

## Was it this that 'triggered off' the crisis in the judiciary with the President ?

Public interest activist Nihal Sri Ameresekere who challenged the arbitrary Expropriation Law, had taken the Supreme Court by surprise on 9<sup>th</sup> February 2012. In making Submissions Ameresekere in his FR Application No. 534/2011 had submitted in open Court the attached Further Written Submission on '**perceived judicial bias**' on the part of the Chief Justice Shirani Bandaranayake in the context of her husband Pradeep Kariyawasam having been appointed by President Mahinda Rajapaksa, as the Minister of Finance, to high profile lucrative political offices of Chairman, Sri Lanka Insurance Corporation Ltd. and National Savings Bank. Pradeep Kariyawasam had no experience or credentials in insurance or banking sectors.

Ameresekere cited the famous Judgment in Appeal in the House of Lords *re – Pinochet* as a precedent, where due to one Lord's wife's connection with Amnesty International, the House of Lords set aside the previous Judgment on grounds of '**perceived judicial bias**'.

Ameresekere had also cited glaring instances of his actions filed in public interest on the illegal oil heading deals, which the Supreme Court had dealt in a less speedier manner, than the Application made by P.B. Jayasundera, at the requirement of President Mahinda Rajapaksa, to be re-appointed as Secretary Ministry of Finance & Treasury. Ameresekere had pointed out in his Written Submission that the Supreme Court Rules had been flouted by the Supreme Court, itself, in having entertained P.B. Jayasundera's Application, whilst Ameresekere had been directed by Chief Justice, Shirani Bandaranayake, herself, that to amend his Petition he must get prior approval of the Supreme Court.

However, the 7 Judge Bench of the Supreme Court, presided by former Chief Justice Asoka de Silva, PC., now Senior Advisor to President Mahinda Rajapaksa and had included Justice Shirani Bandaranayake, but with one of the Justices Shiranee Tilakawardene dissenting had not required such approval for P.B. Jayasundera's Applications to amend his Petition, **one a false Petition**.

The very moment Ameresekere submitted his further Written Submissions on 9<sup>th</sup> February 2012, D.S. Wijesinghe, PC appearing for Minister Basil Rajapakse (D.S. Wijesinghe, PC is also the Senior Legal Advisor to President Mahinda Rajapaksa) and Deputy Solicitor General, Janak de Silva appearing for the Attorney General had strenuously opposed Ameresekere's such further Written Submission expressing apprehensions that such would become public knowledge and lead to controversy. Deputy Solicitor General, Janak de Silva's sister Ms. Leisha Chandrasena also held lucrative political appointment, as Chairperson of Sri Lanka Telecom, sanctioned by President Mahinda Rajapaksa.

The Supreme Court Bench who heard Ameresekere's Application comprised Justice N.G. Amaratunga, R.K.S. Sureshchandra and Sathya Hettige. They observed that they had no power to entertain Ameresekere's Application, recording that the said Bench had no power to entertain or deal with Ameresekere's Application.

The Supreme Court Bench had intimated that such Application for review has to be by the same Bench that made the Special Determination on the Expropriation Bill, namely, Chief Justice Shirani Bandaranayake, Justices Chandra Ekanayake and P.A. Ratnayake. In view of apprehensions expressed by above Counsel, namely D.S. Wijesinghe PC and Deputy Solicitor General Janak de Silva, the Supreme Court returned the copies of this further Written Submission to Ameresekere.

Being persistent, Ameresekere had relentlessly filed the same Written Submission in an Application he had subsequently filed on 8<sup>th</sup> May 2012, thereby making this further Written Submission a public document. This appears to have shocked the conscience of the Supreme Court, who thereafter commenced exercising judicial power as mandated, unconcerned of President Mahinda Rajapakse.

Has such stance by the judiciary resulted in the Government seeing the judiciary to be anti-Government, without merely rubber stamping in the manner that the Government appeared to require ?

Hence, in such circumstances, is the present urgent investigation by the Bribery Commission only against Pradeep Kariyawasam, as former Chairman, National Savings Bank appears to twist the arm of Chief Justice Shirani Bandaranayake ? This is more evident by the fact that no action has been taken against the Directors of The Finance Co. Ltd., appointed by Central Bank Governor, Nivard Cabraal and who endeavoured to get unjustly enriched by the monies of National Savings Bank, which are public monies.

## Extracts from the Judgments of Their Lords of Appeal in the House of Lords in re – Pinochet

### 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."*

SC (FR) APPLICATION NO. 534/2011

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

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 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.** “

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.

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

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.

**QUOTE:**

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

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**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 24<sup>th</sup>, 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 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; (*Emphasis added*)

27(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. (*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) to uphold and defend the Constitution and the law;

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

(e) to respect the rights and freedoms of others; and

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

### Submissions

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 benefited 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 substratum 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(1) 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 8<sup>th</sup> 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 17<sup>th</sup> 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, 3<sup>rd</sup> Respondent, having intimated to the Cabinet, through the 1<sup>st</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 9<sup>th</sup> 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 13<sup>th</sup> 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 13<sup>th</sup> 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 Harbours  
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 more fully 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 states 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, 9<sup>th</sup> Respondent

Shortly after this Determination, in complete contrast to the foregoing, on **21<sup>st</sup> November 2011 in SC (SD) 3/2011**, which was determined upon in terms of Article 121 of the Constitution, as a normal Bill titled "Town & Country Planning Amendment", with Petitioners and an Intervient 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 13<sup>th</sup> 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 13<sup>th</sup> 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 statutes 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, 9<sup>th</sup> 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

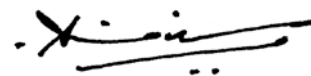
*The foregoing gives rise to the question, as to whether the drafting and finalization of the Bill had, in fact, been examined by the Attorney General and/or the Legal Draftsperson ?*

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

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)**

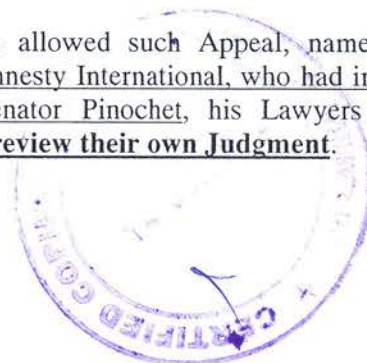
**"Jurisdiction**

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, **in consultation with the Minister of Finance**, 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 1<sup>st</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 1<sup>st</sup> Respondent, Minister of Finance, as the President of Republic, had instructed the 3<sup>rd</sup> 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 3<sup>rd</sup> Respondent, P.B. Jayasundera was **re-instated**, as Secretary, Ministry of Finance & Secretary to the Treasury, by the 1<sup>st</sup> Respondent, Minister of Finance. **The Application of the 3<sup>rd</sup> 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 3<sup>rd</sup> Respondent, P.B. Jayasundera, granted relief under the 3<sup>rd</sup> prayer (c) i.e. "*grant such other and further relief as to Your Lordships' Court shall seem fit and meet*", holding that the 1<sup>st</sup> Respondent, Minister of Finance, as the President of the Republic, in terms of Article 52 of the Constitution, was free to appoint the 3<sup>rd</sup> 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 1<sup>st</sup> 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 3<sup>rd</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent, Minister of Finance and 3<sup>rd</sup> 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 mooted the formulation and enactment of the Bill, with the 1<sup>st</sup> 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 3<sup>rd</sup> 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 1<sup>st</sup> Respondent, Minister of Finance, *at his will and pleasure*, and functions under the purview of the 3<sup>rd</sup> 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. **Arising from the dicta** 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, **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** on the Bill titled - "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets", **which had been determined upon by a Bench presided by Her Ladyship the Chief Justice Dr. Shirani Bandaranayake**.
19. In the public interest, the foregoing are **additional grounds** 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 3<sup>rd</sup> 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 3<sup>rd</sup> Respondent, P.B. Jayasundera, referred to above (*Emphasis added*)

"Pursuant to a Petition filed by the 8<sup>th</sup> Respondent Petitioner (the "Petitioner") (*i.e. the 3<sup>rd</sup> Respondent, P.B. Jayasundera in this Application*) on 7<sup>th</sup> July 2009, and **twice amended by him on 11<sup>th</sup> July 2009 (*Error should read 21<sup>st</sup> July 2009*) and 31<sup>st</sup> 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 31<sup>st</sup> 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 3<sup>rd</sup> Respondent, P.B. Jayasundera in this Application*) amended the Petition on 21<sup>st</sup> 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 21<sup>st</sup> 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 3<sup>rd</sup> August 2009 a fresh set of papers were filed, consisting of a second amended Petition dated 31<sup>st</sup> July 2009 and a purported Affidavit dated 31<sup>st</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 *inalienable* 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, 9<sup>th</sup> Respondent, tabled in Parliament the aforesaid Determination SC (SD) No. 2/2011 only on 8.11.2011
  - vii) Speaker 9<sup>th</sup> 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, 9<sup>th</sup> 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, 9<sup>th</sup> 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:

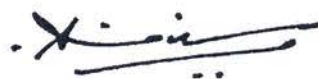
“Fundamental Rights applications are qualitatively different from other types of appeals heard before this Court and warrant greater latitude in their consideration and to grant redress in order to encompass the equitable jurisdiction exercised in these applications.”

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



**TRUE COPY**