004 pronounced by the 5 Judge Bench of Your Ladyships Court, Determination dated 7.8.2003 in SC (SD) Nos. 20 & 21/2003 by a 3 Judge Bench of Your Ladyships' Court, and Determination dated 23.8.2004 in SC (SD) No. 26 of 2004 by 3 Judge Bench of Your Ladyships' Court are annexed marked ***"X4(a)", "X4(b)"*** *and* ***"X4(c)",*** *pleaded as part and parcel hereof*

13. In SC (SD) Nos. 22 & 23 of 2003 challenging the Amendments to the 'Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990', and 'Debt Recovery (Special provisions) Act No. 2 of 1990', in which the Petitioner appeared in person and made submissions, a 5-Judge Bench of Your Ladyships' Court, presided by His Lordship then Chief Justice Sarath N. Silva, and comprising His Lordship former Chief Justice J.A.N. de Silva and Their Lordships Justices P. Edussuriya, H.S. Yapa, and T.B. Weerasuriya, *inter-alia,* giving reference to the *dicta* in the several Judgments of the Indian Supreme Court, determined, *inter-alia*, that -

  - "the principle therefore is that the **Court will strike down harsh, oppressive and unconscionable law prescribing a procedure other than the ordinary procedure"** – H.M. Seervai 'Constitutional Law of India' 4th Edition – Vol 1, Page 532 (*Emphasis added*)

  - the said Amendments had **'denied the right to equality enshrined in Article 12(1) of the Constitution'** and had '**denied the right to access the judiciary in terms of Article 105(1) of the Constitution'**.

    *True copies of Determinations made in SC (SD) 22 & 23 of 2003 by a 5 Judge Bench of Your Ladyship's Court are annexed marked **"X5(a)"** and **"X5(b)",** pleaded as part and parcel hereof*

14. a) The exercise of the constitutional right by a citizen to be heard by Your Ladyships' Court cannot be *deprived* by a *side wind* by merely arbitrarily ***'rubber stamping'*** a Bill, as an 'Urgent Bill', by the Cabinet of Ministers, ***<u>who do not have unfettered powers</u>***.

    b) The foregoing had consciously, intentionally and deliberately *alienated* the s*overeignty* of the people in the exercise of the ***judicial power of the people,*** and precluding Your Ladyships' Court from hearing the people in the enactment of laws, as provided for in the Constitution; and further ***denying natural justice to parties affected denying them their right to have been heard***.

    c) The procedure in terms of Article 122 of the Constitution is *solely* for an urgent *exception* and not the rule, and hence such *intriguingly* questionable and *hasty* procedure, had been caused to be adopted, thereby intentionally keeping the people, whose *sovereignty* is *inalienable,* in the dark, and thereby *precluding* the people from being heard by Your Ladyships' Court, in making the aforesaid Determination, exercising the judicial power of the people, and of *none other.*

    d) The stipulations in Article 123(3) of the Constitution govern a Determination by Your Ladyship's Court on a Bill referred to Your Ladyship's Court under Article 122, as an 'Urgent Bill'.

    e) The foregoing gives rise to the *cogent question*, as to whether there was *apprehension* that the Determination of Your Ladyships' Court would have been otherwise, had the people and/or affected parties had been heard, ***as was amply demonstrated by***

      i) **SC Reference 1/2004** referred to aforesaid; and **<u>more particularly by</u>**

      ii) **the recent Determination in SC (SD) No. 3/2011 by Your Ladyships' Court** *on the Bill titled 'Town & Country Planning (Amendment)"* referred to at paragraph 17 hereinafter, wherein the people and/or affected parties had been given the opportunity to be heard, since the said Bill had been gazetted in terms of Article 78(1) of the Constitution, **as a normal Bill**, and not as an 'Urgent Bill', *whereby such opportunity is denied.*

15. a) The foregoing procedure of an 'Urgent Bill' *deprived* and *denied* the Petitioner and the people of the country and/or the affected parties, their constitutional right to have been heard by Your Ladyships' Court on such matter of national and public importance, thereby *alienating* their sovereignty, which is *inalienable* and *alienating* their constitutional rights, and infringing upon their fundamental rights; and denied them the constitutional right in terms of Article 105 of the Constitution to access the judiciary, *obnoxiously denying natural justice to the affected parties of their right to have been heard.*

b) The Petitioner was able to obtain copies only on 9.11.2011 of the Bill "**Revival of Underperforming Enterprises and Under-utilised Assets"** and the aforesaid Determination by a 3-Judge Bench of Your Ladyships' Court on a Bill titled **"An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets"**, *inasmuch as both Documents had been tabled by the Speaker, 9th Respondent in Parliament only on the previous day 8.11.2011, and* ***it was only thereafter the said two Documents were available to the public***.

c) Hence, it was an **impossibility** for any citizen, including the Petitioner, to have appeared in Your Ladyships' Court to have intervened to be heard, inasmuch as the Bill was not publicly available until it was tabled in Parliament on **8.11.2011**, whereas Your Ladyships' Court had already had an Hearing on **24.10.2011**, ***with the Bill being available secretively only a coterie of a few***.

> *True copies of the Determination on the Bill titled* ***"An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets",*** *and the Bill titled* ***"Revival of Underperforming Enterprises & Under-utilised Assets"*** *both tabled in Parliament on 8.11.2011 are annexed respectively marked* ***"X6(a)" and "X6(b)",*** *pleaded as part and parcel hereof*

16. a) The Petitioner most respectfully submits that Your Ladyship the Chief Justice's following Minute made on 22.11.2011 in respect of the Petitioner's Application SC (SD) No. 2/2011 filed on 17.11.2011, with His Lordship Justice P.A. Ratnayake and Her Ladyship Chandra Ekanayake agreeing, *viz:*

> "The Determination by this Court was with regard to the Bill and any party that had wanted to intervene should have done so at the time, it was taken before the Supreme Court."

was ***per-incuriam***

b) When a Bill is referred to Your Ladyships' Court, as an Urgent Bill, under Article 122(1) of the Constitution, such Bill is not gazetted in terms of Article 78(1) of the Constitution, and the aforesaid Bill was not gazetted under Article 78(1) of the Constitution at least 7 days before it was placed on the Order Paper of Parliament. The Bill itself bears the date **8.11.2011** and was passed by Parliament on **9.11.2011**.

c) With utmost respect the Petitioner submits that Your Ladyships' Court had been under the mistaken belief, that the Bill was publicly available *for anyone to have intervened*, **when it was not the case**.

d) Hence, it was an **impossibility** for the Petitioner or any other citizen to have intervened to have been heard by Your Ladyships' Court, as per the facts set out in paragraph 16(a) hereinbelow.

e) *If 'any party could have intervened'*, then *as amply evidenced* by the several Petitions filed subsequently in Your Ladyships' Court, and the several Letters addressed by certain affected parties published in the media, ***then such parties most certainly would have intervened in Your Ladyships' Court.***

f) At the said Hearing, Your Ladyships' Court had been assisted only by the Deputy Solicitor General, representing the Attorney General.

17. a) The *haste* and *secrecy* in which this Bill had been processed to be enacted into law is revealed by the following;

    i) Certified by the Cabinet of Ministers, as an Urgent Bill under Article 122(1) of the Constitution on **Wednesday, 19.10.2011** (*Cabinet Meeting generally are held late evenings*) and referred to Your Ladyship's Court

    ii) As per the Minutes of the Record in Your Ladyship's Court the said 'Urgent Bill' had been received on **Friday, 21.10.2011**.

    iii) Hearing by Your Ladyship's Court on the matter of the said 'Urgent Bill' had been had on **Monday, 24.10.2011** assisted only by the Attorney General.

    iv) The aforesaid Hearing numbered SC (SD) 2/2011 *had not been listed* in the list of Cases published in the *media* to be heard by Your Ladyship's Court on Monday, 24.10.2011.

    *True copies of the Reports in the Daily News and Daily Mirror of Monday 24.10.2011 are annexed marked together as **"X7"** pleaded as part and parcel hereof*

    v) Even if the matter had been listed, the public would not know that the said specific 'Urgent Bill' was being heard into by Your Ladyship's Court, and the provisions thereof unknown to the public.

    vi) Speaker, 9th Respondent, tabled in Parliament the aforesaid Determination SC (SD) No. 2/2011 only on **8.11.2011**

    vii) Speaker 9th Respondent, tabled in Parliament the aforesaid Bill only on **8.11.2011**

    viii) On the basis of the aforesaid Determination in SC (SD) No. 2/2011, the Bill, with 15 Committee Stage Amendments, was passed by Parliament on **9.11.2011**,

    ix) Speaker, 9th Respondent had certified the Bill into law on **11.11.2011**, (*just two days after the Bill with 15 Committee Stage Amendments, was passed by the Parliament on **9.11.2011***)

    x) Speaker, 9th Respondent's aforesaid certification had been announced to Parliament only on **22.11.2011**, as per Hansard Column 203 of that date.

b) The Petitioner had assisted in formulating and processing the enactment of Bills into law, interacting with the Departments of the Attorney General and Legal Draftsman. Two such instances were the enactment of the Companies Act No. 7 of 2007 and the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004.

c) The Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004 on a matter of national and public importance had been processed as follows:

   i) Certified by the Cabinet of Ministers, as an Urgent Bill under Article 122(1) of the Constitution on **16.8.2004** and referred to Your Ladyships' Court
   ii) Hearing thereinto was had by Your Ladyships' Court on **23.8.2004** assisted only by the Attorney General.
   iii) Bill was presented to Parliament on **7.9.2004**
   iv) Parliament debated and with 14 Committee Stage Amendments passed the Bill on **22.9.2004**
   v) Bill was certified into law by the Speaker on **20.10.2004**

18. a) Recently a Bill titled – **"Town & Country Planning (Amendment)"** was gazetted on 14.10.2011 in terms of Article 78(1) of the Constitution, as a normal Bill and placed on the Order Paper of Parliament on 8.11.2011.

b) This enabled citizens to intervene and make submissions at the Hearing before Your Ladyships' Court on 21.11.2011.

c) Your Ladyships' Court in SC (SD) No. 3/2011 Determined that the Bill was *inconsistent* with the Constitution, and further determined that, as the Bill had been placed in the Order Paper of Parliament, without compliance with provisions of Article 154(G)(3) of the Constitution, that no Determination would be made on the other grounds of challenge, which Determination communicated to the Speaker, 9th Respondent on 2.12.2011, had been tabled in Parliament on the next day 3.12.2011.

d) In the aforesaid Determination in SC (SD) No. 3/2011, Your Ladyship's Court in respect of the subject of Land specifically, *inter-alia*, determined as follows: (*Emphasis added*)

> **"There was no submissions made by the Learned Deputy Solicitor General to the effect that the Bill under reference has been referred by His Excellency the President to the Provincial Councils, as stipulated in Article 154(G)(3) of the Constitution**.
>
> Since such procedure has not been complied with, we make a Determination in terms of Article 120, read with Article 123, of the Constitution that Bill in question is in respect of a matter set out in the Provincial Council List and shall not become law unless it had been referred by His Excellency the President to every Provincial Council as required by Article 154(G)(3) of the Constitution.
>
> **As the Bill has been placed in the Order Paper of Parliament without compliance with provisions of Article 154(G)(3) of the Constitution no Determination would be made at this stage on the other grounds of challenge, which were referred to earlier."**

*A true copy of the aforesaid Determination in SC (SD) No. 3/2011 is annexed marked **"X8(a)",** pleaded as part and parcel hereof*

e) As a consequence the Bill withdrawn by the Government announcing same in Parliament, as was reported in the media.

f) In SC (FR) Application No. 209/2007 Your Ladyship's Court delivered Judgment on 21.7.2008 analysing clearly on pages 46 to 50 thereof the constitutional mandate under Article 154 of the Constitution in respect of the alienation or disposition of State Land within a Province specifically holding that –

"alienation or disposition of State Land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council."

*A true copy of the relevant pages from the a certified copy of the aforesaid Judgment is annexed marked **"X8(b)",** pleaded as part and parcel hereof*

19. a) The statements made that in view of 'national interest' of protecting public property, that the Bill was *secretively* and *expeditiously* enacted into Law, even denying the right of the people and/or affected parties to have been heard thereon, is a *puerile hollow argument,* in that, the Law as in the instance of a winding-up of a company, could have provided, that any *alienation* of property, within a certain past period of time would be null, void and fraudulent, even providing penal provisions, if such *alienation* had taken place.

b) The Fundamental Duties stipulated in Article 28(d) of the Constitution to preserve and protect public property and to combat misuse and waste of public property had been articulated, but this could not be mere *pontification* or a *selective* process; *all being equal before the law*.

c) Whereas, there are several instances Your Ladyship's Court had *annulled* and *reversed* major transactions of the pillage and plunder of public property, such as in the cases of SLIC SC (FR) Application No. Case 158/2007, LMSL SC (FR) Application No. 209/2007 and Water's Edge SC (FR) Application No. 352/2007, **after *inter-partes* inquiries in conformity with norms of natural justice**.

20. a) Nevertheless, **contrary to such pontification** *vis-à-vis*, action to protect public property **no actions, whatsoever, have been taken, as was warranted**, under and in terms of the Offences Against Public Property Act No. 12 of 1982 against the *miscreants*.

b) In SC (FR) Applications Nos. 404 & 481/2009 filed by the Petitioner on the *controversial* Hedging deals by Ceylon Petroleum Corporation, it was assertedly admitted by the Attorney General that the said transactions were *ultra-vires* and *illegal,* **nevertheless no action, as warranted, had been taken against those who were responsible and accountable**, *unlike in the instance of poor villagers, who are arraigned before Courts of Law for betting and gambling*.

c) i) Offences Against Public Property Act No. 12 of 1982 is a very potent law, but regrettably not enforced. Offences Against Public Property Act No. 12 of 1982, stipulates that any person, whether public servant ***or otherwise**,* is liable for the following Offences*:*

1. Mischief to public property.
2. Theft of public property
3. Robbery of public property
4. Misappropriation or criminal breach of trust of public property
5. Cheating, forgery or falsification in relation to public property
6. Attempting to commit any one of the above offences

ii) Punishment for any one of the above Offences is a fine of 3 times (i.e. 300%) the value of the public property in respect of which such offence was committed and imprisonment not exceeding 20 years.

iii) "Public property" is defined in the said Act No. 12 of 1982 thus – " *'Public property' means the property of the Government, any department, statutory board, public corporation, bank, co-operative society or co-operate union."*

d) The 'rule of law' not having been enforced against the *miscreants,* the Petitioner also cites Section 214 of the Penal Code;

> "214. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

e) *On the contrary*, persons who ought to have been arraigned before the law, have been appointed to further public office, *making a mockery of the rule of law*.

f) *On the contrary*, those who had been involved, not only have not been arraigned before the law, but have been given further valuable State Contracts, *making a mockery of the rule of law.*

21. a) In the context of the fundamental duties relied upon, the Petitioner refers to his CA (Writ) Application No. 1661/2003 filed seeking to have the provisions of the Inland Revenue Acts enforced for the due and proper revenue administration and the enforcement of the 'rule of law'.

b) Then Attorney General, K.C. Kamalasabayson, P.C., readily agreeing, a settlement was suggested in the Court of Appeal on 10.10.2005.

c) Subsequently, settlement terms were finalised for the due and proper enforcement of certain specific provisions in the Inland Revenue Acts mandating the Commissioner General of Inland Revenue to report to the

Controller of Exchange or
Director General, Customs or
the Attorney General,

where he suspects from information available instances of violations of the respective laws enforced by the Controller of Exchange or Director General, Customs or the Attorney General in the instance of any suspicion of bribery.

d) The terms of settlement for reasons set out in the Settlement Motion had been finalised for quite sometime, but as set out in the Schedule annexed the case has been mentioned for well over the last 5 years for settlement.

e) Letters addressed by the Petitioner's Attorneys-at-Law to former Attorney Generals, C.R. de Silva, P.C., 5th Respondent and Mohan Peiris, P.C., 6th Respondent had been of no avail, demonstrating that fundamental duties are in the breach.

True copies of the finalised Settlement Motion, with Schedule setting out the number of dates the matter has been mentioned in the Court of Appeal from 2005 to 2011, together with 2 Letters dated 2.4.2008 and 11.2.2011 respectively addressed to the former Attorney Generals, C.R. de Silva, P.C., 5th Respondent and Mohan Peiris, P.C., 6th Respondent are annexed compendiously marked ***("X9")****, pleaded as part and parcel hereof*

22. a) In terms of Article 82(3) of the Constitution it is the *onus* of the Speaker, 9th Respondent, to ensure that Bills presented to Parliament are in conformity with Articles 82(1) and 82(2) of the Constitution, **prior to Bills being placed on the Order Paper of Parliament and/or proceeded with**.

> "82. (1) No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution.
>
> (2) No Bill for the repeal of the Constitution shall be placed on the Order Paper of Parliament unless the Bill contains provisions replacing the Constitution and is described in the long title thereof as being an Act for the repeal and replacement of the Constitution.
>
> (3) **If in the opinion of the Speaker, a Bill does not comply with the requirements of paragraph (1) or paragraph (2) of this .Article, he shall direct that such Bill be not proceeded with unless it is amended so as to comply with those requirements**."
>
> (4) Notwithstanding anything in the preceding provisions of this Article, it shall be lawful for a Bill which complies with the requirements of paragraph (1) or paragraph (2) of this Article to be amended by Parliament provided that the Bill as so amended shall comply with those requirements.
>
> (5) A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon in accordance with the provisions of Article 80 or 79.
>
> (6) **No provision in any law shall, or shall be deemed to, amend, repeal or replace the Constitution or any provision thereof, or be so interpreted or construed, unless enacted in accordance with the requirements of the preceding provisions of this Article**.

b) **Speaker, 9th Respondent also stands mandatorily bounden in duty,** ***in upholding and defending the Constitution*****, to ensure that fundamental rights shall be respected, secured and advanced and shall not be breached, restricted or denied, as enshrined in Article 4(d) of the Constitution**.

c) Determination made by Your Ladyships' Court in SC (SD) No. 3/2011 referred to at paragraph 17 hereinbefore gives rise to the question, as to whether such act of placing the Bill under reference in the Order Paper of Parliament was without due consideration, as warranted, under the Constitution.

d) In the instant Case, the Petitioner by Letter dated 8.11.2011 (*faxed and hand delivered*) had delivered on 8.11.2011 before the debate in Parliament on the aforesaid Bill **("X6(b)")** on 9.11.2011, putting the Speaker, 9th Respondent, on notice of the constitutional limitations, particularly give reference to the aforesaid two Determinations made in October 2002 by a 7 Judge Bench of Your Ladyships' Court.

*True copy of the Petitioner's Letter dated 8.11.2011 addressed to the Speaker is annexed hereto marked **"X10",** pleaded as part and parcel hereof*

e) Article 84 of the Constitution deals with Bills inconsistent with the Constitution as follows:

" 84. (1) A Bill which is not for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, but which is inconsistent with any provision of the Constitution may be placed on the Order Paper of Parliament without complying with the requirements of paragraph (1) or paragraph (2) of Article 82.

(2) Where the Cabinet of Ministers has certified that a Bill is intended to be passed by the special majority required by this Article or where the Supreme Court has determined that a Bill requires to be passed by such special majority, such Bill shall become law only if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and a certificate by the President or the Speaker, as the case may be, is endorsed thereon in accordance with the provisions of Article 80 or 79.

(3) **Such a Bill when enacted into law, shall not, and shall not be deemed to, amend, repeal or replace the Constitution or any provision thereof, and shall not be so interpreted or construed, and may thereafter be repealed by a majority of the votes of the Members present and voting**."

f) The fact that **judicial power was being exercised** to adjudicate upon a Winding-up Application filed 5 years ago by the Petitioner to wind-up Hotel Developers (Lanka) PLC, itemised under Schedule 1 to the Law, as the only 'Underperforming Enterprise', *inter-alia*, had been brought to the attention of the Speaker, 9th Respondent, by Member of Parliament, M.A. Sumanthiran, Attorney-at-Law, as per Hansard Column 1055 of 9.11.2011, and as a Member of Parliament stating that this Bill, as an 'Urgent Bill', had been hurriedly and secretly dealt with, as borne out in Hansard Column 1056.

"There was a Ruling given by the Hon. Speaker with regard to the rule of *sub judice,* citing a previous Ruling by one of his predecessors, the Hon. M.H. Mohamed, in which he says it is possible for somebody, merely to stall the debate in this House, to file a plaint the previous day. That is true. There has been a plaint filed, even in this case, yesterday. But, I am not talking about what was filed yesterday; I am talking about what was filed five years ago. What is pertinent to the matter under discussion is that what was filed five years ago is a matter of winding up of a company on the basis that the company has failed. So, if the task of judicial determination has been given to the Judiciary and if we respect the rule, if we respect the separation of powers in our Constitution, then this House ought not to take this up and pronounce upon a matter that is entirely within the competence of the court.

Sir, I would also urge you to look at the definitions of underutilized assets and an underperforming enterprise. These have been designed, these have been tailored to suit what later appears in the Schedule. That is why I said this is an *ad hominem* legislation. In previous instances, Sir, you will be aware that even the Privy Council has ruled out as bad, any legislation that was recognized to be *ad hominem* and *ad hoc*. This is a classic example of what an *ad homiem* legislation is because it even spells out by name, the enterprises that are said to have underutilized the assets and the enterprises that are underperforming. It is outside the competence of the Legislature to pass laws like this. Now, one might cite the Determination given by the Supreme Court hurriedly when the matter was referred as an urgent Bill. I do not want to talk about the decision to refer it as an urgent Bill. The less said of that, the better. I do not think anybody can argue and justify this matter being referred as an urgent Bill. The only argument that can be put forward is that it is a matter for the Cabinet. Yes, we know it is a matter for the Cabinet but the Cabinet has abused that power in referring this matter as an urgent Bill to the Supreme Court. When one reads this Determination, one is said for the Supreme Court; for what the Supreme Court has been reduced to, at how they have pronounced upon this Bill without any material whatsoever placed before them. How can the Supreme Court like this Legislature, rule on whether a particular enterprise is underperforming or not without examining the accounts of that enterprise, without examining other material? In one hearing, at which only the Attorney-General appears and is said to have assisted it, the Court has come to a ruling that 37 enterprises have, in fact, underutilized assets and one of them is an underperforming enterprise. It is a sad indictment on the highest court of the land. I am saddened by the fact that I am also an officer of that Court and have been prevented from assisting it in the determination of this because it was an urgent Bill and hurriedly and secretively taken up for hearing. "

*True copies of Hansard Columns 1055 and 1056 are annexed together marked **"X11",** pleaded as part and parcel hereof*

g) The Speaker, 9th Respondent had failed and neglected to make a ruling on the material fact that judicial power was being exercised by the judiciary adjudicating upon the Application filed by the Petitioner 5 years back on 17.11.2006 to wind-up Hotel Developers (Lanka) PLC.

h) M.A. Sumanthiran, Attorney-at-Law had appeared for a Petitioner in Your Ladyships' Court in SC (SD) No. 3/2011 referred to at paragraph 17 hereinbefore, where Your Ladyship's Court Determined that the Bill referred to therein was inconsistent with the Constitution.

23. a) Article 77 (1) of the Constitution stipulates that –

> "It is the duty of the Attorney-General to examine every Bill for any contravention of the requirements of paragraphs (1) and (2) of Article 82 and for any provision which cannot be validly passed except by the special majority prescribed by the Constitution; …"

b) The Bar Association Law Journal Vol. 1 Part IV 1984 on the Centenary of the Attorney-General in Sri Lanka 1884 - 1984, *inter-alia*, had stated as follows:

> **"In civil proceedings also, the Attorney General's function is to assist the Court to reach the correct decision and not to endeavour to somehow obtain a judgment in favour of the State. When appropriate, it is his duty to promote conciliation of disputes between government department and citizens if that would meet the ends of justice.**

In advising the government, he has to form his opinion after considering the legal principles as well as the practical effect of his advice. This does not mean that his advice should besides being correct be somehow favourable to the government. Thus where any question in respect of which his advice is sought has arisen out of political, controversy or has political overtones, his opinion should be objective and fair to the parties affected. No doubt he must have due regard to the desire of any government to realise its legitimate aspirations and the political problems ministers have to contend with. However, it is his duty to advise the government to act within the law in implementing its policies."

c) Article 134 of the Constitution mandates that the Attorney General be noticed and be heard in the Supreme Court in the exercise of its jurisdiction under Articles 120, 121, 122, 125, 126, 129(1) and 131 of the Constitution, presumably as *amicus curiae*.

d) It is respectfully submitted that an issue arises, as to whether the Attorney General could **play a role of *duality*** in such instances ?

e) In SC (FR) Applications Nos. 158 & 209/2007 wherein the Supreme Court *annulled* the privatizations of SLIC & LMSL as wrongful, unlawful, illegal and fraudulent, the Attorney General, having been noticed as constitutionally mandated as aforesaid, appeared for the *miscreants* and opposed the said Applications, whilst in the instant matter, the Attorney General, had made submissions ironically to support the impugned Law *targeting alleged wrongful privatisations / transactions and parties,* ***who had been denied the right of being heard, as mandated by natural justice*** !

f) In SC (FR) Applications Nos. 404/ & 481/2009 the Attorney General, opposed the Petitioner's Applications on the *ultra-vires* and *illegal* purported Oil Hedging Deals, and consequently the Petitioner understands that the State has incurred costs of around Rs. 300 Mn., in foreign legal costs, air travel, etc. The Current Expenditure Budgets for 2012 for Judges of the Superior Courts is Rs. 146.5 Mn., (2009 - Rs. 46.5 Mn.) and for the Attorney General's Department Rs. 371.7 Mn. (2009 - Rs. 380.9 Mn.)

24. a) Article 80(3) of the Constitution stipulates thus:

"80(3) Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner calling question, the validity of such Act on any ground whatsoever"

b) The Petitioner very respectfully submits that the foregoing Article 80(3) of the Constitution does not preclude or *ousts* the jurisdiction for Your Ladyships' Court to correct a *per-incuriam* Determination of Your Ladyships' Court, should it be deemed to be the case.

25. a) Article 123(3) of the Constitution stipulates thus: (*Emphasis added*)

"123.(3) In the case of a Bill endorsed as provided in Article 122, **if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution,** and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article."

b) Article 123(3) is specifically in relation to Bills endorsed as 'Urgent Bills' by the Cabinet of Ministers as per Article 122 of the Constitution.

c) Hence, whilst providing for an emergency / urgency, the Constitution has stipulated a check put in place, that **<u>if the Supreme Court entertains a doubt</u>** whether the Bill or any provision thereof is inconsistent with the Constitution, that **it shall be deemed to have been determined that the Bill or such provisions of the Bill is inconsistent with the Constitution**.

d) It is most respectfully submitted that **<u>the threshold therefore is the question or whether there is in fact any 'doubt'</u>** when considering an Urgent Bill submitted under Article 122 of the Constitution.

e) The Petitioner with utmost respect submits that the Determination by Your Ladyship's Court marked **("X6(a)")** is *per-incuriam* and not in conformity with and/or is *ultra-vires* the stipulations in Article 123(3) of the Constitution.

f) Specific submissions in respect of the foregoing, with reference to Determination marked **("X6(a)")** would be made by the Petitioner at the time of supporting this Application before Your Ladyship's Court.

26. a) Notwithstanding Article 80(3), Article 129 of the Constitution confers jurisdiction of Your Ladyships' Court to even express an opinion on a Law if the President refers the same to Your Ladyships' Court, when a question of law or fact has arisen or is likely to arise, which is of such nature and/or such public importance, that it is expedient to obtain the opinion of Your Ladyships' Court.

b) The Petitioner respectfully states that like in the aforesaid instance of the perverse Inland Revenue (Special Provisions) Act Nos. 10 and 31 of 2003, which were referred to Your Ladyships' Court by the President under Article 129 of the Constitution this Law too having given rise to questions of law and fact of public importance warrant such reference by the President for the exercise of the judicial power of the people, if the sovereignty of the people which is *inalienable*, is to be

HOTEL DEVELOPERS (LANKA) PLC (HDL)

The only 'Underperforming Enterprise' itemised under Schedule 1 to the Law

27. a) In the context of HDL, the owning Company of Hilton Hotel, having been categorized, **as the only 'Underperforming Enterprise' under Schedule 1 to the Law**, the Petitioner sets out hereinbelow in outline the salient facts pertaining to HDL, respectfully reserving the right to submit such facts morefully and comprehensively by way of an **Addendum** hereto, together with any further Documents, which may be necessary, to be read and construed, as a part and parcel hereof.

b) "Underperforming Enterprise" has been defined in the Law

> '**as a Company or authority, institution or body established under any written law in which the Government owns Shares and where the Government has paid contingent liabilities of such Enterprise and the Government is engaged in protracted litigation with regard to such Enterprise, which is prejudicial to the national economy and public interest'**.

c) *It is lucidly clear*, that the foregoing definition has been specifically constructed, solely and exclusively targeting HDL, without the warranted disclosure of the totality of the facts; with the Schedule 1 'Heading' i.e. "Underperforming Enterprise" ***defying*** known interpretation of the English language !

d) HDL was and is a separate corporate entity. The Government's status was that of a Shareholder and Guarantor-Creditor.

e) **HDL continues to be a Company coming under the ambit of the Companies Act No. 7 of 2007, and is governed by the provisions of the said Act**.

28. a) Hilton Hotel Project was mooted in or about 1979 by C.L. Perera of Cornel & Co. Ltd., who signed on **31.1.1980** the Management Agreement with Hilton International for 752 Room Hotel.

b) In July **1980** C.L. Perera got the Japanese Architects, Kanko Kikaku Sekkeisha Yozo Shibata & Associates (hereinafter sometimes referred to as 'KKS') to formulate the Project Plans for the Hilton Hotel, sited at the same Echelon Square location, the perspective of which is given below.

c) Your Ladyship's Court in SC Appeals Nos. 33 & 34/1992 in delivering Judgment in December 1992, relied on the aforesaid two Documents.

d) Special Presidential Commission, which commenced investigations in March 1995, also relied on the said two Documents.

29. a) Several endeavours were pursued to finalize a financial package between the years 1980 to 1983.

b) A Preliminary Agreement was signed between Cornel & Co. Ltd., Mitsui & Co. Ltd., and Taisei Corporation (hereinafter sometimes referred to as 'Mitsui & Taisei') on 30.3.1983 for the development of the Hilton Hotel, subject to finalizing the financial package.

c) A Company was incorporated on 15.3.1983 to be the owning Company, later named as HDL.

d) The Project was approved by the then Foreign Investment Advisory Committee.

30.a) The Hilton Hotel Project was *propelled* into implementation by the Government, immediately after the ethnic riots of July 1983, to clear the tarnished international image of Sri Lanka, by securing the collaboration of Hilton International, an American Company, and Japanese Companies Mitsui & Taisei.

b) For such purpose, as approved by the Cabinet the Government afforded Leases of 2 portions of Land at Echelon Square to the main promoter Cornel & Co. Ltd., and to raise the necessary funding, offered the issuance of State Guarantees to develop the Hilton Hotel, as a private sector project, with funding arranged by Mitsui & Taisei, through EXIM Bank of Japan.

c) The financial package was finalised in agreement with the Ministry of Finance, represented by then Director General, Economic Affairs, S. Rajalingam and M.T.L. Fernando, Precedent Partner, Ernst & Young.

d) The Government was assisted by then Attorney General and by a Japanese Law Firm, Hamada & Matsumoto *vis-à-vis* finalising of the Agreements.

e) The salient facts were publicly disclosed in the Prospectus, which included a Report from the Auditors, Ford Rhodes Thornton & Co., Chartered Accountants.

31. a) The construction of the Hilton Hotel by Mitsui & Taisei was to be on a '*turn-key fixed price basis'*, as per Architectural Plans developed by Japanese Architects, KKS.

b) Construction commenced in March 1984, and the Hilton Hotel opened for operation in July 1987, with the formal opening in September 1987, being graced by President J.R. Jayawardene and Prime Minister R. Premadasa, thereby endorsing the Government's interest and support.

32. a) After the Hotel opened for operations, the Petitioner entertained certain *apprehensions* on the correctness of the construction of the Hilton Hotel, and having discovered adequate evidence of fraud, the Petitioner, as a Shareholder of HDL, instituted on 13.9.1990 a commercial litigation in the style of a derivative action in law, D.C. Colombo Case No. 3155/Spl, *on the premise of fraud on HDL and the Government*, **in the circumstances of the Board and the Government being indifferent**.

b) District Court of Colombo promptly issued enjoining orders on 17.9.1990, and interim injunctions on 28.10.1991, restraining payments to Mitsui & Taisei and KKS by HDL and/or by the Government, as its Guarantor, in terms of the following prayers to the Petitioner's Plaint.

> "(g) for an Interim Injunction restraining the said Mitsui/Taisei Consortium and the said Architects, the 1st, 2nd and 3rd Defendants respectively, by themselves their representatives, servants and agents or otherwise howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two Guarantees referred to in the plaint, until the final determination of this action."

> "(h) for an Interim Injunction restraining the 4th Defendant Company (i.*e. HDL*) by itself, its Directors, Servants and Agents or otherwise, howsoever, from entertaining any demand and/or claim from the 1st and/or the 2nd and/or the 3rd Defendants abovenamed in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint until the final determination of this action."

33. a) Notwithstanding the enjoining orders issued on 17.9.1990, and disregarding the Petitioner's objections, the Board and the Ministry of Finance, acting in concert with HDL's Auditors, Ford Rhodes Thornton & Co., Chartered Accountants, endeavoured to adopt in January 1991 the HDL Accounts for the year ended 31.3.1990, to cover-up the aforesaid fraud.

    b) This compelled the Petitioner to file another derivative action in law, D.C. Colombo Case No. 3231/Spl, and the District Court on 15.1.1991 enjoined the adoption of the said HDL Annual Accounts.

34. a) Sri Lanka's gross official foreign reserves as reported in the Central Bank Annual Reports stood at only US $ 291.4 Mn., as at December 1989, whereas the Claims under the aforesaid State Guarantees as at March 1990 were equivalent to about US $ 160 Mn.

    b) The restraining orders obtained by the Petitioner prevented the precipitation of an *international cross default* on country's foreign borrowings, *which assisted the Government*.

35. Subsequently in SC Appeals Nos. 33 & 34/1992 on 2.12.1992, Your Ladyship's Court delivered Judgment, upholding a strong *prima-facie* case of fraud as disclosed in D.C. Colombo Case No. 3155/Spl observing , *inter-alia*, that the Petitioner had real prospects of proving the fraud, and affirmed the interim injunctions issued by the District Court.

36. a) Even prior to the Judgment of Your Ladyships' Court of 2.12.1992, Mitsui & Taisei being unable to answer interrogatories served in March 1992, had required the Government to initiate a settlement with the Petitioner.

    b) Hence in April 1992, then Secretary, Ministry of Finance & Secretary to the Treasury, R. Paskaralingam and then Attorney General, Tilak Marapana, P.C., implored upon the Petitioner to have discussions to reach a settlement, in view of the importance of Japanese Aid to Sri Lanka at that time.

    c) Consequently several rounds of discussions were had by the Petitioner and his Counsel, with the then Attorney General, Tilak Marapana, P.C., with the participation of Secretary, Ministry of Finance & Secretary to the Treasury, R. Paskaralingam, with the attendance of Officers of the Attorney General's Department and Ministry of Finance.

    d) The foregoing led to then Attorney General formulating, and the Ministry of Finance forwarding, draft Settlement Agreements in June 1993 to Mitsui & Taisei and to the Petitioner, for consideration

       True copies of Letters dated 3.6.1993 and 21.6.1993 are annexed marked together as ***"X12",*** *pleaded as part and parcel hereof*

37. a) The Petitioner's stance was to proceed with the litigation, having obtained an Order from the District Court for Mitsui & Taisei and HDL to answer interrogatories, since he was confident in proving the fraud, as had been observed by Your Ladyships' Court, in the aforesaid Judgment.

    b) The Petitioner suggested that in the meantime the construction of the 3rd Tower of Hotel Rooms be completed as had been provided for in the main Hotel construction, utilising monies accumulating in HDL, by reason of the interim injunctions, which had been obtained by the Petitioner.

c) This would have increased the number of Hotel Rooms from 408 to 612, and enhanced the profitability and debt-service ability of HDL, and it is thereafter that a settlement with Mitsui & Taisei could have been negotiated in the context of unjust enrichment, with the balance unwritten-off Claims re-scheduled to be within such enhanced profitability and debt service ability of HDL.

38. a) However, Secretary, Ministry of Finance & Secretary to the Treasury, R. Paskaralingam and then Attorney General, Tilak Marapana, P.C., did not agree to the foregoing, and insisted upon an immediate settlement, *asserting the importance of the goodwill of the Japanese Government*.

b) The Petitioner suggested a 40% write-off of Capital and write-off of all accrued Interest, and with a 4% p.a. Interest on the unwritten-off balance Claims of Mitsui & Taisei, to be re-scheduled within the debt-service ability of HDL

*True copies of two Notes dated 5.9.1992 submitted by the Petitioner at the aforesaid discussions is annexed together marked **"X13"**, pleaded as part and parcel hereof*

c) Nevertheless, R. Paskaralingam, Secretary Ministry of Finance & Secretary to the Treasury and then Attorney General, Tilak Marapana, P.C., *stressing that the Japanese Government was the biggest aid donor to Sri Lanka,* prevailed upon the Petitioner to accept the offer by Mitsui & Taisei to write-off 30% of Capital, and all accrued Interest and a rate of Interest of 5.9% p.a. for the re-scheduled unwritten-off balance; *agreeing to indemnify the Petitioner from any consequences arising therefrom.*

39. In such circumstances, the Petitioner at the very outset insisted on further financial re-structuring of HDL, as borne out by the Note dated 4.1.1993 sent by the Ministry of Finance to the Attorney General's Department for the formulation of the Settlement Agreements.

*True copy of one of the Finance Ministry Notes sent to the Attorney General's Department of a Memorandum of Agreement between the Government, Mitsui, Taisei and HDL is annexed marked **"(X14)"**, pleaded as part and parcel hereof*

MEMORANDUM OF AGreement between GOVERNMENT, MITSUI AND TAISEI, AND HDL.

1. Govt., Mitsui and Taisei and HDL agree that funds required to build a 3rd Tower of Hotel Rooms would be raised from a Right - issue, at an appropriate premium, if considered feasible, in the then prevalent share market.

2. In the event of such a Rights Issue as foresaid, Mitsui/Taisei agree to convert that portion of their Capital Debt in to equity shares, to subscribe to them portion of such Rights - Issue, that would be applicable to their present shareholding thereafter Mitsui/Taisei would be free to dispose of such shares in the share market and repatriate such funds.

3. GOSL agrees to support such Rights - Issue and assist in its functions

4. Mitsui and Taisei agree to extend all co-operation and assistance for the construction of the 3rd Tower of Hotel Rooms, as provided for in the original planning and referred to in the Prospectus of HDL.

40. a) The Settlement did not get concluded in 1993 / 1994 since Mitsui & Taisei insisted on receiving Promissory Notes from the Government for the balance unwritten-off Claims, **instead of receiving Promissory Notes from HDL, who was the Debtor**. Petitioner resisted this.

b) In 1993 / 1994 the Hilton Hotel litigations became a major issue on the Election Platform of the People's Alliance, and among other exposures, the December 1993 *Counterpoint Magazine* published an extensive analytical politically slanted exposure.

*True copy of the relevant pages of the Counterpoint Magazine is annexed marked **"X15",** pleaded as part and parcel hereof*

c) The Speaker, 9th Respondent, as a then Member of Parliament, was one among many, who paid written tribute the Petitioner for his endeavours, *inter-alia*, stating that:

"Nation's tribute should be paid to you for exposing for the knowledge of the public, the fraud in the construction of the Hilton Hotel and the fraudulent attempt to siphon out pubic monies from the country"

*True copy of Letter dated 6.2.1992 from Chamal Rajapaksa, M.P. is annexed marked **"X16",** pleaded as part and parcel hereof*

d) A desperate endeavour by President D.B. Wijetunga intervening with the Petitioner in June 1994 to have the settlement concluded before the General Elections of August 1994 proved futile.

41. a) Consequently in 1995 Mitsui & Taisei agreed to receive Promissory Notes for the balance unwritten-off Claims from HDL, and not from the Government.

b) Accordingly, Settlement Agreements, *with improved financial terms for HDL and the Government,* than those in the 1993 draft Agreements, were finalised by the Solicitor General, Douglas Premaratne P.C., who obtained the consent therefor from the Special Presidential Commission inquiring into the matter of HDL, with copies thereof having been placed, through the Petitioner before the Commission, which was assisted by the Solicitor General.

c) Settlement Agreements were executed on 28.6.1995, after approval from the HDL Board and the Cabinet.

*True copies of the Settlement Agreements are annexed compendiously marked **"X17",** pleaded as part and parcel hereof*

42. a) In accordance with the foregoing stance of the Petitioner, **for further re-structuring of HDL**, the following Conditions were contained in the Settlement Agreements.

- "HDL shall and will explore the feasibility of building the 3rd Tower of Hotel Rooms at the Hotel and consider financing the cost of same, through a Rights and/or a new Issue of its Shares or otherwise, as considered feasible, to enhance HDL's profitability and debt service ability, to enable the repayment of the said Loans to Mitsui and Taisei and/or to the Government as aforesaid."

- "HDL shall and will cause its profitability and cash flow projections required for the purpose of this Agreement and the said Agreement No. 1 to be formulated by Hilton International, the Managers of the Hotel and/or the Auditors of HDL."

b) Secretary Ministry of Finance & Secretary to the Treasury A.S. Jayawardene after discussions had with the Petitioner and others addressed Letter dated 19.10.1994 to the Attorney General authorising the finalising of an early resolution with Mitsui & Taisei, subject to financial re-structuring and debt re-scheduling of HDL, facilitating Loan repayments by HDL.

*A true copy of Letter dated 19.10.1994 is annexed marked **"X18",** pleaded as part and parcel hereof*

c) The Settlement Agreements, *inter-alia*, also contained the following Conditions, *vis-à-vis,* the two Lands.

- "The Government shall and will,

  (a) assist the UDA in taking steps to have the Echelon Square Land Leases pertaining to the Colombo Hilton Hotel, cancelled and/or terminated and given directly to HDL, including the balance portion of Land, containing the Sports Complex/Recreation Area, at present not underleased to HDL, for consideration to be settled by the allotment of Shares in HDL to the UDA"

- "HDL shall and will promptly obtain for itself directly from the UDA, the leasehold rights to the Echelon Square Lands pertaining to the Hotel, including the balance portion of Land containing the Sports Complex/Recreation Area at present not underleased to HDL, for consideration to be settled by the allotment of Shares in HDL to the UDA."

d) Accordingly, on the advice of then, Attorney General, Sarath N. Silva, P.C., with the concurrence of President Chandrika Bandaranaike Kumaratunga, Secretary, Ministry of Finance & Secretary to the Treasury, B.C. Perera, caused the UDA to surrender the aforesaid Lands to be absolutely owned and vested in the Government, by the execution of Surrender of Special Grants Instrument Nos. 673 and 674 on 26.7.1999, in terms of the State Lands Ordinance.

*True copies of the Surrender of Special Grants Instruments Nos. 673 and 674 are annexed together marked **"X19",** pleaded as part and parcel hereof*

e) Prior to pursuing the conclusion of such settlement the Petitioner reiterated that he could proceed with the litigations since he was confident in proving the fraud, which had been upheld by Your Ladyship's Court on 2.12.1992, also upholding the interim injunctions, and that as a consequence monies had accumulated and further monies would accumulate with HDL, enabling HDL to complete the construction of the planned 3rd Tower increasing the number of Hotel Rooms from 408 to 612, thereby enhancing the profitability and debt-service ability of HDL, and then negotiate with settle Mitsui & Taisei for what had been actually constructed.

43. a) By the Settlement Agreements, Mitsui & Taisei wrote-off Jap. Yen 17,586 Mn. (then equivalent to US $ 207 Mn., i.e. SL Rs. 10,200 Mn.) on their stated Claims as at 30.6.1995 from HDL and the Government, as its Guarantor, which comprised 30% write-off of Capital and 10 Years' accrued Interest; amounting to a 63.3% write-off of their stated claims.

b) **The aforesaid write-off obtained by the Petitioner by his sole sustained efforts over several years, amidst obstructions and pressures, amounting to Rs. 10,200 Mn., in June 1995, at 12% p. a. interest would today amount to over Rs. 73,500 Mn.**

c) The Government has advanced to HDL Rs. 4,435,986,893 Mn., over the years 1997 to 2010, claiming together with compound interest thereon at varying rates given at paragraph 63 hereinbelow, at a simple average interest of **13% p. a,** amounting to a total of Rs. 12,098 Mn., as at 10.5.2011 and together with the 7 Acres of Land provided by the Government to HDL in the Colombo City valued at Rs. 10 Mn. per perch would amount to **Rs. 11,200 Mn**. Therefore in total the Government's contribution to HDL would be around **Rs. 23,298 Mn**., as at today.

d) Therefore, **the Petitioner well and truly stood and stands to be a greater Stakeholder of HDL than the Government**.

e) Mitsui & Taisei agreed to re-schedule the unwritten-off balance Claims for a further period of 15-years up to 2010, with a *grace period of one year* **to further financially restructure HDL**, (*originally fully payable by 1999)* at a reduced rate of 5.25% p.a interest (*originally 6% p.a*) ,

A true copy of the Note on the financial terms of Settlement tabled at the HDL Board Meeting on 28.6.1995 is annexed marked ***"X20",*** *pleaded as part and parcel hereof*

f) **The foregoing was immensely beneficial to HDL and the Government, as its Guarantor**.

g) The crux and the main cornerstone of the Settlement Agreements was that the immense benefit, which was to be derived by HDL, and more importantly by the Government, as its Guarantor, as a consequence of the write-off of 30% of the Capital and all accrued Interests by Mitsui & Taisei and re-scheduling the balance unwritten-off Claims for a further period of 15 years, with a grace period of one year, were to accrue to the Government **and none other**.

44. a) After having chaired a Media Conference on **28.6.1995**, *pompously* applauding the Settlement and endeavouring to take credit therefor, **when he had played no role, whatsoever, in the finalisation of the Settlement**, Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent, having discovered a Condition, *which personally affected him*, **precipitating a perverse baseless controversy,** *unilaterally* and *arbitrarily* caused the Settlement Agreements to be suspended on **24.7.1995**

True copies of Letters dated 24.7.1995 sent to Mitsui & Taisei by Secretary Ministry of Finance & Secretary to the Treasury, A.S. Jayawardene are annexed marked together ***"X21",*** *pleaded as part and parcel hereof*

b) The Condition which personally affected Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent was the following, since he had been a Member of the Securities & Exchange Commission of Sri Lanka at the relevant time:

- "The Government shall and will take appropriate independent actions on the conduct and actions of the Securities and Exchange Commission of Sri Lanka and/or Members of its Commission and the Colombo Stock Exchange and/or of its Directors, in relation to the representations made by Mr. Ameresekere to the said institutions on matters pertaining to HDL, which matters Mr. Ameresekere also reserves the right to pursue."

c) Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent also made a baseless and false Statement in Parliament on 8.8.1995 *vide* Hansard Columns 704 – 707 (*4 Columns*) **but could not refute** the fallacy thereof exposed by a comprehensive Statement made on 15.12.1995 in Parliament by Rajitha Senaratne, M.P. *vide* Hansard Columns 2954 – 2965 (*12 Columns).*

*True copy of Hansard Columns 2954 – 2695 of 15.12.1995 is annexed marked together **"X22",** pleaded as part and parcel hereof*

d) Acting in a vicious manner, Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent forced the resignation of Secretary Ministry of Finance & Secretary to the Treasury, A.S. Jayawardene, who was as a result appointed as Governor, Central Bank of Sri Lanka.

e) However, in complete contrast to the aforesaid conduct, Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent, now Minister of External Affairs, has been **significantly silent** on the conduct and actions of Secretary Ministry of Finance & Secretary to the Treasury P.B. Jayasundera, 3rd Respondent ,whose conduct and actions had been castigated by Your Ladyship's Court in SC (FR) Nos. 209 and 158/2007 and in Reports to Parliament by the Committee on Public Enterprises and by the Auditor General.

45. a) Thereafter, with the oncoming Sri Lanka Aid-Group Meeting in November 1996, at which the Government expected the Japanese Government to pledge US $ 245 Mn., as Aid, the Japanese Governmental Authorities exerted pressure on the Government, on the foregoing *unilateral* and *arbitrary* suspension of the Settlement Agreements, which had been signed, as had been finalized by the Attorney General.

b) Petitioner once again *reiterated* that he could pursue with the litigation, since he was confident in proving the fraud, which had been upheld by the Supreme Court on 2.12.1992, also affirming the interim injunctions, and that as a consequence monies over US $ 30 Mn., had accumulated with HDL by March 1996, and that further monies would accumulate with HDL, enabling HDL to complete the construction of the planned 3rd Tower, increasing the number of Hotel Rooms from 408 to 612, thereby enhancing the profitability and debt-service ability of HDL, and thereafter to negotiate and settle with Mitsui & Taisei for just and equitable basis.

46. a) Nevertheless in the given circumstances, President Chandrika Bandaranaike Kumaratunga, Attorney General, Sarath N. Silva P.C., Secretary Ministry of Finance & Secretary to the Treasury, B.C. Perera,. and Deputy Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent, *prevailed* upon the Petitioner to agree to immediately give effect to the Settlement Agreements signed in June 1995, **without the fulfillment of certain 'conditions precedents'**, **which had been agreed to have been fulfilled,** *prior to the settlement and withdrawal of the Petitioner's litigations, which had prevented any payments, whatsoever, to Mitsui & Taisei*.

b) In such circumstances, an Addendum was signed in October 1996 to the Settlement Agreements, by and between the Government, the Petitioner, Mitsui & Taisei, **only excluding** the aforesaid Condition, which affected Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent.

*True copy of the Addendum, with attachments thereto is annexed marked **"X23",** pleaded as part and parcel hereof*

c) The Petitioner *acquiesced* to the foregoing at the behest of then Attorney General, Sarath N. Silva, P.C., Secretary, Ministry of Finance, B.C. Perera and Deputy Secretary to the Treasury P.B. Jayasundera, 3rd Respondent, *who intimated that this condition was an embarrassment to their own Minister !*

47. a) In deference to the requirement of the Government, to enable the payments to be made to Mitsui & Taisei, the Petitioner by the said Addendum, **acting in utmost good faith** agreed to convert certain '*conditions precedent'* to '*conditions subsequent'*, *which had to be performed prior to the withdrawal of the two derivative actions in law, D.C. Colombo Cases Nos. 3155/Spl and 3231/Spl, as had been agreed in June 1995*; **which were promised to be fulfilled subsequently as per the said Addendum**.

b) On Petitioner's insistence, as per the said Addendum, voting power of the Shares of Mitsui & Taisei were *irrevocably* given to the Secretary to the Treasury, for the fulfillment of the said '*conditions precedent'*, as '*conditions subsequent'*.

48. a) Accordingly, D.C. Colombo Cases Nos. 3155/Spl and 3231/Spl were settled and withdrawn on **23.10.1996**, and the Commercial High Court entered Decrees, on the basis of the terms of the Settlement Agreements

*True copies of the Commercial High Court Decrees are annexed marked together as **"X24",** pleaded as part and parcel hereof*

b) Deputy Secretary to the Treasury P.B. Jayasundera, 3rd Respondent, chaired the immediate HDL Board Meeting on **25.10.1996** to give effect to such Settlement and to issue to Mitsui & Taisei Promissory Notes from HDL, *inter-alia*, stating:

> "The Chairman, Dr. P.B. Jayasundera, informed that this Board Meeting was convened as a matter of national importance in the interest of Sri Lanka Japan relationship and that he was acting at the request of the Government and urged the Directors to proceed with the Meeting on the Agenda placed before them. "
>
> "Dr. P.B. Jayasundera informed the Board that the payment due to Mitsui & Co. Ltd., and Taisei Corporation is contingent liability on the Government and that the payments due to Mitsui & Co. Ltd and Taisei Corporation should now be made as per the Settlement Agreements, since legal actions have now been settled and withdrawn and that the company should authorize the Deputy Secretary to the Treasury to make the payments due to Mitsui & Co., Ltd and Taisei Corporation from the funds of the company held by him and/or by transferring from funds of the company as may be required. "

*A true copy of HDL Board Minutes dated 25.10.1996 is annexed marked **"X25",** pleaded as part and parcel hereof*

c) Promissory Notes were issued to Mitsui & Taisei by HDL on 25.10.1996 for the re-scheduled 15 installment payments of the unwritten-off balance Claims, first of which was to have been paid on **1.7.1996**.

49. The accumulation of funds in HDL from 31.3.1993 to 31.3.1996 by reasons of the interim injunctions obtained by the Petitioner is borne out by the following data from the HDL Annual Accounts:

1993	**Rs. Mn.**	**Rate**	**US $ Mn.**
Current Assets	774,056	47.16	16,413
Fixed Deposit	50,004	47.16	1,060
Treasury Bills	455,241	47.16	9,653
1994			
Current Assets	1,111,129	48.72	22,806
Fixed Deposit	572,507	48.72	11,751
Treasury Bills	307,840	48.72	6,319
1995			
Current Assets	1,532,046	49.80	30,764
Fixed Deposit	991,008	49.80	19,900
Treasury Bills	259,031	49.80	5,201
1996			
Current Assets	1,786,645	54.00	33,086
Fixed Deposit	924,044	54.00	17,112
Treasury Bills	654,568	54.00	12,122

*True copies of the HDL Balance Sheets as at 31.3.1994 and 31.3.1996 giving the comparative figures for the previous years and the respective Notes on Current Assets are annexed marked together as **"X26",** pleaded as part and parcel hereof*

50. a) Consequently on 15.11.1996, the following payments were made to Mitsui & Taisei **from funds accumulated in HDL**, prior to then Deputy Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent and others, proceeding for the Sri Lanka Aid-Group Meeting in November 1996.

   i) Initial Lump-sum Payment Jap.Yen 2312 Mn., i.e. SL Rs. 1341 Mn., (**US $ 23.6 Mn**.)
   ii) First Installment due on 1.7.1996 Yap.Yen 933.7 Mn., i.e. SL Rs. 479.8 Mn., (**US $ 8.4 Mn.**)

b) Thus on the insistence of the Government , a total payment of approximately **US $ 32 Mn.,** was paid to Mitsui & Taisei on 15.11.1996 **from funds accumulated in HDL** by reason of the interim injunctions the Petitioner had obtained.

c) Additional Interest cost of approximately Rs. 80 Mn., had to be paid to Mitsui & Taisei by HDL for the foregoing delayed payments, which were to have been paid, as per the Settlement Agreements of June 1995.

d) The grace period of one year from 1.7.1995 to 30.6.1996 was wasted and the *further restructuring of HDL during such grace period was frustrated* by the suspension of the Settlement Agreements by Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent.

51. a) To have built the 3rd Tower increasing the number of Hotel Rooms of the Hilton Hotel from 408 to 612 i.e. and addition of 204 Rooms, for which all provisions had already been made in the main Hotel construction, the cost estimate in 1994 was only around US $ 14 Mn.

b) Hence the 3rd Tower which could have been easily built with the funds accumulated with HDL, *thereby enhancing the profitability and debt-service ability of HDL.*

c) Thereafter, a just and equitable settlement could have been negotiated and concluded with Mitsui & Taisei.

d) **The foregoing was the correct business strategy as was suggested by the Petitioner**.

e) **Nevertheless, the Government insisted otherwise, and therefore the Government stands responsible for the plight the Government put HDL into, *due to external pressures or otherwise*.**

52. a) Relying on the foregoing wrongful and unlawful conduct, and baseless and false statements of Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent, the Court of Appeal in CA Revision No. 721/98 and CA (LA) No. 177/98, taken together with other connected Applications, on 30.3.1999 made a *perverse* prejudicial interim order, detrimental to the interests of HDL and the Government.

b) The Court of Appeal by the said interim order, *questionably* directed the continuation of the reduced unwritten-off balance Claims instalments be made to Mitsui & Taisei, in terms of the aforesaid Settlement Agreements, *but restraining all other Conditions in the Settlement Agreements,* without having taken cognisance of the fact that the Commercial High Court had already entered Decrees on the basis of the conditions in the Settlement Agreements.

c) The foregoing *perverse* interim order of the Court of Appeal resulted in all the balance 14 payments to be made to Mitsui & Taisei, causing grave loss and jeopardy to HDL and the Government, and resulting in HDL's present financial predicament.

d) Significantly in the said Court of Appeal Judgment directing payments to be made to Mitsui & Taisei the following had been recorded:

> "Mr. Sivarasa, President's Counsel, during the course of this Court exploring possibilities of a settlement did mention to Court that he would not have any objections to the Japanese receiving their dues provided his client's rights under P6, P12 and P13 were protected. "

There was no settlement, but an unilateral arbitrary *questionable* direction by the Court of Appeal, resulting in the plight HDL was plunged into, **even preventing HDL from publishing its Annual Accounts for 20 years on the advice of successive Attorney Generals on the basis of such Judgment**, but published for the 20 years recently, the Petitioner believes upon the Attorney General reneging on the earlier advice.

e) This was notwithstanding that HDL and the Petitioner had tendered a comprehensive Statement of Objections, adducing relevant documents. Intriguingly, no reference, whatsoever, had been made to the said Objections in the Court of Appeal Judgment, notwithstanding that the said matter was concerning the grant of interim relief.

f) The Government, represented by the Ministry of Finance, continued to make such payments to Mitsui & Taisei, in terms of the aforesaid direction of the Court of Appeal.

g) **The Petitioner consistently objected to such payments being made to Mitsui & Taisei in the absence of the totality of a Settlement, and disassociated himself from the said payments being made to Mitsui & Taisei**.

53. On the foregoing Judgment of the Court of Appeal, Special Leave to Appeal was granted by Your Ladyships' Court on 16.12.1999 in SC (LA) Nos. 116 and 177/99 on the following questions.

i) Had the Court of Appeal erred in law by dismissing the Applications at the conclusion of the Hearing into the grant of interim relief ?

ii) Had the Court of Appeal misdirected itself by dealing with the main Applications, **when the records clearly shows that it was only the Application for interim relief which was being considered** ? (*Emphasis added*)

iii) Had the Court of Appeal misdirected itself in presuming that one Order would be made in the Revision Application and the Leave to Appeal Application, and that the said Order would be applicable to other Applications, when in fact it had only been agreed, that Order in respect of interim relief in one Revision Application would apply to other Revision Applications ?

54. a) A Special Presidential Commission was appointed by President Chandrika Bandaranaike Kumaratunga to investigate, *inter-alia*, into the aforesaid fraud on HDL and the Government, on the advice of the Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent, who supervised the drafting of the Warrant.

b) After investigations by the CID, assisted by the Solicitor General and a Report by a Panel of 3 Chartered Architects, the Commission issued Show Cause Notices, framed by the Solicitor General, on 4 persons setting out several charges, *inter-alia,* stating as follows;

> "The aforesaid acts of commission and/or omission on your part were fraudulent and were detrimental to the interests of the said Company and/or the Government of Sri Lanka, in its capacity as the major Shareholder, causing financial loss and damage to the said Company and/or the Government of Sri Lanka"
>
> "Having regard to the matters set out hereinabove, you are hereby required to show cause as to why you should not be found guilty of misuse or abuse of power and/or corruption and/or commission of fraudulent acts in terms of Section 9 of the Special Presidential Commission of Inquiry Law No. 7 of 1978, as amended "

*True copies of the said Show Cause Notices are annexed marked together as **"X27",** pleaded as part and parcel hereof*

c) Thereafter, ***irrefutable evidence of criminality*** was disclosed before the Commission, in that, it was discovered that the original Architectural Plans of the Hilton Hotel prepared by KKS had been c*annibalised*, **with some sheets replaced and some sheets tampered with and falsified**.

d) Intriguingly the Warrant of the Commission was not extended to have the matter concluded, the Petitioner verily believes for reasons best known to Justice Minister & Deputy Minister of Finance, G.L. Peiris, 4th Respondent.

55 a) Subsequently, by Letter dated 5.3.2004 President Chandrika Bandaranaike Kumaratunga directed the Inspector General of Police to forthwith investigate into the aforesaid **fraud perpetrated on the Government** and the **cover-up thereof**.

b) CID recorded Petitioner's Statement on 12.3.2004 and acknowledged that *ex-facie* this appeared to be one of the major frauds in this country.

c) Thereafter, the CID sought to locate the original documents, which had been lodged by the Special Presidential Commission with the Department of National Archives.

d) The Petitioner is unaware as to whether Statements of other persons were recorded by the CID or as to whether a 'B Report' was filed in the Magistrate's Court on the conduct of investigations.

e) Secretary to the President, Lalith Weeratunga in terms of the National Archives Law granted permission to the CID to *retrieve* the documents from the Department of National Archives, but *intriguingly* the CID requested for photocopies of such *voluminous* documents, as per their Letter dated 19.10.2006.

f) On a Complaint made by the Petitioner, by Letter dated 8.3.2007 the National Police Commission called for a Report from the IGP.

g) On representations made by the Petitioner on the *tardiness* of the investigations, Secretary to the President, Lalith Weeratunga addressed Letter dated 15.3.2007 to then Attorney General, C.R. de Silva, P.C., 5th Respondent.

h) CID Officers showing a Letter from the Attorney General's Department intimated to the Petitioner that it appeared that the Attorney General's Department was more interested in not having this fraud investigated into, than causing investigations to be pursued.

i) By Letter dated 4.4.2008 the CID finally informed the Petitioner that the investigations could not be proceeded with, on the basis of the advice of then Attorney General, C.R. de Silva, P.C., 5th Respondent, **<u>which the Petitioner refuted</u>**.

j) Such advice had been on the pretext that the original Architectural Plans of the Hilton Hotel were not available when in fact the **Solicitor General assisting the Special Presidential Commission had framed Charges** against 4 persons for the Commission to have issued Show Cause Notices.

k) In assisting the Special Presidential Commission, **the Attorney General's Department was well and truly possessed of copies of all documents placed before the Commission and the proceedings recorded thereat**.

l) The foregoing are only a few of the correspondence in relation to this *intriguingly questionable* non-enforcement of the 'rule of law', by former Attorney General, C.R. de Silva, P.C., 5th Respondent

*True copies of the aforesaid Letters dated 5.3.2004, 19.10.2006, 8.3.2007, 15.3.2007 and 4.4.2008 are annexed marked together as **"X28",** pleaded as part and parcel hereof*

56. a) Special Leave to Appeal having been granted by Your Ladyship's Court against the aforesaid perverse Judgment of the Court of Appeal, Your Ladyships' Court endeavoured to bring about a settlement.

b) In such circumstances Reports had been furnished through the Attorney General to Your Ladyship's Court prepared by a Committee appointed by the Secretary, Ministry of Finance, which Committee was reconstituted at the request of the Petitioner by the Secretary Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent by Letter date 23.8.2004.

*A true copy of the said Letter dated 23.8.2004 is annexed marked **"X29",** pleaded as part and parcel hereof*

c) Consequently, upon a Cabinet Appointed Negotiating Committee (CANC) having been appointed, Proposal for re-structuring HDL, submitted on 11.7.2005 to the Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent, the same had been forwarded by Letter dated 14.7.2005 to then Attorney General, K.C. Kamalasabayson, P.C., in conformity with suggestions made by Your Ladyship's Court.

*True copies of the said Letters dated 11.7.2005 and 14.7.2005 and the said Proposal of the CANC are annexed together marked **"X30",** pleaded as part and parcel hereof*

d) The aforesaid CANC Proposal in July 2005 had, *inter-alia*, stated thus:

i) Without the proposed financial re-structuring, HDL as per projections made, would continue to operate at cognisable Losses, accumulating an estimated Defaulted Debt to the Government of Rs. 9,300,000,000/- by 31.3.2010.

ii) **If, Settlement of pending Litigations cannot be concluded, and the proposed Financial Restructuring on the lines given above not given effect to immediately; then there would be no other option, but to wind-up HDL, transferring the Hotel Building to the Government, which owns the Land, and the Government settling Mitsui & Taisei the balance Loans under the State Guarantees; and setting-off the value of the Hotel Buildings against the defaulted owings by HDL to the Government**.

iii) The foregoing has been set out without prejudice to the rights of the Government to take warranted action.

e) Consequently, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent caused the Cabinet Memorandum titled 'Resolution of disputes relating to Hilton Hotel Project' dated 5.10.2005 to be submitted through the then Minister of Finance, Sarath Amunugama, M.P., which was approved by the Cabinet on 13.10.2005.

*True copies of the Cabinet Memorandums dated 5.10.2005 and 13.10.2005 are annexed together marked **"X31",** pleaded as part and parcel hereof*

57. a) Your Ladyship's Court on 16.1.2006 having suggested that settlement be effected taking into reckoning the interests of all parties, including the Petitioner, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent on 24.4.2006 intimated to Your Ladyship's Court that as regards of the Petitioner the matter has already resolved on the basis of an independent assessment.

b) In conformity therewith Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent obtained the Report dated 19.7.2006 from Merchant Bank of Sri Lanka Ltd., who had been intimatedly engaged.

c) The following paragraphs are cited from a said Report prepared by the Merchant Bank of Sri Lanka Ltd., on the services rendered by the Petitioner.

> "NSA (reference being the Petitioner) was removed from the Board of Directors of HDL in December 1990 but was re-appointed as a Director of HDL in October 1994 by the Govt. Whilst NSA's derivative actions were pending in Courts, the Govt. initiated discussions with a view of having the said litigations withdrawn, upon reaching a settlement with Mitsui & Taisei. In June 1995 Settlement Agreements were finalized and executed by the Govt., Mitsui & Taisei, HDL and NSA."

> "4.3. In terms of the Settlement Agreements entered in June 1995, as amended in October 1996, Mitsui & Taisei had written off **Jap Yen 17,586 Mn (then US $ 207 Mn / LKR 10,200 Mn)** which was a write off of **63.3%** of their total claim as at **30.6.1995** in respect of the loan granted to HDL and after paying **Jap. Yen 2,312 Mn (then US $ 27 Mn / LKR 1,341 Mn),** the balance has been further re-scheduled over a period of **15 Years** up to **2010 (previously fully payable by 1999)** at a **reduced rate of interest of 5.25% p.a. (previously 6% p.a.)**. The fact has been confirmed by HDL by their letter dated 19th June 2006 addressed to Mr. V Kanagasabapathy, Director General of Public Enterprises."

> "However, Minister G L Peiris wrongfully suspended the implementation of the Settlement Agreements upon the discovery of a "certain condition" therein affecting him personally. As such, in October 1998 NSA instituted a further derivative action in the interest of HDL in addition to the personal action filed against Min G L Peiris in July 1997 claiming damages, which are still pending in Courts. By then in May 1996, the Govt. had started discussions with NSA, with a view to persuade him to co-operate to implement the Settlement Agreements and accordingly the Settlement Agreements signed in June 1995 were given effect to with an Addendum signed thereto in September/October 1996 by and between the Govt., Mitsui & Taisei and NSA. The said Addendum endorsed all the conditions contained in the Settlement Agreements save and except the condition, which personally affected Mr. G L Peiris."

> "On the basis of the aforesaid Settlement Agreements and the Addendum NSA's Legal actions (DC Col Case Nos. 3155/Spl and 3231.Spl) have been settled and withdrawn in October 1996 in the Commercial High Court and the Commercial High Court had entered Decrees accordingly."

d) The Petitioner , as a stakeholder of HDL had been actively involved in the promotion of the Hilton Hotel, and also in probing and prosecuting the fraud amidst obstructions and pressures, and obtaining the aforesaid write-off deriving immense benefit to HDL and the Government, and also in assisting in defending the interest of HDL and the Government in several vexatious litigations, incurring valuable time, considerable costs and efforts.

> *True copies of the Proceedings dated 16.1.2006 and 24.4.2006 of Your Ladyship's Court, together with copy of the said Report of the Merchant Bank of Sri Lanka Ltd., are annexed compendiously marked **"X32(a)",** pleaded as part and parcel hereof*

e) i) There was a bomb explosion in October 1997, whereby several buildings in the City, including Hilton Hotel, were extensively damaged.

ii) Consequently, under a 'business interruption insurance policy', Hilton International negotiated a payment of US $ 10 Mn. from the overseas insurers for the re-instatement of the Hilton Hotel.

iii) By Letter dated 16.1.1998, Roy Coxon, Group Risk Manager, Hilton International claimed title to these insurance monies of US $ 10 Mn., paid to HDL for the re-instatement of Hilton Hotel

iv) On such hypothesis, Hilton International required additional new Shares of HDL to the value of US $ 7 Mn., to be allotted to Hilton International, and the balance US $ 3 Mn., to be re-paid over 30 months, as an increase in the subsequent insurance *premia*, to the Insurer.

v) **Petitioner refuted such stance of Hilton International**, by Petitioner's Memo dated 28.3.1998 to the HDL Board, with copies to among others, then Deputy Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent.

vi) Petitioner successfully established, that such insurance monies of US $ 10 Mn., paid to HDL, rightfully and lawfully, belonged to HDL, and not to Hilton International.

vii) Had it not been for the Petitioner's such ***defiant stance***, the US Dollar at that time having been equivalent to SL Rs. 61/-, for US $ 7 Mn., Hilton International would have got additional new Shares of HDL to the value of Rs. 427 Mn., against the nominal Share Capital of HDL of Rs. 452.3 Mn., thereby increasing the nominal Share Capital of HDL to Rs. 879.3 Mn.

viii) Had Hilton International been given additional new Shares, as had been required, to the value of 427 Mn., this would have vested in Hilton International, an ownership of 48.5% of the increased new nominal Share Capital of HDL.

ix) The foregoing fraudulent ***manoeuvre*** by Hilton International to acquire a 48.5% of the increased new nominal Share Capital of HDL, together with the Shareholdings of Mitsui & Taisei, reduced to 14.2%, would have given a total *'controlling'* Shareholding of 62.7% in HDL to Hilton International and Mitsui & Taisei, ***compared against the Government's Shareholding being reduced to 33.4%*** *!*

*True copies of the Hilton International's Letter dated 16.1.1998 and Petitioner's Memo dated 28.3.1998 are annexed together marked **"X32(b)",** pleaded as part and parcel hereof*

58. a) Since the aforesaid settlement suggested by Your Ladyship's Court did not materialise, the Petitioner, as warranted, on 17.11.2006 filed an Application in D.C. Colombo Case No. 217/CO to wind-up HDL, in view of its bankrupt position.

*A true copy of the Winding-up Petition, without the Documents annexed thereto is annexed marked **"X33",** pleaded as part and parcel hereof*

b) Then Chairman HDL, Nawaz Rajabdeen appointed by the Minister of Finance, 1st Respondent, by Affidavit dated 8.12.2006 opposed the winding-up of HDL.

c) In the given facts and circumstances of HDL, Section 219 of the Companies Act No. 7 of 2007, which came into force on 3.5.2007 mandated the winding-up of HDL, and **made the Directors personally liable for the debts of HDL**, for having opposed the winding-up of HDL.

d) In addition, Section 375 of the Companies Act No. 7 of 2007 prohibits the fraudulent trading by a Company, **making Directors personally liable for its debts**.

e) Section 382 of the Companies Act No. 7 of 2007 empowers the Attorney General **to criminally prosecute Directors of a Company** in such circumstances.

f) Directors of HDL appointed by the Minister of Finance, 1st Respondent, who held Office after the winding-up Petition was filed on 17.11.2006, and **who exercised the management control of the HDL Board**, **with the Government being a 64% Shareholder of HDL** have been as follows:

- T. Nadesan, Chairman, from 12.5.2010
- N. Rajabdeen, Chairman, resigned on 21.5.2010
- V. Kanagasabapathy
- K.V.N. Jayawardene
- T. Wickramasuriya
- N. Warusuvitharana
- K. Wickramanayake

g) As per the definition of Directors specified in Section 529 of the Companies Act No. 7 of 2007 in respect of certain specific provisions therein, particularly Sections 187, 188, 189, 190, 197, 374, 375, including also Sections 191 to 195, persons in accordance with whose directions or instructions, Directors of a Company would act, are also deemed to be Directors of a Company.

h) Hence, the Government Directors of HDL, appointed by the Minister of Finance, 1st Respondent, **who exercised the management control of the HDL Board**, **with the Government being a 64% Shareholder of HDL**, who opposed the Winding-up of HDL and acted in blatant violation of the Companies Act No. 7 of 2007 are personally liable for the debts of HDL, which is to the Government i.e the public.

i) Thus and thereby the aforesaid Directors of HDL are not fit and proper persons to be Directors of HDL and/or any other public Company.

j) **It is indeed appalling that the statutory law of the land had been blatantly violated by Government Nominee Directors.**

59. a) In circumstances of serious loss of capital, where 50% of the Share Capital of a Company is eroded, in terms of Section 220 of the Companies Act No. 7 of 2007, the Directors are bounden in duty to call for an Extra-ordinary General Meeting, to *inter-alia* explain the extent of losses, causes therefor, and steps being taken to recoup the losses.

b) In the case of HDL, the entire Share Capital had been eroded, but nevertheless its Directors had failed to comply with the mandatory provisions of Section 220 of the Companies Act No. 7 of 2007.

c) Section 187 to 190 of the Companies Act No. 7 of 2007 stipulates the 'Duties of Directors' and Section 188 thereof **prohibits a Director from acting or agreeing to act in contravention of any provisions of the said Act**.

d) Hence, the Government Directors of HDL, appointed by the Minister of Finance, 1st Respondent, who were in control of HDL are guilty of having acted blatantly in violation the provisions of the Companies Act No. 7 of 2007 and thereby they are not fit and proper persons to be Directors of HDL and/or any other public Company.

e) **It is indeed appalling that the statutory law of the land had been blatantly violated by Government Nominee Directors**

60. a) Cabinet Memorandum dated 5.10.2005 approved on 13.10.2005 **(X31)** had given approval to a CANC Report, which had, *inter-alia*, recommended that if HDL was not restructured, it should be wound-up.

b) Supressing the foregoing, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent, had caused the Minister of Finance, 1st Respondent, to submit Cabinet Memorandum dated 21.1.2007 to oppose the winding-up of HDL and to indicate to Court, as an option, to re-structure HDL. Cabinet Approval was granted on 26.1.2007

*True copies of the Cabinet Memorandum dated 21.1.2007 and Cabinet Approval dated 26.1.2007 are annexed together marked "**X34**", pleaded as part and parcel hereof*

c) Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera 3rd Respondent wrongfully and unlawfully intervened by Motions dated 10.5.2007 and 7.12.2007 through State Attorney, as an '**Intervenient-Party'** , without having first had and obtained the permission of Court to have done so, to oppose the winding-up of HDL, blatantly contravening the provisions of the Companies Act, admittedly as advised by the then Attorney General C.R. de Silva P.C., 5th Respondent.

*True copies of the Motions dated 10.5.2007 and 7.12.2007 are annexed together marked "**X35**", pleaded as part and parcel hereof*

d) Former Attorney Generals C.R. de Silva P.C. 5th Respondent and Mohan Peiris P.C., 6th Respondent, appearing for the State continued to oppose the aforesaid Winding-up, contravening the mandatory provisions of the Companies Act No. 7 of 2007, which came into force on 3.5.2007.

In terms of Rule 11 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988, an Attorney-at-Law is prohibited from accepting any professional matter, which would involve him in the commission or in the furtherance of the commission of an offence.

e) Then Attorney General Mohan Peris, P.C., 6th Respondent by Letter dated 16.9.2010 called for a Meeting to explore the possibility of a Settlement. Nevertheless, no such discussion took place.

f) In the given facts and circumstances, it is indeed appallingly that HDL is Scheduled as an 'Underperforming Enterprise' **due to protracted litigation** prejudicial to the national economy and public interest. If such be the case, then the former Attorney Generals C.R. de Silva, P.C., 5th Respondent and Mohan Peiris, P.C., 6th Respondent, appearing for the State, stand responsible and liable for having continuously opposed the aforesaid Winding-up of HDL contravening the provisions of the Companies Act No. 7 of 2007 and having caused the judiciary to have kept the Winding-up Application pending now for 5 years; **with intimation of a possible settlement**.

g) Had the former Attorney General Mohan Peiris, P.C., 6th Respondent been instrumental, in any manner, whatsoever or howsoever, in the act of including HDL under Schedule 1 to the Law, for the Shares of HDL to be vested in the State **then it would be a great travesty of justice**.

61. a) The Balance Sheet of HDL as at **31.3.2005** as had been disclosed in the Winding-up Petition filed on 17.11.2006 was given to be as follows:

	Rs. Mn
Fixed Assets	2,139.2
Current Assets	744.6
Current Liabilities	271.6
	473.0
Net Assets	2,612.2
Share Capital	452.2
Reserves	860.7
(Accumulated Loss)	(6,351.5)
	(5,038.6)
Long Term Liabilities	7,650.8
Sources of Funds	2,612.2

b) The Balance Sheet of HDL as at **31.3.2010** as recently circulated is set out below, **disclosing the further erosion of the Capital of HDL and further accumulation of Losses and Liabilities by HDL**

	Rs.Mn.			Rs.Mn.
Shareholders' Equity		Non-Current Assets		
Stated Capital	452	Property, Plant & Equipment		6,127
Revaluation Reserve	4,706	Pre-paid Lease Rental		185
FF&E Reserve	371			6,312
Accumulated Loss	(10,302)			
Deficit	(4,773)			
Non-Current Liabilities		Current Assets		
Interest bearing Loans	10,268			
Retiring Benefit Obligations	69	Inventories		49
	10,337	Receivables		208
		Short Term Investments		
Current Liabilities		- Treasury Bills	688	
		- Bank Deposits	114	802
Trade and Other Payables	371	Cash & Bank		24
Interest bearing Loans (*1 Year*)	1,457			1,083
Bank Overdraft	3			
	1,831			
Total Liabilities	12,168			
Liabilities *Less* Deficit	7,395	Total Assets		7,395

62. a) By Letter dated **3.5.2011** the Government had required HDL to repay the Loans advanced to HDL, stated to amount to Rs. 12,098,634,769/77 to have made payments to Mitsui & Taisei.

b) By Letter dated **6.5.2011** HDL had forwarded a proposal to repay the Loans to the Government **over a period of 18 years**.

c) By Letter dated **10.5.2011** the Government had refused to accept the repayment proposal by HDL and had required HDL repay the outstanding amount claimed of Rs. 12,098,634,769/77, **within a period of 2 years on a monthly instalment basis**.

d) With the Government Directors having been in full management control of HDL, *the above exchange of correspondence is indeed a tragi-comedy*.

*True copies of Letters dated 3.5.2011, 6.5.2011 and 10.5.2011 are annexed together marked as **'X36"**, pleaded as part and parcel hereof*

63. a) The **Capital of the Loans** advanced by the Government to HDL, as disclosed in the Petition in H.C. (Civil) W.P. Application No. 52/2011/CO as set out below, **had amounted to only Rs. 4,435,986,893/-**

Date of Loan	Amount Rs.	Int. Rate
01.07.97	288,567,631	12.50%
07.07.99	469,742,070	12.50%
03.07.00	464,427,826	12.50%
03.07.01	360,618,876	18.56%
03.07.02	446,803,874	12.50%
01.07.03	340,024,378	9.40%
01.07.04	395,658,959	8.59%
30.06.05	225,639,338	10.28%
30.06.06	157,555,617	11.61%
30.06.07	344,772,738	18.77%
30.06.08	456,077,609	20.59%
28.12.10	486,097,977	8.39%
Total	4,435,986,893	

b) No re-payments, whatsoever, have been made to the Government by HDL on account of either any Interest or Capital.

c) The aforesaid Balance Sheet of HDL as at 31.3.2010 had included interest at the aforesaid rates, ***compounded annually***. (*i.e. at a simple average interest of **13.0% p.a.)***

d) **Section 5 of the Civil Law Ordinance mandates that the Interest shall not exceed the Capital.**

64. a) In terms of Section 364, read with Section 277 of the Companies Act No. 7 of 2007, no interest is payable by and/or chargeable from HDL, *after the Petition for Winding-up of HDL had been presented on 17.11.2006*.

b) In terms of Section 277 of the Companies Act No. 7 of 2007, the winding-up of a Company shall be deemed to have commenced at the time of presentation of the Petition for winding-up.

c) **Hence, no interest is chargeable by or payable to the Government by HDL after 17.11.2006**.

65. Therefore, the interest stated in the HDL Accounts of 31.3.2010 is *wrongfully* and *unlawfully* **overstated**.

66. **Those persons, who have transgressed the law and have caused the foregoing losses to the Government i.e. the public, ought be held accountable and responsible therefor**.

67. a) The foregoing reveals that HDL, had been recklessly mismanaged by the Government Directors, who controlled HDL, and were nominated by the Minister of Finance, 1st Respondent.

b) They have been paying themselves emoluments, allowances and enjoying other perquisites, whilst HDL has been *languishing* in losses and has been in dire financial straits.

c) Just prior to the aforesaid Bill tabled in Parliament on 8.11.2011, the draft Board Minutes of HDL of 6.9.2011 and 24.10.2011 have recorded approval for payment of Rs. 400,000/- per month and the purchase of a BMW SUV reckoned to cost over Rs. 25 Mn., for the Chairman of HDL, a kinsman of the 1st, 2nd and 9th Respondents.

*True copies of the said HDL draft Board Minutes of HDL are annexed together marked **"X37",** pleaded as part and parcel hereof*

68. a) Just prior to the aforesaid Bill tabled in Parliament on 8.11.2011, the Deputy Secretary to the Treasury, obviously with the concurrence and agreement of the Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent, had issued a Letter dated 10.5.2011 (included in **X36**) to HDL requiring the outstanding payments, wrongfully and unlawfully claimed to be Rs. 12,098 Mn., **to be paid within a period of preferably 2 years**.

b) Hence, HDL and/or any one or more of its Shareholders were entitled to raise investments and to repay the Government its lawful dues, as demanded to be paid **within the period of 2 years**.

c) Had the Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, 3rd Respondent been instrumental, in any manner, whatsoever or howsoever, in the act of including HDL under Schedule 1 to the Law, for the Shares of HDL to be vested in the Secretary to the Treasury **then it would be a great travesty of justice**.

69. a) Upon having been informed that HDL of which the Petitioner is a Shareholder / Stakeholder, had been included in the Schedule to the aforesaid Bill, the Petitioner having returned to the island on Friday, 4.11.2011 filed on the very next working day 8.11.2011 (*7.11.2011 being a public holiday*) an Application No. 52/2011/CO to be made by his Company, Consultants 21 Ltd., under and in terms of Part X of the Companies Act No. 7 of 2007 in the High Court (Civil) of the Western Province, Colombo, **demonstrating that there was prevalent ordinary and regular law for a rearrangement and compromise of HDL**.

*A true copy of the Petition filed in the said H.C. (C) W.P. Application No. 52/2011/CO without the Documents attached thereto is annexed marked **"X38",** pleaded as part and parcel hereof*

b) Upon the Cabinet Spokesman, Minister Keheliya Rabukwella addressing a formal Press Conference announcing that the existing owners of 'Underperforming Enterprises' could give proposals for the revival and/or restructuring of such enterprises, the Petitioner forwarded Letter dated 18.11.2011 to him, exhorting him to promptly make known the specific provisions in the Law, which provides for and/or enable the foregoing, specifically forwarding the aforesaid Application made to the Commercial High Court for re-arrangement and re-structuring of HDL, *for which the Petitioner received no reply from the said Minister*.

A true copy of Letter dated 18.11.2011 is annexed marked ***"X39",*** *pleaded as part and parcel hereof*

c) **HDL being governed by the Companies Act No. 7 of 2007 ought be restructured and developed in terms of the ordinary and regular law *viz* the provisions of the Companies Act No. 7 of 2007, under the supervision of the judiciary, as per the aforesaid Application No. 52/2011/CO made to the Commercial High Court ("X38"), and not secretly away from the public glare, behind closed doors**

70. In the premises the Petitioner very respectfully states that;

a) he has good, sufficient and valid right, reasons and grounds to invoke the jurisdiction of Your Ladyship's Court to seek just and equitable reliefs constitutionally warranted as prayed for herein including to have the *per-incuriam* Determination **("X6(a)")** not in conformity with and/or *ultra-vires* the stipulations in Article 123(3) of the Constitution reviewed by a Fuller Bench of Your Ladyship's Court in terms of Article 132, read with Article 118 of the Constitution.

b) in so urging Your Ladyship's Court, the Petitioner cites the *dicta* by Bhagawati J in *State of Rajasthan v Union of India, AIR 1977 SC 1361, 1413;*

> **"…. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. In deed, it would be its constitutional obligation to do so …. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution …. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the Rule of Law …."**

c) Your Ladyships' Court in S.C. FR No. 431/2001 has held thus;

> **"It is now firmly established that all powers and discretions conferred upon public authorities and functionaries are held upon trust for the public, to be used reasonably, in good faith, and upon lawful and relevant grounds of public interest; that they are not unfettered, absolute or unreviewable; and that the legality and propriety of their exercise must be judged by reference to the purposes for which they were conferred"**

and held that – 'Your Ladyships' Court **did have jurisdiction** to consider whether a Proclamation and the Referendum Proposal was in conformity with the Constitution ….' *(Emphasis added)*

d) In the context of the advent of the Government into commercial business, the following citations from Judgements of Lord Denning MR are cited,. *(1977) 1 All ER @ 892*

> **"If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the disputes concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our court, there is no ground for granting immunity" – Rahimtoola v Nizam of Hyderabad**

> **"….. a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market, or if it has a state department which charter ships on the Baltic Exchange it thereby enters into the market places of the world, and international comity requires that it should abide by the rules of the market" – Thai–Europe Tapioca Service Ltd. v Government of Pakistan "**

e) In SC Appeals 33 & 34 of 1992 Your Ladyships' Court, *inter-alia*, ***succinctly*** pointed out – *viz* (CLR *(Comm) 1992 @ 636*)

> "it could not entirely be a matter of indifference to the Government ….."

The foregoing well and truly demonstrated the true independence of the judiciary, *as a separate organ of the State*, and its right to state that - '***the Government can do no wrong'***

f) On assumption of Office, former Chief Justice J.A.N. De Silva, in his *Ceremonial Address,* though not a Buddhist, *adverted* to the following *Dhammapada*.

> "Not by passing arbitrary judgments does a man become just; a wise man is he who investigates both right and wrong"

> "He who does not judge others arbitrarily, but passes judgment impartially according to the truth, that sagacious man is a guardian of law and is called just"

71. a) The Petitioner has not invoked the jurisdiction of Your Lordships' Court on this matter except SC (SD) 2/2011 and that in the case of HDL certain Cases SC (Spl) LA Nos. 49 & 114/96, which had been concluded and SC Appeal Nos. 99-103/99 which have been pending before Your Ladyship's Court including SC Leave to Appeal Nos. 32/2001 and 33/2001 in relation to D.C. Colombo Cases Nos. 21819/MR and 19849/MR against the 4th Respondent. Which have been laid by due to the Winding-up Application D.C. Colombo Case No. 217/CO.

b) The Petitioner respectfully reserve the right to tender any further requisite documents to Your Ladyships' Court as may be necessary

72. The Affidavit of the Petitioner is annexed hereto in support of the averments herein contained.

WHEREFORE the Petitioner respectfully prays that Your Ladyship's Court be pleased to:

a) issue Notice on the Respondents

b) grant Leave to Proceed with this Application in the first instance

c) make Order declaring that the fundamental rights of the Petitioner and the citizens of Sri Lanka enshrined and guaranteed in Articles 12(1) and 12(2) of the Constitution have been infringed

d) call for the examination any one or more of the following records, should the Supreme Court so deem necessary to adjudicate upon this matter

  h) Record in D.C. Colombo Case No. 217/CO
  ii) Records of the Departments of the Legal Draftsman
  iii) Records from the Criminal Investigation Department
  iv) Record in CA (Writ) Application No. 1661/2003
  v) Records from the Attorney General's Department

e) make Order declaring that a Determination by the Supreme Court, on a Bill referred to the Supreme Court, as an 'Urgent Bill' under Article 122 of the Constitution, is specifically governed by the stipulations in Article 123(3) of the Constitution

f) make Order declaring that the test or threshold for a Bill endorsed as an 'Urgent Bill' in terms of Article 122 of the Constitution to be consistent with the Constitution, is as to whether a doubt is entertained by the Supreme Court, that the Bill or any provision thereof is inconsistent with the Constitution

g) make Order declaring that a Bill or any provision of a Bill, endorsed as an 'Urgent Bill' under Article 122 of the Constitution, shall be deemed to have been determined to be inconsistent with the Constitution, if the Supreme Court entertains a doubt, as to whether the Bill or any provision thereof is inconsistent with the Constitution, in terms of Article 123(3) of the Constitution.

h) review and re-examine the Determination **("X6(a)")** made by the Supreme Court under Article 123 of the Constitution on the Bill marked **("X6(b)")** referred to the Supreme Court under Article 122 of the Constitution, as an 'Urgent Bill', and consider, as to whether the said Determination is in conformity with and/or *ultra-vires* the stipulations in Article 123(3) of the Constitution

i) make Order rectifying the said Determination **("X6(a)")** made by the Supreme Court, as a *per-incuriam* Determination, should the Supreme Court, after such review and re-examination, deems the said Determination to be not in conformity with and/or *ultra-vires* the stipulations in Article 123(3) of the Constitution

j) make Order directing that the 9th Respondent, Speaker of Parliament, be notified of any rectification of Determination **("X6(a)")** made by the Supreme Court, should the Supreme Court, after a review and re-examination thereof, make any such rectifications thereto, as a *per-incuriam* Determination

k) make Order declaring that the 9th Respondent, Speaker of Parliament, in terms of Article 82(3) of the Constitution, read with Articles 82(1) and 82(2) of the Constitution, ought not have proceeded with the Bill titled "Town & Country Planning Amendment" on which the Supreme Court made a Determination **("X8(a)")** in SC (SD) No. 3/2011, Determining the said Bill to be inconsistent with the Constitution.

l) make Order declaring that the 9th Respondent, Speaker of Parliament, in terms of Article 82(3), read with Articles 82(1) and 82(2) of the Constitution, ought not have proceeded with the Bill **("X6(b)")** should the Supreme Court rectify the Determination **("X6(a)"),** after a review and examination thereof, as a *per-incuriam* Determination.

m) make Order declaring that as per Article 84(3) of the Constitution, read with other Sub-Articles of Article 84 of the Constitution, that a Bill when enacted into law, shall not, and shall not be deemed to, amend, repeal or replace the Constitution or any provision thereof, and shall not be so interpreted or construed, and may thereafter be repealed by a majority of the votes of the Members present and voting

n) make Order declaring that the 9th Respondent, Speaker of Parliament, had failed to respect, secure and advance the fundamental rights of the Petitioner and the citizens of Sri Lanka, in terms of Article 4(d) of the Constitution, notwithstanding Petitioner's Letter dated 8.11.2011 **("X10")**

o) make Order declaring that the 7th Respondent, Minister of Justice, Rauf Hakeem and/or the 8th Respondent, Secretary, Ministry of Justice, Suhada Gamalath had permitted the functions of the respective Departments coming under their Ministry, to be usurped and/or subverted

p) make Order declaring that the 3rd Respondent, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera and/or the 6th Respondent, former Attorney General, Mohan Peiris, P.C., among others, had misled the 2nd Respondent, Minister of Economic Development, Basil Rajapaksa, to include Hotel Developers (Lanka) PLC under Schedule 1 to the Bill **("X6(b)"),** without the 2nd Respondent, Minister of Economic Development having been correctly apprised of the totality of the facts pertaining to Hotel Developers (Lanka) PLC, and regardless of the Letter dated 10.5.2011 **(part of "X36")** addressed to Hotel Developers (Lanka) PLC by the Treasury **affording Hotel Developers (Lanka) PLC 2 years time to re-pay the debts to the Government (**i.e. **by May 2013)**.

q) make Order declaring that the Supreme Court had not been correctly apprised of the totality of the facts pertaining to Hotel Developers (Lanka) PLC, at the Hearing into SC (SD) No. 2/2011

r) make Order declaring that 3rd Respondent, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera and the former Attorney Generals, 5th Respondent, C.R. de Silva P.C., and 6th Respondent, Mohan Peiris, P.C., had caused and stand responsible for the protracted litigation of Hotel Developers (Lanka) PLC, by opposing the Petitioner's Winding-up Application in D.C. Colombo Case No. 217/CO, made 5 years back on 17.11.2006 to wind-up Hotel Developers (Lanka) PLC.

s) make Order declaring that the former Attorney General, 5th Respondent, C.R. de Silva P.C., had failed and neglected to cause warranted criminal investigations to be carried out into the fraud perpetrated on Hotel Developers (Lanka) PLC and the Government, notwithstanding the findings thereon in the Judgment dated 2.12.1992 of the Supreme Court in SC (Appeal) Nos. 33 & 34/1992, and regardless of the findings after investigations by the CID and charges framed against certain persons by a Special Presidential Commission, assisted by the Solicitor General.

t) make Order declaring that 3rd Respondent, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera and the former Attorney Generals, 5th Respondent, C.R. de Silva P.C., and 6th Respondent, Mohan Peiris, P.C., by opposing the Petitioner's Winding-up Application in D.C. Colombo Case No. 217/CO, made 5 years back on 17.11.2006 to wind-up Hotel Developers (Lanka) PLC, had acted in contravention of the mandatory provisions of the Companies Act No. 7 of 2007, which came into force on 3.5.2007

u) make Order declaring that the 3rd Respondent Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera had misled and caused the 1st Respondent, Minister of Finance, Mahinda Rajapaksa to submit Cabinet Memorandum dated 21.1.2007 **("X34")** and which was approved by the Cabinet on 26.1.2007**("X34"),** to oppose the winding-up of Hotel Developers (Lanka) PLC, knowingly supressing the fact that the 3rd Respondent, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, himself, had previously caused Minister of Finance, Sarath Amunugama to submit Cabinet Memorandum dated 5.10.2005 **("X31")**, which had been approved by the Cabinet on 13.10.2005 **("X31")**, approving the Cabinet Appointed Negotiating Committee recommendations to restructure Hotel Developers (Lanka) PLC, and failing which, to wind-up Hotel Developers (Lanka) PLC **("X30")**; thereby causing the 1st Respondent, Minister of Finance and the Cabinet of Ministers to have acted to continue to cause the contravention of the provisions of the Companies Act No. 7 of 2007, which came into force on 3.5.2007.

v) make Order declaring that the Directors of Hotel Developers (Lanka) PLC, who held such Office after 3.5.2007 had acted in contravention of the mandatory provisions of the Companies Act No. 7 of 2007, by opposing the Petitioner's Winding-up Application in D.C. Colombo Case No. 217/CO, made 5 years back on 17.11.2006 to wind-up Hotel Developers (Lanka) PLC

w) make Order declaring that the Directors of Hotel Developers (Lanka) PLC, who held such Office after 3.5.2007 are not fit and proper persons to hold Office, as Directors of Hotel Developers (Lanka) PLC or any other public company, for having continuously contravened for several years the provisions of the Companies Act No. 7 of 2007

x) make Order declaring that the Directors of Hotel Developers (Lanka) PLC, who held such Office after 3.5.2007 stand personally liable for the debts incurred by Hotel Developers (Lanka) PLC, in excess of its Assets, in terms of Sections 219 and 375 of the Companies Act No. 7 of 2007, in this instance, such debts being to the Government, which is the public

y) make Order declaring that the Directors of Hotel Developers (Lanka) PLC, who held such Office after 3.5.2007 stand personally liable for any interest paid and/or agreed to be paid by Hotel Developers (Lanka) PLC in excess of its Assets, in terms of Section 364, read with Section 277 of the Companies Act No. 7 of 2007, in this instance such interest mainly being to the Government, which is the public

z) make Order declaring that the Attorney General under Section 382 of the Companies Act No. 7 of 2007 is empowered to criminally prosecute Directors of Companies, and directing the Attorney General to consider, whether Directors of Hotel Developers (Lanka) PLC, who held Office after 3.5.2007 are liable to be so prosecuted, and if so, to so prosecute.

aa) make Order declaring that it was the Government, acting through several Secretaries to the Ministry of Finance & Secretaries to the Treasury and Attorney Generals, and the 3rd Respondent, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, who had prevailed upon the Petitioner to enter into terms of Settlement in D.C. Colombo Cases Nos. 3155/Spl and 3231/Spl with Mitsui & Co. Ltd., and Taisei Corporation, together with the Government and Hotel Developers (Lanka) PLC, as per Settlement Agreements **("X17")** & Addendum **("X23")**

bb) make Order declaring that Hotel Developers (Lanka) PLC, by reason of the interim injunctions obtained by the Petitioner in D.C. Colombo Case No. 3155/Spl and affirmed by the Supreme Court, had adequate funds accumulated with it to have completed the construction of the 3rd Tower, which had been provided for, increasing the number of Hotel Rooms, and thereby enhancing the profitability and debt-service ability of Hotel Developers (Lanka) PLC, to have been able to thereafter settle and pay Mitsui & Co. Ltd., and Taisei Corporation, from the own funds of Hotel Developers (Lanka) PLC, without the Government having to advance monies under the State Guarantees for such purpose, using public funds

cc) make order declaring that 3rd Respondent, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, was primarily responsible for causing Hotel Developers (Lanka) PLC to pay Mitsui & Co. Ltd., and Taisei Corporation from funds, which had accumulated in Hotel Developers (Lanka) PLC, by reason of the interim injunctions obtained by the Petitioner in D.C. Colombo Case No. 3155/Spl, and affirmed by the Supreme Court, restraining any such payments being made to them, by prevailing upon the Petitioner to enter into Addendum **("X23")**, and thereby causing cognisable loss and jeopardy to Hotel Developers (Lanka) PLC and the Government, which is the public

dd) make Order declaring that the 3rd Respondent, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, is not a fit and proper person to hold Office, as a Secretary, Ministry of Finance & Secretary to the Treasury and/or any other Public Office, directly or indirectly

ee) make Order declaring that cognisable loss and jeopardy have been caused to Hotel Developers (Lanka) PLC and the Government, which is the public, by the 4th Respondent, Minister of External Affairs, G.L. Peiris, as the former Minister of Justice & Deputy Minister of Finance, wrongfully and unlawfully suspending the Settlement Agreements **("X17"),** entered into by the Petitioner at the behest of the Government, and by such suspension frustrating the further restructuring of Hotel Developers (Lanka) PLC, which had been specifically provided for in the said Settlement Agreements, as had been insisted upon by the Petitioner

ff) make Order declaring that the 4th Respondent, Minister of External Affairs, G.L. Peiris, is not a fit and proper person to hold the Office, as a Minister of Cabinet of the Government, and/or any other Public Office, directly or indirectly

gg) make Order declaring that the Order made by the Court of Appeal in CA Revision No. 721/98 and CA (LA) No. 177/98, taken together with other connected Applications, directing that payments be made to Mitsui & Co. Ltd., and Taisei Corporation, as per the Settlement Agreements **("X17"),** whilst at the same time restraining all other Conditions of the said Settlement Agreements, had caused cognisable loss and jeopardy to Hotel Developers (Lanka) PLC and the Government, which is the public; and that this had resulted in the present financial predicament of Hotel Developers (Lanka) PLC, with considerable debts to the Government, which is the public.

hh) make Order declaring that the write-off of Jap.Yen. 17,586 Mn., equivalent to **SL Rs. 10,200 Mn**., obtained by the Petitioner in June 1995, amidst pressures and obstructions, solely through his sustained efforts, from Mitsui & Co. Ltd., and Taisei Corporation on their stated Claims from Hotel Developers (Lanka) PLC and from the Government, under the State Guarantees amounted as at November 2011 to a value of over **SL Rs. 73,500 Mn**., at **12% p.a. Interest**, and this had been of immense value and benefit to Hotel Developers (Lanka) PLC and the Government.

ii) make Order declaring that the Government had advanced to Hotel Developers (Lanka) PLC **SL Rs. 4,436 Mn.,** between 1997 and 2010, which together with simple average **13% p.a**. Interest thereon, had accumulated by May 2011 to **SL Rs. 12,098 Mn**., and that the Government had provided to Hotel Developers (Lanka) PLC **Seven (7) Acres of Land** in the City of Colombo, reckoned to be of a value as at November 2011 around Rs. 10 Mn., per perch, amounting to a total value of **SL Rs. 11,200 Mn.,** thereby making the Government's total contribution to Hotel Developers (Lanka) PLC to be around **SL Rs. 23,500 Mn**.

jj) make Order declaring that under and by virtue of the aforesaid contribution made by the Petitioner to Hotel Developers (Lanka) PLC, **being well and truly of a far greater value**, than the contribution made by the Government to Hotel Developers (Lanka) PLC, that the Petitioner stood and stands, as a greater Stakeholder of Hotel Developers (Lanka) PLC, than the Government

kk) make Order declaring that Hotel Developers (Lanka) PLC, being governed by the Companies Act No. 7 of 2007, ought be restructured, taking into cognisance the suggestion made by the Supreme Court on 16.1.2006 to take into reckoning the interests of all Stakeholders, which was agreed to by he 3rd Respondent, Secretary Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera **("X32(a)")**, and developed in terms of the ordinary and regular law *viz* the provisions of the Companies Act No. 7 of 2007, under the supervision of the judiciary, as per the Application No. 52/2011/CO made to the Commercial High Court **("X38"),** and not secretly away from the public glare, behind closed doors, by non-Stakeholders

ll) make Order declaring that the former Attorney Generals, 5th Respondent, C.R. de Silva, P.C., and 6th Respondent, Mohan Peiris, P.C., **regardless of the public interest**, had failed and neglected to have the provisions of the Inland Revenue Act enforced, to protect public revenue and uphold the 'rule of law', in Petitioner's Court of Appeal (Writ) Application No. 1661/2003**("X9")**

mm) grant such other and further reliefs as Your Ladyship's' Court shall seem meet

Petitioner

G

<u>SC (FR) APPLICATION NO. 534/2011</u>

SUBMISSIONS WARRANTING SC SPECIAL DETERMINATION NO. 2/2011 OF 24.10.2011 TO BE RESCINDED OR VARIED AS *PER-INCURIAM* <u>*ULTRA-VIRES* THE CONSTITUTION</u>

On the persuasive submissions by the Queens Counsel appearing for Senator Pinochet, contending that, although <u>there was no exact precedent</u>, the House of Lords must have jurisdiction to set aside its own Orders, where they have been improperly made, since there is no other Court, which could correct such impropriety, another Committee of the House of Lords entertained the Petition of Appeal by Senator Pinochet for review their own Judgment, **<u>whilst unanimously holding that they have jurisdiction to rescind or vary an earlier order to correct an injustice caused</u>** – *viz*: *dicta* of Lord Browne-Wilkinson, with the other Lords *agreeing: (Copies of Judgments attached marked **"A"**, with relevant paragraphs highlighted, with emphasis added)*

> "**Jurisdiction**
>
> As I have said, **<u>the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House</u>. In my judgment, <u>that concession was rightly made both in principle and on authority</u>**.
>
> In principle it must be that your Lordships, **<u>as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House</u>. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its <u>inherent jurisdiction remains unfettered</u>.**
>
> However, it should be made clear that the House will not reopen any appeal **<u>save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure</u>**. Where an order has been made by the House in a particular case **there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong**. "

By Judgment of 17.12.1998, with reasons given on 15.1.1999, the new Committee of the House of Lords, set aside the previous Judgment of 25.11.1998 of the House of Lords, directing a re-hearing by a differently constituted Committee, without any of their Lords, who had heard the matter.

<u>THE FOLLOWING SUBMISSIONS ARE MOST RESPECTFULLY MADE TO DEMONSTRATE THAT THE SC SPECIAL DETERMINATION NO. 2/2001 IS *PER-INCURIAM ULTRA-VIRES* THE CONSTITUTION</u>.

For easy reference the Special Determination 2/2011 is re-produced below, with the relevant Submissions, respectively interpolated in **Blue Colour** in a different font.

<u>QUOTE:</u>

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

A Bill titled **"An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets"**.

In the matter of application under Article 122(1) of the Constitution.

Present: Dr. Shirani A. Bandaranayake - Chief Justice
P.A. Ratnayake, PC - Judge of the Supreme Court
Chandra Ekanayake - Judge of the Supreme Court

S.C. Special Determination
No. 02/2011

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

Counsel: Janak de Silva DSG with Nerin Pulle SSC for
Hon. The Attorney-General.

The Court assembled at 11.30 a.m. on 24th, October 2011.

A Bill bearing the title "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets" was referred to this Court by His Excellency the President, in terms of Article 122(1)b of the Constitution for a special determination as to whether the Bill or any Provision thereof is inconsistent with the Constitution. The Bill bears an endorsement of the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers it is urgent in the national interest.

Submissions

Article 123(3) of the Constitution governs the aforesaid Bill, which had been endorsed by the Cabinet of Ministers in terms of Article 122 of the Constitution **as urgent in the national interest.** Article 123(3) is re-produced below:

> "123.(3) In the case of a Bill endorsed as provided in Article 122, **if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution,** and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article."

Thus and thereby **if a doubt is entertained by the Supreme Court** as to whether the Bill or any provision thereof is inconsistent with the Constitution, the Constitution mandates that the Bill or such provision of the Bill **shall be deemed to have been determined as inconsistent with the Constitution**.

As per Section 9 of the Bill defining Underutilized Assets, it is noted that the Bill was to provide for the vesting in the State Underutilized Assets, which included two categories of Land, both State and privately owned. Such Lands listed under Schedule II to the Bill were accordingly to be vested in the State, as per the second recital to the Bill.

As so stated, Land has to be vested in the Republic i.e. the State, and such Land is referred to as State Land *(formerly Crown Land).*

In terms of Article 33(d) of the Constitution Lands vested in the Republic could be alienated upon the sealing of Instruments using the Public Seal, with the President of the Republic vested with constitutional power to do so.

Therefore, the vesting of Land in a public functionary to be held on behalf of the State is constitutionally barred. Hence, Land could not be vested in the Secretary to the Treasury, who is also not a legal person, as provided for in Section 2 of the Bill.

The Bill pertained to 37 Enterprises with 36 Enterprises listed in Schedule II to the Bill, scheduling 77 allotments of Lands of **36 Enterprises** respectively situate in 7 different Provinces, and which Lands had been vested as per Section 2 of the Bill in the Secretary to the Treasury on behalf of the State. **Hence the Bill essentially and mainly dealt with Lands;** except for one sole Enterprise listed under Schedule I to the Bill described as 'Underperforming Enterprise'.

Under Section 2 of the Bill 'Underutilized Assets' specified in Schedule II of the Bill stand vested in the Secretary to the Treasury for an on behalf of the Government of Sri Lanka. In Section 9 of the Bill 'Underutilized Asset' is defined to include two categories of Lands, government owned and privately owned. 'Underutilized Assets' in Schedule II to the Bill lists 77 allotments of Lands of 36 Enterprises situated in 7 different Provinces in the island.

Section 3(2)(b) of the Bill empowers a Competent Authority to take possession of 'Underutilized Asset', which is defined to '*include any building and any fixtures or fittings, which are part of such building and any building belonging to and appurtenant thereto, or treated as part and parcel thereof'*. Whereas under Section 3(2)(a) of the Bill a Competent Authority is empowered to take possession of **movable** and immovable property of an Underperforming Enterprise. Therefore, admittedly **movable** property **has been excluded from being taken possession of by a Competent Authority**, in the case of the 36 Enterprises referred to as 'Underutilized Assets'.

Hence, plant, machinery, vehicles and other movable assets, which would include any inventory of stocks, etc., of the 36 Enterprises referred to as 'Underutilized Assets' could not be taken over by a Competent Authority, thereby completely frustrating any ongoing operational activity/ies of such Enterprise, and **thereby causing complete jeopardy to any ongoing business/es**. *This tantamounts to harsh, oppressive, unconscionable and draconian law.*

There is regular and ordinary procedure for the acquisition of Land by the State for public purpose, more particularly in terms of the **Land Acquisition Act,** where in conformity with the principles of natural justice the parties affected are put on notice prior to such acquisition affording them right of access to justice in terms of Article 105, read with Article 4 of the Constitution

In SC (SD) Nos. 22 & 23/2003 wherein the Petitioner intervened and made submissions and a 5 Judge Bench of the Supreme Court struck down the Amendments to the 'Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990', and 'Debt Recovery (Special provisions) Act No. 2 of 1990', citing the *dicta* of several Judgments in the Indian Supreme Court, *inter-alia,* determined that "**the principle therefore is that the Court will strike down *harsh, oppressive or unconscionable law* prescribing a procedure other than the ordinary procedure**".

The objective of the Bill is **to vest in the State identified** Underperforming Enterprises and Underutilized Assets in order to ensure their effective administration, management or their revival through alternate methods of utilization. This is carried out in the national interest and the: intention is to utilize the said assets through restructuring and entering into management contracts. (*Emphasis added*)

Submissions

The word **identified** admits that the said **Underperforming Enterprises** listed under Schedule I to the Bill (*however in this instance only one Enterprise*) and **Underutilized Assets** (*in this instance including State Lands and Private Lands*) listed under 36 Enterprises in Schedule II to the Bill, had been **pre-determined** and/or selected unilaterally at will and pleasure by some undisclosed authority/ies without any known transparent process of evaluation for such **identification**.

The objective is stated to **vest in the State** the Underperforming Enterprises and such Underutilized Assets, including Land.

'The Government had been of the view that it is an inherent obligation on its part to ensure its People maximum benefits from the limited resources that are available' by '*securing and protecting as effectively as possible the social order in which social, economic and political justice would prevail'*. Having the basic welfare of the people in the country in mind, the Government had divested land and granted extensive concessions to promote economic activities with the objective of ensuring maximum benefits to the People. This has been carried out in the national interest. **However it has been identified** that there are Underutilized Assets and Underperforming Enterprises that would not permit to perform the said obligation on the part of the Government to ensure its People the maximum benefits from its limited resources that are available. (*Emphasis added*)

Submissions

If the Government had been of the view that it is an inherent obligation on its part to ensure its people maximum benefits from the limited resources that are available, if that be the case, then it was obligatory on its part to have curtailed the giant size extravagantly costly Cabinet of Ministers, huge loss making egoistic

ventures, grandeur schemes and ostentatious wasteful expenditure, and unjustifiable perquisites, such as super luxury vehicles for those wielding power, and ensure the efficacious administration of revenue collection – (*Eg: vide para 21 of the Petition and the documents marked therewith*)

If securing and protecting as effectively as possible the **social order** in which social, economic and **political justice would prevail**, then the Bill, itself, could not have been introduced in such manner, in that, it is violative of social order and political justice *and inimical to the rule of law.*

Ironically on the contrary, the Government has failed and neglected to enforce the rule of law against those miscreants, who had misappropriated public property, as per the findings of the Supreme Court in SC (FR) 158/2007 (SLIC Case), SC (FR) 209/2007 (LMSL Case) and SC (FR) 352/2008 (Water's Edge Case).

Accordingly the Bill in question would make provision for the **vesting in the State**, two types of assets known as Underutilized Assets or Underperforming Enterprises. This would be in conformity of the Directive Principles of State Policy, referred to in Article 27 and specifically in Article 27(2) b and 27(2) d of the Constitution. These two Articles refer to the following objectives of the State, based on the Directive Principles of State Policy. (*Emphasis added*)

"27(2) b - the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life.

27(2) d - the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and co-ordinating such public and private economic activity towards social objectives and the public weal."

Submissions

The Directive Principles of State Policy ought be taken in its **entirety** and not in isolation of just two Sub-Articles thereof.

Would not the provisions of the Bill and the process of **pre-identification** by unilateral selection *devoid of transparent process*, and **denying natural justice** to those affected to have been heard, be not in conformity with the objectives of Sub-Articles 27(2)(a), 27(2)(f) and 27(4) cited below and also **harsh, oppressive and unconscionable** ?

"27.(2) **The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include**-

(a) **the full realization of the fundamental rights and freedoms of all persons**; **(***Emphasis added***)**

(f) **the establishment of a just social order in which the means of production, distribution and exchange <u>are not concentrated and centralised in the State, State agencies or in the hands of a privileged few</u>, but are dispersed among, and owned by, all the People of Sri Lanka;** (*Emphasis added)*

27(4) **<u>The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People</u> by decentralising the administration and <u>by affording all possible opportunities to the People to participate at every level in national life and in government</u>.** (*Emphasis added)*

Sub-Article 28 (a), (d), (e) stipulates thus:

"28. **The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka**-(*Emphasis added)*

(a) **<u>to uphold and defend the Constitution and the law</u>**;

(d) **to preserve and protect public property, and to combat misuse and waste of public property**;

(e) **<u>to respect the rights and freedoms of others</u>**; and

On an examination of the objectives of the Bill, it is **<u>clearly seen</u>** that the said Bill deals with Underutilized Assets as well as Underperforming Enterprises. (*Emphasis added*)

<u>Submissions</u>

The objectives of the Bill was '*mere say so*'. There is no record that evaluated evidence in such regard had been placed before Court to establish that the Assets were underutilized or the Enterprise were underperforming.

The Underutilized Assets deal with two categories of land.

The first category refers to State land alienated within a period of twenty years (20) prior to the date of the coming into operation of this Act, to a person for the purpose of generating employment, foreign exchange earnings or savings or economic activities beneficial to the public, but where such benefits have not accrued and therefore being prejudiced to the national economy and public interest.

The second category deals with land owned by, a person who had been granted within a period of twenty years (20) prior to the date of coming into operation of this Act, either tax incentives under any tax related law, incentives under the Board of Investment law or Regulations framed there under or any Government Guarantees on the basis that the related operations proposed to be carried out by such person will result in generating employment, foreign exchange earnings or savings or economic activities beneficed to the public, but where such benefits as aforesaid have not accrued and therefore being prejudicial to the national economy and public interest.

Submissions

> State Land would be governed by the constitutional provisions and laws in that behalf.
>
> Land owned by persons would be subject to the Fundamental Rights enshrined in the Constitution and Article 17 of the UN Universal Declaration of Human Rights, whereby '**everyone has the right own property alone, as well as in association with others, and no one shall be arbitrarily deprived of his property**'.
>
> In any case, parties affected had a right to be heard and access to justice in terms of Article 105, read with Article 4, of the Constitution, which had been denied.
>
> Ironically, what in fact is prejudicial to the national economy and public interest is such ad hoc unilateral listings, devoid of *intelligible* process of selection and denial of natural justice. In contrast thereto is the inaction, *vis-à-vis,* non-enforcement of statutorily mandated revenue enforcement (*vide para 21 and Documents "X9" of the Petition)*
>
> Furthermore, inaction, *vis-à-vis*, the enforcement of the rule of law against the miscreants based upon the findings of the Supreme Court in SC (FR) Applications Nos. 158/2007 (*re* – SLIC), 209/2007 (*re* – LMSL) and 352/2007 (*re* - Water's Edge) and on the other hand further conferring public appointments and granting State Contracts to such parties, would only be prejudicial to the national economy and public interest.

An Underperforming Enterprises on the other hand would mean a legal entity such as a company, institution or body established by or under any written Law for the time being in force, in which the Government owns shares and where the Government has paid contingent liabilities of such Enterprise and **is engaged in protracted litigation regarding such Enterprise**, which is prejudicial to the national economy and public interest. (*Emphasis added*)

Submissions

> The definition of an Underperforming Enterprise had been "tailor-made" attempting to target Hotel Developers (Lanka) PLC (HDL), and this is established by the fact that HDL is the **only enterprise** named under Schedule I titled - 'Underperforming Enterprises' to the Bill.
>
> Apart from mere 'say so', the totality of the facts pertaining to HDL, as it ought to have been, had not been placed before the Supreme Court, and the Supreme Court had been fatally misled even by the above definition, as morefully set out hereinbelow and in the Petition (***vide paras 27 to 69 of the Petition***).

The above description shows that for the purpose of this Bill, Assets and Enterprises had been classified and **a question arose** as to whether such classification would make the said provisions inconsistent with Article 12(1) of the Constitution. (*Emphasis added*)

Article 12(1) of the Constitution, which refers to the right to equality, clearly states that **all persons are equal before the law** and **are entitled to the equal protection of the law**. (*Emphasis added*)

Submissions

> The Supreme Court in stating as aforesaid in the Special Determination that '**a question arose'** has undoubtedly admitted that it had, in fact, entertained a doubt specifically as to whether the provisions of the Bill were inconsistent with Article 12(1) of the Constitution, pointing out that Article 12(1) **guarantees all persons to be equal before the law** and **to be entitled to equal protection of the law**.
>
> Since the above **entertainment by the Supreme Court of a doubt, whether provisions of the Bill were inconsistent with the Constitution raising the aforesaid question** on a fundamental issue going to the very root and the substrum of the Bill, which was before the Supreme Court, as mandated by Article 123(3) of the Constitution governing the said Bill, submitted under Article 122 of the Constitution, **the entirety of the Bill in terms of Article 123(3) of the Constitution stood mandated to have been deemed to have been determined to be inconsistent with the Constitution** *viz* - Article 123(3):
>
> "123.(3) In the case of a Bill endorsed as provided in Article 122, **if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution,** and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article."

Equality, which is a concept based on the firm foundation of the Rule of Law, does not forbid reasonable classification. A classification, which is not arbitrary, could be regarded as valid and permissible and for this purpose it would be necessary for such classification to be founded upon reasonable differentia. As has been stated in the well known decision of **Ram Krishna Dalmia v Justice Tendolkar (AIR (1958) SC 538)** for a classification to be valid, there are two conditions that should be satisfied, which could be stipulated as follows:

1. that the classification must be founded on an **intelligible differentia** which distinguish persons or things that are grouped together from others **who are left out of that group**, and (*Emphasis added*)

2. that the differentia must bear a reasonable, or a rational relation to the objects and effects sought to be achieved by the Statute in question.

Considering the aforementioned conditions, it is abundantly clear as stated in **Budhan Chowdhary v State of Bihar (AIR (1955) SC 191)** what is necessary is that there should be a nexus between the basis of classification and the object of the enactment that carries such classification.

In the context of the present Bill the classification is based on the differentiation made with regard to the type of land that would come into question. Such land is either State land which had been given with a particular objective to be achieved, which has not been realized or is private land and certain exemptions from tax and other incentives under written law has been given with an objective to be achieved, which had failed.

In **K. Thimmappa v Chairman, Central Board of Directors** (AIR (2001) SC 467) discussing the concept of classification in terms of the right to equality, the Indian Supreme Court had observed that,

> "When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not *per se* amount to discrimination within the inhibition of the equal protection clause. **To attract the operation of the clause it is necessary to show that the selection of differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislature has in view**." (*Emphasis added)*

In **Union of India v M.V. Valliappan** (AIR (1999) SC 2526, the Indian Supreme Court had specifically stated thus:

> "It is settled law that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution."

Considering all the aforementioned it is evident that there is a clear rational nexus between the object sought to be achieved by the Bill in question and the differentiation it has made, and in such instance there cannot be a violation of the provisions contained in Article 12(1) of the Constitution.

Submissions

> In conformity with the dicta of Article 123(3) of the Constitution, the Supreme Court having entertained such **fundamental doubt**, having **raised a question** was thereupon debarred or functus from endeavouring to address and/or answer such question raised, to **dispel such doubt which had been entertained**.
>
> The very entertainment of the doubt by Supreme Court by having raised such question rendered the Bill to be inconsistent in terms of the Constitution, as mandated by Article 123(3) of the Constitution.
>
> Hence, the foregoing answering of the question raised is not permissible in terms of Article 123(3) of the Constitution and is *ultra-vires* the mandate in Article 123(3) of the Constitution.
>
> Without any prejudice to the foregoing, it is respectfully submitted that there had been no *intelligible differentia*, whatsoever, or in any manner howsoever in the **pre-identified** unilaterally selected Lists of Enterprises given in Schedules I and II to the Bill.

On the contrary, Schedules I and II to the Bill had merely listed unilaterally and arbitrarily, *ad-hominem* pre-identified and/or targeted one so-called Enterprise and 36 so called Underutilized Assets, without any transparent intelligible process for making such differentia.

There is no record that facts, data or evaluation basis had been adduced before the Supreme Court to establish such **intelligible differentia**.

Ironically the so-called intelligible differentia had been tailor-made attempting to target HDL purporting to be an Underperforming Enterprise and not *vice-versa* as contemplated by the *dicta* of the aforesaid Judgments cited.

On the contrary, a proper transparent evaluation process **with rational intelligible differentia** would identified Underperforming Enterprises and Underutilized Assets; **whereby there being patent discrimination**. (*Vide para 6 and document marked "X2" of the Petition*).

Learned Deputy Solicitor General submitted that the classification specified in the Bill is permissible in terms of Article 12(1) of the Constitution. **He further contended that even if there had been any inconsistency**, the restriction placed in by the Provisions of the Bill would be permitted in terms of Article 15(7) of the Constitution. (*Emphasis added*)

Article 15 of the Constitution refers to the restrictions on fundamental rights and Article 15(7) specifically deals with such restrictions regarding the exercise and operation of fundamental rights which fall within Articles 12, 13(1), 13(2) and 14 of the Constitution. The said Article 15(7) of the Constitution is as follows:

> "The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be 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**" …… (*Emphasis added*).

Since the present Bill contains provisions in meeting the 'just requirements of the general welfare of a **democratic society'**, the restrictions, if any, envisaged by the Bill could easily come within the provisions of the said Article 15(7) of the Constitution. However there is no necessity to go into the applicability of Article 15(7) as there is no inconsistency with Article 12(l) of the Constitution. (*Emphasis added*).

Submissions

The foregoing submissions by the Learned Deputy Solicitor General only confirms that a doubt, in fact, had been entertained on the inconsistency with Article 12(1) of the Constitution, with the Deputy Solicitor General submitting that **even if there is such inconsistency** then the provisions of the Bill could easily come within the provisions of Article 15(7) of the Constitution; which is not conceded, in that, one cannot take refuge *'as meeting the just requirements of the general welfare of a **democratic society**'*, when the totality of the process and Bill had been **undemocratic**.

The **very entertainment by the Supreme Court of the foregoing doubt**, as demonstrated as aforesaid, in terms of Article 123(3) of the Constitution, constitutionally mandated that **the provisions of the Bill to have been deemed to have been determined to be inconsistent with the Constitution**.

Without prejudice to the foregoing, it demonstrated that in the instance of Sri Lanka Insurance and Lanka Marine Services in SC (FR) Applications Nos. 158/2007 and 209/2007, respectively, the Supreme Court annulled and reversed these perverse privatizations upholding public interest, **but only after an inter-partes inquiries**, that too, **raising the question, as to whether all relevant documents had been tendered before the Supreme Court**.

Also, in the instances of Sri Lanka Airlines and Shell Gas, negotiations were had with the respective parties concerned by the Government to reverse such perverse privatisations; **thereby well and truly demonstrating discrimination**.

Hence, the ad hoc unilateral *ex-parte ad-hominem* process contained in the Bill is discriminatory and violative of the provisions of Articles 12(1) of the Constitution guaranteeing equality and denying access to justice in terms of Article 105, read with Article 4, of the Constitution.

The process does not meet the just requirement of general welfare of democratic society, in that, the process is unjust, undemocratic and antithetic to the rule of law; and violative of the Constitution, and the UN Universal Declaration of Human Rights.

Relevant dicta from the Determinations of a 7 Judge Bench of the Supreme Court in October 2002 is given in para 9 of the Petition *viz*: (*Emphasis added*)

- **"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective - *(Cited from Indian Judgment)* "**

- ***"It had been firmly stated in several judgments of this Court that*** *'rule of law' is the basis of our Constitution* ***".***

- ***"A.V. Dicey in Law of the Constitution postulates that 'rule of law' which forms a fundamental principle of the Constitution has three meanings one of which is described as follows:-***

  'It means, in the first place, *the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative, or even of wide discretionary authority on the part of the government*. ***Englishmen are ruled by the law, and by the law alone …. ' "***

- **"The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution"**
- **"We have to give effect to this provision according to the solemn declaration made in terms of the Fourth Schedule to the Constitution to "uphold and defend the Constitution" "**

Learned Deputy Solicitor General stated that Underperforming Enterprises encompass situations where the Government is engaged in **protracted litigation**. It was submitted that having such litigation does not mean that judicial power would be exercised through the Bill, or there would be interference in the exercise of judicial power. (*Emphasis added*)

Learned Deputy Solicitor General drew our attention to the view expressed by **Sirimane, J in Tuckers Ltd v The Ceylon Mercantile Union** ((1970) 73 NLR 313) where it was stated that,

> "The first question that arises therefore is whether in the provisions of the impugned Act ... , there is a usurpation of judicial power by the legislature.
>
> In dealing with this question one must bear in mind that a Court should be slow to strike down an Act of Parliament unless there is a clear encroachment on the judicial sphere.
>
> In order to ascertain whether there has been such an encroachment one should I think look at the Act as a whole and not at a particular section isolated from other provisions of the Act. I am also of the view that in determining this question it is permissible to look at the object and the true purpose of the legislature in passing the Act."

Learned Deputy Solicitor General referred to the test which drew attention on the ability to enforce the decision, as at that-time, judicial power was based on the enforcement of the rights and liabilities of the parties (**Senadheera v The Bribery Commissioner** ((1961) 63 NLR 313)). This test was later rejected in **Piyadasa v The Bribery Commissioner** ((1962) 64 NLR 385) and **Jailabdeen v Danina Umma** ((1962) 64 NLR 419) where it had been held that the power of enforcement was not essential to judicial power.

It was also submitted that in **Queen v Liyanage** ((1962) 64 NLR 313) **Jailabdeen v Danina Umma (Supra) and Piyadasa v The Bribery Commissioner** (Supra) that our Courts had followed the approach taken by Griffith CJ in **Huddart Parker and Co. v Moorehead** ((1909) 8 CLR 330) where the judicial power had been interpreted as follows:

> "..... the words "judicial power" as used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property."

This position changed in **Kariapper v. Wijesinghe** ((1967) 70 NLR 49), where referring to the Griffith CJ's observations, the Privy Council had been of the view that,

> "It is unwise in the sphere of constitutional law to go beyond what is necessary for the determination of the case in hand and because the Board is of the opinion that the character of the Act is not that of an act of attainder or a bill of pains and penalties it is not necessary here to attribute a particular character to what has, as has already been seen, been described an "exercise of the judicial power of Parliament in a legislative form."

On the basis of the aforesaid it is apparent that the present Bill contains no provisions which would provide for the exercise of judicial Power or the interference in the exercise of judicial power in relation to Underperforming Enterprises.

Submissions

It would be very pertinent important and relevant to note that the authorities cited above by the Deputy Solicitor General had been authorities prior to the enactment of the 1978 Constitution, and before the interpretation thereof given by the Determinations in October 2002 of a 7 Judge Bench of the Supreme Court.

Though Schedule II heading to the Bill stipulated 'Underperforming **Enterprises'**, significantly **only one company** namely, Hotel Developers (Lanka) PLC (HDL) had been listed in Schedule I to the Bill. Hence, in truth and fact it was only one Enterprise and not **Enterprises**.

The aforesaid submissions by the Deputy Solicitor General only reinforces the fact that the Supreme Court in fact had **entertained a further doubt,** as to whether the provisions of the Bill tantamounted to the interference by the legislature in the exercise of judicial power and/or whether the legislature had alienated the judicial power, **which is an entrenched matter in the Constitution.**

The foregoing entertainment of such further doubt by the Supreme Court, as mandated by the provisions in Article 123(3) of the Constitution, **constitutionally the Bill was deemed to have been determined to be inconsistent with the Constitution**.

The foregoing submissions by the Deputy Solicitor General **demonstrates that the Supreme Court had entertained a doubt**, as to whether the **power of one organ of Government is being alienated and/or transferred and/or usurped by another organ of the Government, which is prohibited in terms of the interpretation of the 1978 Constitution**, **as per the Determinations of October 2002 by a 7 Judge Bench of the Supreme Court**, cited in the Petition vide para 10 thereof *viz*:

- ***"Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that*** *any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution".*

- ***"It necessarily follows that the balance that had been struck between the three organs of government in relation to the*** *power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained"'*

- *"The transfer of a power which attributed by the Constitution to one organ of government to another; or the relinquishment or removal of such power, would be an alienation of sovereignty inconsistent with Article 3 read with Article 4 of the Constitution"*

- *"The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People*. ***This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the 'trust" that is implicit in the conferment of power has been stated as follows:***

  'Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way with Parliament when conferring it is presumed to have intended" – (Administrative Law 8th Ed. 2000 – H.W.R. Wade and C.F. Forsyth p, 356) ' "

Without prejudice to the foregoing, it is submitted that the totality of the facts pertaining to Hotel Developers (Lanka) PLC (HDL) had not been placed before the Supreme Court, as morefully set out in the Petition – (***Vide paras 27 to 69 of the Petition***)

In fact, a Winding-up Petition had been filed by the Petitioner on 17th November 2006 in D.C. Colombo Case No. 217/CO, to wind-up HDL.

It is the Attorney General, who had opposed the same on the premise of the Secretary, Ministry of Finance, 3rd Respondent, having intimated to the Cabinet, through the 1st Respondent, Finance Minister, by Cabinet Paper of 21.1.2007 that if feasible, **to indicate to Court, as an option, the re-structuring of HDL, whilst opposing the winding-up** – (*vide para 60 and Documents marked "X34" of the Petition)*; having suppressed the decisions based on the previous Cabinet Paper of 11.7.2005 - (*vide para 56 and Documents "X31" of the Petition*), which had approved the winding-up of HDL, if a restructuring could not be effected.

Hence, judicial power which was being exercised in the matter of winding-up of HDL in D.C. Colombo Case No. 217/CO, and the subsequent Application in HC (WP) 52/2011/CO filed on 8.11.2011 under Part X of the Companies Act No. 7 of 2007 to **restructure HDL** (*vide para 69 and Documents "X38" of the Petition)* in the context of Letter dated 10.5.2011 (*vide para 62 and Documents marked "X36" of the Petition*), given by the Deputy Secretary to the Treasury, admittedly with the knowledge of the 3rd Respondent, **giving HDL 2 years' time to repay the monies advanced by the Government on behalf of the HDL**, whereas as morefully set out in the Petition, it was the Government and Officials of the Government, including the 3rd Respondent, **who had caused the present predicament of HDL**

Before the passing on 9.11.2011 of the impugned Bill by Parliament on the basis of this Special Determination made on 8.11.2011, the Petitioner, as he lawfully might **to re-structure HDL under ordinary and regular procedure**, through his Company, Consultants 21 Ltd., filed an Application No. HC (Civil) WP 52/2011/CO in the Commercial High Court under Part X of the Companies Act No. 7 of 2007 upon having received on 4.11.2011 the HDL Accounts for the Year ended 31.3.2010, and promptly on 8.11.2011 put the 9th Respondent, the Speaker of Parliament on notice thereof, **prior** to him proceeding with the Bill (*vide para 69 and Documents marked "X38" & "X39" of the Petition*)

In SC (SD) Nos. 22 & 23/2003 wherein the Petitioner intervened and made submissions and a 5 Judge Bench of the Supreme Court struck down the Amendments to the 'Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990', and 'Debt Recovery (Special provisions) Act No. 2 of 1990', citing the *dicta* of several Judgments in the Indian Supreme Court, *inter-alia,* determined that "**the principle therefore is that the Court will strike down *harsh, oppressive or unconscionable law* prescribing a procedure other than the ordinary procedure**".

Learned Deputy Solicitor General submitted that the Bill deals with National Policy, which is a matter within the Reserved List introduced by the Thirteenth Amendment to the Constitution.

The Thirteenth Amendment to the Constitution, which made provision for the establishment of Provincial Councils that were empowered to make statutes applicable to the Province, had clearly stipulated that such Councils would have no power to make statutes on any matter set out in the Reserved List. Accordingly the legislative power with regard to the National Policy on all subjects and functions are vested with the Central Government.

Since the present Bill deals with National Policy, which is a matter within the Reserved List, the Parliament has the authority and, is competent to legislate.

On a consideration of the totality of the aforementioned, **it is apparent** that no provision of the Bill is inconsistent with any provisions of the Constitution. (*Emphasis added*)

Submissions

The very use of the word **apparent** **i.e. seems** taking into consideration the submissions made by the Deputy Solicitor General, amply demonstrates, that the apprehension and/or **doubt** which had been entertained by the Supreme Court had not been **absolutely cleared with certainty**, but had merely **appeared** or seemed to have been cleared; ***thereby having mandated the Bill to have been deemed to have been determined as inconsistent with the Constitution***.

The foregoing amply demonstrates that apprehension and **doubt** had been entertained by the Supreme Court as to the consistency with the Constitution, more particularly with the 13th Amendment to the Constitution, *vis-à-vis,* the vesting of several Lands, both State and privately owned.

The Bill pertained to 37 Enterprises listed in Schedules I and II to the Bill, scheduling 77 allotments of Lands of **36 Enterprises** respectively situate in 7 different Provinces, and which Lands had been vested in the Secretary to the Treasury on behalf of the State. **Hence the Bill essentially and mainly dealt with Lands**.

The said Lands are situate respectively in 7 Provinces, namely:

Western Province	– 32 Lands
Uva Province	- 35 Lands
North Central Province	- 2 Lands
Central Province	- 2 Lands
Sabaragamuwa Province	- 3 Lands
Eastern Province	- 1 Land
Sothern Province	- 2 Lands

- *vide* Note attached.

The Deputy Solicitor General in an endeavor to allay such apprehensions and **doubt** of the Supreme Court had misleadingly submitted thus: (*Emphasis added*)

i) The Bill deals with National Policy, which is a matter within the **Reserved List** introduced by the 13th Amendment to the Constitution.

ii) The 13 Amendment to the Constitution, which made provision for the establishment of Provincial Councils that were empowered to make Statutes applicable to the Province, had clearly stipulated that such **Councils would have no power to make Statutes on any matter set out in the Reserved List**.

iii) Accordingly the legislative power with regard to the **National Policy** on **all subjects and functions are vested with the Central Government**. (*Emphasis added*)

iv) Since the present Bill deals with National Policy, **which is a matter within the Reserved List**, **the Parliament has the authority and, is competent to legislate.**

The very surfacing and/or raising of the aforesaid apprehension and/or **doubt** by the Supreme Court, warranting the foregoing misleading submissions to have been made by the Deputy Solicitor General, Article 123(3) of the Constitution mandates that the said Bill **shall be deemed to have been determined to be inconsistent with the Constitution**. The Supreme Court could not have acted otherwise and/or *ultra-vires* the terms of the Constitution.

On the contrary, it had been determined that on a **consideration of the totality of the aforesaid submissions by the Deputy Solicitor General** that **it was apparent** that no provision of the Bill was inconsistent with any of the provisions of the Constitution.

In other words, having entertained apprehension and/or **doubt** and consequent to the consideration of the submissions made by the Deputy Solicitor General, it had been determined that **it was apparent i.e. it merely seemed,** not with certainty, that no provision of the Bill was inconsistent with the Constitution.

In any event, the very entertainment of such **doubt** by the Supreme Court, in terms of the **Article 123(3) of the Constitution, it was mandatory that the Bill shall be deemed to have been determined, as inconsistent with the Constitution**.

In the instance of a Bill submitted in terms of Article 122 of the Constitution, there is no provisions in the Constitution for the Supreme Court to receive clarifications on a **doubt** entertained, but on the very entertainment of such a **doubt**, that **it shall be deemed to have been determined that the Bill or such provisions of the Bill was inconsistent with the Constitution**.

Without prejudice to the foregoing, it is submitted that the Supreme Court had been gravely misled by the Deputy Solicitor General to err on a very material constitutional matter, in that:

i) National Policy referred to in List II (Reserved List) of the Ninth Schedule to the Constitution, governed by Article 154(G)(7) of the Constitution defines the Subjects and Functions, which come under the purview of National Policy.

   Nowhere in the List II (Reserved List) has the subject of Land been included.

   Hence, to have been purported that the mere use of the words National Policy covered the subject of Land was incorrect.

ii) The List II (Reserved List) lists the subject and functions coming within the purview of National Policy, as follows:

   Defence and National Security
   Foreign Affairs
   Posts & Telecommunications, Broadcasting; Television
   Justice in so far as its relates to the judiciary and the courts' structure
   Finance in relation to national revenue, monetary policy and external resources; customs,
   Foreign Trade; Inter-Province Trade and Commerce
   Ports and Habours
   Aviation and Airports
   National Transport

Rivers & Waterways; Shipping & Navigation; Maritime zones, including Historical Waters, Territorial Waters; Exclusive Economic Zone and Continental Shelf and Internal Waters; **State Lands and Foreshore, Except to the Extent Specified in Item 18 of List I** (i.e. **Provincial Council List**)

The Subheadings given under the foregoing essentially refers to Piracies, Shipping, Maritime, Light Houses, Rivers, Fisheries and Property of the Government and revenue therefrom, but as regards property situated in the Province, subject to statutes made by the Province, saving so far as Parliament by law otherwise provides.

Mineral and Mines
Immigration and Emigration and Citizenship,
Elections, Including Presidential, Parliamentary, Provincial Councils and Local Authorities
Census and Statistics
Professional Occupation and Training
National Archives
All Subjects and Functions not specified in List 1 or List III stipulating items included under the foregoing

The foregoing clearly demonstrates what Subjects come under List II (**Reserved List**) which are all Subjects and Functions not specified in List 1 (**Provincial Council List**) or List III (**Concurrent List**). **Hence since Land is a subject itemized under List I (Provincial Council List) it does not come under List II (Reserved List),** as more specifically reiterated in the aforesaid List II by the words therein – "**Except to the Extent Specified in Item 18 of List I** "

iii) It appears that an attempt had been made to '**conjecture**' Land to be a subject coming under List II (Reserved List), by misleadingly and pervasively interpreting National Policy, and purporting that Provincial Council shall have no power to make any Statute thereon, **whereas the above stipulations clearly demonstrate that it was otherwise**.

iv) Subject of Land is stipulated in List 1 (**Provincial Council List**) of the Ninth Schedule to the Constitution as item 18 therein, to the extent set out in Appendix II to List 1, which sets out morefully how Land is to be dealt with and that State Land may be disposed of in accordance with Article 33 (d) of the Constitution and written law governing the matter, subject that Land shall be a Provincial Council Subject, subject to special provisions contained in Appendix II where the Government is required to consult the Provincial Councils.

v) Article 154(G)(3) mandates that no Bill in respect of any matter set out in List I (**Provincial Council List**), **which includes Land** shall become law, unless such Bill has been referred by the President, after its publication in the Gazette, and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of views thereon, within such period as may be specified in such reference.

vi) The foregoing had not been done, as evident by the aforesaid *dicta* of the Special Determination, which records a misleading submission made by the Deputy Solicitor General, upon which the Supreme Court Determination sates that **it is merely apparent**.

vii) List III (Concurrent List) of the Ninth Schedule to the Constitution governed by Article 154(G)(5)(a) of the Constitution, stipulates that Parliament may make laws with respect to any matter set out in List III (Concurrent List) **after such consultations with all Provincial Councils as Parliament may consider appropriate in the circumstances of each case**.

viii) Likewise, Article 154(G)(5)(b) of the Constitution gives such reciprocal power to the Provincial Councils to make Statutes with respect to any matter in List III (Concurrent List) after consultation with Parliament, as it may consider appropriate in the circumstances of each case.

ix) **List III (Concurrent List) does not stipulate the subject of Land, which had been dealt with in List 1 (Provincial Council List) governed by Article 154(G)(3), as morefully set out above**.

The above tantamounts to an Amendment of the Constitution and therefore the Bill could not have been proceeded with by the Speaker, 9th Respondent

Shortly after this Determination, **in complete contrast to the foregoing**, on **21st November 2011 in SC (SD) 3/2011**, which was determined upon in terms of Article 121 of the Constitution, as a normal Bill tiled "Town & Country Planning Amendment", **with Petitioners and an Intervenient Petitioner making submissions**, in addition to the Deputy Solicitor General, **the Supreme Court determined as follows *vis-à-vis* the subject of Land**:

> "The Bill under review, as stated earlier, deals with integrated planning in relation to the economic, social, historic, environmental, physical and religious aspects of land in Sri Lanka which come within the purview of the subject of land that is referred to in Item 18 of the Provincial Council List which includes rights in or over land, land tenure, transfer and alienation of land, land use, and land improvement.

It is therefore evident that the subject matter referred to in the Bill deals with an item that comes within the purview of Provincial Councils.

Article 154 (G) (3) provides for the making of statutes on any subject, which come within the ambit of the Provincial Councils and reads thus:

> 'No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the *Gazette* and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference .....'

After such reference in terms of Article 154 (G) (3), where every Provincial Council agree to the passing of the Bill, it may be passed by a simple majority in Parliament and in terms of Article 154 (G) (3) (b), where one or two Provincial Councils do not agree to the passing of the Bill, the said Bill has to be passed by the special majority required by Article 82 of the Constitution.

There was no submissions made by the learned Deputy Solicitor General to the effect that the Bill under reference has been referred by His Excellency the President to the Provincial Councils, as stipulated in Article 154 (G) (3) of the Constitution.

Since such procedure has not been complied with, we make a Determination in terms of Article 120 read with Article 123 of the Constitution that the Bill in question is in respect of a matter set out in the Provincial Council List and shall not become law unless it has been referred by His Excellency the president to every Provincial Council as required by Article 154 (G) (3) of the Constitution.

As the Bill has been placed in the Order Paper of Parliament without compliance with provisions of Article 154 (G) (3) of the Constitution no Determination would be made at this stage on the other grounds of challenge, which were referred to earlier. "

Furthermore, the foregoing constitutional provisions in relation to **subject of Land** had been comprehensively dealt with by Supreme Court in the Judgment in **SC (FR) No. 209/2007 as follows** –*viz*:

"The 13th Amendment to the Constitution certified on 14.11.1987 provided for the establishment of Provincial Councils. Article 154 G(1) introduced by the Amendment vests legislative power in respect of the matters set out in List 1 of the Ninth Schedule (the Provincial Council List) in Provincial Councils. Article 154C vests the executive power within a Province extending to the matters in List 1 in the Governor to be exercised in terms of Article 154F(1) on the advice of the Board of Ministers. In terms of Article 154(F)(6) the Board of Ministers is collectively responsible and answerable to the Provincial Council. Thus it is seen that the 13th Amendment provides for the exercise of legislative and executive power within a Province in respect of matters in the Provincial Council List on a system akin to the "Westminster" model of Government. Item 18 of the Provincial Council List which relates to the subject of land reads as follows:

> "*Land – Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II:*

Appendix II referred to in item 18 reads as follows:

"*Land and Land Settlement*"

> *"State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter. Subject as aforesaid, land shall be a Provincial Council subject, subject to the following:-*

1. State Land –

1.1 State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilized by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject;

1.2 Government shall make available to every Provincial Council State land within the province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilize such State land in accordance with the laws and statues governing the matter.

1.3 Alienation or disposition of the State land within a Province to any citizen or to any organization shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."

> It is seen that the power reposed in the President in terms of Article 33(d) of the Constitution read with Section 2 of the State Lands Ordinance to make grants and dispositions of State Lands is circumscribed by the provisions of "Appendix II" cited above.
>
> "Appendix II" in my view establishes an interactive legal regime in respect of State Land within a Province. Whilst the ultimate power of alienation and of making a dispositions remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied.
>
> A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council. The advice would be of the Board of Ministers communicated through the Governor. The Board of Ministers being responsible in this regard to the Provincial Council."

Learned Deputy Solicitor General referred to several drafting errors in the Bill under consideration and accordingly such errors are referred to below under the relevant Clause.

Clause 1

This Clause refers to the short title of the Bill. Learned Deputy Solicitor General at the hearing submitted that the word **and** after the word Enterprises should be replaced with the word **or.**

Clause 2

This Clause deals with the vesting of underperforming or underutilized Assets in the Secretary to the Treasury for and on behalf of the Government of Sri Lanka. In SC (SD) No.3/2002, this Court had determined that if there are no provisions in a Bill to pay compensation where provision has been made for the purpose of requisition of movable property, such a provision would be inconsistent with Article 12(1) of the Constitution. The said Determination further stated that the Hon. The Attorney General had submitted that an appropriate provision would be included for the payment of compensation to persons whose property is requisitioned and it was determined that with the suggested amendment, the said Bill would not be inconsistent with any provisions of the Constitution.

In the present Bill Clauses 4(2) and 4(3) states that 'prompt, adequate and effective' compensation is payable and in such instances the said Clause is not inconsistent with Article 12(1) of the Constitution.

Learned Deputy Solicitor General at the hearing submitted that the words **Government of Sri Lanka** in Clause 2(1) should be replaced with the word **State** as the preamble to the Bill states that the intention is to vest the Enterprises and Assets in the State.

Learned Deputy Solicitor General also submitted that the words **in writing** would have to be added at the end of Clause 2(3) to ensure that there is no ambiguity as to whether any authorization has been given.

Clause 3

Clause 3 deals with the appointment of a Competent Authority by the Cabinet of Ministers. This is for the purpose of controlling, administering and managing or ensuring the revival of Underperforming Enterprises or Underutilized Assets vested in the Secretary to the Treasury .

Learned Deputy Solicitor General submitted that the words **Section 3** in Clause 3(1) should be replaced with the words **Section 2(1)**, since the vesting takes place in terms of Clause 2(1) and not Clause 3.

The Competent Authority so appointed is subject to general or special directions of the Government issued from time to time.

Learned Deputy Solicitor General submitted that the word **Government** in Clause 3(3) should be replaced with the word **Cabinet** since the use of word Government in relation to giving special or general direction is ambiguous.

Learned Deputy Solicitor General also submitted that the words **in writing** should be inserted after the words **as may be issued** in Clause 3(3) to ensure that there is no ambiguity as to any such direction was given or not.

Learned Deputy Solicitor General also submitted that the words **identified** in Clause 3(4) be deleted as it is redundant. It was also submitted that the words or **Asset** in Clause 3(4)(a) be deleted in order to avoid any ambiguity.

Clause 4

In terms of this Clause, the shares held by all Shareholders (except for those already held by the Secretary to the Treasury) of any Underperforming Asset or Underutilized Enterprise are vested in the Secretary to the Treasury. The said Clause, as stated earlier, also provides for prompt, adequate and effective compensation for shares and assets that are vested.

Article 157 of the Constitution refers to International Treaties and Agents and such Treaties and Agents shall have the force of law in Sri Lanka and otherwise than in the interests of national security, no written-law should be enacted or made and no executive or administrative action should be taken in contravention of the provisions of such Treaty of Agreement.

In the event if there are any Treaties or Agreements that had been passed by the Parliament, the Bill is not in contravention of such Treaties or Agreements as it provides for prompt, adequate and effective compensation. It is also to be noted that the vesting would take place for a **public purpose**. (*Emphasis added*)

Submissions

> Here again a **doubt** has been entertained by the Supreme Court in terms of inconsistency with Article 157 of the Constitution.

In terms of Article 123(3) of the Constitution, the aforesaid entertainment of **doubt** *vis-à-vis* Article 157 of the Constitution, mandated the Bill to have been deemed to have determined to be inconsistent with the Constitution.

Such doubt has been addressed as aforesaid that in the event there are any Treaties or Agreements that had been passed by the Parliament the Bill is not in contravention of such Treaties or Agreements, as it provides for prompt, adequate and effective compensation, also noting that the vesting by the Bill would take place for a **public purpose**.

However Article 157 of the Constitution stipulates that where Parliament passes by a 2/3rds majority such Treaty or Agreement between the Government of Sri Lanka and the Government of any Foreign State, **then such Treaty or Agreement shall have the force in law in Sri Lanka** and **that otherwise than in the interest of national security** ***no law shall be enacted or made and no executive or administrative action shall be taken in contravention of the provisions of such Treaty***.

Hence, other than in the interest for **national security** Article 157 of the Constitution stipulates that **no written law shall be enacted or made**. Therefore, it could not be done for public purpose and for payment of compensation.

The above tantamounts to an Amendment of the Constitution and therefore the Bill could not have been proceeded with by the Speaker, 9th Respondent.

Learned Deputy Solicitor General submitted that the Bill is introduced for the purpose of vesting in the State Underutilized Assets, which would include two classes of land, defined earlier. Since land is being vested in the State there cannot be any question with regard to any shares. Accordingly the word **or an Underutilized Asset** in Clause 4(1) should be deleted. Learned Deputy Solicitor General also submitted that the word **Government** in Clause 4(1) should be replaced with the word **State**.

Learned Deputy Solicitor General also submitted that the word **Section 2** in Clause 4(2)(a)be replaced with the words **Section 4,** since the shares of 'Underperforming Enterprises' get vested with the Secretary to the Treasury in terms of Clause 4(1) and not in terms of Clause 2 (1).

Clause 6

This Clause deals with the determination of compensation by the Tribunal and appeals there from and provision has been made to make its Award within **6 months** from the date of the receipt of the claim after such inquiry. The said Clause does not specify the time frame within which a claim for compensation should be made. Learned Deputy Solicitor General submitted that a time frame of 2 years from the date of vesting be given in making a claim. (*Emphasis added*)

Learned Deputy Solicitor General also submitted that although an aggrieved person has the right to appeal against an Award to the Court of Appeal on a question of law with the leave of the Court of Appeal that such an appeal should not be limited only to a question of law and therefore to delete the words **on a question of law.**

Accordingly, the drafting errors, which learned Deputy Solicitor General submitted that should be corrected are as follows:

1. Clause 1 — The word **and** should be replaced with the word **or**.
2. Clause 2 (1) — The words **Government of Sri Lanka** should be replaced with the word **State**.
3. Clause 2(3) — the words **in writing** be added at the end of said Clause 2(3) .
4. Clause3(1) — the words **Section 3** be replaced with the words **Section 2(1).**
5. Clause 3(3) — the word **Government** be replaced with the word **Cabinet**.
6. Clause 3(3) — the words **in writing** be inserted after the words as may be issued.
7. Clause 3(4) — the word **identified** to be deleted.
8. Clause 3(4) (a) — the words **or Assets** to be deleted.
9. Clause 4(1) — the words **or an Underutilized Assets** to be deleted.
10. Clause 4(1) — the word **Government** be replaced with the word **State**.
11. Clause 4(2) — the words **Section 2** be replaced with the words **Section 4.**
12. Clause 6 — to be amended by specifying a time frame of 2 years from the date of vesting to make a claim.
13. Clause 6 — to delete the words **on a question of** law.

The Hon. The Attorney - General informed Court that the aforementioned drafting errors would be corrected at the sittings of the Committee Stage in Parliament.

Submissions

> The foregoing gives rise to the question, as to whether the drafting and finalization of the Bill had, in fact, been examined by the Attorney General and/or the Legal Draftsperson ?

For the reasons aforementioned we make a determination that in terms of Article 23 (1) of the Constitution that neither the Bill nor any provision thereof is inconsistent with the Constitution.

We shall place on record our deep appreciation of the assistance given by the Learned Deputy Solicitor General and learned Senior State Counsel, who appeared on behalf of the Hon. The Attorney General. "

END OF QUOTE:

The foregoing is copy of Determination in SC (SD) 2/2011 of 24.10.2011 on the Bill titled - "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets", with Submissions interpolated in **Blue Colour** for easy reference.

Petitioner
9.2.2012

H1

SC (FR) APPLICATION NO. 534/2011

FURTHER SUBMISSIONS ON *ADDITIONAL GROUNDS* WARRANTING SC SPECIAL DETERMINATION NO. 2/2011 OF 24.10.2011 TO BE RESCINDED OR VARIED

Further to the earlier Oral Submissions, with Written Submissions thereon, the Petitioner, in the national and public interest, most respectfully tenders these additional Submissions, **arising from the *dicta* in the given facts and circumstances disclosed by the Judgments of the Lords of Appeal in the House of Lords in *re* – Pinochet** cited in the said earlier Submissions.

On the persuasive submissions by the Queens Counsel appearing for Senator Pinochet, contending that, **although there was no exact precedent, the House of Lords must have jurisdiction to set aside its own Orders, where they have been improperly made, since there is no other Court, which could correct such impropriety**, another Committee of the House of Lords entertained the Petition of Appeal by Senator Pinochet for review of their own Judgment, whilst **unanimously holding that they have jurisdiction to rescind or vary an earlier order to correct an injustice caused** – *viz*: *dicta* of Lord Browne-Wilkinson, with the other Lords *agreeing: (Copies of Judgments attached marked **"A"**, with relevant paragraphs highlighted, with emphasis added)*

> "**Jurisdiction**
>
> As I have said, **the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority**.
>
> In principle it must be that your Lordships, **as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered.**
>
> However, it should be made clear that the House will not reopen any appeal **save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure**. Where an order has been made by the House in a particular case **there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong**. "

1. In the public interest, the Petitioner is reluctantly compelled to most respectfully place the following, as ***additional grounds*** **warranting the exercise of the inherent powers of the Supreme Court, *to set aside or rescind or rectify the Determination No. 2/2011 of 24.10.2011*** on the Bill titled - "An Act to provide for the **vesting** in the Government **identified** Underperforming Enterprises and Underutilized Assets" .

2. A 5 Member Committee of the House of Lords delivered Judgment on 25.11.1998 allowing an Appeal by a majority 3 to 2 verdict, against the quashing by the Queen's Bench Divisional Court of an arrest warrant against former Head of State of Chile, Senator Pinochet, to be extradited from the UK; against whom there had been allegations of crimes against humanity, for the prosecution of which, the Spanish Supreme Court had issued international warrants for his arrest.

3. Thereafter, upon discovery, that one of the Lords, who allowed such Appeal, namely, Lord Hoffmann and his wife, Lady Hoffmann, had **links** with Amnesty International, who had intervened in the Application for the arrest and extradition of Senator Pinochet, his Lawyers in such circumstances, proffered a Petition to the House of Lords **to review their own Judgment**.

4. The foregoing discoveries were consequent to squealing, whistleblowing and media exposures, resulting in Amnesty International's Solicitors by Letters dated 1.12.1998 and 7.12.1998 admitting that Lady Hoffmann had been working at the International Secretariat of Amnesty International in UK, mainly in administrative positions; and further admitting that Lord Hoffmann had been Director and Chairman of Amnesty International Charity Ltd., UK, which carried out some aspects of work of Amnesty International Ltd., UK, both being functionaries of Amnesty International. **Lord Hoffmann had no financial interest and had not received any remuneration from these institutions**.

5. The new **5 Member Committee** of the House of Lords, who entertained the Petition of Appeal by Senator Pinochet for review of the Judgment of 25.11.1998 by a **5 Member Committee** of the House of Lords, delivered on 17.12.1998 the Judgment of Their Lords of Appeal, with reasons given on 15.1.1999, **setting aside the previous Judgment of the House of Lords of 25.11.1998**, and directing a re-hearing by a differently constituted Committee, without any of Their Lords, who had heard the matter.

6. The kind attention of the Supreme Court is very respectfully drawn to the paragraphs **highlighted with emphasis added** in the Judgments of the Lords of Appeal in the House of Lords annexed marked **"A"**

7. SC Special Determination No. 2/2011 of 24.10.2011 on the Bill titled – "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets", was delivered by a 3 Judge Bench, presided by Her Ladyship the Chief Justice, Dr. Shirani Bandaranayake, with His Lordship Justice, P.A. Ratnayake and Ladyship Justice, Chandra Ekanayake.

8. In the Judgment delivered on 4.6.2009 in SC (FR) Application No. 158/2007 by the Supreme Court, *annulling* the privatization of Sri Lanka Insurance Corporation Ltd., (SLICL), as *wrongful, unlawful and illegal*, the Supreme Court, *inter-alia,* made the following Order:

   "5. Since it is necessary in the interest of the public to ensure proper and efficient management of SLICL, this Court directs the Secretary to the Treasury, **<u>in consultation with the Minister of Finance</u>**, to submit to this Court for its approval the appropriate number of names of persons who have recognized **academic/professional qualifications** and **more than 10 years experience in anyone or more of the fields of business management, accountancy, law, commerce, economics, and insurance** to be appointed to the Board of Directors of SLICL. The Secretary to the Treasury is directed to submit the list of names within two weeks from today. The Secretary to the Treasury is hereby authorized to make suitable arrangements to administer the affairs of SLICL until a Board of Directors is appointed. " (*Emphasis added*)

9. On or about **26.6.2009** the Supreme Court approved the names of Directors submitted by the Deputy Solicitor General, having noted that **the 1st Respondent, Minister of Finance had given approval therefor.**

10. Consequently, in or about **July 2009**, Pradeep G.S. Kariyawasam, assumed Office, as Chairman, SLICL. *SLICL functions under the purview of the Ministry of Finance and the post of Chairman, SLICL was a prestigious post, with lucrative perquisites*.

11. The 3rd Respondent, P.B. Jayasundera **was compelled to resign from the post of Secretary, Ministry of Finance & Secretary to the Treasury and other public office, in the face of the severe castigations made against him in the Judgment delivered by the Supreme Court on 21.7.2008 in SC (FR) Application 209/2007,** *annulling* the privatization of Lanka Marine Services Ltd., *as wrongful, unlawful, illegal and fraudulent,* and the 3rd Respondent, P.B. Jayasundera tendered an Affidavit dated 16.10.2008 to the Supreme Court, *inter-alia*, declaring, affirming and undertaking *not to hold any public office, directly or indirectly, or purport to do so.*

12. The Secretary to the President, having intimated that the 1st Respondent, Minister of Finance, as the President of Republic, had instructed the 3rd Respondent, P.B. Jayasundera to **resume** duties, as Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera made Application to the Supreme Court to be relieved of the aforesaid undertaking given by the Affidavit dated 16.10.2008 to the Supreme Court.

13. a) Consequent to the majority Judgments, with one Justice dissenting, delivered on **13.10.2009** in SC (FR) Application No. 209/2007 by a 7 Judge Bench of the Supreme Court, the 3rd Respondent, P.B. Jayasundera was **re-instated,** as Secretary, Ministry of Finance & Secretary to the Treasury, by the 1st Respondent, Minister of Finance. **The Application of the 3rd Respondent, P.B. Jayasundera was heard as a matter of general and public importance in terms of Article 132(3)(iii) of the Constitution**.

    b) The majority 6-1 Judgment of the 7 Judge Bench of the Supreme Court, whilst refusing the substantial 2 prayers (a) and (b) to the Amended-Petition of the 3rd Respondent, P.B. Jayasundera, granted relief under the 3rd prayer (c) i.e. "*grant such other and further relief as to Your Lordships' Court shall seem fit and meet* ", holding that the 1st Respondent, Minister of Finance, as the President of the Republic, in terms of Article 52 of the Constitution, was free to appoint the 3rd Respondent, P.B. Jayasundera, as Secretary, Ministry of Finance & Secretary to the Treasury.

14. Subsequent to having been appointed as Chairman, SLICL in or about **July 2009**, thereafter in or about **May 2010**, Pradeep G.S. Kariyawasam was appointed by the 1st Respondent, Minister of Finance, as Chairman, National Savings Bank, *which also comes under the purview of the Ministry of Finance, of which the Secretary was and is the 3rd Respondent, P.B. Jayasundera. Chairman, National Savings Bank is also a prestigious post, with lucrative perquisites.*

15. Upon the said Bill titled – "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets", in terms of Article 122(1)(b) of the Constitution having been referred to Her Ladyship the Chief Justice, Dr. Shirani Bandaranayake on Friday, **21.10.2011** by the President of the Republic, who is also the 1st Respondent, Minister of Finance, the Special Determination No. 2/2011 of Monday, **24.10.2011** was delivered by a Bench presided by Her Ladyship the Chief Justice, Dr. Shirani Bandaranayake.

16. a) The 1st Respondent, Minister of Finance and 3rd Respondent, P.B. Jayasundera, Secretary, Ministry of Finance, under whose purview most of the Enterprises listed in the Schedule to the Bill came, among others, *had been interested and instrumental in mooting the formulation and enactment of the Bill,* with the 1st Respondent, Minister of Finance, *having made public pronouncements thereon, inter-alia, vide* Hansard Columns 3223/3224 of 21.12.2011**.**

    b) The 37 Enterprises and the 77 allotments of Land were to be vested in the 3rd Respondent, P.B. Jayasundera, as the Secretary to the Treasury, to be held on behalf of the State, as per Sections 2 and 4 of the Bill titled - "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets"

17. Pradeep G.S. Kariyawasam, who was appointed, as aforesaid, *to prestigious high profile political Offices* by the 1st Respondent, Minister of Finance, <u>*at his will and pleasure,*</u> and functions under the purview of the 3rd Respondent, Secretary, Ministry of Finance & Secretary to the Treasury, P.B. Jayasundera, is the husband of Her Ladyship the Chief Justice, Dr. Shirani Bandaranayake; and though the Surnames used are different, *this matter has been raised in the public domain*.

18. <u>**Arising from the *dicta***</u> in the given facts and circumstances disclosed by the aforesaid Judgments of the Lords of Appeal in the House of Lords in *re* Pinochet **("A"),** the foregoing facts and circumstances, <u>**warrant the exercise of the inherent jurisdiction of the Supreme Court, the highest judiciary, to rescind / set aside or vary or rectify SC Determination No. 2/2011 of 24.10.2011**</u> on the Bill titled - "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets", <u>**which had been determined upon by a Bench presided by Her Ladyship the Chief Justice Dr. Shirani Bandaranayake**</u>.

19. In the public interest, the foregoing are <u>***additional grounds***</u> **to augment the grounds in the separate Submissions made earlier in respect of the *dicta* contained in the Determination No. 2/2011 of 24.10.2011** of the Bill titled - "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets", *vis-à-vis,* the **constitutional mandates** referred to in the said separate **Submissions made earlier.**

20. It is most respectfully submitted that **national and public interest being of paramount importance**, the Petitioner stands bound and compelled to *reluctantly* place before the Supreme Court the matters contained herein, citing the following '*extracts*' from the Judgments of the Lords of Appeal in the House of Lords in *re* – Pinochet (**"A"**). (*Emphasis added*)

LORD BROWNE-WILKINSON

"The matter proceeded to your Lordships' House with great speed …... Lord Hoffmann agreed with their speeches but did not give separate reasons".

"…… there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased ….. it is alleged that there is an appearance of bias not actual bias".

"The fundamental principle is that a man may not be a judge in his own cause …... or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification".

"….. may give rise to a suspicion that he is not impartial, for example because of his friendship with a party ….. the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial".

"…. he is disqualified without any investigation into whether there was a likelihood or suspicion of bias".

".…. that absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome".

"….. anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause".

"….. therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. ….. the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties"

".…. whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial".

LORD GOFF OF CHIEVELEY

"Your Lordships are concerned with a case in which a judge is closely connected with a party to the proceedings".

"It follows that in this context the relevant interest need not be a financial interest. … A judge may have to disqualify himself by reason of his association with a body that institutes or defends the suit"

LORD NOLAN

"…..the appearance of the matter is just as important as the reality. "

LORD HOPE OF CRAIGHEAD

"Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired."

"The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured."

"It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. …. He must be seen to be impartial."

"If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing that duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists."

LORD HUTTON

"…… or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice".

" ….. and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires".

"…… The third category is disqualification by association ……. where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings."

"…. there is an overriding public interest that there should be confidence in the integrity of the administration of justice ….. it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

"The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

21. The Petitioner expressly states that these Submissions are nothing personal, and **are solely made in the national and public interest**, in that, the Petitioner had known Pradeep G.S. Kariyawasam, as one time Marketing Manager of the Motor Division of Brown & Co. Ltd., a then Client of the Petitioner's Company, Consultants 21 Ltd.

22. The Petitioner did not **raise an issue,** when in **September 2009**, a 7 Member Bench of the Supreme Court, **including Her Ladyship the Chief Justice, Dr. Shirani Bandaranayake**, heard the aforesaid Application of the 3rd Respondent, P.B. Jayasundera **to be relieved of the undertaking he had given to the Supreme Court** by his Affidavit dated 16.10.2008; whereby he was to **re-assume** Public Office, as Secretary, Ministry of Finance & Secretary to the Treasury, under whose purview the SLICL came, **and by which time Pradeep G.S. Kariyawasam, her husband had been appointed as Chairman SLICL in July 2009**.

23. The following 'extracts' are cited from the dissenting Judgment dated **13.10.2009** by Her Ladyship Shiranee Tilakawardene, one of the Justices of the 7 Judge Bench, that heard the aforesaid Application of the 3rd Respondent, P.B. Jayasundera, referred to above (*Emphasis added*)

    "Pursuant to a Petition filed by the 8th Respondent Petitioner (the "Petitioner") (*i.e. the 3rd Respondent, P.B. Jayasundera in this Application)* on 7th July 2009, and **twice amended by him on 11th July 2009** *(Error should read 21st July 2009)* **and 31st July 2009** (the "Petition"), this application was listed before a bench of 7 judges of the Supreme Court …… "

    "Court …… refuses the reliefs sought in paragraphs (a) and (b) of the prayer to the amended Petition dated 31st July 2009. However the Court is inclined to grant other relief under paragraph (c) of the prayer to the amended Petition."

    "The Petitioner, (*i.e. the 3rd Respondent, P.B. Jayasundera in this Application)* **amended the Petition on 21st July 2009 *without obtaining* permission from Court to do so**. More specifically, **the supporting affidavit made in connection with the amendment lacks a signature of a Justice of the Peace/Commissioner, such omission rendering invalid and false the *jurat* contained therein**. The amended Petition dated 21st July 2009, **thus remained unsupported by a valid Affidavit, and, consequently, the said Affidavit should have been rejected *in limine***.

    When this matter was taken up on 3rd August 2009 a fresh set of papers were filed, **consisting of a second amended Petition dated 31st July 2009** and a purported Affidavit dated 31st July 2009, ***once again* without having obtained permission of Court.** "

24. a) It was shortly thereafter, that the Petitioner filed Amended Petition dated **10.11.2009**, together with a covering Motion also dated **10.11.2009**, explicitly disclosing the amendments made to his Petition filed on 25.6.2009 in SC (FR) Application No. 481/2009, ***an Application made in the public interest***, *vis-à-vis, the scandalous Hedging Deals in the perpetration of which the 3rd Respondent, P.B. Jayasundera had played a pivotal role*.

b) ***In complete contrast to the foregoing matter*** of filing Amended Papers on two occasions, *one with a defective Affidavit by the 3rd Respondent, P.B. Jayasundera*, **without the permission of the Supreme Court,** *Her Ladyship Justice Shirani Bandaranayake* on 19.11.2009, *expressly directed the Petitioner that he should support such Motion and get approval of the Supreme Court for amending his Petition in terms of the Supreme Court Rules*, and for such purpose the matter was fixed for Support. **Here again the Petitioner raised no issue**.

25. Nevertheless, **national and public interest being of paramount importance**, **the Petitioner in this instance is reluctantly *compelled* to raise this issue**, since the highest judiciary being the last bastion of democracy, the instant matter in issue now before the Supreme Court is of vital importance, infringing upon the i*nalienable* sovereignty of the people, in the exercise of the legislative power of the people, as mandated by the Constitution, which is bound to be upheld and defended, and in the exercise of the judicial power of the people, as per the *dicta* in the Determination by a 7 Judge Bench of the Supreme Court in October 2002, *vide* para 9 of the Petitioner's Petition *viz*: (*Emphasis added*)

> **"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective"**

26. The Petitioner re-produces below paragraphs 16 and 17 of his Petition.

"16. a) The Petitioner most respectfully submits that Your Ladyship the Chief Justice's following Minute made on 22.11.2011 in respect of the Petitioner's Application SC (SD) No. 2/2011 filed on 17.11.2011, with His Lordship Justice P.A. Ratnayake and Her Ladyship Chandra Ekanayake agreeing, *viz:*

> "The Determination by this Court was with regard to the Bill and any party that had wanted to intervene should have done so at the time, it was taken before the Supreme Court."

was ***per-incuriam***

b) When a Bill is referred to Your Ladyships' Court, as an Urgent Bill, under Article 122(1) of the Constitution, such Bill is not gazetted in terms of Article 78(1) of the Constitution, and the aforesaid Bill was not gazetted under Article 78(1) of the Constitution at least 7 days before it was placed on the Order Paper of Parliament. The Bill itself bears the date **8.11.2011** and was passed by Parliament on **9.11.2011**.

c) With utmost respect the Petitioner submits that Your Ladyships' Court had been under the mistaken belief, that the Bill was publicly available *for anyone to have intervened*, **when it was not the case**.

d) Hence, it was an **impossibility** for the Petitioner or any other citizen to have intervened to have been heard by Your Ladyships' Court, as per the facts set out in paragraph 16(a) hereinbelow.

e) *If 'any party could have intervened'*, then *as amply evidenced* by the several Petitions filed subsequently in Your Ladyships' Court, and the several Letters addressed by certain affected parties published in the media, ***then such parties most certainly would have intervened in Your Ladyships' Court.***

f) At the said Hearing, Your Ladyships' Court had been assisted only by the Deputy Solicitor General, representing the Attorney General. "

17. a) The *haste* and *secrecy* in which this Bill had been processed to be enacted into law is revealed by the following;

   i) Certified by the Cabinet of Ministers, as an Urgent Bill under Article 122(1) of the Constitution on **Wednesday, 19.10.2011** (*Cabinet Meeting generally are held late evenings*) and referred to Your Ladyship's Court

   ii) As per the Minutes of the Record in Your Ladyship's Court the said 'Urgent Bill' had been received on **Friday, 21.10.2011**.

   iii) Hearing by Your Ladyship's Court on the matter of the said 'Urgent Bill' had been had on **Monday, 24.10.2011** assisted only by the Attorney General.

   iv) The aforesaid Hearing numbered SC (SD) 2/2011 *had not been listed* in the list of Cases published in the *media* to be heard by Your Ladyship's Court on Monday, 24.10.2011.

   True copies of the Reports in the Daily News and Daily Mirror of Monday 24.10.2011 are annexed marked together as ***"X7"*** *pleaded as part and parcel hereof*

   v) Even if the matter had been listed, the public would not know that the said specific 'Urgent Bill' was being heard into by Your Ladyship's Court, and the provisions thereof unknown to the public.

   vi) Speaker, 9th Respondent, tabled in Parliament the aforesaid Determination SC (SD) No. 2/2011 only on **8.11.2011**

   vii) Speaker 9th Respondent, tabled in Parliament the aforesaid Bill only on **8.11.2011**

   viii) On the basis of the aforesaid Determination in SC (SD) No. 2/2011, the Bill, with 15 Committee Stage Amendments, was passed by Parliament on **9.11.2011**,

   ix) Speaker, 9th Respondent had certified the Bill into law on **11.11.2011**, (*just two days after the Bill with 15 Committee Stage Amendments, was passed by the Parliament on* ***9.11.2011***)

   x) Speaker, 9th Respondent's aforesaid certification had been announced to Parliament only on **22.11.2011**, as per Hansard Column 203 of that date.

b) The Petitioner had assisted in formulating and processing the enactment of Bills into law, interacting with the Departments of the Attorney General and Legal Draftsman. Two such instances were the enactment of the Companies Act No. 7 of 2007 and the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004.

c) The Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004 on a matter of national and public importance had been processed as follows:

   i) Certified by the Cabinet of Ministers, as an Urgent Bill under Article 122(1) of the Constitution on **16.8.2004** and referred to Your Ladyships' Court
   ii) Hearing thereinto was had by Your Ladyships' Court on **23.8.2004** assisted only by the Attorney General.

iii) Bill was presented to Parliament on **7.9.2004**
iv) Parliament debated and with 14 Committee Stage Amendments passed the Bill on **22.9.2004**
v) Bill was certified into law by the Speaker on **20.10.2004** ”

27. The Petitioner filed the following Motion on 18.1.2012 making an Application under and in terms of **Article 132(3)(iii)** of the Constitution: (*Emphasis added*)

“WHEREAS when this Application came-up on 25.11.2011, Your Ladyship’s Court directed that Notices be issued on the Respondents, through the Registrar of Your Ladyship’s Court, granting permission to the Petitioner to tender an Amended Petition.

AND WHEREAS accordingly an Amended Petition, having been tendered on 16.12.2011, the Registrar of Your Ladyship’s Court issued Notices on the Respondents returnable on 26.1.2012.

AND WHEREAS the Petitioner respectfully draws the attention of Your Ladyships’ Court to the following *dicta* by His Lordship the former Chief Justice J.A.N. de Silva in SC (FR) Application No. 352/2007 cited in the said Amended Petition – *viz*:

> “Fundamental Rights applications are qualitatively different from other types of appeals heard before this Court and warrant greater latitude in their consideration and to grant redress in order to encompass the equitable jurisdiction exercised in these applications.”

AND WHEREAS this being a complex matter involving questions of general and public importance, the Petitioner most respectfully states that in terms of Article 132 of the Constitution he stands entitled to make this Application to Your Ladyship the Chief Justice.

AND ACCORDINGLY the Petitioner very respectfully MOVES that Your Ladyship the Chief Justice be pleased to direct that this matter be heard by a Bench comprising 5 or more Judges of Your Ladyship’s Court, on a date convenient to Your Ladyships’ Court, very respectfully citing that previous Applications by other Parties in relation to this matter had been directed to be heard by a 5-Judge Bench of Your Ladyship’s Court.

AND WHEREAS should the date so fixed by Your Ladyship’s Court be not 26.1.2012, then that Your Ladyship’s Court be pleased to direct the Registrar of Your Ladyship’s Court to so inform the Respondents of the new date, on which this matter is fixed.”

The Documents and matters referred to hereinabove are of record in the Supreme Court, and if need be, copies of same can be provided for the convenience of Your Ladyships, if so directed.

Petitioner

9.2.2012

H2

HOUSE OF LORDS

Judgment - In Re Pinochet

Lord Browne-Wilkinson
Lord Goff of Chieveley
Lord Nolan
Lord Hope of Craighead
Lord Hutton

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE *IN RE PINOCHET*

Oral Judgment: 17 December 1998
Reasons: 15 January 1999

LORD BROWNE-WILKINSON

“My Lords,

Introduction

This petition has been brought by Senator Pinochet to set aside an order made by your Lordships on 25 November 1998. It is said that the links between one of the members of the Appellate Committee who heard the appeal, Lord Hoffmann, and Amnesty International ("AI") were such as to give the appearance that he might have been biased against Senator Pinochet. On 17 December 1998 your Lordships set aside the order of 25 November 1998 for reasons to be given later. These are the reasons that led me to that conclusion.

Background facts

Senator Pinochet was the Head of State of Chile from 11 September 1973 until 11 March 1990. It is alleged that during that period there took place in Chile various crimes against humanity (torture, hostage taking and murder) for which he was knowingly responsible.

In October 1998 Senator Pinochet was in this country receiving medical treatment. In October and November 1998 the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face trial for those alleged offences. The Spanish Supreme Court has held that the courts of Spain have jurisdiction to try him. Pursuant to those international warrants, on 16 and 23 October 1998 Metropolitan Stipendiary Magistrates issued two provisional warrants for his arrest under section 8(1)(b) of the Extradition Act 1989. Senator Pinochet was arrested. He immediately applied to the Queen's Bench Divisional Court to quash the warrants. The warrant of 16 October was quashed and nothing further turns on that warrant. The second warrant of 23 October 1998 was quashed by an order of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) However, the quashing of the second warrant was stayed to enable an appeal to be taken to your Lordships' House on the question certified by the Divisional Court as to "the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of State."

As that question indicates, the principle point at issue in the main proceedings in both the Divisional Court and this House was as to the immunity, if any, enjoyed by Senator Pinochet as a past Head of State in respect of the crimes against humanity for which his extradition was sought. The Crown Prosecution Service (which is conducting the proceedings on behalf of the Spanish Government) while accepting that a foreign Head of State would, during his

tenure of office, be immune from arrest or trial in respect of the matters alleged, contends that once he ceased to be Head of State his immunity for crimes against humanity also ceased and he can be arrested and prosecuted for such crimes committed during the period he was Head of State. On the other side, Senator Pinochet contends that his immunity in respect of acts done whilst he was Head of State persists even after he has ceased to be Head of State. The position therefore is that if the view of the CPS (on behalf of the Spanish Government) prevails, it was lawful to arrest Senator Pinochet in October and (subject to any other valid objections and the completion of the extradition process) it will be lawful for the Secretary of State in his discretion to extradite Senator Pinochet to Spain to stand trial for the alleged crimes. If, on the other hand, the contentions of Senator Pinochet are correct, he has at all times been and still is immune from arrest in this country for the alleged crimes. He could never be extradited for those crimes to Spain or any other country. He would have to be immediately released and allowed to return to Chile as he wishes to do.

The court proceedings.

The Divisional Court having unanimously quashed the provisional warrant of 23 October on the ground that Senator Pinochet was entitled to immunity, he was thereupon free to return to Chile subject only to the stay to permit the appeal to your Lordships' House. **The matter proceeded to your Lordships' House with great speed.** It was heard on 4, 5 and 9-12 November 1998 by a committee consisting of Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann. However, before the main hearing of the appeal, there was an interlocutory decision of the greatest importance for the purposes of the present application. Amnesty International ("AI"), two other human rights bodies and three individuals petitioned for leave to intervene in the appeal. Such leave was granted by a committee consisting of Lord Slynn, Lord Nicholls and Lord Steyn subject to any protest being made by other parties at the start of the main hearing. No such protest having been made AI accordingly became an intervener in the appeal. At the hearing of the appeal AI not only put in written submissions but was also represented by counsel, Professor Brownlie Q.C., Michael Fordham, Owen Davies and Frances Webber. Professor Brownlie addressed the committee on behalf of AI supporting the appeal.

The hearing of this case, both before the Divisional Court and in your Lordships' House, produced an unprecedent degree of public interest not only in this country but worldwide. The case raises fundamental issues of public international law and their interaction with the domestic law of this country. The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. There are many Chileans and supporters of human rights who have no doubt as to his guilt and are anxious to bring him to trial somewhere in the world. There are many others who are his supporters and believe that he was the saviour of Chile. Yet a third group believe that, whatever the truth of the matter, it is a matter for Chile to sort out internally and not for third parties to interfere in the delicate balance of contemporary Chilean politics by seeking to try him outside Chile.

This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions. In the eyes of very many people the issue was not a mere legal issue but whether or not Senator Pinochet was to stand trial and therefore, so it was thought, the cause of human rights triumph. Although the members of the Appellate Committee were in no doubt as to their function, the issue for many people was one of moral, not legal, right or wrong.

The decision and afterwards.

Judgment in your Lordships' House was given on 25 November 1998. The appeal was allowed by a majority of three to two and your Lordships' House restored the second warrant of 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity: **Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal.** Lord Slynn and Lord Lloyd each gave separate speeches setting out the reasons for their dissent.

As a result of this decision, Senator Pinochet was required to remain in this country to await the decision of the Home Secretary whether to authorise the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989. The Home Secretary had until the 11 December 1998 to make that decision, but he required anyone wishing to make representations on the point to do so by the 30 November 1998.

The link between Lord Hoffmann and AI

It appears that neither Senator Pinochet nor (save to a very limited extent) his legal advisers were aware of any connection between Lord Hoffmann and AI until after the judgment was given on 25 November. Two members of the legal team recalled that they had heard rumours that Lord Hoffmann's wife was connected with AI in some way. During the Newsnight programme on television on 25 November, an allegation to that effect was made by a speaker in Chile. On that limited information the representations made on Senator Pinochet's behalf to the Home Secretary on 30 November drew attention to Lady Hoffmann's position and contained a detailed consideration of the relevant law of bias.

It then read:

> "It is submitted therefore that the Secretary of State should not have any regard to the decision of Lord Hoffmann. The authorities make it plain that this is the appropriate approach to a decision that is affected by bias. Since the bias was in the House of Lords, the Secretary of State represents the senator's only domestic protection. Absent domestic protection the senator will have to invoke the jurisdiction of the European Court of Human Rights."

After the representations had been made to the Home Office, Senator Pinochet's legal advisers received a letter dated 1 December 1998 from the solicitors acting for AI written in response to a request for information as to Lord Hoffmann's links. The letter of 1 December, so far as relevant, reads as follows:

> **"Further to our letter of 27 November, we are informed by our clients, Amnesty International, that Lady Hoffmann has been working at their International Secretariat since 1977. She has always been employed in administrative positions, primarily in their department dealing with press and publications. She moved to her present position of Programme Assistant to the Director of the Media and Audio Visual Programme when this position was established in 1994.**
>
> **"Lady Hoffmann provides administrative support to the Programme, including some receptionist duties. She has not been consulted or otherwise involved in any substantive discussions or decisions by Amnesty International, including in relation to the Pinochet case."**

On 7 December a man anonymously telephoned Senator Pinochet's solicitors alleging that Lord Hoffmann was a Director of the Amnesty International Charitable Trust. That allegation was repeated in a newspaper report on 8 December. Senator Pinochet's solicitors informed the Home Secretary of these allegations. On 8 December they received a letter from the solicitors acting for AI dated 7 December which reads, so far as relevant, as follows:

> "On further consideration, our client, Amnesty International have instructed us that after contacting Lord Hoffmann over the weekend both he and they believe that the following information about his connection with Amnesty International's charitable work should be provided to you.
>
> "Lord Hoffmann is a Director and Chairperson of Amnesty International Charity Limited (AICL), a registered charity incorporated on 7 April 1986 to undertake those aspects of the work of Amnesty International Limited (AIL) which are charitable under UK law. AICL files reports with Companies' House and the Charity Commissioners as required by UK law. AICL funds a proportion of the charitable activities undertaken independently by AIL. AIL's board is composed of Amnesty International's Secretary General and two Deputy Secretaries General.
>
> "Since 1990 Lord Hoffmann and Peter Duffy Q.C. have been the two Directors of AICL. They are neither employed nor remunerated by either AICL or AIL. They have not been consulted and have not had any other role in Amnesty International's interventions in the case of Pinochet. Lord Hoffmann is not a member of Amnesty International.
>
> "In addition, in 1997 Lord Hoffmann helped in the organisation of a fund raising appeal for a new building for Amnesty International UK. He helped organise this appeal together with other senior legal figures, including the Lord Chief Justice, Lord Bingham. In February your firm contributed £1,000 to this appeal. You should also note that in 1982 Lord Hoffmann, when practising at the Bar, appeared in the Chancery Division for Amnesty International UK."

Further information relating to AICL and its relationship with Lord Hoffmann and AI is given below. Mr. Alun Jones Q.C. for the CPS does not contend that either Senator Pinochet or his legal advisors had any knowledge of Lord Hoffmann's position as a Director of AICL until receipt of that letter.

Senator Pinochet's solicitors informed the Home Secretary of the contents of the letter dated 7 December. The Home Secretary signed the Authority to Proceed on 9 December 1998. He also gave reasons for his decision, attaching no weight to the allegations of bias or apparent bias made by Senator Pinochet.

On 10 December 1998, Senator Pinochet lodged the present petition asking that the order of 25 November 1998 should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that Lord Hoffmann's links with AI were such as to give the appearance of possible bias. It is important to stress that Senator Pinochet makes no allegation of actual bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being done. There is no allegation that any other member of the Committee has fallen short in the performance of his judicial duties.

Amnesty International and its constituent parts

Before considering the arguments advanced before your Lordships, it is necessary to give some detail of the organisation of AI and its subsidiary and constituent bodies. Most of the information which follows is derived from the Directors' Reports and Notes to the Accounts of AICL which have been put in evidence.

AI itself is an unincorporated, non-profit making organisation founded in 1961 with the object of securing throughout the world the observance of the provisions of the Universal Declaration of Human Rights in regard to prisoners of conscience. It is regulated by a

document known as the Statute of Amnesty International. AI consists of sections in different countries throughout the world and its International Headquarters in London. Delegates of the Sections meet periodically at the International Council Meetings to co-ordinate their activities and to elect an International Executive Committee to implement the Council's decisions. The International Headquarters in London is responsible to the International Executive Committee. It is funded principally by the Sections for the purpose of furthering the work of AI on a worldwide basis and to assist the work of Sections in specific countries as necessary. The work of the International Headquarters is undertaken through two United Kingdom registered companies Amnesty International Limited ("AIL") and Amnesty International Charity Limited ("AICL").

AIL is an English limited company incorporated to assist in furthering the objectives of AI and to carry out the aspects of the work of the International Headquarters which are not charitable.

AICL is a company limited by guarantee and also a registered charity. In McGovern v. Attorney-General [1982] Ch. 321, Slade J. held that a trust established by AI to promote certain of its objects was not charitable because it was established for political purposes; however the judge indicated that a trust for research into the observance of human rights and the dissemination of the results of such research could be charitable. It appears that AICL was incorporated on 7 April 1986 to carry out such of the purposes of AI as were charitable. Clause 3 of the Memorandum of Association of AICL provides:

"Having regard to the Statute for the time being of Amnesty International, the objects for which the Company is established are:

(a) To promote research into the maintenance and observance of human rights and to publish the results of such research.

(b) To provide relief to needy victims of breaches of human rights by appropriate charitable (and in particular medical, rehabilitational or financial) assistance.

(c) To procure the abolition of torture, extra judicial execution and disappearance. . . ."

Under Article 3(a) of AICL the members of the Company are all the elected members for the time being of the International Executive Committee of Amnesty International and nobody else. The Directors are appointed by and removable by the members in general meetings. Since 8 December 1990 Lord Hoffmann and Mr. Duffy Q.C. have been the sole Directors, Lord Hoffmann at some stage becoming the Chairperson.

There are complicated arrangements between the International Headquarters of AI, AICL and AIL as to the discharge of their respective functions. From the reports of the Directors and the notes to the annual accounts, it appears that, although the system has changed slightly from time to time, the current system is as follows. The International Headquarters of AI are in London and the premises are, at least in part, shared with AICL and AIL. The conduct of AI's International Headquarters is (subject to the direction of the International Executive Committee) in the hands of AIL. AICL commissions AIL to undertake charitable activities of the kind which fall within the objects of AI. The Directors of AICL then resolve to expend the sums that they have received from AI Sections or elsewhere in funding such charitable work as AIL performs. AIL then reports retrospectively to AICL as to the monies expended and AICL votes sums to AIL for such part of AIL's work as can properly be regarded as charitable. It was confirmed in the course of argument that certain work done by AIL would therefore be treated as in part done by AIL on its own behalf and in part on behalf of AICL.

I can give one example of the close interaction between the functions of AICL and AI. The report of the Directors of AICL for the year ended 31 December 1993 records that AICL commissioned AIL to carry out charitable activities on its behalf and records as being included in the work of AICL certain research publications. One such publication related to Chile and referred to a report issued as an AI report in 1993. Such 1993 reports covers not only the occurrence and nature of breaches of human rights within Chile, but also the progress of cases being brought against those alleged to have infringed human rights by torture and otherwise in the courts of Chile. It records that "no one was convicted during the year for past human rights violations. The military courts continued to claim jurisdiction over human rights cases in civilian courts and to close cases covered by the 1978 Amnesty law." It also records "Amnesty International continued to call for full investigation into human rights violations and for those responsible to be brought to justice. The organisation also continued to call for the abolition of the death penalty." Again, the report stated that "Amnesty International included references to its concerns about past human rights violations against indigenous peoples in Chile and the lack of accountability of those responsible." Therefore AICL was involved in the reports of AI urging the punishment of those guilty in Chile for past breaches of human rights and also referring to such work as being part of the work that it supported.

The Directors of AICL do not receive any remuneration. Nor do they take any part in the policy-making activities of AI. Lord Hoffmann is not a member of AI or of any other body connected with AI.

In addition to the AI related bodies that I have mentioned, there are other organisations which are not directly relevant to the present case. However, I should mention another charitable company connected with AI and mentioned in the papers, namely, "Amnesty International U.K. Section Charitable Trust" registered as a company under number 3139939 and as a charity under 1051681. That was a company incorporated in 1995 and, so far as I can see, has nothing directly to do with the present case.

The parties' submissions

Miss Montgomery Q.C. in her very persuasive submissions on behalf of Senator Pinochet contended:

1. That, although there was no exact precedent, your Lordships' House must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety.

2. That (applying the test in Reg. v. Gough [1993] A.C. 646) the links between Lord Hoffmann and AI were such that there was a real danger that Lord Hoffmann was biased in favour of AI or alternatively (applying the test in Webb v. The Queen (1994) 181 C.L.R. 41) that such links give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased.

On the other side, Mr. Alun Jones Q.C. accepted that your Lordships had power to revoke an earlier order of this House but contended that there was no case for such revocation here. The applicable test of bias, he submitted, was that recently laid down by your Lordships in Reg. v. Gough and it was impossible to say that there was a real danger that Lord Hoffmann had been biased against Senator Pinochet. He further submitted that, by relying on the allegations of bias in making submissions to the Home Secretary, Senator Pinochet had elected to adopt the Home Secretary as the correct tribunal to adjudicate on the issue of apparent bias. He had thereby waived his right to complain before your Lordships of such bias. Expressed in other words, he was submitting that the petition was an abuse of process

by Senator Pinochet. Mr. Duffy Q.C. for AI (but not for AICL) supported the case put forward by Mr. Alun Jones.

Conclusions

1. Jurisdiction

As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Cassell & Co. Ltd. v. Broome (No. 2) [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

2. Apparent bias

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, **it is alleged that there is an appearance of bias not actual bias.**

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or **has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification.**

The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour **may give rise to a suspicion that he is not impartial, for example because of his friendship with a party.** This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, **since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.**

In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, **he is disqualified without any investigation into whether there was a likelihood or suspicion of bias.** The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, Judges on Trial, (1976), p. 303; De Smith, Woolf & Jowel, Judicial Review of Administrative Action, 5th ed. (1995), p. 525. I will call this "automatic disqualification."

In Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L. Cas. 759, the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to your Lordships' House on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit: at p. 786. This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell said, at p. 793:

> **"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." (Emphasis added)**

On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a party to the suit: see, for example, Reg. v. Rand (1866) L.R. 1 Q.B. 230; Reg. v. Gough at p. 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the Dimes case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited. **That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome**.

The importance of this point in the present case is this. Neither AI, nor AICL, have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit to anyone. The interest of AI in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice AI became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of AI and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non financial litigation, **anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.**

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, AI. One of the constituent parts of that unincorporated association is AICL. AICL was established, for tax purposes, to carry out part of the functions of AI--those parts which were charitable--which had previously been carried on either by AI itself or by AIL. Lord Hoffmann is a Director and chairman of AICL which is wholly controlled by AI, since its members, (who ultimately control it) are all the members of the International Executive Committee of AI. A large part of the work of AI is, as a matter of strict law, carried on by AICL which instructs AIL to do the work on its behalf. In reality, AI, AICL and AIL are a close-knit group carrying on the work of AI.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to AI but he is not in fact AI. Although this is an area in which legal technicality is particularly to be avoided, it cannot be

ignored that Lord Hoffmann took no part in running AI. Lord Hoffmann, AICL and the Executive Committee of AI are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing AI to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, AI, shares with the Government of Spain and the CPS, not a financial interest but an interest to establish that there is no immunity for ex-Heads of State in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial--a non-pecuniary interest. So far as AICL is concerned, clause 3(c) of its Memorandum provides that one of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance". AI has, amongst other objects, the same objects. Although AICL, as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, AICL plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that AICL had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a Director of AICL, was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, **there is no good reason in principle for so limiting automatic disqualification**.

The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; **therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case.** But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, **the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.** Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr. Duffy.

Can it make any difference that, instead of being a direct member of AI, Lord Hoffmann is a Director of AICL, that is of a company which is wholly controlled by AI and is carrying on much of its work? Surely not. The substance of the matter is that AI, AIL and AICL are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is **"of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."** (see Rex v. Sussex Justices, Ex parte McCarthy [1924] K.B. 256, 259)

Since, in my judgment, the relationship between AI, AICL and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of Lady Hoffmann as an employee of AI and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant

if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear (if I have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his Directorship of AICL, a company controlled by a party, AI.

For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in Reg. v. Gough ("is there in the view of the Court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in Reg. v. Gough, or modified it so as to make the relevant test the question **whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial**: see, for example, the High Court of Australia in Webb v. The Queen. It has also been suggested that the test in Reg. v. Gough in some way impinges on the requirement of Lord Hewart's dictum that justice should appear to be done: see Reg. v. Inner West London Coroner, Ex Parte Dallaglio [1994] 4 All E.R. 139 at page 152 A to B. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) the judge was a Director of a charity closely allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking an active role as trustee or Director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Finally on this aspect of the case, we were asked to state in giving judgment what had been said and done within the Appellate Committee in relation to Amnesty International during the hearing leading to the Order of 25 November. As is apparent from what I have said, such matters are irrelevant to what we have to decide: in the absence of any disclosure to the parties of Lord Hoffmann's involvement with AI, such involvement either did or did not in law disqualify him regardless of what happened within the Appellate Committee. We therefore did not investigate those matters and make no findings as to them.

Election, Waiver, Abuse of Process

Mr. Alun Jones submitted that by raising with the Home Secretary the possible bias of Lord Hoffmann as a ground for not authorising the extradition to proceed, Senator Pinochet had elected to choose the Home Secretary rather than your Lordships' House as the arbiter as to whether such bias did or did not exist. Consequently, he submitted, Senator Pinochet had waived his right to petition your Lordships and, by doing so immediately after the Home Secretary had rejected the submission, was committing an abuse of the process of the House.

This submission is bound to fail on a number of different grounds, of which I need mention only two. First, Senator Pinochet would only be put to his election as between two alternative courses to adopt. I cannot see that there are two such courses in the present case, since the Home Secretary had no power in the matter. He could not set aside the order

of 25 November and as long as such order stood, the Home Secretary was bound to accept it as stating the law. Secondly, all three concepts--election, waiver and abuse of process--require that the person said to have elected etc. has acted freely and in full knowledge of the facts. Not until 8 December 1998 did Senator Pinochet's solicitors know anything of Lord Hoffmann's position as a Director and Chairman of AICL. Even then they did not know anything about AICL and its constitution. To say that by hurriedly notifying the Home Secretary of the contents of the letter from AI's solicitors, Senator Pinochet had elected to pursue the point solely before the Home Secretary is unrealistic. Senator Pinochet had not yet had time to find out anything about the circumstances beyond the bare facts disclosed in the letter.

Result

It was for these reasons and the reasons given by my noble and learned friend Lord Goff of Chieveley that **I reluctantly felt bound** to set aside the order of 25 November 1998. It was appropriate to direct a re-hearing of the appeal before a differently constituted Committee, so that on the re-hearing the parties were not faced with a Committee four of whom had already expressed their conclusion on the points at issue."

LORD GOFF OF CHIEVELEY

"My Lords,

I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend, Lord Browne-Wilkinson. It was for the like reasons to those given by him that I agreed that the order of your Lordships' House in this matter dated 25 November 1998 should be set aside and that a rehearing of the appeal should take place before a differently constituted Committee. Even so, having regard to the unusual nature of this case, I propose to set out briefly in my own words the reasons why I reached that conclusion.

Like my noble and learned friend, I am of the opinion that the principle which governs this matter is that a man shall not be a judge in his own cause--nemo judex in sua causa: see Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759, 793, per Lord Campbell. As stated by Lord Campbell in that case at p. 793, the principle is not confined to a cause to which the judge is a party, but applies also to a cause in which he has an interest. Thus, for example, a judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous case of Dimes itself. In that case the then Lord Chancellor, Lord Cottenham, affirmed an order granted by the Vice-Chancellor granting relief to a company in which, unknown to the defendant and forgotten by himself, he held a substantial shareholding. It was decided, following the opinion of the judges, that Lord Cottenham was disqualified, by reason of his interest in the cause, from adjudicating in the matter, and that his order was for that reason voidable and must be set aside. Such a conclusion must follow, subject only to waiver by the party or parties to the proceedings thereby affected.

In the present case your Lordships are not concerned with a judge who is a party to the cause, nor with one who has a financial interest in a party to the cause or in the outcome of the cause. **Your Lordships are concerned with a case in which a judge is closely connected with a party to the proceedings.** This situation has arisen because, as my noble and learned friend has described, Amnesty International ("AI") was given leave to intervene in the proceedings; and, whether or not AI thereby became technically a party to the proceedings, it so participated in the proceedings, actively supporting the cause of one party (the Government of Spain, represented by the Crown Prosecution Service) against another (Senator Pinochet), that it must be treated as a party. Furthermore, Lord Hoffmann is a Director and Chairperson of Amnesty International Charity Limited ("AICL"). AICL and

Amnesty International Limited ("AIL") are United Kingdom companies through which the work of the International Headquarters of AI in London is undertaken, AICL having been incorporated to carry out those purposes of AI which are charitable under UK law. Neither Senator Pinochet nor the lawyers acting for him were aware of the connection between Lord Hoffmann and AI until after judgment was given on 25 November 1998.

My noble and learned friend has described in lucid detail the working relationship between AICL, AIL and AI, both generally and in relation to Chile. It is unnecessary for me to do more than state that not only was AICL deeply involved in the work of AI, commissioning activities falling within the objects of AI which were charitable, but that it did so specifically in relation to research publications including one relating to Chile reporting on breaches of human rights (by torture and otherwise) in Chile and calling for those responsible to be brought to justice. It is in these circumstances that we have to consider the position of Lord Hoffmann, not as a person who is himself a party to the proceedings or who has a financial interest in such a party or in the outcome of the proceedings, but as a person who is, as a director and chairperson of AICL, closely connected with AI which is, or must be treated as, a party to the proceedings. The question which arises is whether his connection with that party will (subject to waiver) itself disqualify him from sitting as a judge in the proceedings, in the same way as a significant shareholding in a party will do, and so require that the order made upon the outcome of the proceedings must be set aside.

Such a question could in theory arise, for example, in relation to a senior executive of a body which is a party to the proceedings, who holds no shares in that body; but it is, I believe, only conceivable that it will do so where the body in question is a charitable organisation. He will by reason of his position be committed to the well-being of the charity, and to the fulfilment by the charity of its charitable objects. He may for that reason properly be said to have an interest in the outcome of the litigation, though he has no financial interest, and so to be disqualified from sitting as a judge in the proceedings. The cause is "a cause in which he has an interest", in the words of Lord Campbell in Dimes at p. 793. I**t follows that in this context the relevant interest need not be a financial interest.** This is the view expressed by Professor Shetreet in his book Judges on Trial at p. 310, where he states that **"A judge may have to disqualify himself by reason of his association with a body that institutes or defends the suit"**, giving as an example the chairman or member of the board of a charitable organisation.

Let me next take the position of Lord Hoffmann in the present case. He was not a member of the governing body of AI, which is or is to be treated as a party to the present proceedings: he was chairperson of an associated body, AICL, which is not a party. However, on the evidence, it is plain that there is a close relationship between AI, AIL and AICL. AICL was formed following the decision in McGovern v. Attorney-General [1982] Ch. 321, to carry out the purposes of AI which were charitable, no doubt with the sensible object of achieving a tax saving. So the division of function between AIL and AICL was that the latter was to carry out those aspects of the work of the International Headquarters of AI which were charitable, leaving it to AIL to carry out the remainder, that division being made for fiscal reasons. It follows that AI, AIL and AICL can together be described as being, in practical terms, one organisation, of which AICL forms part. The effect for present purposes is that Lord Hoffmann, as chairperson of one member of that organisation, AICL, is so closely associated with another member of that organisation, AI, that he can properly be said to have an interest in the outcome of proceedings to which AI has become party. This conclusion is reinforced, so far as the present case is concerned, by the evidence of AICL commissioning a report by AI relating to breaches of human rights in Chile, and calling for those responsible to be brought to justice. It follows that Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings.

It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependent on any bias or apparent bias on his part. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet. It arises simply from Lord Hoffmann's involvement in AICL; the close relationship between AI, AIL and AICL, which here means that for present purposes they can be regarded as being, in practical terms, one organisation; and the participation of AI in the present proceedings in which as a result it either is, or must be treated as, a party. "

LORD NOLAN

"My Lords,

I agree with the views expressed by noble and learned friends Lord Browne-Wilkinson and Lord Goff of Chieveley. In my judgment the decision of 25 November had to be set aside for the reasons which they give.

I would only add that in any case where the impartiality of a judge is in question **the appearance of the matter is just as important as the reality."**

LORD HOPE OF CRAIGHEAD

"My Lords,

I have had the advantage of reading in draft the speeches which have been prepared by my noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. For the reasons which they have given I also was satisfied that the earlier decision of this House cannot stand and must be set aside. But in view of the importance of the case and its wider implications, I should like to add these observations.

One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small. In London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99 the same question as that which arose in Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759 was considered in an appeal from the Court of Session to this House. **Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired.**

In Sellar v. Highland Railway Co. 1919 S.C. (H.L.) 19, the same rule was applied where a person who had been appointed to act as one of the arbiters in a dispute between the proprietors of certain fishings and the railway company was the holder of a small number of ordinary shares in the railway company. Lord Buckmaster, after referring to Dimes and Lindsay, gave this explanation of the rule at pp. 20-21:

"The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none

the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. **The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured.** In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside."

As my noble and learned friend Lord Goff of Chieveley said in Reg. v. Gough [1993] A.C. 646, 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. **It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath.** The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

In the present case we are concerned not with civil litigation but with a decision taken in proceedings for extradition on criminal charges. It is only in the most unusual circumstances that a judge who was sitting in criminal proceedings would find himself open to the objection that he was acting as a judge in his own cause. In principle, if it could be shown that he had a personal or pecuniary interest in the outcome, the maxim would apply. But no case was cited to us, and I am not aware of any, in which it has been applied hitherto in a criminal case. In practice judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as defendant or as prosecutor.

The ground of objection which has invariably been taken until now in criminal cases is based on that other principle which has its origin in the requirement of impartiality. This is that justice must not only be done; it must also be seen to be done. It covers a wider range of situations than that which is covered by the maxim that no-one may be a judge in his own cause. But it would be surprising if the application of that principle were to result in a test which was less exacting than that resulting from the application of the nemo judex in sua causa principle. Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases. Article 6(1) of the European Convention on Fundamental Rights and Freedoms makes no distinction between civil and criminal cases in its expression of the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Your Lordships were referred by Miss Montgomery Q.C. in the course of her argument to Bradford v. McLeod 1986 S.L.T. 244. This is one of only two reported cases, both of them from Scotland, in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. The other is Doherty v. McGlennan 1997 S.L.T. 444. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his impartiality.

The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in Reg. v. Gough [1993] A.C. 646 is whether there was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts. The aim, as Lord Woolf explained at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias. In Scotland the High Court of Justiciary applies the test which was described in Gough as the reasonable suspicion test. In Bradford v. McLeod 1986 S.L.T. 244, 247 it adopted as representing the law of Scotland the rule which was expressed by Eve J. in Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276, 279 where he said:

"Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. **If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing that duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists."**

The Scottish system for dealing with criminal appeals is for all appeals from the courts of summary jurisdiction to go direct to the High Court of Justiciary in its appellate capacity. It is a simple, one-stop system, which absolves the High Court of Justiciary from the responsibility of giving guidance to inferior appellate courts as to how to deal with cases where questions have been raised about a tribunal's impartiality. Just as Eve J. may be thought to have been seeking to explain to members of the council of the Chartered Institute in simple language the test which they should apply to themselves in performing their judicial duty, so also the concern of the High Court of Justiciary has been to give guidance to sheriffs and lay justices as to the standards which they should apply to themselves in the conduct of criminal cases. The familiar expression that justice must not only be done but must also be seen to be done serves a valuable function in that context.

Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no-one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. **He must be seen to be impartial.**

As for the facts of the present case, it seems to me that the conclusion is inescapable that Amnesty International has associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result because it also seeks to bring Senator Pinochet to justice. This distinguishes its position fundamentally from that of other bodies which seek to uphold human rights without extending their objects to issues concerning personal responsibility. It has for many years conducted an international campaign against those individuals whom it has identified as having been responsible for torture, extra-judicial executions and disappearances. Its aim is that they should be made to suffer criminal penalties for such gross violations of human rights. It has chosen, by its intervention in these proceedings, to bring itself face to face with one of those individuals against whom it has for so long campaigned.

But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Limited he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside. "

LORD HUTTON

"My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Browne-Wilkinson. I gratefully adopt his account of the matters (including the links between Amnesty International and Lord Hoffmann) leading to the bringing of this petition by Senator Pinochet to set aside the order made by this House on 25 November 1998. I am in agreement with his reasoning and conclusions on the issue of the jurisdiction of this House to set aside that order and on the issues of election, waiver and abuse of process. In relation to the allegation made by Senator Pinochet, not that Lord Hoffmann was biased in fact, but that there was a real danger of bias or a reasonable apprehension or suspicion of bias because of Lord Hoffmann's links with Amnesty International, I am also in agreement with the reasoning and conclusion of Lord Browne-Wilkinson, and I wish to add some observations on this issue.

In the middle of the last century the Lord Chancellor, Lord Cottenham, had an interest as a shareholder in a canal company to the amount of several thousand pounds. The company filed a bill in equity seeking an injunction against the defendant who was unaware of Lord Cottenham's shareholding in the company. The injunction and the ancillary order sought were granted by the Vice-Chancellor and were subsequently affirmed by Lord Cottenham. The defendant subsequently discovered the interest of Lord Cottenham in the company and brought a motion to discharge the order made by him, and the matter ultimately came on for hearing before this House in Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L. Cas. 759. The House ruled that the decree of the Lord Chancellor should be set aside, not because in coming to his decision Lord Cottenham was influenced by his interest in the company, but because of the importance of avoiding the appearance of the judge labouring under the influence of an interest. Lord Campbell said at p. 793:

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, **but applies to a cause in which he has an interest.** Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

In his judgment in Reg. v. Gough [1993] A.C. 646, 659G my noble and learned friend Lord Goff of Chieveley made reference to the great importance of confidence in the integrity of the administration of justice, and he said:

> "In any event, **there is an overriding public interest that there should be confidence in the integrity of the administration of justice,** which is always associated with the statement of Lord Hewart C.J. in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259, that it is 'of **fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'"**

Then at p. 661B, referring to the case of Dimes, he said:

> ". . . I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in Reg. v. Rand (1866) L.R. 1 Q.B. 230, 232: 'any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.' The principle is expressed in the maxim that nobody may be judge in his own cause (nemo judex in sua causa). Perhaps the most famous case in which the principle was applied is Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which then proceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793:
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>> 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.'
>
> In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

Later in his judgment Lord Goff said at p. 664F, agreeing with the view of Lord Woolf at p. 673F, that the only special category of case where there should be disqualification of a judge without the necessity to inquire whether there was any real likelihood of bias was where the judge has a direct pecuniary interest in the outcome of the proceedings. However I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief **or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice** as much as a shareholding (which might be small) in a public company involved in the litigation. I find persuasive the observations of Lord Widgery C.J. in Regina v. Altrincham Justices, Ex parte Pennington [1975] 1 Q.B. 549, 552F:

> "There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not

judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples **and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires.**

"Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned."

A similar view was expressed by Deane J. in Webb v. The Queen (1994) 181 C.L.R. 41, 74:

"The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, **cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. . . . The third category is disqualification by association**. It will often overlap the first and consists of cases **where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings."** (My emphasis)

An illustration of the approach stated by Lord Widgery and Deane J. in respect of a non-pecuniary interest is found in the earlier judgment of Lord Carson in Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, 618 when he cited with approval the judgments of the Divisional Court in Reg. v. Fraser (1893) 9 T.L.R. 613. Lord Carson described Fraser's case as one:

". . . where a magistrate who was a member of a particular council of a religious body one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence, and the magistrate sat on the bench and took part in the decision. The Court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed mala fides to the magistrate, but Cave J., in giving judgment, said: 'the question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?' Wright J. stated that although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a well settled principle of law, which affected the character of the administration of justice."

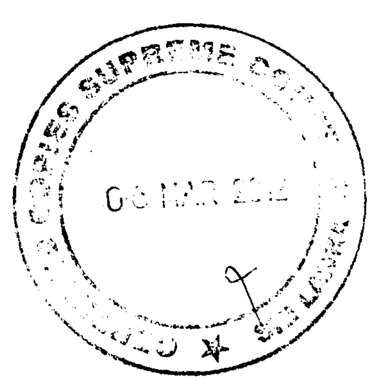
I have already stated that there was no allegation made against Lord Hoffmann that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links, described in the judgment of Lord Browne-Wilkinson, between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand. **It was this reason and the other reasons given by Lord Browne-Wilkinson which led me to agree reluctantly in the decision of the Appeal Committee on 17 December 1998 that the order of 25 November 1998 should be set aside.**"

Source : www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm

SC. FR. No. 534/2011

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

In the matter of an application under Article 126, read with Articles 17,3,105 and Chapters III and VI of the Constitution of the Democratic Socialist Republic of Sri Lanka, together with an application under Article 132, read with Articles 118 and 123 of the Constitution.



Nihal Sri Ameresekare
167/4, Vipulasena Mawatha,
Colombo 10.

Petitioner

SC. FR. No. 534/2011

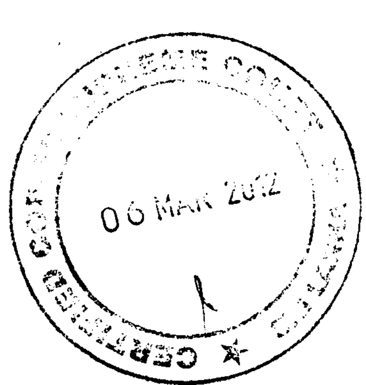
Vs.

1. Hon. Attorney General, as representing the Minister of Finance, Mahinda Rajapakse, in terms of Article 35 of the Constitution
   Attorney General's Department
   Colombo 12.

2. Basil Rajapaksa, M. P.
   Minister of Economic Development
   Ministry of Economic Development
   No. 464 A, T. B. Jayah Mawatha
   Colombo 10.

3. P. B. Jayasundera
   Secretary, Ministry of Finance & Secretary to the Treasury and Secretary Ministry of Economic Development
   The Secretarial
   Colombo 1.

4. G L. Peiris, M. P.
   Minister of External Affairs
   Ministry of External Affairs
   Republic Building
   Colombo 7.



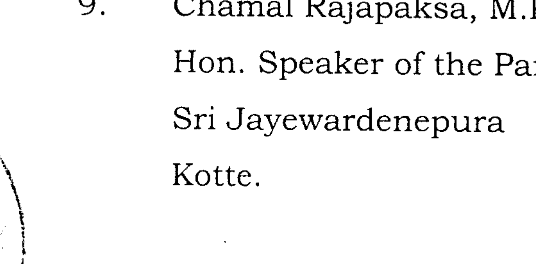
5. C. R. de Silva, P. C.
   Former Hon. Attorney General
   C 83, Gregory's Avenue
   Colombo 7.

6. Mohan Peiris, P.C
   Former Hon. Attorney General,
   and now Advisor to the Cabinet of Ministers
   3/14 D, Kynsey Road,
   Colombo 8.

7. Rauf Hakeem, M.P
   Minister of Justice
   Superior Courts Complex
   Colombo 12.

8. Suhada Gamalath
Secretary, Ministry of Justice
Superior Courts Complex
Colombo 12.

9. Chamal Rajapaksa, M.P.
Hon. Speaker of the Parliament
Sri Jayewardenepura
Kotte.



10. Hon. Attorney General,
in terms of Article 134 of the Constitution
Attorney General's Department
Colombo 12.

Respondents

BEFORE : **AMARATUNGA, J**
SURESH CHANDRA, J
HETTIGE, PC. J

COUNSEL : Nihal Sri Amarasekara appears in person
Janak De Silva, DSG with Nerin Pulle, SSC
for the 1st, 3rd -10th Respondents.
D.S.Wijesinghe, PC with Priyantha
Jayawardena for the 2nd Respondent.

ARGUED &
DECIDED ON : 09th February 2012

06 MAR 2012

SC. FR. No. 534/2011

AMARATUNGA, J

We have heard the Petitioner who appeared in person and the learned Deputy Solicitor General who appeared for the 1st, 3rd to 10th Respondents and the Learned President's Counsel who appears for the 2nd Respondent. After considering the submission made by all parties, we uphold the preliminary objection raised by the Learned Deputy Solicitor General that in view of the decisions in SC.FR. 516/2011, 535/2011 and 536/2011, this Bench has no power to accept this petition or to deal with it. Accordingly the preliminary objection is upheld and the Petition is dismissed *in limine.*

All papers submitted by the Petitioner in supporting this application to assist the Bench is returned to the Petitioner and those papers shall not form a part of record in this case.

The record consists only of the Petition and the amended petition filed by the Petitioner and no other material is to be considered as a part of the record.

Sgd/-JUDGE OF THE SUPREME COURT

SURESH CHANDRA, J

I agree

Sgd/-JUDGE OF THE SUPREME COURT

HETTIGE, PC. J

I agree

Sgd/-JUDGE OF THE SUPREME COURT

I do hereby certify that the foregoing is a true copy of the judgment dated 09.02.2012 filed of record in SC. FR. No. 534/2011

Typed by :

Comp. with :

124806

2012.03.05

CHIEF CLERK (Courts Branch)
SUPREME COURT

2012-03-05