IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR No. 195/2022

1. Dr. Athulasiri Kumara Samarakoon.
   The Open University of Sri Lanka
   P.O.Box 21 Nawala, Nugegoda.

2. Soosaiappu Neavis Morais.
   49/7, Cyril Peiris Mawatha
   Palliyawatte, Wattala

3. Dr. Mahim Mendis.
   301/1A, Kotte Road
   Mirihana, Nugegoda.

Petitioners

Vs.

1. Hon. Ranil Wickremesinghe
   Minister of Finance 2022-Present.

2. Mahinda Rajapakse
   Former Cabinet Minister of Finance
   2019 – 2020.

2A. Basil Rajapakse

   Former Cabinet Minister of Finance
   2020 – 2022.

2B. M.U.M.Ali Sabri, PC
   Former Cabinet Minister of Finance
   2022.

3. Prof. G.L. Peiris.

4. Dinesh Gunawardena.

5. Douglas Devenanada.

6. Dr. Ramesh Pathirana.

7. Prasanna Ranathunga.

8. Rohitha Abeygunawardhana.

9. Dullas Alahapperuma.

10. Janaka Wakkumbura.

11. Mahindananda Aluthgamage.

12. Mahinda Amaraweera.

13. S.M. Chandrasena.

14. Nimal Siripala de Silva.

15. Johnston Fernando.

16. Udaya Gammanpila

17. Bandula Gunawardana.

18. Gamini Lokuge.

19. Vasudeva Nanayakkara.

20. Chamal Rajapakse.

21. Namal Rajapakse

22. Keheliya Rambukwella.

23. C.B. Ratnayake.

24. Pavithradevi Wanniarachchi.

25. Sarath Weerasekera.

26. Wimal Weerawansa.

27. Janaka Bandara Tennakoon.

The 1st to 27th Respondents are all former Members of the Cabinet of

Ministers of the Republic and presently sit as Members of Parliament of the Republic.

Parliament of Sri Lanka
Sri Jayawardenapura Kotte.

28. The Monetary Board of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01

29. Ajith Nivad Cabral
Former Governor of the Central Bank of Sri Lanka.
32/7, School Lane, Nawala.

30. Deshamanya Professor W.D. Lakshman
Former Governor of the Central Bank of Sri Lanka.
No. 224, Ihalayagoda, Imbulgoda.

31. S.R. Attygalle
Former Secretary to the Treasury
No. 23, Madapatha, Piliyandala.

32. S.S.W. Kumarasinghe
Former Member of the Central Bank of Sri Lanka.
No. 62/4, 11th Lane,
Wickramasinghepura Road,
Battaramulla.

32A. Gotabaya Rajapakse
Pangiriwatte Road, Mirihana.

32B. Mr. Sanjeeva Jayawardena, PC.
Member of the Monetary Board of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01.

32C. Dr. Ranee Jayamaha
Member of the Monetary Board of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01.

33. Hon. Attorney General.
Attorney General's Department
Colombo 12.

34. Chulantha Wickramaratne
Auditor General.
306,72 Polduwa Road,
Battaramulla.

35. Hon. Justice Eva Wanasundara.

36. Hon. Justice Deepali Wijesundara.

37. Mr. Chandra Nimal Wakishta.

Members of the Commission To Investigate Allegations of Bribery or Corruption.
36, Malalasekera Mawatha
Colombo 07, Sri Lanka.

38. Mr. P.B. Jayasundera.
Pelawatte, Battaramulla.

39. Mr. Dhammika Dasanayake.
Parliament of Sri Lanka
Sri Jayawardenapura Kotte.

Respondents

SC FR No. 212/2022

1. Chandra Jayaratne
No.2 Greenland Avenue
Colombo 05.

2. Julian Bolling
No. 72, 5th Lane, Colombo 05.

3. Jehan CanagaRetna,
No. 05, Bullers Lane,
Apartment 3B, Colombo 05.

4. Transparency International Sri Lanka

No. 366, Nawala Road, Nawala,
Rajagiriya

Petitioners

Vs

1(a)Hon. Attorney General.
Attorney General's Department
Colombo 12.

1(b) Hon. Gotabaya Rajapakse
Former President of Sri Lanka.
Pangiriwatte Road, Mirihana.

2. Hon. Mahinda Rajapakse
Former Prime Minister, Former Minister of Buddhasasana, Religious & Cultural Affairs Former Minister of Urban Development & Housing, Former Minister of Economic Policies and Plan Implementation and Former Minister of Finance.
No. 117, Wijerama Mawatha,
Colombo 07.

3. Hon. Basil Rajapakse
Former Minister of Finance.
No.1315, Jayanthipura, Nelum Mawatha, Battaramulla.
No.1316, Jayanthipura, Nelum Mawatha, Battaramulla.

4. Hon. M.U.M. Ali Sabry, PC
Former Minister of Finance.
No. 5, 27th Lane, Colombo 03.

5. Hon. Ranil Wickremesinghe
Prime Minister.
Minister of Finance, Economic Stability and National Policies,
No.117, 5th Lane, Colombo 03.

6. Deshamanya Professor W.D. Lakshman
Former Governor of the Central Bank of Sri Lanka.
No. 224, Ihalayagoda, Imbulgoda.

7. Mr. Ajith Nivad Cabral
Former Governor of the Central Bank.
32/7, School Lane, Nawala.

8. Dr. P. Nandalal Weerasinghe
Governor of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01, Sri Lanka.

9. The Monetary Board of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01, Sri Lanka.

10. S.R. Attygalle
Former Secretary to the Treasury/
Ministry of Finance
No. 23, Madapatha, Piliyandala.

11. Mr. K.M. Mahinda Siriwardana
Secretary to the Treasury/
Ministry of Finance
The Secretariat, Colombo 01.

12. Mr. Saliya Kithsiri Mark Pieris, PC.
President of the Bar Association of Sri Lanka.
No. 153, Mihindu Mawatha,
Colombo 12.

12(a) Kaushalya Navaratne
Attorney-at-Law
President of the Bar Association of Sri Lanka
No. 153, Mihindu Mawatha,
Colombo 12.

13. Mr. Isuru Balapatabendi, AAL
Secretary of the Bar Association of Sri Lanka
No. 153, Mihindu Mawatha,
Colombo 12.

Respondents

Before	:	Jayantha Jayasuriya, PC, CJ Buwaneka Aluwihare, PC, J Priyantha Jayawardana, PC, J Vijith K. Malalgoda, PC,J Murdu N.B. Fernando, PC, J
Counsel	:	Upul Jayasooriya, PC with Vishwaka Peiris, Sampath Wijewardene, and Hasith Samayawardana for the Petitioners in SCFR 195/22. Chandaka Jayasundera, PC with S.A. Beiling, Chinthaka Fernando, Manisha Dissanayalke, Sayuri Liyanarachchi and Imaz Imthiyas for the Petitioners in SCFR 212/22. Romesh de Silva, PC with Uditha Egalahewa, PC and Niran Anketell for the 28th , 32B and 32C Respondents in SCFR 195/22 and 9th Respondent in SCFR 212/22. Shavendra Fernando PC with Mrs. Anika Arawwala, Jeewantha Jayathilaka, Ralitha Amarasekera and Sapumal Tennakoon for the 29th Respondent in SCFR 195/22 and 7th Respondent in SCFR 212/22. Manohara de Silva, PC with Boopathy Kahathuduwa for 32nd Respondent in SCFR 195/22. Gamini Marapana, PC with Navin Marapana, PC and Uchitha Wickremesinghe for the 2nd &2A respondents in 195/22 and 2nd & 3rd respondents in SCFR 212/22. Nihal Jayawardena, PC with R. Herath for the 31st Respondent in SCFR 195/22 and 10th Respondent in SCFR 212/22. Nerin Pulle,PC, ASG, with Madhushika Kannangara, SC., Shiloma David SC, Indumini Randeny SC and Vishni Ganepola, SC for the

33rd, 34th and 39th Respondents in SCFR 195/22 and 1A &11th Respondents in SCFR 212/22.

Anura Meddegoda, PC with Ms. Yasa Jayasekera, Ms. Nadeesha Kannangara, Chathura Galhena, Isuru Deshapriya and Ms. Ashani Kankanange for the 38th Respondent in SCFR 195/22.

Gamini Marapana, PC with Navin Marapana, PC and Uchitha Wickremesinghe for the 2nd &2A respondents in 195/22 and 2nd & 3rd respondents in SCFR 212/22.

K. Kanag-Isvaran, PC with Shivaan Kanag-Isvaran & Lakshmanan Jayakumar for the 12th & 13th Respondents in SCFR 212/22.

Suren Gnanaraj with Rashmi Dias, Wathsala Kekulawala and Sakuni Weeraratne for the 30th Respondent in SCFR 195/22 and 6th Respondent in SCFR 212/22.

Written Submissions filed by : Petitioners in SCFR 195/22 on 03.10.23.

2nd and 2A Respondents on 04.07.23 and 02.10.23
2B Respondent on 02.10.23
28th Respondent on 04.07.23 and 02.10.23
29th Respondent on 23.06.23 and 02.10.23
30th Respondent on 30.06.23, 27.09.23 and 02.10.23
31st Respondent on 28.06.23 and 02.10.23
32nd Respondent on 02.10.23
32B Respondent on 06.10.23
32C Respondent on 02.10.23
33rd Respondent on 02.10.23 and
38th Respondent on 02.10.23 in SCFR 195/22.

Petitioners in SCFR 212/22 on 30.06.2023 and 02.10.2023

1A Respondent on 04.10.23
2nd and 3rd Respondents on 04.07.23 and 02.10.23
4th Respondent on 02.10.23
6th Respondent on 30.06.23 and 02.10.23
7th Respondent on 23.06.23 and 02.10.23
9th Respondent on 04.07.23 and 02.10.23 in SCFR 212/22.

Argued on : 06.07.2023, 07.07.2023, 13.07.2023, 25.07.2023, 27.07.2023, 28.07.2023, 08.08.2023, 19.09.2023, 20.09.2023 and 22.09.2023.

Decided on : 14.11.2023

Petitioners in these two applications invoked the jurisdiction of this Court vested under Article 126 of the Constitution. Both these matters are public interest litigations. In both these matters petitioners are claiming violations of their rights too. This Court, having considered the material placed by all parties, granted leave to proceed in both matters. In SC FR 195/2022 leave to proceed was granted against 2nd, 2A, 2B, 3rd to 27th, 28th to 32nd, 32A and 38th respondents. Furthermore, petitioners were directed to add two members of the 28th respondent as 32B and 32C respondents. In SC FR 212/2022, the Court granted leave to proceed against 1(b), 2nd, 3rd, 6th, 7th, 9th, and 10th respondents.

The learned President's Counsel for the petitioners in both these applications drew the attention of the Court to the fact that Gotabaya Rajapaksa – the former President who is cited as 1(b) respondent in SC FR 212/2022 and who is cited as 32A respondent in SC FR 195/2022 (hereinafter referred to as "32A respondent") had neither filed objections nor has made arrangements for legal representation in Court even though notices were issued on him through Court. The learned President's Counsel further contended that the allegations made against the 32A respondent therefore remain uncontroverted.

The learned President's Counsel Chandaka Jayasundera in presenting his case in SC FR 212/2022 submitted that the petitioners do not challenge the policy of the government in these proceedings. In further elaborating this submission he contended that the conduct impugned in these proceedings include illegal, arbitrary, unreasonable or capricious executive and or administrative actions and or inactions. It is claimed that such actions and/or inactions arise from the implementation of arbitrary and/or capricious decisions, by the executive and/or administrative branches of the Government. It is his contention that the impugned conduct of the respondents breached the 'public trust' reposed in them. It is his position that the conduct impugned in these proceedings led to the economic collapse of an unprecedented magnitude. Acute shortages in essentials such as fuel and gas, food and medicine and prolonged power cuts became the regular pattern of life. Long queues for fuel and gas brought in severe hardships to the entire society and led to many deaths. This situation brought in a total breakdown of economic and social life of the entire society. Such breakdown ultimately led to the collapse of the public order and the complete undermining of the rule of law.

Petitioners contend that it is a series of decisions taken during the relevant period, including the decisions to revise taxes, artificial control of the exchange rate, failure to maintain official reserves leading to serious depletion of reserves, failure to seek assistance from the International Monetary Fund (IMF) in a timely manner and the failure to make necessary adjustments to the interest rates which were the main causes for this economic collapse.

It is further contended that the decision to reduce various taxes was taken without proper analysis and study of its possible repercussions to the government revenue. Furthermore, it was contended that no remedial measures were adopted even after the adverse repercussions were apparent. It was the "inaction to remedy" even after warnings by the officials brought in irreversible consequences. Mr Jayasundera PC further submitted that the respondent's claim, that the failure to honour the foreign debt repayment instalments in May 2022 is the cause for the economic debacle, is nothing but a futile attempt to absolve themselves from the responsibility arising from their own conduct. It is his contention that the impugned conduct of the respondents is the cause for the failure to honour the debt obligations of the State. It was further contended that the default of foreign debt repayment by the Government in May 2022 is nothing but an inevitable result of the conduct of the respondents that is impugned in these proceedings. The learned President's Counsel's position was that, if remedial measures were taken such as seeking assistance from the IMF in a timely manner, a crisis of this nature could have been averted.

The learned President's Counsel for the petitioners in SC FR 195/2022 Mr Upul Jayasuriya, fully associated himself with the aforementioned submissions of the learned President's Counsel for the petitioners in SC FR 212/2022. He further contended, that the failure to introduce tax revisions without a proper consideration of its impact to the government revenue triggered off a series of events that had a domino effect that caused the economic crisis. He further contended that introduction of tax revisions without setting up necessary effective mechanisms to ensure that the extra earnings accrued by persons due to tax revisions are invested to the benefit of the overall economic growth of the country demonstrate that such revisions were implemented to the benefit of a selected group of persons and not to the benefit of the society and hence amounts to corruption. It is his contention, that a proper investigation under the relevant laws relating to Bribery and Corruption will ensure due respect to accountability. The learned President's Counsel further contended that the downgrading of credit rating by international rating agencies

that brought in severe impact on foreign investment and borrowings is a direct result of arbitrary tax revisions. Furthermore, direct consequences of the artificial pegging of foreign exchange rates further aggravated the depletion of foreign reserves. Under these circumstances, the failure to honour foreign debt obligations in the absence of any support mechanism such as an assistance scheme from the IMF was inevitable. Explaining the consequences of such a non-negotiated disorderly default – a hard default – the learned President's Counsel submitted that would have been disastrous and would have led to total collapse of the social life.

Learned President's Counsel for the petitioners further submitted that the failure to take remedial measures when the adverse consequences of the tax revisions were felt and the persistent reluctance to take remedial measures further aggravated the situation and brought in the most damaging result to the economy as well as social lives of the entire population. In his submissions averting to several remedial measures, the learned President's Counsel submitted that such measures ought to have been taken on a priority basis to avoid the crisis.

According to the Petitioners, the adverse impact on the economy was primarily due to the tax revisions. It further aggravated due to a few other measures including artificial fixing of the exchange rate and the interest rate, maintaining an open account for foreign exchange transactions and the failure to introduce proper mechanisms to ensure that the profits and/or revenue earned due to tax revisions are properly invested to bolster the economy. The learned Counsel submitted that the failures identified above made an environment for any person to convert the extra earnings due to tax revisions to foreign exchange at an artificial rate and engage in imports or any other overseas transactions to the detriment of official reserves. It was further submitted that the artificial exchange rate discouraged receipt of foreign exchange remittances through official financial institutions and thereby led to further depletion of official reserves.

It was further contended that the above situation fell well within a renowned concept in international economics – the "impossible trinity"-. It is an accepted theory that three main factors namely a fixed exchange rate, free capital flow across borders and an independent monetary policy should not co-exist. If such a situation is created, dire consequences to the economy are inevitable. The learned President's Counsel contended that the conduct of the respondents during the relevant period created such an environment in Sri Lanka, which brought in disastrous consequences. It was his contention that this situation was created due to the

arbitrary, capricious and unreasonable conduct of the respondents. He contended that the impugned conduct of the respondents was not based on any scientific analysis or reasoning.

The learned President's Counsel submitted that constant and repeated concerns raised by the officials of the Central Bank on the overall situation and the need to seek assistance and initiate a programme with the International Monetary Fund (IMF) were ignored by the Government. It was further contended that the failure to take timely action on seeking IMF assistance heavily contributed to the downfall of the economy. It was their contention that the arbitrary, unreasonable, irrational and capricious conduct of the respondents led not only to the denial of the last tranche of the IMF programme commenced in 2016 but also refusal to grant a relief facility – Rapid Financing Instrument (RFI) - to overcome ill-effects of the pandemic. A facility that was made available to many other countries that helped them overcome difficulties caused due to the pandemic. It was further contended that the presence of an IMF assisted programme would not only have brought much needed foreign exchange but also credibility and confidence, enabling the government to attract foreign investment and assistance.

Both Mr Jayasundera and Mr Jayasuriya contended that the conduct of the respondents impugned in these proceedings amounts to a breach of the public trust and also had a direct impact on Rule of Law. They contended that the impugned conduct of the respondents resulted in the violation of the Fundamental Rights guaranteed under the Constitution. Both President's Counsel did concede that the pandemic had an adverse impact on the economy, but they claimed that the failure on the part of the respondents to take remedial measures, led to this crisis.

Mr Suren Gnanaraj, who represented W.D.Lakshman, the 6th respondent in SC FR 212/2022 and the 30th respondent in SC FR 195/2022 (hereinafter referred to as the "30th respondent") submitted that Professor Lakshman functioned as the Governor of the Central Bank for a period of less than two years namely from 24th December 2019 to 14th September 2021. The learned Counsel further contended that the conduct assailed in these proceedings relate to the performance of his duties as the Chairman of the Monetary Board. In this context it is his submission that none of the decisions of the Monetary Board can be attributed to any particular individual member of the Board but they are decisions of the Board. Therefore, it was his contention that no individual responsibility can be attached to a particular member or members in relation to any decision of the Board. In this context, he drew the attention of the Court to

sections 8 and 9 of the Monetary Law, that stipulates that the Governor of the Central Bank be the Chairman of the Monetary Board and the Board is a body corporate with perpetual succession. It was his contention that none of the decisions of the Board is a decision of any particular individual member including the Chairman but remains a decision of the Board. However, the composition of the Board and the practice has made way for divergent views of the members to be considered and a final decision of the Board to be reached on consensus. Section 47 (1) of the Monetary Law Act grants protection to each member of the Board for acts done in good faith. It is his contention that none of the petitioners were able to establish that the 30th respondent acted in bad faith or his impugned conduct amounts to a misconduct or a wilful default. It was further contended that the said respondent cannot therefore be held liable to any breach of a Fundamental Right.

He also emphasized that the impugned conduct of the 30th respondent should be viewed in the proper context of the legal framework relating to the scope, functions and the relationship between the Central Bank and the Government. Legislative framework as recognized by the jurisprudence of this Court envisages "a continuous and constructive cooperation between the Central Bank and the Government " and the Central Bank is only an "agent of the Government".

The learned Counsel submitted that the petitioners have invoked the jurisdiction of this Court on an incorrect premise. Attributing to the three factors referred to by the petitioners namely the tax revisions introduced in 2019, pegging of the US Dollar and the delay to seek assistance from the IMF, as the only causes for the economic collapse, is a misconception. Mr Gnanaraj submitted that there were numerous other factors for the economic crisis other than the three factors referred to by the petitioners. On this basis Mr Gnanaraj submitted that the contention that downgrading by the international rating agencies for the reason of unsustainable debt is a result of the aforesaid factors is incorrect.

He contended that the unsustainability of debt was envisaged even in the year 2016 and the downgrading commenced in that year itself and therefore, the petitioners have failed to act *bona fide* by fixing the downgrading to the year 2019.

It was his contention that even though an IMF facility was obtained in 2016 there was no proper investment of such funds to uplift the economy but such funds were utilized for non-income generation projects. Furthermore, he contended that there was a failure to fulfil conditions on

which such facility was granted and thereby failed to draw the last tranche of the said facility. He conceded that in the year 2019, diametrically opposed policy in the context of taxation was adopted. He emphasized that low level of reserves was observed even by October 2019.

It was his contention that the continued adverse conditions in the economy were further aggravated due to the onset of the pandemic in early 2020. The adverse impact on the economic activities and growth caused due to various steps taken by the Government to arrest the spread of the disease including lock downs and robust vaccination drives, further depleted reserves of an economy which was already ailing. He further submitted that the adverse conditions existed in the year 2020 due to the pandemic, impacted on the income and profits earned by most of the legal and natural persons other than public servants whose full salaries were continued to be paid by the Government. This situation was further compounded by the non-availability of the IMF assisted RFI.

Mr Gnanaraj further contended that at no instance fixing of the exchange rates as provided under sections 74 and 76 of the Monetary Law took place, during the relevant time. However, moral suasion is a legitimate tool available to the Central Bank and use of such tool is neither unlawful nor arbitrary. In this process the Central Bank uses influence by way of advice, suggestions, requests and persuasion extended to the commercial banks. It was his submission that the decision to seek IMF assistance is solely a prerogative of the Government and it is reflected through the statutory reports submitted as provided under the Monetary Law. The 30th respondent had briefed the Minister of Finance the benefit of reaching out to the IMF.

Mr Gnanaraj reiterated that no individual responsibility can be attributed to the 30th respondent as he had always acted in accordance with the law.

Mr Shavendra Fernando PC, representing Nivard Cabraal - the 29th respondent in SC FR 195/2022 who is also the 7th respondent in SC FR 212/2022 - (hereinafter referred to as the "29th respondent") who served as the Governor of the Central Bank from 15th September 2021 to 4th April 2022, associated himself with the submissions of Mr Gnanaraj in particular, the duties and responsibilities of the Chairman of the Monetary Board and the legal framework within which the Chairman and the other members of the Monetary Board discharge their duties and responsibilities. Furthermore, he contended that the petitioners are impugning the conduct of the 29th respondent qua Chairman of the Monetary Board. In this regard he emphasised that all the

decisions of the Monetary Board are collective decisions of the Board and none of them could be classified as decisions of the individual members. On this basis, it was argued that as far as the decisions of the Board are concerned, no responsibility could be attached to any individual member by excluding one or several of other members, as all the members are bound by the principle of collective responsibility.

Mr Fernando PC also reiterated that the petitioners in both these applications are challenging the policy decisions of the Government and hence this Court lacks jurisdiction to entertain both these applications. Furthermore, he submitted that in SC FR 212/2022 necessary parties are not before Court and in SC FR 195/2022 the petitioners are attempting to attribute responsibility on a few public servants selectively, even though the entire Cabinet of Ministers are cited as respondents. He therefore contends that both these applications are politically motivated. He further contended that the responsibility of formulating the policies of the Government lies with the Executive.

It was Mr Fernando's submission that the 29th respondent had no role to play in relation to the impugned decisions on tax revisions. He contended that the responsibility on the decision whether to seek assistance from the IMF or not cannot be attributed to the Monetary Board or any of its members. It was his submission, that the said responsibility lies with the President. Even prior to the 29th respondent assuming office as Governor of the Central Bank, the Monetary Board in this regard [seeking IMF assistance] had expressed views on two options, namely; seeking IMF assistance or to rely on alternative "structural reforms".

Although the learned President's Counsel submitted that the Cabinet of Ministers had decided to adopt the option to work on a homegrown solution instead of seeking the assistance from the IMF, we observe that there is no such material before this Court of a Cabinet Decision on the said option up until 3rd January 2022.

Mr Fernando PC submitted that the Central Bank adopted a six-month road map as part of the home grown solution. It is to be noted that, at a point closer to the date the country declaring bankrupt, however, during the 29th respondent's tenure as Governor of the Central Bank / Chairman of the Monetary Board, the President did take a decision to seek the assistance of the IMF.

The Learned President's Counsel further submitted that the pegging of the US Dollar or fixing the exchange rate, were not based on a decision of the Central Bank but was a policy decision [of the Government]. The parity of the US Dollar was initially fixed at Rupees 203 on a directive of the Minister [of Finance] but thereafter the exchange rate was partially floated subject to a cap of Rupees 230 as the rate of exchange. This was achieved using a legitimate tool, "moral suasion".

It was further contended that honouring the ISB in January 2022 was nothing but discharging an obligation of the country and a failure of which could have brought in dire consequences. Any default could have triggered cross-default clauses and a demand on other commitments would have created an unmanageable situation. He submitted that the funds necessary for the repayment was already allocated by the Parliament by the annual budget.

Mr Fernando PC submitted that no responsibility can be attributed to the 29th respondent as at no stage the respondent had acted outside the legal framework but always had lawfully discharged duties as the Chairman of the Monetary Board as provided by law.

Mr Manohara de Silva PC, representing Samantha Kumarasinghe, an appointed member of the Monetary Board, the 32nd respondent in SC FR 195/2022, (hereinafter referred to as the "32nd respondent"), at the outset submitted that this application (SC FR 195/2022) should be dismissed as the petitioners have failed to cite all necessary parties as respondents. It was his contention, as far as the allegations, made against the 32nd respondent is concerned, they arise from and out of his conduct as a member of the Monetary Board and the petitioners have selectively made him and two others as respondents whereas two other members of the Monetary Board had been conveniently left out for inexplicable reasons. He further contended that the petitioners have abused the process by selectively targeting the 32nd respondent causing great inconvenience to him. The learned President's Counsel argued that there is no merit in the case against the 32nd respondent and the petitioners have clearly acted *mala fide* in citing him as a respondent in these proceedings. Mr de Silva PC further argued that the petitioners' attribution of the responsibility regarding the mismanagement of the economy is selective in that only selected persons such as the Prime Minister, Minister of Finance, and four others have been cited as respondents. He further contended that the petitioners are impugning the decisions of various persons that fall within the ambit of economic and political decisions. It is his contention that the Court is not

equipped to examine merits or demerits of such decisions and therefore Court should refrain from making any attempt to tread into areas beyond its competency.

According to his submission the decision to honour the ISBs was a decision of the Government and the petitioners are acting maliciously by making an attempt to attribute responsibility on a few selected individuals, including the 32nd respondent.

Mr De Silva PC, further contended that the petitioners are maliciously claiming that the 32nd respondent was in control of the Monetary Board. Whilst pointing out that the previous sixteen programmes with the IMF has resulted in failures, the learned President's Counsel contended that the 32nd respondent always took up the stand that seeking IMF assistance, is not the best solution for the country and wanted to stop the leakage of foreign exchange and thereafter pursue other avenues.

Mr de Silva PC further submitted that in ascertaining the reasons for economic debacle, it is neither possible nor reasonable to confine to a few years, as to how the economy was managed (ie 2019-2022). The management of the economy during this period should not be considered in isolation for the reason that the sharp increase in the borrowings from 2017 to 2019 had placed an unbearable burden on the economy and the debt management.

He pointed out that the decisions of the sub-committee of the Monetary Board cannot be regarded as the decisions of the Board. The Monetary Board at no stage had delegated its authority to the sub-committee. Mr de Silva PC also submits that this application (SC FR 195/2022) is time barred.

On behalf of the 38th respondent in SC FR 195/2022 (P.B.Jayasundera) (hereinafter referred to as the "38th respondent") President's Counsel Mr. Anura Meddegoda, while associating himself fully with the submissions of Mr Gnanaraj in relation to the operation and applicability of the Monetary Law Act and the submissions of Mr de Silva PC on the jurisprudence relating to the extent to which the policy decisions should be examined by courts, submitted that the petitioners have not only failed to plead any specific allegation against Dr Jayasundera in the petition but also had failed to produce any material to establish a violation of any fundamental rights resulting from the conduct of this respondent. He submitted that the application is misconceived in law. The learned President's Counsel further contended that the petitioner's allegations are

palpably untenable and the application should be dismissed. He further claimed that the 38th respondent had been added as a respondent maliciously and the application is devoid of any merit.

According to Mr Meddegoda PC, the 38th respondent at no stage acted arbitrarily, unreasonably or capriciously but performed the responsibilities and duties attached to the post of Secretary to the President lawfully. The 38th respondent accepted the post of Secretary to the President on 19th November 2019 and relinquished all duties on 14th January 2022. It was further submitted that the 38th respondent always acted according to the instructions, guidance and advise of the President (32A respondent). He facilitated national and international initiatives to give effect to the policies of the Government. It was also contended that allocation of funds through a proper annual budget took place only in 2020 and allocation of funds in the preceding two years was effected by votes on account. By the time the budget was presented in 2020 the adverse conditions due to the onset of pandemic had already made an impact on the economy and the Government adopted a policy prioritising solutions to public health issues. Implementation of such policy required a collective effort at national and international levels. Further, explaining the circumstances under which the 38th respondent sent the letter dated 21st June 2021 to the Governor of the Central Bank (the 30th respondent) the learned President's Counsel submitted that he conveyed to the Governor the policy of the Government while drawing his attention to the role and the scope of functions of the Monetary Board. He contended that a closer examination of this letter in its proper context clearly shows that the Governor was appraised with the suggestions and options enabling him to take decisions exercising his discretion as opposed to any directions compelling a particular course of action. In his submission the response of the Governor dated 13th July 2021 clarifies this position.

Mr Meddegoda PC drew the attention of this Court to paragraph 3(i) of the petition and submitted that the petition fails to substantiate the basis of the assertion that the 38th respondent is responsible for the decisions of the Monetary Board. He further submitted that the absence of a specific reference to the 38th respondent in the prayers (b), (c) and (d) reflects that the petitioners themselves accept that no responsibility could be attributed to the 38th respondent for infringement of any fundamental right. It is a futile attempt to argue that the Court could grant

relief against the 38th respondent on the strength of the omnibus clause in the prayer of the petition.

Mr Nihal Jayawardena PC on behalf of S.R.Attygalle Secretary to the Treasury, the 31st respondent in SC FR 195/2022 - who is also cited as 10th respondent in SC FR 212/2022 – (hereinafter referred to as the "31st respondent") submitted that the 31st respondent functioned as Secretary to the Treasury from 13th November 2019 to end of March 2022. He submitted that the 31st respondent was the chief financial officer of the Ministry and an ex officio member of the Monetary Board. Therefore, this respondent had the duty to implement the government policy as well as appraise the Monetary Board on details of such policy. It was his submission that no responsibility could be attributed to the 31st respondent based on the change of tax policies introduced in 2019. He contended that such change did take place as a pledge to the people by the President (32A respondent) during his election campaign and subsequently adopted as the policy of the Government. In his capacity as the Secretary to the Treasury and the Ministry of Finance he was acting on the instructions and guidance of the Minister and taking necessary measures to implement policy decisions of the Government. Furthermore, the decision to seek assistance from the IMF or not was a decision that should have been taken by the Government and his function is only to make necessary administrative arrangements to implement the decision. Therefore, it was argued that the 31st respondent cannot be faulted on the basis of any delay in making the decision to seek assistance from the IMF.

It was the submission of the learned President's Counsel that the payments made to the investors on ISBs in early 2022 was nothing but honouring the commitment following the maturity of such ISBs. Any default could have brought about serious repercussions. Not only such a default would have created a deep dent on the reputation of the Country preserved over several decades since independence but also would have dried off all current and future avenues for foreign investments and borrowings. Furthermore, it was contended that the Parliament through the budget had already allocated funds necessary for the payment in issue and as such there was no reason for this respondent not to have made arrangements necessary to honour the pledge utilising available funds.

He further submitted that the adverse conditions to the economy is not due to the conduct of any of the respondents but due to the irresponsible borrowings and the depletion of reserves that took

place prior to this respondent assuming duties as Secretary to the Treasury. He submitted that the reserves of USD 8.6 billion that existed in the year 2014, sharply declined to USD 6.3 billion within a period of five years due to mismanagement and irresponsible policies. It was further contended that the increase in the volume of borrowings during the same period also caused a serious impact on debt sustainability.

The learned President's Counsel submitted that the petitioners have failed to establish a case against this respondent and therefore urged the Court to dismiss both applications.

Sanjeeva Jayawardena, President's Counsel who was added as 32B respondent (hereinafter referred to as the "32B respondent") at the hearing appeared in person. Sanjeeva Jayawardena was added as a respondent pursuant to the Order of this Court at the point this Court granted leave to proceed. He was made a respondent in his capacity as a Member of the Monetary Board along with Ranee Jayamaha (who was also a member of the Monetary Board) who was added as 32C respondent. Both these said respondents filed affidavits jointly before this Court. It is to be noted however, that leave to proceed was not granted against either of them.

32B respondent at the outset submitted that the impact of the tax revisions introduced in the year 2019 removed 600 billion rupees from state coffers as taxes and fiscal revenue. Such depletion in Government revenue adversely impacted on the service of recurring domestic debt liabilities and the day to day running and management of the affairs of the State. It is his submission that the downgrading by the rating agencies on the basis of unsustainability of debts caused immense hardships to the economy. The failure to attract foreign direct investments due to downgrading and loss of confidence among the investors aggravated the balance of payment crisis. The inability to maintain the level of foreign reserves needed for three months of imports had a serious impact on the Government's capacity to import essential items such as fuel, gas, medicinal drugs and food. It was his submission, that the government failed to take necessary effective remedial measures even after realising the serious repercussions of the tax revision. The situation was further aggravated due to continued refusal and/or the resistance to seek an unqualified assistance programme from the IMF, in a timely manner. He contended that he along with the 32C responded repeatedly urged the importance of obtaining an IMF assisted programme at the meetings of the Monetary Board. Furthermore, he contended that upon his suggestion, a board level committee namely "Monetary Board External Debt Management

Committee" – MBEDMC - was established within the Central Bank. The first meeting of the said Committee was held on 12th January 2021. Mr Jayawardena and the 32C respondent had functioned as the Chairman and Vice-Chairman of the committee which comprised of Deputy Governors, Assistant Governors, Heads of Departments as well as a senior officer from the Treasury as an ex officio member. However, the ex officio member – the officer from the treasury - had abstained from participating at these meetings other than on the very first day where he was requested to provide details of sources of inflow of foreign currency, claimed by the said official as "firmly expected sources of inflows of foreign currency", for reasons unknown. 32B respondent further submitted that the critical importance of the presence of an IMF programme was apparent; even friendly countries were reluctant to provide SWAP facilities or any other financial assistance in the absence of an IMF programme.

It is Mr Jayawardena's contention that no positive steps were taken due to the policy of the government, as made known to them, despite several discussions emphasising the need to seek IMF assistance. According to the minutes of the Monetary Board meeting held on 3rd February 2021 the 31st respondent had said *"since the Government policy is not to go to the IMF, as officials we have to abide by it. Therefore (he stated) that other means of inflows need to be considered".* Under these circumstances time passed by without any real solution to the crisis that was gradually reaching alarming levels. Repercussions were aggravated in the absence of any effective remedial measures in place.

On 6th April 2022, both the 32B & 32C respondents had presented themselves before the Parliamentary Committee on Public Finance. 32B respondent contended that following the revelations made before the said Parliamentary Committee at the request of one of the members of the said Committee, a one-on-one meeting took place between him and the President (32A respondent). In preparation of this meeting Mr Jayawardena had obtained statistics with regard to foreign reserves and the inflows expected and the outflows that would be imminent due to the upcoming debt service deadlines and the expected further decline of the reserves. Furthermore, he had been informed that a letter the President had sent to the IMF on 18th March 2022 was ambiguous and no request was made for a full programme but referred only to an engagement. Therefore, the IMF was not prepared to extend any meaningful assistance. At the meeting this respondent had briefed the President on all aspects and had stated to him that there is no other

option but to reach out to the IMF for a fully pledged programme. At this discussion the President had revealed that he in fact had inquired as to how the country could recover without an IMF programme and whether promised influx of monies from foreign countries would actually materialise. The President himself has expressed serious scepticism on such assured inflows. Furthermore, the President had said that the impression given to him was that the Central Bank was against seeking assistance from the IMF. After this meeting on the suggestion of Mr Jayawardena, the President had communicated with the IMF with a request for a full IMF programme. Accordingly, on the 7th April 2022 a letter signed by the President (32A respondent) seeking a full IMF programme was prepared and on the following day a further communication to the IMF by the new Governor (who had assumed duties on 08th April 2022) was made, resulting a positive response from the IMF which facilitated the GOSL to formally announce on the debt standstill on 12th April 2022. He submitted that debt restructuring with the backing of a fully blown IMF programme has made a significant impact on the recovery process. He further submitted that the hardships the country was experiencing in the year 2021 could have been averted if the intervention of the IMF was sought in a timely manner.

In relation to the maintenance of the exchange rate, Mr Jayawaradena submitted, that the policy of the Government had been to maintain a fixed exchange rate. However, the dire situation did not permit the Central Bank to use reserves to defend the exchange rate but moral suasion was used to maintain the exchange rate without allowing a sudden spike, which could have serious repercussions. He pointed out, however, that the failure to impose effective restrictions on imports had a direct impact on the exchange rate. The Minister of Finance by his letter dated 12th August 2021 had called upon the Central Bank and the Monetary Board to initiate ten specific measures on an expeditious basis. One such measure was to release a total of USD 250 million to all commercial banks with the instructions not to exceed the parity of the exchange rate beyond Rs. 202 per 1 USD. The Monetary Board and the MBEDMC closely monitored the exchange rate continuously. The Monetary Board at the meeting of 7th March 2022 decided to allow the market to have a greater flexibility in the exchange rate with immediate effect. The Board further decided to communicate that decision by way of a notice informing that the Central Bank is of the view that forex transactions would take place at levels which are not more than Rs. 230 per US Dollar. However, the 29th respondent (Nivard Cabraal) at a meeting with the chief executive officers of the commercial banks and licenced specialised banks held on 09th March 2022 had

informed that *"certain trades may take place beyond the exchange rate stated by the Central Bank considering the greater flexibility that has been permitted".* According to Mr Jayawardena, the abovementioned statement of the 29th respondent did completely subvert and over-ride the carefully considered decision of the Monetary Board and the banks felt free to take an exponential increase of the forex rate. This situation escalated the forex rate and resulted in the USD appreciating to Rs.365 (interbank) and in the informal banking (hawala) to around Rs. 420. He contended that the impact of this overshoot of the exchange rate, on inflation and the cost of essential imports like fuel, gas, coal, medicines and food, were unbearable. The Rupee cost of purchasing such items from international markets, was not something that the liquidity levels of the treasury could bear under any circumstances. He further contended that this had a deep impact on the cost of living and also created shortages of essential items needed as there was insufficient currency in Sri Lanka rupees to meet the costs of these purchases and no purchase of US dollars from the Central Bank was possible. This issue had been raised at the meeting of the Parliamentary Committee on Public Finance. He contended that the Monetary Board had to take various steps thereafter in order to resuscitate the situation. In his submission the conduct of the 29th respondent was not only a clear deviation from the well-considered decision of the Monetary Board but aggravated the economic crisis, further deepening the enormous hardships caused to the general public.

Mr Navin Marapana PC represented both, Mahinda Rajapaksa and Basil Rajapaksa who are cited as the 2nd and 2A respondents in SC FR 195/2022 and 2nd and 3rd respondents in SC FR 212/2022 (hereinafter referred to as "2nd respondent" and "2A respondent" respectively). Mr Marapana PC at the outset submitted that both these applications should be dismissed. He contended that the impugned conduct of the two respondents in these applications are arising from policy decisions of the Government. He contends that the case of the petitioners is based on the premise that the decisions of the respondents are not the best decisions and in hindsight, different decisions could have averted the economic crisis. It is his contention that the petitioners have failed to establish as to which fundamental right was infringed due to the conduct of the respondents. He further contended that if the Court grants relief in these applications, the Court will be recognising a right to have infallible decisions from the executive or administrative authorities. He submitted that no such right is recognised by the Constitution. He further contended that at no stage, the petitioners claim that the respondents could not have taken the

impugned decisions nor they allege that the decisions they took are tainted with *mala fide*. Learned President's Counsel further submitted that the Court should desist from hearing these applications as a Parliamentary Select Committee is examining the same issues that the Court is invited to examine in these proceedings. In his submissions these decisions fall in the realm of public finance and it is the Parliament which has the sole jurisdiction to consider such matters.

In response to the contention of the petitioners that the tax revision was the root cause for the economic collapse, Mr Marapana PC submitted that the claim of the petitioners is misconceived. In his submission, attributing the sole responsibility to the tax revision not only is artificial but would be a complete disregard to many other factors that contributed to the economic collapse. It is his submission that the tax revisions were introduced with the expectation to revive the economic growth that was badly affected due to the easter attack in April 2019. It is common ground that one of the main avenues for foreign exchange earnings, tourism, was badly affected due to the unfortunate events that took place in April 2019. However, tax revisions that were introduced in late 2019 were with the expectation to help revive the economic growth. Unexpectedly however, within a very short period the global health crisis – Covid 19 pandemic – caused serious disruption to the day-to-day life of the entire society and continued to adversely impact on the economic growth. During the period of the pandemic, the main priority of the government was the safety of the people. This policy caused unexpected loss of revenue as well as the need to divert funds to protect peoples' lives. When tax revisions were introduced, several parties including Colombo Chamber of Commerce commended the move and expressed optimism. Furthermore, the decision to revise taxes was a lawful decision giving effect to the policy adopted by the Government in keeping with the promise in the election manifesto. He further contended that it is unrealistic to have reversed the tax revisions in the year 2020 as all the people were badly affected by the pandemic. However, in the first given opportunity, at the budget in 2021, steps were taken to bring in certain changes to the tax regime with the view to enhance government revenue. Furthermore, Mr Marapana PC contended that the claim the tax revisions caused a loss of Rs. 600 billion is a myth. He claims that the impact of the pandemic itself would have lowered the earnings of people and thereby reduced the tax income of the Government. Furthermore, Government earnings from excise duty and custom duties on imported vehicles dropped as the sales of excise items dropped and importation of vehicles was suspended by the Government. The learned President's Counsel contended that the petitioners

have failed to demonstrate that these factors were taken into account in quantifying the loss of revenue due to tax revisions. It is only in hindsight that the tax revisions are criticised. He contends that the attempt to attribute sole responsibility on the decision for tax revisions as the cause for the economic collapse has no merit.

On behalf of the 2nd and 2A respondents, Mr Marapana PC conceded that the decision to seek or not to seek assistance from the IMF lies with the Government. In his submission, the decision on this matter at no stage ignored the advise and/or the recommendations of the Monetary Board. He submitted that all the cabinet papers submitted by the respondents in this regard were in line with the expert opinion of the Monetary Board as provided by its statutory reports in compliance with section 68 of the Monetary Law. He drew the attention of this Court to the fact that in none of the statutory reports the Monetary Board identifies seeking IMF assistance as the only available path to economic recovery. The Monetary Board in the statutory reports identified seeking assistance from the IMF as an option vis a vis the "home grown" solution that was also identified as an alternative option. He contended that all the cabinet memorandums submitted in this regard are based on the statutory reports provided by the Monetary Board. Therefore, no responsibility could be attributed to any particular individual or individuals in this regard. He drew the attention of this Court to nine such reports submitted by the Monetary Board to the Minister of Finance. He contends that in none of the reports, seeking assistance from the IMF is recognised as the only way forward to recover from the crisis. To the contrary, the Monetary Board had commended various steps taken by the Government, including the adoption of the "home grown solution" as opposed to seeking assistance from the IMF.

Dr Romesh de Silva PC representing the Monetary Board, cited as 28th respondent in SC FR 195/2022 and as 9th respondent in SC FR 212/2022 (hereinafter referred to as the "28th respondent") at the outset submitted that even if the Court accepts the submissions of the petitioners, no responsibility can be attributed to the Monetary Board. The 28th respondent had discharged all duties in accordance with the law and had taken all possible measures to avert the crisis, acting within the statutory powers vested on it. It was his submission that the impugned conduct and the decisions which the petitioners claim that their rights were breached, have been taken by the Government and not by the Monetary Board. Furthermore, he submitted that the Monetary Board by its statutory reports had informed the Minister of Finance the dire situation

in the economy and the need to seek assistance from the IMF due to the situation that prevailed at the relevant period. It was his submission that these reports even though did not specifically mention that seeking assistance from the IMF as the only viable option available, provided a clear picture of the situation leaving for the Minister to take an informed decision in this regard. Furthermore, these reports themselves reflect that the Government was averse to seeking assistance from the IMF despite the critical condition in the economy. Therefore, as an agency of the Government the Monetary Board had to continue with the discharge of its duties while respecting the policy decisions of the Government. It was the responsibility of the Monetary Board to engage and discharge its duties at the best possible levels within the policy framework of the Government. Even under these constraints, the Monetary Board made all attempts to convey the importance of seeking an IMF programme to avert the crisis and overcome the difficulties.

In his submission Dr de Silva contended that the 28th respondent is vested with the powers, duties and functions of the Central Bank and be generally responsible for the management, operations and administration of the Central Bank. The Central Bank and the Monetary Board are created by the Monetary Law, Act No 58 of 1949 as amended from time to time. He submitted that within the statutory framework of the Monetary Law, the Central Bank is an agency of the Government and not an entirely independent entity. In this regard he drew the attention of this Court to the "Report on the Establishment of a Central Bank for Ceylon", Sessional Paper XIV-1949 (commonly known as Exter Report) and the determination of this Court in SC SD 6-12/2023 (determination on the Bill titled "Central Bank of Sri Lanka").

The learned President's Counsel further contended that the 28th respondent which operated under the Monetary Law Act has now ceased to operate. By virtue of section 125 of the Central Bank of Sri Lanka, Act No 16 of 2023, which came into operation on 15th September 2023, the Monetary Law Act has been repealed and the "Central Bank" and a "Governing Board of the Central Bank" are established under sections 2 and 8 respectively of the said Act. Governor and the Members of the Monetary Board who were holding office on the day immediately prior to the appointed date have now become the Governor of the Central Bank and members of the Governing Body, by the operation of a deeming provision in sections 126(1) and 126(2) of the Act No 16 of 2023. Furthermore, under section 134(h) of the Act, all applications instituted

against the Central Bank, the Monetary Board, its members under the repealed Act, is deemed to be an application instituted against the Central Bank under the new Act.

Therefore, the learned President's Counsel submits that any finding by this Court against the 28th respondent will have serious repercussions on the Central Bank functioning under the new law. He submitted that it is just and equitable for this Court not to make any adverse finding on the agency which has ceased to exist, the Monetary Board. However, in the event the Court reaches the conclusion that the conduct of some of the members of the Monetary Board have resulted in the violation of any rights, such members cannot hide behind the corporate veil and the Court could find them individually responsible for such conduct.

Dr de Silva contended that the Monetary Board has discharged all its duties as required by law and hence no responsibility can be attributed for any violation of a Fundamental Right.

Additional Solicitor General Mr Nerin Pulle PC, represented the Attorney-General. At the outset Mr Pulle PC submitted that the Court should accord great weight to the two reports of the Auditor-General in considering economic, public finance auditing and related aspects raised in the two instant applications.

The learned Additional Solicitor General drew our attention to the observations and conclusions of the Auditor-General in these reports and submitted that the Auditor General has the legal competency to make such observations and express opinions having reviewed and examined all necessary material available at the Central Bank. He further contended that even though the Auditor-General has refrained from expressing an opinion as to whether or not any loss had been caused to the Central Bank, the report does show the background in which various issues occurred as well as the direct or indirect impact of each factor on the other.

In relation to the complaint of the petitioners that the revision of taxes had a direct impact on the subsequent events which led to the economic collapse, Mr Pulle PC submitted that there are several legal principles and legislative provisions that need to be considered when examining this issue. According to him the imposition of taxes is within the full control of Parliament and enactment of tax legislation with retrospective effect is a lawful exercise of such powers. The Constitution does not provide for post enactment judicial review of legislation. In this context the

learned ASG posed the question, "would the exercise of wide sweeping powers of Parliament to impose taxes precludes the Court examining the merits or demerits of such legislation?"

The learned Additional Solicitor General contended that the formulation of national policy is a matter that is solely vested with the Central Government and the economic policy does form part and parcel of the national policy. He drew the attention of this Court to a series of judgements of this Court as well as judgments from foreign jurisdictions including the judgments of the Indian Supreme Court that recognises limitations on the power of judicial review on economic policy. It was his submission that the mere disagreement with a policy is not a ground on which courts could review economic policy and therefore, when there are various theories and hypotheses regarding the correct course of action it would not be possible to evaluate the correctness or otherwise of the policy. He contended that the Court should refrain from acting as a "super auditor". Mr Pulle PC further drew the attention of this Court to the scope of the "doctrine of political question" and submitted that courts have declined judicial review in instances where a political judgement has been made based on the assessment of diverse factors and varied factors, and there are no judicially discoverable and manageable standards other than in instances where the policy is *mala fide* and/or manifestly unreasonable and/or the policy is based on wholly extraneous and irrelevant grounds. Furthermore, he submitted that the Court should be mindful of the issue of whether the Court has the institutional capacity to examine the matters raised in the two instant applications. The doctrine of separation of powers is another matter he said that the Court needs to be mindful of when considering these two applications as matters of economic policy which are within the exclusive power of the Executive and taxation which is within the exclusive purview of the legislature.

The learned Additional Solicitor General having drawn our attention to the jurisprudence of this Court finally submitted that the Court has the power to make directions as it seems fit even if the Court decides that no violation of Fundamental Rights had been established.

REPORTS OF THE AUDITOR GENERAL

This Court when granting leave to proceed, directed the Auditor General to conduct an audit upon examining all relevant material and submit a report on (a) the decision made by the 28th respondent (Monetary Board) to set the value of the Sri Lanka Rupees at or around 203 as against the US Dollar and all matters connected to the said decision; (b) the delay in seeking

facilities from the IMF by the Republic and (c) all matters relating to the settlement of International Sovereign Bond/s to the value of USD 500 million on 18.01.2022 utilising foreign reserves. In addition, the Auditor General was further directed that the said report should comprise observations, including whether any loss had been caused to the Central Bank due to one or more of the three matters referred to above.

The Auditor General in compliance with the said direction, submitted to this Court the report titled "Audit Report Including Observations of the Auditor-General pertaining to the Fundamental Rights Case No 195/2022", on 08th March 2023. Furthermore, a copy of the report titled "Special Audit Report on Financial Management and Public Debt Control in Sri Lanka 2018-2022" dated 04th July 2022 was also tendered along with the said report, as per the direction of this Court.

We accept the submission of the learned Additional Solicitor General that the two reports of the Auditor General provide material including views, observations and opinions that could be taken into account by this Court in examining the instant applications.

In this regard we note that the Auditor General has refrained from making any observations on the issue whether any loss has been caused to the Central Bank. The Auditor General has refrained from making any observations on this issue for the reasons, (a) examination on the positive or negative aspects of matters that are prima facie policies of the Government is open for challenge; (b) the inability to identify the loss caused that resulted from the specific issues referred to by this Court as the pandemic also could have had an adverse impact on the economy and (c) the difficulty of ascertaining what ought to have been the best decision the Government could have taken in the face of limited foreign resources available at the relevant time.

Nonetheless, the Auditor General states that the report sets out the background in which the matters under consideration had taken place and further goes on to state that the interconnection of such matters as well as the impact those factors had on each other can be observed by the examination of this report.

This Court had the benefit of both these reports in considering the material tendered by all parties and the submissions of Counsel.

NON-COMPLIANCE WITH ARTICLE 126(2)

The petition in SC FR 195/2022 is dated 3rd June 2022. The petition in SC FR 212/2022 is dated 16th June 2022. In both these applications, several respondents took up the preliminary objection that both applications were time-barred in that the applications were not in compliance with Article 126(2) of the Constitution, and they are therefore liable to be dismissed *in limine*. The learned President's Counsel for the 2nd and 2A respondents argued that in both applications, no act or omission on the part of the 2nd and 2A respondents are alleged to have been committed or occurred within one month of the date of the petitions, and that the said respondents, namely Mahinda Rajapaksa and Basil Rajapaksa had ceased to be the Ministers of Finance prior to one month of the dates of each petition. That is, the 2nd and 2A respondents had ceased to be the Ministers of Finance prior to 3rd May 2022 and 16th May 2022 respectively.

The learned President's Counsel for the 29th respondent argued that the applications were time-barred in respect of the 29th respondent too, as the 29th respondent had been named respondent *qua* Chairman of the Monetary Board and the Governor of the Central Bank, positions he had only held till 4th April 2022. Similarly, Counsel for several other respondents took up the objections on the basis that the applications were time-barred in respect of their clients, citing their final date in office as being beyond the reach of one month prior to the dates of the petitions. These objections will be addressed as a composite argument.

Each respondent claimed to have held office during a period of time beyond the reach of one month prior to the dates of the petitions. Essentially, Counsel for the respondents argued that by failing to name any act or omission committed or alleged to have occurred at the hands of the said respondents after either 3rd May 2022 or 16th May 2022, both sets of petitioners before this Court were not in compliance with Article 126(2) of the Constitution.

This Court cannot ex facie dismiss, nor has it considered it prudent to dismiss fundamental rights applications for their failure to conform to an arithmetic stricture of 30 days without first examining the context of such applications. The petitioners in both applications placed their grievances before this Court while stating that the matters impugned in both applications relate directly and greatly to the entire citizenry, and the consequences of decisions, actions, omissions or irregularities committed by the respondents have transpired over a period of time and at the time of filing their applications, appeared to be deep-set in a manner which may affect successive

generations of Sri Lankans. The petitioners claimed to have filed their applications in the public interest. It would be correct to state that this Court has not previously been called upon to take cognizance of such a predicament.

It was submitted on behalf of the petitioners that the public was unaware of the contributory elements for the critical condition of the economy until the 4th Respondent in SC FR 212/2022 – the then Minister of Finance - conceded in parliament on 4th May 2022 that,

a) The reduction in income taxes reduced government revenue and resulted in grievous ramifications to the economy;
b) The rupee should have been 'floated' earlier and its depreciation should have been managed;
c) The assistance of the IMF should have been sought with greater promptitude;
d) The delay in rescheduling foreign loans resulted in severe ramifications to the economy;
e) There was a significant and rapid decrease in foreign reserves.

The Judgement in the case of ***Nanayakkara v Choksy*** (**SLIC case**) [2009] BLR 1 at 28-29 is particularly relevant here. The preliminary objection that the application (in that case) was time barred was overruled for the reason that the impugned transaction was an ongoing one and also since, "*in applications which have been filed in the public interest*", the Court can take cognizance of the time required to obtain relevant documents, study the subject matter of the impugned transaction and formulate the application to be submitted to this Court. Succinctly, his Lordship Justice Amaratunga held that the time period of one month should be deemed to commence only after the petitioners had a reasonable opportunity to complete the preparatory work which was essential to formulate and file their application.

> "…….*when the Court has to deal with any objection to such application the Court has to consider Articles 12 (1), 17, 126 and 28 (d) in combination*."
>
> *"It must be remembered that these two applications have been filed in the public interest to make the fundamental right enshrined in article meaningful- that is to make it "tangible" and "palpable", and also to ensure that all officers of the State and its agencies entrusted with the duty to discharge their functions and obligations, do so in*

accordance with the law, bearing in mind the concept of equality enshrined in the Constitution and the basic tenet of the Rule of Law."

"The Petitioners have stated that they learnt about the alleged irregularities relating to the sale of SLIC after they read the COPE report tabled in Parliament. Thereafter, they had to obtain the relevant documents, which as revealed by this judgment itself, were in various government bodies not readily accessible to the public. Even after they managed to get the necessary documents, they have to study those documents to have a proper insight into the transaction to prepare their affidavits to be presented to this Court along with their applications."

As already observed, the petitioners in the present applications are public spirited persons and both these applications have been filed in the public interest. The alleged events, decisions, actions, omissions and irregularities complained of by the petitioners are matters connected with the mismanagement of the economy of the country. The events, decisions, actions, omissions and irregularities and the complaints which have flown from them are elaborate and complex in nature. The learned President's Counsel for the petitioners stated that relevant documents and material essential to obtain even a preliminary understanding of what had occurred and *how* the petitioners' fundamental rights were violated were difficult to discover, acquire and analyse. The voluminous court briefs and records which this Court scrutinised and examined over nearly a fortnight of hearings evidences the complexity of their claims. Therefore, considering the aforesaid circumstances and the inherent nature of the events, decisions, actions, omissions and irregularities impugned, it would be correct to state that the petitioners required additional time to reasonably complete the preparatory work which was essential to formulate and file their applications.

Furthermore, in the case of ***Sugathapala Mendis and Another v Chandrika Kunarathunga and Others*** **(Waters Edge Case)** [2008] 2 SLR 339,at pages 354, 355, in determining whether the application was time-barred (as this application too was filed in respect of a series of acts which ka Kunarathunga and Othershad occurred several years ago), Tilakawardane, J. considered the series of acts in totality, and in respect of the "particulars" which had changed over time which were "*central to the case*". Her Ladyship further held that "*...For this Court to ignore the continuing*

nature of a large-scale development project would be to ignore it the continuing nature of any violations that stem out of such a project…".

Similarly, for this Court to ignore the long and sustained nature of the matters impugned in these present cases, would be to ignore any possible violations which may stem from these actions.

For the aforementioned reasons, the preliminary objection concerning the time-bar is overruled in respect of all respondents.

POLICY OF THE GOVERNMENT, ECONOMIC POLICY AND DOCTRINE OF "POLITICAL QUESTION"

One of the main contentions of the respondents, particularly the 29th,30th,31st,32nd,38th,2nd and 2A respondents was that this Court lacks jurisdiction to entertain, hear and determine these applications as the impugned mattes, cumulatively challenged by the petitioners before this Court are of fiscal, economic and political in nature and also are 'policy decisions of the Government'.

To substantiate the above argument, the respondents heavily relied upon the dicta of Sripavan, J. (as he then was) in the case of ***Sujeewa Senasinghe v. Ajith Nivard Cabraal*** (**the Greek Bond Case**) SC.FR 457/2012 S.C. Minutes 18-09-2014, wherein His Lordship observed;

> *"We must not forget that in complex economic policy matters every decision is necessarily empiric and therefore its validity cannot be tested on any rigid formula or strict consideration. The Court while adjudicating the constitutional validity of the decision of the Governor or Members of the Monetary Board must grant a certain measure of freedom considering the complexity of the economic activities. The Court cannot strike down a decision merely because it feels another policy decision would have been fairer or wiser or more scientific or logical. The Court is not expected to express its opinion as to whether at a particular point of time or in a particular situation any such decision should have been adopted or not. It is best left to the discretion of the authority concerned."*

Further, it was the contention of the respondents, that issues relating to policy or its appropriateness are not matters for consideration by the judicial branch of the Government. The

respondents drew the attention of Court to the Statutory Determinations of this Court in the ***Nation Building Tax (Amendment) Bill*** SC.SD. 34/2016, [Decisions of the Supreme Court on Parliamentary Bills 2016-2017 Vol XIII 65], the ***Fiscal Management (Responsibility) (Amendment) Bill*** SC.SD. 28- 29/2016 [Decisions of the Supreme Court on Parliamentary Bills 2016-2017 Vol XIII 53] and ***The Inland Revenue (Amendment) Bill*** SC.SD. 17/1997 [Decisions of the Supreme Court on Parliamentary Bills 1991-2003 Vol VII 103] to bolster its argument.

The respondents also relied on the pronouncements made in the ***Special Goods and Services Tax Bill*** [SC.SD. 1-9/2022, Hansard of 22.02.2022] to propound that, formulation of policy is very much the prerogative of the Executive and the Legislature and converting the policies into legislation is within the exclusive domain of the legislative power of the Parliament and, that it is not prudent for the judiciary to comment upon policy formulation by the Executive.

Another judgement the learned Counsel for the respondents relied upon was ***Jathika Sevaka Sangamaya v. Sri Lanka Hadabima Authority*** SC/App 15/2013- S.C. Minutes 16.12.2015, a judgement of this Court, wherein it was observed;

> *"The doctrine of separation of powers is based on the concept that concentration of the powers of Government in one body will lead to erosion of political freedom and liberty and abuse of power. Therefore, powers of Government are kept separated to prevent the erosion of political freedom and liberty and abuse of power. This will lead to controlling of one another.*
>
> *There are three distinct functions involved in a Government of a State, namely legislative, the executive and the judicial functions. Those three branches of Government are composed of different powers and functions as three separate organs of Government. Those three organs are constitutionally of equal status and also independent from one another. One organ should not control or interfere with the powers and functions of another branch of Government and should not be in a position to dominate the others and each branch operates as a check on the others. This is accomplished through a system of 'checks and balances', where each branch is given certain powers so as to check and balance the other branches"*

Thus, the submission of the respondents was, since this Court has consistently recognized that the formulation of Government policy is very much the prerogative of the Executive and the Legislature elected by the People, that this Court should neither approve, critique or quash policies adopted by the Executive and the Legislature, or comment regarding its appropriateness in comparison with what the Court believes to be in national and public interests.

Additional Solicitor General Nerin Pulle PC in his submissions, responding to the petitioners contention that three main reasons contributed to the economic crisis, and one of which was arbitrary tax reductions, strenuously argued that the reduction and /or increase of taxes is a matter which is entirely within the purview of Parliament under Article 148 of the Constitution and this Court lacks jurisdiction to determine such matters and drew the attention of this Court to a number of tax revisions passed by Parliament in line with Article 148 of the Constitution.

The attention of the Court was also drawn to Article 80 (3) of the Constitution that prohibits post review of enactments and a plethora of Statutory Determinations of this Court, pertaining to fiscal statutes, to put forward the argument, that in tax matters, the legislator is the best judge and must benefit from greater freedom of classification and is at liberty to make reasonable classification and the Court lacks institutional capacity to assess or appraise such policy decisions and therefore, should not intervene in matters of policy unless such policy is found to be 'manifestly unreasonable.'[Vide ***Inland Revenue (Amendment) Bill*** SC.SD. 64-71/2022 Hansard of 17.11.2022]

Further, it was the contention of the learned ASG that the challenge by the petitioners to certain actions of the Executive which amounts to matters of economic policy, falls within the ambit of national policy and since national policy on all subjects and functions is listed under the 'reserved list' (List II of the 9th Schedule to the Constitution under Article 154 G (7) of the Constitution), the Central Government has sole control over such matters and thus the scope of judicial review of economic policy is limited and the Court cannot strike down a policy decision taken by the Government unless it is manifestly unreasonable and relied upon judicial dicta of the Indian Supreme Court to justify the said contention. [Vide - ***M/S Prag Ice and Oil Mills and another v. Union of India*** (1978) 3 SCC 459 and ***Balco Employees Union (Regd) v. Union of India and others*** [2002] AIR 350]

Another argument forcefully presented by the learned ASG is that certain narratives of the petitioners in these applications leading up to actions / inactions and the policies adopted by the Government would attract the application of the doctrine of political question- questions said to be 'non-justiciable' and as observed by the Supreme Court of the United States, the law is that the judiciary has no right to entertain the claim for unlawfulness, because such question is entrusted to one of the political branches and in view of a lack of judicially discoverable and manageable standards for resolving it and it involves no judicially enforceable rights.[Vide ***Baker v. Carr*** 369 US 186 (1962), ***Vieth and Furey v Jubelirer et al*** 541 US 267 (2004)] **.**

He further submitted, that although the 'doctrine of political question' was considered and rejected in the case of ***Premachandra v Major Montegue Jayawickrema and another*** [1994] 2 SLR 90, the said judgement can be distinguished and the doctrine of political question could be applied in the matter under consideration. The argument presented by the learned ASG was that in **Premachandra** (supra) the doctrine was rejected, since the impugned decision was made by a Provincial Governor and the Provincial Councils which are a subordinate arm of the Government viś-â-vis the Superior Courts. The learned ASG further submitted that even if the Court decides to examine decisions of the Executive disregarding the doctrine of political question the Court should be cautious and should be mindful, whether the Court has the institutional capacity to review matters of economic policy and formulate standards for the management of economic policy. Hence, it was submitted that the case of the petitioners is 'non-justiciable' and should be dismissed.

The attention of this Court was drawn by the learned Counsel for the Respondents to the judicial pronouncements of the Indian Supreme Court, to contend that this Court lacks jurisdiction to review taxation policies unless it is in violation of a law or is done ultra vires; and also drew our attention to specific passages of the said judgements: -

Prag Ice & Oil Mills & another v. Union of India (1978) 3 SCC 459

> ***"We do not think that it is the function of this Court or of any Court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide.*** *Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtless differ. Courts can certainly not be expected to decide them without even the aid of experts."*

Bharat Aluminium Company, Ltd. Employees Union v Union of India (2002) 2 SCC 333 *(The BALCO case)*

> *"In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court. […] Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution."*

Sidheswar Sahakari Sakhar Karkhana Ltd. v Union of India (2005) 3 SCC 369

> *"Normally the Court should not interfere in policy matter which is within the purview of the government unless it is shown to be contrary to law or inconsistent with the provisions of the Constitution."*

Ugar Sugar Works Ltd. v Delhi Administration and others (2001) 3 SCC 635

> *"In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference to the Executive. The Courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State."*

However, we are of the view that these passages cannot be taken in isolation. It must be considered and understood holistically. It must be examined with the narration of its facts.

In the **Ugar Sugar case** (supra) the Indian Supreme Court categorically observed:

> ***"It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily inter fere with the policy decisions of the Executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc, Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional***. *However, if the policy cannot be faulted on any of these grounds, the mere fact that it would*

hurt business interests of a party, does not justify invalidating the policy." (emphasis added).

Furthermore, this Court is conscious that the Indian Supreme Court in ***Delhi Development Authority v Joint Action Committee, Allottee of SFS Flats*** **(2008) 2 SCC** 672 t*he Court held as follows-*

> ***"****An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the* ***other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision.*** *Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review."* (emphasis added)

Similarly in the case***, Centre for Public Interest Litigation v Union of India*** **(2012) 3 SCC 1** ***(The 2G case)*** the Court observed as follows-

> *"...The power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State.* ***However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest*** *and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters."*
>
> *"...When matters like these are brought before the judicial constituent of the State by public-spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and* ***ensure that the institutional integrity is not compromised by those in whom the people have reposed trust*** *and who have taken an oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill-will and who, as any*

other citizen, enjoy fundamental rights and, at the same time, are bound to perform the duties enumerated in Article 51-A." (emphasis added)

In contradistinction, to the contention of the respondents the main thrust of the case presented by the petitioners was the conduct of the 2nd,2A,29th,30th,31st,32nd, 32A and 38th respondents demonstrate a 'patent breach of public trust' and thereby a complete disregard of the 'rule of law'. The petitioners contend that in considering these applications the Court need not examine the policies adopted by the Government but focus on the failure to take necessary steps to remedy the situation which amounted to irrational and arbitrary conduct of the respondents. It was the position of the petitioners that even if this Court is to go into the policies of the State in determining whether any one or more of the Fundamental Rights of the petitioners had been violated as the law stands today, this Court is both empowered and has the jurisdiction to go into the policies adopted by the State in determining as to whether the Fundamental Rights of the petitioners have been violated by any of the respondents.

In the determination of the ***Appropriation Bill of 2012*** [Decisions of the Supreme Court on Parliamentary Bills 2010-2012 Vol X] it was observed that *'due and proper fiscal accountability must be viewed as the bedrock of good governance by any Government and must at all times be balanced and viewed through the lens of intra and intergenerational responsibility and equity.'*

This Court in its determination on the ***Inland Revenue (Amendment Bill)*** [SC SD 63-64/2023, Hansrad of 05.09.2023] in dealing with the issue of classifications in revenue matters recognized that *"such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable".* Hence the Court in Statutory Determinations too recognized its jurisdiction even to examine matters relating to revenue, when such matters are ***manifestly unreasonable***.

Indian authorities also provide that economic decisions are reviewable. Although an extent of judicial deference should be exercised in such review.

In ***Shri Sitaram Sugar Company v Union of India and Others*** (1990) AIR 1277 the price of levy on sugar was questioned. The Indian Supreme Court held that the doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated, and he does not abuse his power. He must act reasonably and in good faith. It is not sufficient that the

instrument is intra vires the parent Act but must also be consistent with the constitutional principles**.** It was held that**;**

> *"The doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated, and he does not abuse his power. He must act reasonably and in good faith. It is not only sufficient that an instrument is intra vires the parent Act, but it must also be consistent with the constitutional principles: Maneka Gandhi v. Union of India, [1978] 1 SCC 248, 314-315."*
>
> *"The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or* ***it is so arbitrary or unreasonable that no fair-minded authority could ever have made it"***
>
> *"Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land."*

Similarly, in ***Small Scale Industrial Manufactures Association (Registered) v Union of India and Others*** (2021) 8 SCC 511 the Indian Supreme Court observed that**;**

> *"What is best in the national economy and in what manner and to what extent the financial reliefs/packages be formulated, offered and implemented is ultimately to be decided by the Government and RBI on the aid and advise of the experts. The same is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review. Merely because some class/sector may not be agreeable and/or satisfied with such packages/policy decisions, the courts,* ***in exercise of the power of judicial review, do not ordinarily interfere with***

the policy decisions, unless such policy could be faulted on the ground of mala fides, arbitrariness, unfairness, etc."

In the recent judgement of ***Vivek Narayan Sharma v Union of India*** *Writ petition* (Civil) No. 906 of 2016 the Indian Supreme Court observed that the Court would not interfere with any opinion formed by the government if it is based on relevant factors. The judgement was concerned with the decision of the Central Government of India to demonetise certain legal tenders**.** In para 224 the Indian Supreme Court observed that;

> *"This Court observed that the Court would not interfere with any opinion formed by the government if it is based on the relevant facts and circumstances or based on expert's advice. The Court would be entitled to interfere only when it is found that the action of the executive is arbitrary and violative of any constitutional, statutory or other provisions of law. It has been held that when the government forms its policy, it is based on a number of circumstances and it is also based on expert's opinion, which must not be interfered with, except on the ground of palpable arbitrariness. It is more than settled that the Court gives a large leeway to the executive and the legislature in matters of economic policy."*

These series of Indian judgements demonstrate that the role of Courts is to expand and not to attenuate fundamental rights. This view is stated by Justice Y.V Chandrachud et.al in 'Commentary on the Constitution of India' 8th edn Vol. 1 at page 227 as follows;

> "*Until recently, the Indian Supreme Court judges eschewed the policy approach as they treated the Indian Constitution as a statute and construed it according to the ordinary canon of statutory construction, except in one area, viz. The amenability of the Constitution and they usually stated that 'This Court is not concerned with policy or economic considerations' (vide State of Bombay v Bombay Education Society, AIR 1954 SC 561, 567).*
>
> *In Cooper's case the attitude was displayed, and it seems to continue. However, in recent times a 'policy' approach in interpreting constitutional interpretation is seen and emphasis is placed on a more creative law-making judicial role as regards to constitutional interpretation. In Maneka Gandhi it was openly declared that the role of*

the Courts is to expand not to attenuate the Fundamental Rights. This judicial policy has been translated into practical terms through a series of post-Maneka cases. Particularly in the order of personal liberty and freedom of speech."

Similar to Indian authorities, when we consider the jurisprudence of this Court it is clear that the scope and content of the Right to Equality guaranteed by Article 12 of the Constitution has evolved with the passage of time. Such evolution is in accord with the progressive changes that have taken place in other jurisdictions as well. To quote Justice Y.V Chandrachud (supra) at page 228:

"Judicial interpretation is a process of slow and gradual metamorphosis of Constitutional principles. Change caused thereby has to be deciphered by an analysis of a body of judicial precedents. This process is slow because it develops from case to case over a length of time and may take a long period for a view to crystalize. As per Dr Jain it is also somewhat haphazard because the Courts do not take initiative; they interpret the Constitution only when the question is raised before them, and the course of interpretation depends on the nature of cases and constitutional controversies which are presented to the Courts for adjudication."

In its current form the Right to Equality guarantees protection from arbitrary exercise of power and discretion by State functionaries and enhances the Rule of Law. It further requires State authorities to ensure that their conduct will not breach the trust placed on them and ensure that public resources placed in their custody are protected and preserved for the benefit of the people and not to exhaust for political or personal benefit. Exercise of discretionary powers in the decision-making process should be guided by the Directive Principles as recognized by the Constitution and callous disregard of such principles will pollute decisions with arbitrariness. Thus, the Rule of Law is not only rights and equality. The Rule of Law is also about functionality and efficiency for sustainable economic development of the nation and all of its People. **Hence, the respondents will not be absolved of liability merely because the decision and/or decisions are concerned with economic policies. This is not to state that the Court will not provide a margin of deference to the relevant decision makers in implementing national economic policies. However, such decisions should be considered decisions, for the long-term sustainable development and for the public benefit.**

This Court has considered the submissions made in respect of the "economic policy" and the "doctrine of political question", the judicial dicta of our Courts and other jurisdictions and we are convinced that this Court has jurisdiction to look into the grievances of the petitioners in these applications.

We are also of the view as laid down in the case of ***Jathika Sewaka Sangamaya v Sri Lanka Hadabima Authority*** (supra) one organ of a State should not dominate, control or interfere with the powers and functions of another branch of a government but operate as a check on the other through the mechanism of "checks and balances".

In coming to this conclusion, we are mindful that in the case of ***Sujeewa Senasinghe v Ajith Nivard Cabraal*** (supra) though leave to proceed was not granted the Court pronounced that it has to focus on the applicable law and ascertain whether the impugned decision to invest in Greek bonds was an arbitrary exercise of power serving a collateral purpose. The Court considered the totality of the circumstances, the risk management strategy in particular and the decisions complaint of in the said case viz. that the Central Bank investing in the bonds issued by the Hellanic Republic Ministry of Economy and Finance Public Debt Management Agency was based on the trade-off between the different risks faced and the Central Bank's tolerance for higher risks on a very small part of its portfolio (only 0.6 of its portfolio); and investing in high yielding Sovereign paper is an integral part of fund management of many funds in the world over and the Central Bank too had followed a similar practice in investing a tolerable proportion of its resources (0.6 percent) in Greek Bonds, The Court went on to observe when the euro zone took a turn for the worst several weeks later after the investment was made, the Central Bank sold a part of the Greek bonds at a loss of USD 6.6 million and this measure was taken to mitigate the risk of the Greek investment losing further value due to subsequent development in the euro zone and came to the conclusion, that it is neither possible nor desirable to hold that the Monetary Board in taking a decision to invest in Greek bonds have acted arbitrarily, unreasonably or in a fraudulent manner.

In view of the factors discussed above we see no merit in the submission of the learned Counsel for the respondents that the applications of the petitioners are non-justiciable or that this Court lacks jurisdiction to determine the impugned decisions of the Government.

RIGHT TO EQUALITY, RULE OF LAW AND 'PUBLIC TRUST'

Under Article 3 of the Constitution, the inalienable Sovereignty that is vested in the People includes powers of Government and Fundamental Rights. The Executive power of the People is exercised by the President who is the Head of the State, Head of the Government and the Head of the Executive. Within this Constitutional framework, The Cabinet of Ministers is charged with the direction and control of the Government and the President is the Head of the Cabinet of Ministers. The Constitution which is the Supreme Law recognises that FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL RIGHTS and the INDEPENDENCE OF THE JUDICIARY as intangible heritage of succeeding generations of the People of Sri Lanka.

Article 3 of the Constitution reads as follows;

> *"In the Republic of Sri Lanka sovereignly is in the People and is inalienable. Sovereignty includes the powers of Government, fundamental rights and the franchise."*

Article 4 of the Constitution speaks of exercise of such power in the People and **Article 4(d)** of the Constitution declares;

> *"the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and extent hereinafter provided."*

In ***Rajavarothiam Sampanthan v Attorney General*** **(Dissolution Case)** SC/FR/351 to 356 of 2018 and SC/FR/358 to 367 of 2018, SC minutes of 13-12-2018 at page 31, a Seven Judge Bench of this Court observed as follows;

> *"It has been emphasised time and again by this Court that it is a foremost duty of the Supreme Court to protect, give full meaning to and enforce the fundamental rights which are listed in Chapter III of the Constitution. Thus, Sharvananda, CJ observed in* ***Mutuweeran v The State*** *- 5 Srikantha's Law Reports 126 at page 130, 'Because the remedy under Article 126 is thus guaranteed by the Constitution, a duty is imposed upon the Supreme Court to protect fundamental*

rights and ensure their vindication'. In the same vein, Ranasinghe, J stated in ***Edirisuriya v Navaratnam*** *[1985 1 SLR 100 at page 106], that "A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured to the citizens of the Republic as part of their intangible heritage. It therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations.""*

"In honouring this duty, the Supreme Court is giving tangible and effective life and meaning to the sovereignty of the people. The single and only instance specified in the Constitution where the exercise of these fundamental rights may be restricted is in circumstances falling within the ambit of Article 15 of the Constitution and the present application do not fall with the ambit of Article 15 in the absence of any laws which have been passed prescribing restricting the operation of Article 12(1) in the interests of national security, public order or any other of the specified grounds referred to in Article 15(7) of the Constitution [……] In the absence of a specific and express provision in the Constitution which strips the Supreme Court of jurisdiction under Article 118(b) read with Article 126 and Article 17 for the protection of fundamental rights, the provisions of Article 118(b) read with Article 126 and Article 17 will prevail. Therefore, this Court has the jurisdiction and, in fact a solemn duty to hear and determine these applications according to the law."

Thus, this Court is not fettered or precluded from exercising the fundamental rights jurisdiction and has a solemn and a bounden duty to uphold the rule of law and to safeguard the sovereignty of each and every citizen of this country.

Over the last period of forty-five years since the adoption of the Constitution in the year 1978, Right to Equality remains one of the mostly invoked rights by the People before the Supreme Court through the process provided under Article 126 of the Constitution.

The Right to Equality is guaranteed under **Article 12(1)** of the Constitution and it reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law".

The expression 'equality before the law' which is found in written Constitutions, originated from the English Law and the expression 'equal protection of the law' first appeared in the American jurisprudence. The Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights use the said expressions which exemplify that the object of these phrases is equal justice to mankind.

Sharvananda, J. (as he then was) in the case of ***Palihawadana v. Attorney General*** [1978]1 SLR 65, postulates that the Preamble to our Constitution recognizes that the People of Sri Lanka have ranked equality with justice and freedom and the notion of equality underlies all religious and political philosophies.

The Supreme Court which has the sole and exclusive jurisdiction to hear and determine any question relating to the infringement of fundamental rights in exercising this jurisdiction had examined and interpreted the scope and content of the right to equality as guaranteed by Article 12. The right to equality as guaranteed under Article 12 had evolved to its present form over a period of four decades. In this process the co-relationship between the Democracy, Rule of Law and the doctrine of Public Trust has been clearly recognised in the context of arbitrary and / or irrational exercise of power by Executive and / or Administrative authorities as well on violation of right to equality due to inaction of the Executive and / or Administrative authorities.

Equality is the corollary of the 'Rule of Law' and Sharvananda, J. in ***Sirisena & others v Kobbekaduwa, Minister of Agriculture and Lands*** 80 NLR 1 at 169-170 observed:

"Rule of law is the very foundation of our Constitution and the right of access to the Courts has always been jealously guarded. Rule of Law depends on the provision of adequate safeguards against abuse of power by the executive. Our Constitution promises to usher in a welfare state for our country. In such a state, the Legislature has necessarily to create innumerable administrative bodies and entrust them with multifarious functions. They will have power to interfere with every aspect of human activity. If their existence is necessary for the progress and development of the country the abuse of power by them, ***if unchecked, may defeat***

the legislative scheme and bring about an authoritarian or totalitarian state. The existence of the power of judicial review and the exercise of same effectively is a necessary safeguard against such abuse of power." (emphasis added)

In ***Visualingam and others v Liyanage and others*** [1983] 2 SLR 311 at page 380 it was observed that

"...there is a firm judicial policy against allowing the 'Rule of Law' to be undermined by weakening of the power of the Courts".

In the year 1984, in ***Jayanetti v The Land Reform Commission and others*** [1984] 2 SLR 172, Wanasundera J with other four judges agreeing with him observed that:

"Article 12 of our Constitution is similar in content to Article 14 of the Indian Constitution. The Indian Supreme Court has held that Article 14 "combines the English doctrine of the rule of law with the equal protection clause of the 14th amendment to (the U.S.) Constitution". We all know that the rule of law was a fundamental principle of English Constitutional Law and it was a right of the subject to challenge any act of the State from whichever organ it emanated and compel it to justify its legality. It was not confined only to legislation, but extended to every class and category of acts done by or at the instance of the State. That concept is included and embodied in Article 12." (at 184-185).

In ***De Silva v Atukorale*** [1993] 1 SLR 283, Mark Fernando, J. in interpreting the term public purpose relied on the following opinion of H. W. Wade –

"... 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 which Parliament when conferring it is presumed to have intended."(at 296)

Based on the said observation, the Court held that discretion of a public authority is not absolute, and that such discretion must be used exclusively for the public good, and went onto observe;

> *"It was a power conferred solely to be used for the public good, and not for his personal benefit; it* ***was held in trust for the public****; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest."* (emphasis added)(at 297)

The principle that there is no absolute or unfettered power is also recognized in ***Marie Indira Fernandopulle and Another v E.L Senanayake, Minister of Lands and Agriculture*** 79 2 N.L.R 115 at page 120 wherein the Court held that;

> *"...Are the Courts obliged to turn a deaf ear merely because some statutory officer is able to proclaim, "I alone decide". "When I open my mouth let no dog bark"? If that be the position when the rights of the subject are involved, then the Court would have abdicated its powers necessary to safeguard the rights of the individual."*

Another case wherein the public interest was considered is ***Bandara v Premachandra*** [1994] 1 SLR 301. In this case Fernando, J. at page 318 reasoned that;

> *"The State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of Constitutional and statuary powers and jurisdictions, the Judiciary must endeavour to ensure that this expectation is realised."*

In ***Heather Mundy v Central Environmental Authority and Others*** SC Appeal 58 60/2003 - SC Minutes 20.01.2004- Fernando, J. reiterated that powers vested in public authorities are not absolute and unfettered;

> *"...Further, this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes"* (page 13)

Similarly, in ***Premachandra v Major Montague Jayawickrema and another*** [1994] 2 SLR 90 G.P.S. de Silva, C.J. held;

"There are no absolute and unfettered discretions in public Law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted." (page 105)

Further, Shirani Bandaranayake, J. (as she then was) in ***Azath Salley v Colombo Municipal Council*** S.C. (FR) Application No. 252/2007 -S.C Minutes 04.03.2009- referring to the above position, states as follows;

"It is therefore apparent that a public authority has no absolute or unfettered discretion. Referring to this position, Professor Wade (supra pgs. 354 - 355) had stated that,

***'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 which Parliament when conferring it is presumed to have intended'(emphasis added)."* (page 30)

Fernando, J. in ***Priyangani v Nanayakkara and others*** [1996] 1 SLR 399 at 404-405 reiterated the interrelationship between the Right to Equality guaranteed by Article 12 of the Constitution and Rule of Law. Furthermore, the Court held that

*"We are not concerned with contractual duties, but with the safeguards based on the **Rule of Law which Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers**. Discretionary powers can never be treated as absolute and unfettered unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred **- not at the whim and fancy of officials for political advantage or personal gain**". (emphasis added)*

In ***Bulankulama v Secretary, Ministry of Industrial Development*** **(Eppawela case)** [2000] 3 SLR 243 a case involving an imminent infringement of fundamental rights, the respondents sought to argue that the government and not this Court is the trustee of the natural resources of

the country and as long as the government acts correctly the Courts will not put itself in the shoes of the government and the Court could not *'interfere'* in the exercise of discretion of the Government in situations where the Government acts as a 'trustee'. This Court rejected the argument and Amerasinghe, J. held that under **Articles 4, 17 and 126 of the Constitution,** the Court is expressly authorised to exercise its jurisdiction where the actions / omissions of the executive, violates fundamental rights of the people and that such jurisdiction applies even in situations where the Government exercises its powers as a 'trustee'.

Amerasinghe, J. at page 253 and 257 further observes:

> *"The Constitution declares that sovereignly is in the People and is inalienable (Article 3). Being a representative democracy, the powers of the People are exercised through persons who are for the time being entrusted with certain functions"*
>
> *"The Executive does have a significant role in resource management conferred by law, yet the management of natural resources has not been placed exclusively in the hands of the Executive. The exercise of Executive power is subject to judicial review. Moreover, Parliament may, as it has done on many occasions, legislate on matters concerning natural resources and the Courts have the task of interpreting such legislation in giving effect to the will of the People as expressed by Parliament."*

The above dicta of this Court amply demonstrate that during the last few decades, the Public Trust Doctrine has been applied by this Court when violations of the fundamental rights of People were considered. Furthermore, in relation to powers, functions and duties which are public in nature, this Court has always had respect for the Rule of Law and specifically to the principles of openness, fairness and accountability and observed that process of making a decision should not be shrouded in secrecy and that the powers are conferred upon the Executive in the public interest and in trust for the public and these powers must be governed by reason.

In ***Vasudeva Nanayakkara v Choksy*** (**Lanka Marine Case**) [2008] 1 SLR 134 at 181 Sarath N Silva, CJ. held as follows:

"...As firmly laid down in the Determination of the Divisional Bench of Seven Judges of this Court in regard to the constitutionality of the proposed 19th Amendment to the Constitution (2002 3 SLR page 85) the principle enunciated in Articles 3 and 4 of our Constitution is that the respective organs of Government, the Legislature, the Executive, and the Judiciary are reposed power as custodians for the time being to be exercised for the people. In Bulankulame and others v Secretary, Ministry of Industrial Development (2000 3 SLR 243) this Court has observed that the resources of the State are the "resources of the People" and the Organs of the State are "guardians to whom the people have committed the care and preservation" of these resources (p.253). That, there is a confident expectation (trust) that the Executive will act in accordance with the law and accountably in the best interests of the people of Sri Lanka (p 258)".

In ***Sugathapala Mendis and another*** (**Waters Edge Case**) [2008] 2 SLR 339 Tilakawardane, J. elaborated the Public Interest Doctrine as follows;

"The principle that those charged with the upholding the Constitution- be it a police officers of the lowest rank or the President- are to do so in a way that does not "violate the Doctrine of Public Trust" by state action / inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The "Public trust Doctrine" is based on the concept that the powers held by the organs of the government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain, favour, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution the Sovereignty reposes. ***Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review".***

"The Public Trust Doctrine, taken together with the Constitutional Directives of Article 27, reveal that all state actors are so principally obliged to act in furtherance of the trust of the People that they must follow this duty even when a furtherance of this trust necessarily renders inadequate an act or omission that would otherwise legally suffice." (Vide pages 352-353).

"The oral arguments and written submissions presented on behalf of the principal respondents in this case engage in precisely this abdication of responsibility, that have come to be seen as a hallmark of Sri Lanka's governmental bureaucracy. Following Bandara v Premachandra in which the Court held that ***"….the State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the judiciary must endeavour to ensure that this expectation is realized…"*** *we recognize that this duty has to be upheld not only in the name of good governance but also for sustainable economic development of the nation and all of its People, especially the economically challenged, the disadvantaged and the marginalised. In time this will empower the marginalised and disempowered members of our society, and will in due course establish a true Democratic Socialist Republic with equality for all."* (vide page 354) (emphasis added)

In ***Vasudeva Nanayakkara v K.N. Choksy and others*** (**SLIC Case**) [2009] BLR 1 at page 56 and 57 Amaratunga, J. observed as follows:

"Fundamental rights jurisdiction forms a part of the equitable jurisdiction of the Supreme Court which exercises, at the highest level, the judicial power of the people according to the Rule of Law and the fundamental rights provisions enshrined in the Constitution."

"The petitioners have filed this application in public interest alleging that the executive power of the people, delegated to the Executive by the Constitution, to exercise in good faith and according to law have been wrongfully and illegally exercised, to the prejudice of the people. The trust reposed on the executive to which the peoples' executive power has been delegated is, in the words of

Amarasinghe J in Bulankulama Case," the confident expectation (trust) that the executive will act in accordance with the law and accountability, in the best interest of the people" (2000 3 SLR 243 at 258). The ruler's trusteeship of the resources of the State which belong to the people is a part of the legal heritage of Sri Lanka dating back at least to the third century BC as pointed out by Justice Weeramantry in his separate opinion in the International Court of Justice in the Danube Case, by quoting the sermon of Arahath Mahinda to King Devanampiyatissa as recorded in the Great Chronicle-Mahawamsa."

"This concept of the public trust which curtailed the absolute power of the monarch is in perfect harmony with the doctrine of public trust developed by the Supreme Court on the basis of sovereignty of the people set out in Articles 3 and 4 of the Constitution, Article 12(1) and the principle of the Rule of law, which is the basis of our Constitution. ***The Rule of Law is the principle which keep all organs of the State within the limits of the law and the public trust doctrine operates as a check to ensure that the powers delegated to the organs of the government are held in trust and properly exercised to the benefit of the people and not to their detriment.*** *When the Executive which is the custodian of the People's Executive Power act "ultra vires" and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court."* (emphasis added)

Furthermore, in ***Sugathapala Mendis and another*** (supra) Tilakawardane, J., at page 374 elaborated that public officials must exercise executive and administrative power subject to the Rule of Law and for the long-term sustainable development of the country and for the larger benefit of the People;

"…any person who is elected to the Presidency or appointed to ministerial services [….] are so chosen because they are deemed able to embrace, uphold and set example as a follower of the Rule of Law created pursuant to the Constitution and they hold in trust the executive power of the People acquired through the Sovereignty of the People. while the exercise of Presidential power is a duty that must accord with the Rule of Law, such compliance should also come from one's own conscience and sense of integrity as owed

to its People. This means that whilst they can use their private power and their private property in an unfettered manner when granting any privileges or favours and, even in an overwhelming act of great generosity, give all their private property away, ***their public power must only be used strictly for the larger benefit of the People, the long-term sustainable development of the country and in accordance with the Rule of Law****."*

"Consequent to this framework it is to be noted for our purposes that all facets of the country - its land, economic opportunities or other assets - are to be handled and administered under the stringent limitations of the trusteeship posed by the public trust doctrine and must be used in a manner for economic growth and always for the benefit of the entirety of the citizenry of the country," (emphasis added)

In the more recent past, in ***Wijeratne v Warnapala*** SC.FR 305/2008 (S.C. Minutes 22-09-2009), Sripavan J., (as he then was) quoting Bhawati, J. in ***S.P.Gupta v Union of India and others*** 1982AIR (SC) 149 observed;

"It has been firmly stated in several judgements of this Court that the "Rule of Law" is the basis of our Constitution [....] 'If there is one principle that 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'"

Similarly, in ***Jayawardena v Wijayatilake*** [2001] 1 Sri LR 132**;** ***Senarath and others v Chandrika Bandaranayake Kumaratunga and others*** SCFR 503/2005 - S.C. Minutes 03.05.2007; ***Hapuarachchi and others v Commissioner of Elections and Another*** [2009] 1 SLR 1; ***Watte Gedera Wijebanda v Conservator General of Forests*** [2009] 1 SLR 337**;** and ***Environmental Foundation Ltd. v Mahaweli Authority of Sri Lanka*** [2010] 1 SLR 1, the concept of the 'Public Trust Doctrine' and the 'Rule of Law' was recognized and applied. Furthermore, this Court went onto hold, that administrative acts and decisions contrary to 'public trust' would be in excess and/or abuse of power by the Executive and therefore, violative of the

fundamental rights in general and Article 12(1) of the Constitution in particular, which guarantees equality before the law and equal protection of the law.

The above position is explicitly recognized by Fernando J, in ***Heather Mundy v Central Environmental Authority and Others*** (supra) at page 13**;**

> *"Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. For the purposes of the appeals now under consideration, the "protection of the law" would include the right to notice and to be heard. Administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable."*

Commenting on the unfettered discretion, this Court in ***Premalal Perera v Tissa Karaliyadda*** SC FR 891/2009 - SC Minutes 31.03.2016, categorically held, quoting many judgements of this Court, that;

> *"The said authorities have specifically rejected the notion of unfettered discretion given to those who are empowered to act in such capacity and held that* ***discretions are conferred on public functionaries in trust for the public, to be used for the good of the public,*** *and propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were entrusted". (emphasis added)*

In ***Shanmugam Sivaraja and another v OIC Terrorist Investigation Division and others,*** SC FR 15/2010, SC Minutes of 27.07.2017, Aluwihare, J. cited with approval the dicta of Wanasundera, J. in ***Jayanetti v Land Reform Commission*** (supra) and re-iterated that it was a right of the subject to challenge any act of the State from whichever organ it emanated and compel it to justify its legality.

H.N.J.Perera, CJ. in the Full Bench decision of this Court *in* ***R Sampanthan and others v Attorney-General and others,*** [SC FR 351/2018 and other applications SC minutes of 13th

December 2018] agreeing with the jurisprudence of this Court in ***Wijeyratne v Warnapala*** [SC FR 305/2008 SC minutes of 22.9.2009], ***Premachandra v Major Montegu Jayawickrema*** [1994 2 SLR 90], ***Vasudeva Nanayakkara v Choksy*** [2008 1 SLR 134], ***Sugathapala Mendis v Chandrika Kumaratunga*** [2008 2 SLR 339], ***Jayanetti v Land Reform Commission*** [1984 2 SLR 172] and ***Shanmugam Sivaraja v OIC Terrorisdt Investigation Division and others*** SC FR 15/2010, SC minutes of 27.07.2017 recognized that the jurisprudence of this Court under Article 12 of the Constitution had extended the scope of the said guarantee to encompass the protection of Rule of Law.

Thus, this Court has recognized that when different organs of the State exercise the respective powers attributed to them as the Sovereignty of the People, such organs exercise such powers on behalf of the People and therefore, a duty is cast on State organs not to use such powers arbitrarily or irrationally. This Court has through its decisions had developed the "Public Trust Doctrine" by examining use of the discretionary power vested on executive and / or administrative authorities, initially focusing on the protection of natural resources and subsequently expanded to exclude arbitrariness in decisions where public authorities exercise powers vested on the said organs, to ensure the said bodies exercise such powers to the ultimate benefit of the people.

In ***Ravindra Kariyawasam v Central Environment Authority*** **(Chunnakam case)** - SC FR 141/2015 – SC minutes of 04.04.2019, where the petitioner alleged, pollution of the groundwater making it unfit for human use, the Court held that the failure of the State agencies, *i.e.,* CEA and BOI to fulfil its statutory obligations was **'a breach of the public trust'** reposed in them and the Court held that the said agencies have violated the fundamental rights guaranteed by Article 12(1) of the Constitution, of the residents of Chunnakam as well as the Petitioner, a member of the public.

Noble Resources International Pte Limited v. Minister of Power and Renewable Energy - SC FR 394/2015 SC Minutes of 24.06.2016, is a unique case in which the Public Trust Doctrine was applied by this Court, as the events that transpired, literally and metaphorically "shocked the conscience of court". The Petitioner claimed that the decision of the Standing Cabinet Appointed Procurement Committee (SCAPC) not to award the tender for the supply of coal, to the petitioner

was unlawful and violative of petitioner's fundamental rights and the Court granted the Petitioner Leave to Proceed for the alleged violation of the petitioner's fundamental rights guaranteed in terms of **Articles 12(1) and 14(1)(g)** of the Constitution.

When the application was taken up for hearing, a preliminary objection was raised by the respondents, that the petitioner company is a company registered in Singapore and was not a registered company in Sri Lanka and has invoked the jurisdiction of this Court by itself without a local agent, representative or an Attorney-at-Law enjoining him as a petitioner. The Court nevertheless, decided to go into the merits of the case as *'some of the events that took place in the award of the tender shocked the conscience of the Court'* and the Court pronounced as follows;

> *"The Court is mindful that the fundamental rights provisions in the Constitution must be interpreted having regard to the constitutional objectives and goals and in the light of the action taken by the Governmental Authority at a given point of time.* ***As it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it in accordance with the provisions of the Constitution and the law,*** *the Court cannot close its eyes and allow the actions of the State or the Public Authority to go unchecked in its operations, in the public interest. If the Petitioner with a good case is turned away, merely because he is not sufficiently affected or the Petitioner has no "locus standi" to maintain this application, that means that* ***some Government Agency is left free to violate the law and this is not only contrary to the public interest but also violate the Rule of Law, the object of which is to protect the citizens from unlawful governmental actions.*** *It will be a travesty of justice if, having found as a fact that a fundamental right has been infringed or is threatened to be infringed, the Court yet dismisses the application on a preliminary objection raised by the Respondents.* ***This Court has been given power to grant relief as it may deem just and equitable****. The Court therefore decided to go into the merits of the case as some of the events that took place, in the award of the tender to the 22nd Respondent shocks the conscience of the*

Court, ***especially when the awarding of the tender involves public funds****."* (emphasis added)

Having considered the merits of the case, the Court came to the finding that the decisions made by the SCAPC was outside its jurisdiction and therefore cannot be considered as a valid decision and Sripavan, J. (as he then was) opined;

> *"The power of the State is conferred on the Members of the SCAPC and the PAB* ***to be held in trust for the benefit of the public.*** *The Supreme Court being the protector and guarantor of the fundamental rights cannot refuse to entertain an application seeking protection against infringement of such rights. The Court must regard it as its solemn duty to protect the fundamental rights jealously and vigilantly. It has an important role to play not only preventing or remedying the wrong or illegal exercise of power by the authority but has a* ***duty to protect the nation in directing it to act within the framework of the law and the Constitution****."* (emphasis added)

Though this Court dismissed this application *in limine* on the preliminary objection raised, pertaining to maintainability of the application Sripavan, J. quoted with approval the words of Md Faizal Karim J, in the case of ***SSA Bangladesh Ltd. v Engineer, Mahmudul Islam*** 9 BLC (AD)(2004), that;

> *"The judiciary has an important role to play not only preventing or remedying the wrong or illegal exercise of power by the authority but has a duty to guide the nation in shaping its destiny within the framework of the law and the Constitution. The Court of Law would always jealously guard against any abuse or misuse of power/authority by the State functionary in dealing with the State property." a*nd went on to make directions, considering the procedural flaws in the award of tender upon the basis, ***"...the award of tender involved public funds, and the solemn duty of the Court to protect the Rule of Law embodied in the Constitution in order to ensure its credibility in the faith of the people."*** (emphasis added)

Similarly, in the words of Tilakawardane, J. in her dissenting opinion in ***Vasudeva Nanayakkara v Choksy and Others*** [2009] 2 SLR 1;

> *"The entire fabric of the Constitution mandates that the Rule of Law be the ultimate framework of all acts carried out under the Constitution, including the acts of the executive, the legislature and the judiciary."*.(at page 5)

The foregoing exemplifies the bounden duty that is cast on this Court to protect the Rule of Law and jealously guard against the abuse and misuse of power and authority by the State and its functionaries in dealing with public funds.

In ***Ajith C.S. Perera v Daya Gamage*** SC FR 273/2018, SC Minutes of 18.04.2019, the petitioner complained to this Court of 'continued inaction' of the authorities to give effect to the regulations made under the Protection of Rights of Persons with Disabilities Act No 28 of 1996. The Court having been satisfied that there was no satisfactory or meaningful compliance with the said regulations held, that the rights guaranteed under Article 12 (1) of the Constitution of the petitioners and other persons with disability rights, have been violated by the State and its agencies and opined as follows;

> *"…that the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution. It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country"*

It is also pertinent to observe that **Article 27(1)** of the Constitution requires the President and the Cabinet of Ministers in the governance of Sri Lanka to be guided by the Directive principles of State Policy including (a) the full realization of the fundamental rights and freedom of all persons and (b) realization by all citizens of an adequate standard of living for themselves and their families including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.

In Sri Lanka the Supreme Court recognized that when the different organs of the State exercise the respective powers attributed to them as the Sovereignty of the People such organs exercise such powers on behalf of the People. Therefore, a duty is cast on State organs not to use such powers arbitrarily or irrationally. This Court through its decisions had developed the "Public

Trust Doctrine" in examining use of discretionary power vested on executive and / or administrative authorities. Initially the Court focused on the protection of natural resources as in the Indian Supreme Court in ***M.C.Mehta v Kamal Nath*** [1997] 1 SCC 388. In the said case it was observed that:

> *"The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, air, forests and ecological fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership".*

The Supreme Court later expanded to exclude arbitrariness in decisions in instances where public authorities exercise powers vested on them and ensure that they exercise such powers to the ultimate benefit of the people. [vide ***Bandara and another v Premachandra and others*** (1994) 1 SLR 301, ***Jayawardena v Wijayatilake*** – (2001) 1 SLR 132]. It is also pertinent that this Court had extended the doctrine of Public Trust **to protect national resources from use of arbitrary power**. [vide ***Fernando v Sri Lanka Broadcasting Corporation*** (1996) 1 SLR 157, ***Mundy v Central Environmental Authority*** (SC Appeal 58/2003, SC minutes of 20.01.2004, ***Watte Gedara Wijebanda v Conservator General of Forests*** (2009) 1 SLR 337]

There is no dispute that the 'corner stone' or the *'Grundnorm'* of our Constitution is the Sovereignty of its People and this Court has time and time again held that unfettered discretion is anathema to the Rule of Law on which our Constitution is founded.

In the case of ***Premachandra v Major Montague Jayawickrema*** (supra) at page 111, this Court succinctly held *"In Sri Lanka, however it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary."*

In ***R Sampanthan and others*** (supra) having considered *curses curiae* and jurisprudence of this Court it was held that in interpreting the provisions in the Constitution, the Court should adopt an approach which enforces the Rule of Law. Furthermore, the Court held that our law does not recognize that any public authority, whether they be President or an officer of the State or organ of State, has unfettered or absolute discretion of power.

Whilst this Court in Fundamental Rights applications have always safeguarded and preserved the relationship between Democracy, Rule of Law, Public Trust and Human Dignity this Court in its Statutory Determinations too have recognised the said relationship.

In the ***Appropriation Bill of 2008***, [Decisions of the Supreme Court on Parliamentary Bills 2007-2009 Vol IX] this Court went onto hold that Parliament's power of control over public finance is exercised ***'in trust for the People'*** and therefore *'the process should be transparent and in the public domain, so that People who remain Sovereign are informed as to the manner of control exercised.'*

In ***Assistance to and Protection of Victims of Crime and Witnesses Bill*** SC SD 1-6/2014 [Decisions of the Supreme Court on Parliamentary Bills 2014 Vol XII – 3] this Court opined that "*When considering the exercise of statutory power certain fundamental principles can never be overlooked. The first is that our Constitution and System of Courts are founded on the rule of law; secondly statutory power conferred for public purposes is conferred as if it were upon trust and not absolutely*".

In the ***Inland Revenue (Amendment Bill)*** SC SD 63-64/2023, Hansard 05-09-2023 in dealing with the issue of classifications in revenue matters, this Court recognized that "*such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable*" and thus recognized its jurisdiction even to examine matters relating to revenue, when such matters are based upon the principles of Public Trust.

Furthermore, this Court concluded its determination by observing as follows;

> "[…] *It was submitted that there had been corruption and mismanagement of public funds which had led to the present economic predicament. […] This Court is exercising its constitutional jurisdiction over the Bill. These are not matters which we can take into consideration in this exercise.* ***Nevertheless, we are mindful that this Court is the last bulwark to protect the Rule of Law and prevent any breach of public trust. […] In order to do so, the jurisdiction of this Court must be properly invoked in the appropriate proceedings.***" (emphasis added)

In the ***Value Added Tax (Amendment) Bill*** [SC SD 62-63/2023 Hansard of 10.11.2022] it was opined,

"*This Court shall continue to exercise its Constitutional role as the sentinel on the qui vive over executive and administrative action."* (at page 22)

When we consider the jurisprudence of this Court it is clear that the scope and content of the Right to Equality guaranteed by Article 12 of the Constitution has evolved with the passage of time. Such evolution is in accord with the progressive changes that had taken place in other jurisdictions such as in India. In its current form this Right guarantees a protection from arbitrary exercise of power and discretion by state functionaries and enhances the Rule of Law. It further requires State authorities to ensure that their conduct will not breach the trust placed on them and **make certain that public resources in their custody are protected and preserved for the benefit of the people and not to be exhausted for political or personal benefit.** Furthermore, the exercise of discretionary powers in the decision-making process, should be guided by the Directive Principles as recognized by the Constitution and callous disregard of such principles will pollute decisions with arbitrariness. Thus, Rule of Law is not only rights and equality. It's about functionality and efficiency for sustainable economic development of the nation and all of its People.

INACTION AND / OR OMMISSION TO ACT

In ***Janath S Vidanage and others v Pujith Jayasundara and others*** **(Easter Sunday case),** SC FR 163/2019 and other applications (SC minutes of 12.01.2023) a full Bench of this Court considered the Constitutional framework within which the Executive branch of the Government performs its duties and responsibilities while examining the complaint of the petitioners that the inaction of the President and other State officials led to the disastrous consequences including destruction to life and property. Having examined the statutory frame work and the common law principles governing the obligations of a Minister attached to his supervisory role over the institutions assigned to him, the Court held that the inaction on the part of the Minister as well as the State Officials, that led to the serious impact on the entire society, violated the rights guaranteed under Article 12(1) of the Constitution.

In the ***Easter Sunday Case*** (supra) this Court observed that

> *"The heads of Department and responsible officers remain liable for the infractions of not performing their duties assigned to them to safeguard the security and integrity of the nation. The Minister becomes liable when he fails in his constitutional and common law duties to have robust systems and mechanisms to protect and promote national security. It is for this reason that there has to be constant supervision and control of his officials. There must be structures and mechanisms which facilitate transparent exchange of intelligence and information. A proper mechanism to acquaint himself with intelligence and information would serve the Minister proper notice of intelligence and information and such an absence of supervisory mechanism will expose the Minister to allegations of failure of his constitutional, statutory and common law duties". (at page 89)*

This Court further proceeded to consider the relevant factors in deciding the required standard of care when the liability is attributed due to inaction or omission. Court recognised *inter alia* factors such as the magnitude of the risk, the cost and practicability of precautions, the social value of the respondent's activities and what reasonable man would have foreseen. The Court cited with approval the following dictum in ***Blyth v Birmingham Waterworks*** [(1856) 11 Exch 781]

> *"the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct human affairs would do, or doing something which a prudent and reasonable man would not do".*

PARLIAMENTARY SELECT COMMITTEE

The learned President's Counsel for the 2nd and 2A respondents submitted that the instant applications are futile and ought to be dismissed by this Court as a Parliamentary Select Committee had been appointed to investigate into the matters that are also the subject matters relating to which this Court will examine in determining these two applications. It is his contention that it is the Parliament, which has full control over public finance, is now investigating into the reasons for the economic setback through this select committee process and such select committee is empowered to submit proposals and recommendations.

In this regard it is pertinent to observe that the petitioners in these two applications invoked the jurisdiction of this Court as provided under Article 17 read with Article 126 of the Constitution. Article 118 (b) of the Constitution recognises the Supreme Court's jurisdiction to protect fundamental rights. The Supreme Court is the highest and final Superior Court of record of the Republic. Article 4(c) of the Constitution recognizes that the Parliament exercises people's judicial power through courts created and established or recognized by the Constitution or created and established by law. However, the Parliament is empowered to exercise People's judicial power, directly, in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, according to law. Therefore, there is no doubt or ambiguity as to the power of Courts to exercise judicial power of the People in regard to all matters that are recognized by law other than the specific instance excluded by Article 4(c). The Constitution which is the Supreme law of the Democratic Socialist Republic of Sri Lanka assures that independence of the judiciary as an intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka.

This Court in its Determination in **"*Industrial Disputes (Special Provisions) Bill***", SC SD 30/2022, cited with approval the following passage from Blackstone (Blackstone's Commentaries Vol. 1 at p. 269):

> *"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."*

This Court, further observed that:

> *"....except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, Parliament has only the power to provide for the creation of courts, tribunals and institutions for the exercise of the judicial power of the people. This judicial power can only be exercised by a judicial officer duly appointed under the law."*

The manner in which the Parliament could replace or abolish or amend the powers, the jurisdiction of any court other than of the Supreme Court is recognised by Article 105(2).

This Court in ***Ratnasiri Perera v Dissanayake*** [1992] 1 SLR 286 at 300 held:

> *"The Constitution now entrenches some of the jurisdictions of the Supreme Court and of the Court of Appeal, precluding an erosion of such jurisdictions by ordinary law. Other jurisdictions, however, can be taken away by ordinary law, provided of course that if they are transferred to other bodies, the officers or members thereof must be appointed in terms of Articles 114 and 170."*

Therefore, the only manner in which the Parliament could change the jurisdiction of the Supreme Court is by way of an amendment to the Constitution and any deviation is a breach of the doctrine of separation of powers. In this regard it is also pertinent to note that Standing Order 91(f) recognises the *"sub judice"* Rule in relation to proceedings in Parliament. Paragraphs 20.11 and 21.19 of Erskin May, online edition of the 25th print edition[1] provides inter alia

Para 20.11 "*The House has resolved that no matter awaiting adjudication by a court of law (including a coroner's court or a Fatal Accident Inquiry) – ie matters* sub judice *– should be brought before it. This covers both the content of Members' speeches and the subject matter of motions and questions. The resolution means that matters currently before the courts cannot be raised in a motion or amendment save where legislation is under consideration".*

Para 21.19 *"Subject to the discretion of the Chair and to the right of the House to legislate on any matter or to discuss any matters of delegated legislation, matters awaiting the adjudication of a court of law should not be brought forward in debate."*

[1] (https://erskinemay.parliament.uk/)

The applicability of this Rule to the select committees in the United Kingdom is discussed in para 38.25 which reads:

> "*The resolution of the House prescribing its practice with regard to matters that are awaiting judgment in the courts (see paras 20.11, 21.19) includes proceedings in select committees. The discretion available to the Chair should be exercised only in exceptional circumstances and, if time allows, following consultation with the Speaker. Committees have suspended inquiries in progress because a witness had been charged with criminal offences related to the subject-matter of the inquiry or have decided not to take evidence from particular witnesses in the course of an inquiry because the committee had been informed that the witnesses would also be witnesses in impending criminal or civil proceedings. The bar does not, however, operate when committees are deliberating, since they do so in private, nor when evidence is being taken in private and, since there is no restriction on the right of the House to legislate, the proceedings of a select committee on a bill need not be affected by it"*

According to the material submitted to this Court, the "Select Committee of Parliament to Investigate Causes for Financial Bankruptcy declared by the Government and to report to Parliament and submit its proposals and recommendations in this regard" had been appointed by Parliament on 19th January 2023 whereas the petitioners, invoked the jurisdiction of this Court in June 2022 and this Court having heard all parties granted leave to proceed on 7th October 2022. Therefore, by the time the select committee was appointed in Parliament, the petitioners had already invoked the jurisdiction of this Court and leave to proceed had been granted. As discussed hereinbefore, the jurisdiction vested by the Constitution on this Court under no circumstances could be curtailed or abridged by the Select Committee process of Parliament. Hence, we are of the view that the submission of the learned President's Counsel on this issue is devoid of any merit.

JURISDICTION OF THE COURT

One of the main complaints of the petitioners in these instant applications is that one or more of the respondents failed to take necessary remedial measures having come to know the adverse consequences to the economy due to the tax revisions introduced in December 2019. They contend that such inaction on the part of the State functionaries taken together with the inaction to seek assistance from the IMF in a timely manner contributed heavily to the economic collapse which caused immense hardships and damage to persons and property, including death of persons. They contend that such inaction infringed the Right to Equality guaranteed under Article 12 of the Constitution.

In our view the examination of this contention of the petitioners does not amount to an examination of the policies of the Government. In our view the jurisprudence developed with the passage of time as discussed hereinbefore requires the Court to exercise its jurisdiction vested under Article 126 of the Constitution and examine whether the executive and/or administrative authorities have acted arbitrarily and / or irrationally and / or with manifest unreasonableness and thereby breached the Public Trust and Rule of Law, in situations where the petitioners allege an infringement of the right to equality guaranteed by Article 12 of the Constitution. Therefore, we are not inclined to accept the submission that the Court lacks jurisdiction on the basis of "public policy", "economic policy" or "doctrine of political question".

In addition to the main objections raised on behalf of the respondents, that are discussed hereinbefore, regarding the maintainability of these applications, several other objections were raised, which the learned counsel argued, had made the petitions misconceived in law and should be dismissed for those reasons. This Court gave its mind to those objections and finds no merit in any of them. Accordingly, we are of the view that the petitions are valid and can be proceeded with.

RESPONDENTS AGAINST WHOM LEAVE TO PROCEED GRANTED

Gotabaya Rajapaksa - 32A respondent – assumed duties as the President on 18th November 2019, after being declared elected to the Office of the President following the resounding victory at the election held on 16th November 2019. Under Article 4(b) of the Constitution the executive power

of the People, including the defence of Sri Lanka, is exercised by the President, elected by the People. As held by this Court, it is the People's executive power that the President is exercising on behalf of the People. The President holds executive powers in trust for the People and needs to exercise such powers with due regard to rule of law. The President is the Head of the Cabinet of Ministers which is charged with the direction and control of the Government. Among the powers and functions of the President, the act of appointing the Prime Minister and other Ministers of the Cabinet of Ministers is recognised under Article 33(f) of the Constitution. On 21st November 2019, a new Government was formed by the 32A respondent. Mahinda Rajapakse – 2nd respondent - was appointed as the Prime Minister of the new Government on 21st November 2019 and the Cabinet of Ministers of the new Government was appointed on the 22nd November 2019. Cabinet portfolio of Defence in the newly formed Government was held by the 32A respondent.

P.B.Jayasundera – 38th respondent – assumed duties as the Secretary to the President on 19th November 2019 and he resigned on 22nd January 2022. The President is empowered to appoint the Secretary, as provided under Article 41 (1) of the Constitution.

Mahinda Rajapaksa – 2nd respondent - was appointed Minister of Finance, Economy and Policy Development on 21st November 2019. Scope of responsibilities attached to the Minister can be derived from the subjects and functions assigned by the President in accordance with the Constitution. Once the subjects and functions are assigned, the responsibility lies with the Minister to ensure that the relevant duties are performed and goals are achieved through the institutions that are placed under the supervision and control of the Minister. The Central Bank of Sri Lanka is one of the institutions that is placed under the supervision of the Minister of Finance. Some of the duties and functions attributed to the Minister of Finance include:

- Formulation, implementation, monitoring and evaluation of policies, programmes and projects; in relation to Public Finance, Taxation and Economic Affairs in accordance with the National Policy Plan and the subject of the departments, specified statutory institutions and laws and regulations
- Formulation of policies relating to public finance and national revenue preparation of the legal framework and operation of the other programmes

- Formulation of public finance and macro finance management policies and their operation and co-ordination
- Liaison with international development finance institutions, organizations and international financial market.
- Preparation of Annual Budget, implementation, enforcement of financial control, implementation and financial resources management.
- Implementation of National Taxation policies, strengthening the institutional structure and effective utilization of state revenue
- Formulating National Policies in order to achieve National Economic and Social Development Goals
- Supervising all specified institutions and matters relating to all subjects assigned to such institutions.

It is also pertinent to note that the Monetary Law Act No 58 of 1949 and several other fiscal statutes including Value Added Tax Act No 14 of 2002 and Inland Revenue Act No 10 of 2006 are among the statutes that are to be implemented by the Minister of Finance. (vide Gazette Extraordinary No 2153/12 dated 10 December 2019).

Examination of these duties and functions clearly show that key features in economic development and financial management are placed under the responsibility of the Minister of Finance. This responsibility requires the Minister to establish proper mechanisms of supervision and to obtain necessary data and information from the institutions that are placed under his supervision. Such flow of data and information is of utmost importance to ensure that the powers vested on him are exercised to the benefit of the people and desist from arbitrary exercise of power. Even though, the duties and functions assigned to the Minister of Finance have been revised time to time during the period relevant to these applications, core duties, institutions placed under the supervision of the Minister including the Central Bank of Sri Lanka and core statutes including Monetary Law Act and other fiscal statutes had remained under him without a change.

Basil Rajapaksa – 2A respondent – replaced the 2nd respondent and assumed duties on 08th July 2021 as the Minister of Finance. Mahinda Rajapaksa (2nd respondent) was sworn in as Minister of Economic Policies and Planning on the same day. The 2A respondent functioned as the

Minister of Finance till 04th April 2022. It is pertinent to note that the 2A respondent prior to assuming duties as the Minister of Finance in July 2021, functioned as the Chairman of the Presidential Task Force on Economic Revival and Poverty Alleviation.

Members of the Cabinet of Ministers – 03rd to the 27th respondents in SC FR 195/2022

S.R.Attygalle – 31st respondent – was appointed Secretary to the Treasury and Ministry of Finance on 19th November 2019. Ex Officio he is a member of the Monetary Board as per section 8(2) of the Monetary Law. Under Article 51(2)(b) of the Constitution the Secretary exercises supervision over the Departments and other institutions in charge of the Minister, subject to direction and control of the Minister. Being an ex officio member of the Monetary Board, his responsibility is explained in the Exter Report. Accordingly, it is observed that:

> *"The ideal which it is hoped that the proposed law will achieve is one in which there will be continuous and constructive co-operation between the Monetary Board and the Government. The principal instrument for achieving this co-operation should be the Permanent Secretary to the Ministry of Finance whose membership on the Board will ensure at all times that his Minister's views will be made known to the other members of the Board. The effectiveness of the co-operation and co-ordination between the Board and the Government will depend more upon the men occupying the key positions at particular times than upon any legal formula no matter how carefully or elaborately it might be worked out. A relationship as complex and sometimes as delicate as this one is certain to be, cannot be established full-blown by a piece of legislation. It must be the result as in other countries of years of experience and the slow growth of political conventions"* (page 13 Exter Report).

The 31st respondent resigned on 07th April 2022.

W.D.Lakshman – 30th respondent – assumed duties as Governor of the Central Bank on 24th December 2019 and resigned on 14th September 2021. Section 8(1) of the Monetary Law Act provides for the Governor of the Central Bank to be the Chairman of the Monetary Board.

Ajith Nivard Cabraal – 29th respondent – assumed duties as Governor of the Central Bank on 15th September 2021 and resigned on 04th April 2022. Prior to him assuming duties as the Governor this respondent functioned as the State Minister of Finance, Capital Markets and State Enterprise Reforms.

Samantha Kumarasinghe – 32nd respondent – was an appointed member of the Monetary Board. He functioned in this capacity from 29th June 2020 to 31st March 2022.

The Monetary Board of the Central Bank– 28th respondent – is a statutory body created under the Monetary Law Act. Section 9(1) recognizes that the Monetary Board is a body corporate with perpetual succession. Under section 5 of the Monetary Law Act, the Central Bank is established as the authority responsible for the administration and regulation of the monetary and banking system. The Central Bank is charged with the duty of regulating the supply, availability, cost and international exchange of money to secure objects including the stabilization of domestic monetary values, determining the par value of the Sri Lankan Rupee and the preservation of the par value and preservation of the stability of the exchange rate when there is no determination on the par value. Furthermore, the Central Bank is recognized as the fiscal agent, banker and financial adviser of the Government.

One of the main duties of the Central bank in the context of its duty to secure international monetary stabilization is the duty to endeavor to maintain among the assets of the Central Bank **an international reserve adequate to meet any foreseeable deficits in the international balance of payments**. Section 66(2) of the Monetary Law Act provides that

> *"In judging the adequacy of the International Reserve, the Monetary Board shall be guided by the estimates of prospective receipts and payments of foreign exchange by Sri Lanka; by the volume and maturity of the Central Bank's own liabilities in foreign currencies; and, in so far as they are known or can be estimated, by the volume and maturity of the foreign exchange assets and liabilities of the Government and of banking institutions and other persons in Sri Lanka. So long as any part of the foreign currency assets of Sri Lanka are held in currencies which are not freely convertible by the Central Bank, whether directly or indirectly, into special drawing rights or such other common*

denominator prescribed by the International Monetary Fund or into foreign currencies freely usable in international transactions, or are frozen, the Monetary Board shall also take this factor into account in judging the adequacy of the International Reserve of the Central Bank".

TAX REVISION AND DOWNGRADING BY RATING AGENCIES

In a note to the Cabinet by the 32A respondent on 26th November 2019, had recommended implementation as a matter of priority a series of measures to revise taxes. These proposals to lower taxes had been introduced to give effect to an election pledge to "restructure and introduce a simplified tax mechanism". In the note to the Cabinet, it was acknowledged that a reduction of Government revenue would take place as a result of such revisions. However, the 32A respondent had expressed the view that "potential benefit from re-engineering the tax system will eventually revive revenue". In the same note, the 32A respondent had urged the line ministries and agencies to go slow on public spending to manage fiscal imbalance. He also urged that the government expenditure incurred by semi government agencies and State Owned Enterprises (SOEs) should also be curtailed as taxes on goods and services are to be lowered. The 32A respondent in this Note to the Cabinet titled "An Economic Revival Initiative" recommended implementation of a series of measures as a matter of priority "pending parliamentary approval for amendments to the relevant tax statutes". These measures included *inter alia* bringing down the rate of VAT from 15% to 8% and to do away the 2% NBT with effect from 1st December 2019. In addition, the threshold for VAT liability was raised from 12 million per annum to 300 million per annum on the turnover. Further, tourism business was to be treated as an export and VAT would be zero rated provided 60 % of the turnover is sourced from locally. Further tax concessions were offered to the construction industry by reducing the tax liability to 14% from the existing rate of 28%. Religious institutions were removed from tax liability and further the threshold for collection of tax through PAYE was raised from all inclusive monthly income of Rs 150,000.00 to Rs 250,000/-.

The 32A respondent requested the Minister of Finance, Economy and Policy Development to take appropriate action to implement this programme. The 2nd respondent, who held the portfolio of Finance, Economy and Policy Development by his observations to the Cabinet agreed with the said proposals. It was envisaged that such tax revisions would create a conducive

environment for businesses and a positive impact on all prices. It is pertinent to note that the 38th respondent had been present on invitation at the deliberations of the Cabinet and had explained the desirable immediate impact on the economy and the well-being of the People by the implementation of the proposed measures. The Cabinet of Ministers had granted the approval to implement these proposals.

It is pertinent to observe that Article 148 of the Constitution provides that *"Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law".* However, these proposals had been implemented through an administrative mechanism by way of public notices released by the Commissioner General of Inland Revenue in early 2020 whereas the necessary legislation had been introduced only in mid 2021. It is significant to note that the Commissioner General of Inland Revenue has failed to identify the basis on which he derived authority to issue such notices but merely states that such notices were issued either on the instructions of the Ministry of Finance or as instructed by the Ministry of Finance as approved by the Cabinet of Ministers.

The income from taxes remains a significant portion of government revenue and the reduction of taxes would inevitably result in depletion of government revenue. Therefore, an important issue that arises in this regard is whether a credible mechanism was introduced parallel to the introduction of tax reductions and whether the reductions did in fact bring in the expected results. The Auditor-General observes, that the statistics does not show such a positive change in prices indices and inflation rate, as expected by these changes. The Inland Revenue Department had estimated the potential loss from tax income resulting from the proposed tax for the year 2020 amounts to 493,394 million rupees. The loss of government revenue due to the measures referred to resulted in an unmanageable budget deficit. It is to be noted that the country had been facing the phenomenon of budget deficits over a considerable period and the respondents should have been aware of this fact.

Furthermore, a major adverse consequence that resulted directly from the tax revisions was lowering of the country's credit rating by the international agencies. This remains an immediate outcome from the tax revisions introduced in late 2019. Fitch Ratings downgraded Sri Lanka from B stable to B negative on 18th December 2019. It is uncontroverted that the Fitch Rating by

27th September 2019 remained B Stable. Standard & Poor's downgraded the country rating from B stable to B negative on 14th January 2020. Fitch Ratings, directly attributed the downgrading to the sweeping tax cuts introduced in late 2019. It is recognised that such downgrading reflects the debt sustainability position of the country. This trend continued unabated, throughout the next two years (2020 and 2021) resulting in further gradual downgrading of credit rating from CCC to CC and finally reaching C. On 19th May 2022 it culminated in a "restricted default". According to the Fitch Ratings "B" represents the presence of material default with a limited margin of safety, "CCC" represents a substantial credit risk with a very low margin for safety and default is a real possibility, "CC" reflects a very high levels of credit risk and a default of some kind appears probable and "C" reflects "a default or default like process had begun, or the issuer is in standstill, or for a closed funding vehicle, payment capacity is irrevocably impaired". Ratings by two other agencies namely Moody's Investor Service and Standard & Poor's also reflect a similar pattern of downgrading. The main impact of such downgrading was the loss of access to capital markets at reasonable costs which resulted in drying up foreign exchange inflows from such sources.

When one examines the trend in downgrading by foreign rating agencies, it makes clear that remedial measures were mandatory, if the trend was to be reversed and to take control of the situation. These downgradings by multiple agencies have had a serious impact on the strength and the capacity to obtain foreign assistance and to attract foreign investment. The situation that prevailed had the obvious result in the depletion of foreign reserves deeply, affecting the capacity of importation of essentials such as fuel, gas, medicines and food. Therefore, taking remedial measures to reverse the trend of downgrading was of paramount importance. However, the reaction to these downgradings reflect the resistance to accept the errors or the mistakes and to take immediate steps to remedy the situation. The response of the Government to the downgradings had been confrontational without seeking a way out. The Ministry of Finance and the Central Bank through public statements released from September 2020 had made an attempt to criticise these downgradings and had refused to accept them. It is pertinent to note at this point that the Gross Official Reserves which stood at USD 7,780.08 million as at 31st October 2019 had decreased to USD 5,555 million by November 2020. It had further depleted to USD 2362 million in January 2022.

It is apparent that the continued inaction to reintroduce and/or to raise taxes and regain the government revenue that was lost, brought about an adverse impact on the economy which had a domino effect on the entire social fabric.

It is also important to examine these events in the context of another factor. The Government of Sri Lanka in June 2016 had entered into an agreement with the International Monetary Fund (IMF) for an Extended Fund Facility (EFF). Through this process the total funds that were made available amounts to USD 1.5 billion. In May 2019, the Executive Board of the IMF approved an extension of the arrangement by an additional year spanning up to June 2020 with rephasing of remaining disbursements. In October 2019, by a letter of intent signed by the Minister of Finance and the Governor of the Central Bank had requested the completion of the sixth review and the disbursement of the 7th instalment under the programme. Through this letter of intent, a request was also made for waivers on non-observance of certain targets. Furthermore, it was emphasised that the Government will continue to consult in advance with the Fund on adoption of new measures or revisions of the policies. On 01st November 2019, the Executive Board of the IMF completed the sixth review of economic performance under the programme and the 7th instalment of USD 164 million was released making a total of USD 1.31 billion under the arrangement. The final instalment was expected to be released on 03rd April 2020 upon the completion of the seventh review and continuous performance criteria. However, there is no material available to indicate that the Government pursued the final instalment scheduled to be disbursed in April 2020. There had been a visit to Sri Lanka by the IMF Staff during the period 29th January 2020 to 7th February 2020 to meet with the new administration and to discuss its policy agenda. Through a press release the preliminary findings of the visit were conveyed. One of the findings of the visit was that the primary deficit could widen further in 2020 due to newly implemented tax cuts and exemptions and two other factors. In view of the risks to debt sustainability and large refinancing needs it was recognised that renewed efforts to advance fiscal consolidation was essential.

In this context we will examine the submissions of the learned Counsel for the respondents. They contended that reversing tax cuts was delayed due to the adverse impact of the pandemic. It was their contention that it was impractical to have raised taxes at a time there were restricted economic activity due to the pandemic. Furthermore, they contended that no extra revenue could

have been collected even if taxes were revised. However, it is pertinent to observe that the Parliamentary authority for most of the tax revisions introduced in late December 2019 was granted by way of legislation one and half years after the tax revisions were introduced. [Value Added Tax (Amendment) Act no 9 of 2021 and Inland Revenue (Amendment) Act no 10 of 2021]. Therefore, by the time these Bills were presented in Parliament by the Executive, the adverse repercussions on the economy due to the pandemic as well as due to the tax revisions that took place in December 2019 were apparent. Yet, no steps were taken to reassess and reconsider the grave repercussions of the tax revisions on the economy. Continued efforts to move forward ignoring the adverse repercussions, in our view is both irrational and arbitrary.

We observe that no adequate steps had been taken to remedy the adverse repercussions on the deficit due to loss of revenue following the tax revisions, in a timely manner even when it was apparent that the changes failed to bring the expected positive outcomes. Such failure heavily contributed and had a domino effect on the economy which ultimately collapsed bringing in serious hardships to the entire society. The Governor of the Central Bank in his report submitted to the Minister of Finance on 15th September 2020 had drawn the attention of the Minister to the fact that the IMF raised concerns on debt sustainability during the discussions to obtain emergency financing and had proposed certain revisions in the tax regime with a view to enhance government revenue while highlighting the negative results following the changes made to collection of tax through PAYE.

It is pertinent to note, that when the tax revisions were introduced in December 2019, there had been no consultations or discussions with the officials of the Central Bank or the Monetary Board. Failure to embark on a study relating to the tax revisions and the possible adverse impact it would have on the ongoing Extended Fund Facility arrangement with the IMF, cannot be comprehended. The responsibility for the failure to complete the IMF facility that was in force from 2016 rests on the introduction of tax revisions in late 2019. The Government failed to engage in any consultation with the IMF as agreed upon through its letter of intent based on which the 7th EFF instalment was released, before introducing sweeping tax reforms.

We are of the view that the 32A respondent as the person who introduced these tax revisions as one of his election pledges and the 2nd respondent who undertook the responsibility to implement those proposals in his capacity as the Minister of Finance, Economy and Policy Development

had the responsibility to follow up and examine whether the changes made have produced the results envisaged. When the 2nd respondent relinquished duties as Minister of Finance and the 2A respondent assumed duties as the Minister of Finance on 08th July 2022, this responsibility shifted to him. We also observe that the 38th respondent who had played a major role in introducing the proposal for tax revision to the Cabinet of Ministers also had a duty to follow up to see whether the tax revisions have brought in the desired results or whether any adverse impact was caused to the economy. If they embarked on such an inquiry, they would have had the opportunity to observe the adverse consequences that had flown as a result of these changes. In our view they also had the responsibility to take remedial measures on priority basis without letting the situation aggravate. Furthermore, as observed hereinbefore, by the Governor's report submitted to the 2nd respondent (15th September 2020**)** the attention of the 2nd respondent was drawn on the grave consequences of the tax revisions and the need to bring in changes to increase government revenue.

In our view, the continued inaction and callous disregard to take remedial measures on the part of the 2nd (Mahinda Rajapaksa), 2A (Basil Rajapaksa), 32A (Gotabaya Rajapaksa) and 38th (P.B.Jayasundera) respondents is arbitrary and irrational and they had breached the public trust reposed in them by the People.

DEPLETION OF GROSS OFFICIAL RESERVES AND SEEKING ASSISTENCE FROM THE IMF

As discussed hereinbefore, the Government had entered into an Extended Fund Facility programme with the IMF in 2016 and the penultimate tranche was received in early November 2019. The last tranche was due in April 2020 after a review in December 2019. It was in October 2019 the Minister of Finance and the Governor of the Central Bank in the letter of intent signed by them stated that the Government will continue to consult in advance with the IMF, if any new measures or a change or revision of the policies are to be adopted. The Executive Board of the IMF thereafter approved the release of the penultimate tranche having satisfied with the progress made by Sri Lanka. The Governor of the Central Bank in the "Road Map 2020" delivered on 06th January 2020 had recognised "the continuation of the EFF programme with the IMF is likely to be instrumental in supporting external sector stability in the medium term". However, in December 2019, no steps had been taken to request the release of the last tranche or to engage in

negotiations and/or any consultation with the IMF after the introduction of tax revisions. No such steps had been taken even at the IMF staff visit from January 29th to 7th February, 2020.

In this background on 08th April 2020 the 38th respondent had communicated with the Managing Director of the IMF and had requested assistance in the form of Rapid Financing Instrument (RFI). In this letter the adverse impact on the economy due to the pandemic was highlighted and it was acknowledged that the "sharp decline in the economic growth, fiscal revenue and foreign exchange receipts would create a large and urgent fiscal and balance of payment needs". Furthermore, a suggestion to replace the current Extended Fund Facility arrangement with the requested Rapid Financing Instrument was also made. In the same letter it was said that Sri Lanka will be requesting additional support from other development partners, particularly Japan, the People's Republic of China, the World Bank and the Asian Development Bank.

In response to the request made by the 38th Respondent, the Director of the Asia Pacific Department of the IMF while reaffirming the commitment to support Sri Lanka had observed that the particular economic challenges may require additional time and coordination among relevant parties including other International Financing Institutions. He had further said that he and his staff would do their utmost to process the request and to follow up on the intention to replace the current Extended Fund Facility arrangement with the Rapid Finance Instrument. The Auditor General has not found any material indicating a follow up on this request by the Government. However, the 38th respondent had referred to a series of meetings and correspondence as follow up steps to the initial request. Nonetheless, this request had not brought any positive results as there was no follow up response acceptable to the IMF on their concerns as to how the key requirements including policies to continue ensuring debt sustainability, concerns on balance of payment challenges and preserving international reserves, would be fulfilled.

The Auditor General had observed that a major change had taken place to the economic policies relating to the Government's tax income set out in the letter of intent sent to the IMF in October 2019 under the hands of the Minister of Finance and the Governor of Central Bank, within a month. This is a clear instance where the sudden departure or deviation of commitments and undertakings with the international organisation resulted in consequences detrimental to the country.

It is pertinent to observe that the last tranche of the EFF that was due in April 2020 could have been secured if either the policies agreed with the IMF in obtaining the EFF in 2016 and reiterated in the October 2019 letter of intent were carried forward as agreed or if the tax revisions had been introduced in consultation with the IMF, as assured by the letter of intent. Such a scenario would not only have paved the way for the inflow of foreign exchange and enhance foreign reserves but have preserved ratings without being downgraded. This would have created an environment conducive for foreign investment and other sources of foreign funds.

The Auditor General had observed that there is no material to indicate whether any discussion and/or deliberations took place between the President, Finance Minister, Central Bank and its officials as to whether the Government is continuing with the EFF or not. It appears that there had been no decision based on a proper study on the possible repercussions of abandoning the programme. There is no indication that any discussion had taken place on any reasons as to why the continuation up to obtaining the last tranche has adverse consequences or possible ill-effects to the economy. In this background the inaction to take necessary steps to obtain the last tranche of the IMF facility which was in operation since 2016 is irrational and arbitrary. In this regard it is also pertinent to observe that since 1965 Sri Lanka had entered into agreements with the IMF to obtain funds from its Extended Fund Facility Programme in 1979, 1991, 2003 and in 2016 and the Government had drawn funds agreed in the said programmes and completed them other than in 2016. Furthermore, in 2003 funds from an Extended Fund Facility as well as from an Extended Credit Facility have been drawn fully.

On 4th August 2020, the 30th respondent by his report has drawn the attention of the 2nd respondent on multiple issues relating to the status of the economy and challenges envisaged due to many reasons. Downgrading by the rating agencies due to the growing concerns on debt sustainability, possibility of further downgrading on the basis that the economic growth and the growth of foreign currency earnings are not on par with the rising debt stock, in the event planned funding did not materialize were highlighted in the said report. Furthermore, the importance of active engagement with major multilateral and bilateral agencies was highlighted while observing that loans from such agencies are likely to follow an IMF facility. This report further predicted the depletion of foreign reserves to critical levels in 2020 due to large foreign debt service payments falling due in the period ahead and deterioration of confidence and

appetite for Sri Lanka's equity and bond markets. This report further highlighted the urgent need to secure foreign financing in two months and the possibility of triggering the automatic prepayment clauses in project loan agreements in the event of a failure to secure such financing in a timely manner.

This report had been compiled by the 30th Respondent in compliance with section 68 (1) (b) of the Monetary Law. Section 68(1)(b) reads as follows:

> **Section 68** **(1)** Whenever the Monetary Board anticipates that there may develop a deficit in the international balance of payments of such magnitude as to cause a serious decline in the international Reserve, or whenever there is an imminent threat of a serious decline in the International Reserve, or whenever the International Reserve actually falls to a level which the board considers to be a threat to the international stability of the Sri Lanka rupee, or whenever international payments or remittances are being made which in the opinion of the board constitute an actual or a potential threat to such stability or are prejudicial to the national welfare, it shall be the duty of the board ……..
>
> **(b)** To submit to the Minister in Charge of the Subject of Finance a detailed report which shall include, as a minimum, an analysis of
>
> i. The nature, causes, and magnitude of the actual or potential threat to the international stability of the Sri Lanka rupee; and
> ii. The measure which the board has already taken, and the further monetary, fiscal or administrative measures which it proposes to take or recommends for adoption by the Government.

Eight months from the initial report, on 06th April 2021, the 30th respondent has submitted another report to the 2nd respondent under section 64(3) and 68(2) of the Monetary Law. In the said report the 30th respondent had set out the challenges due to the pandemic as well as the bleak situation in the domestic economy. In the said report challenges faced by the Central Bank due to decline of official reserves were described and emphasised the need for the Government to secure adequate foreign financing on an urgent basis.

Furthermore, it is said that the Central Bank is actively working with the Government to facilitate enhancing non-debt sources of foreign exchange inflow in view of **"*the Government's stance not to approach the International Monetary Fund (IMF) for emergency financing.*"** (emphasis added). This report further provided a detailed account on the depleted foreign exchange reserves and the need to secure sufficient inflows. While recognizing positive results of facilities provided by certain agencies such as People's Bank of China, Asian Infrastructure Investment Bank, China Development Bank, Reserve Bank of India and SAARCFINANCE in foreign exchange inflows, the report in no uncertain terms emphasised that;

> *"these inflows are barely sufficient to finance the remaining debt service obligations and the likely deficit in the balance of payments in 2021. Furthermore, these facilities provide only temporary relief, as debt service payments remain large over the near to medium term. Therefore, the Government's foreign currency debt service challenge is considerable, particularly in the context of sovereign rating downgrades by all three credit rating agencies in 2020. These downgrades have reduced country's ability to access the international capital markets at a reasonable cost".*

This statutory report from the 30th respondent to the 2nd respondent dated 06th April 2021, needs to be examined along with a development that had taken place within the Monetary Board. The Monetary Board had established two Committees to monitor the external debt situation. One such committee namely External Debt Monitoring Committee (DEDMC) was led by the Deputy Governor and the other namely Monetary Board External Debt Monitoring Committee (MBEDMC) was chaired by the 32B respondent and 32C respondent has functioned as the Vice Chairman. This Committee comprised of three Deputy Governors and five other officers of the Central Bank. The MBEDMC after its first two meetings had submitted a report titled "Note on the views of the Monetary Board Level External Debt Monitoring Committee on the Need for a Close Engagement with the International Monetary Fund" to the 30th respondent on 02nd February 2021. In this report having set out the decline of foreign reserves to USD 4.8 billion by end January had predicted that the reserves will further decline to USD 4 billion by end March based on the confirmed projected inflows and outflows. It is the first time that reserves had declined below USD 5 billion after 2009. The report had further detailed the concerns raised by and the reluctance showed by different sources of foreign funding agencies to continue with any

funding facilities to Sri Lanka, in the absence of an IMF intervention. Having set out the actual situation the Committee has said *"initiating active negotiations with IMF may well be necessary to rebuild the confidence of the international investor and financial sector community on Sri Lanka".* Having expressed this view the Committee had observed a possible change of policy approaches by the IMF and commented that *"it may be possible to arrive at an agreement with the IMF to allow the new economic model that is currently being pursued by the Government to continue with little adjustment and without being subject to standard IMF conditionality and policy prescriptions".*

Having laid out all these background facts, the Committee in no uncertain terms had highlighted the need for an early engagement with the IMF. It had further said that *"the MBEDMC and DEDMC strongly agree on this requirement in order to ensure that external debt service obligations are met while maintaining adequate levels of gross official reserves and exchange rate stability, thereby preserving macroeconomic stability and financial system stability".*

The 30th respondent at the Monetary Board meeting held on 03rd February 2021 at the discussion on "The impending acute foreign exchange shortfall as reflected in the estimated steady decline in official reserves and related challenges" had informed the Board the fact that the MBEDMC has submitted a report with several suggestions. However, he had suggested considering a few other measures relating to forex inflows. Furthermore, he had requested the 31st respondent, (the Secretary to the Treasury who was an, ex-officio member of the Monetary Board) to outline the sources of foreign exchange inflows that are in the pipeline. The 31st respondent thereafter had listed out five expected sources of inflows including divesting of EPF holding in West Coast Power (Pvt) Ltd, another investment in a hotel project and facilities from China Development Bank, People's Bank of China and Asian Infrastructure Investment Bank.

The 30th respondent thereafter had suggested to review the progress in those anticipated inflows by the end of March 2021 and thereafter to consider making appropriate proposals to the Government, if necessary. However, the Deputy Governor(S) observed the difficulty to accurately estimate the volume of inflows due to the exceptional global situation and he expressed the view that negotiations for borrowing facilities should commence without delay if funds are to be received in a few months. Both the 32C respondent and Deputy Governor(N) had emphasised that it is not the quantum of funding that can be obtained from the IMF but the

restoration of the investor confidence due to an engagement with the IMF is the key factor. It was further pointed out that even inflows from many bilateral agencies are also conditional upon Sri Lanka having an engagement with the IMF. Furthermore, the 32C respondent had said that necessary measures should be taken as a matter of urgency without deferring the process to end of March. However, at these discussions the 31st respondent had remarked that ***"obtaining USD 165 million from IMF will not be the final solution"*** and had further said that ***"since the Government policy is not to go to the IMF, as officials we have to abide by it"***. He had emphasised that other means of inflows need to be considered.

These discussions that took place at the Monetary Board meeting held on 03rd February 2021 explains the position taken up by the 30th respondent in his statutory report dated 06th April 2021. It is reasonable to conclude that the 30th respondent had been influenced by the comments made by the 31st respondent that the Government's policy is not to seek the assistance of the IMF. Therefore, the 30th respondent had formulated his recommendations on the premise that there is a Government Policy not to seek assistance from the IMF. However, in this regard, it is pertinent to observe that there had been no cabinet decision by April 2021 not to seek assistance from the IMF. There is no material before this Court to conclude that such policy had been developed as the policy of the Government having considered advantages and disadvantages based on all material facts. It is the Cabinet of Ministers who is charged with the duty of direction and control of the Government.

Minutes of the meeting of the Monetary Board held on 21st April 2021 reveal that both the 30th and the 32nd respondent had expressed the view that their personal opinion as well as the policy of the Government is to move away from the IMF.

At the said meeting the 32nd respondent remarked that he personally felt that **"majority of the Central Bank officials feel that we should go to the IMF"**. The 32C respondent while noting that 170 countries have already gone to the IMF to overcome the impact of pandemic that several Central Banks that were approached by the Central Bank of Sri Lanka have indicated that Sri Lanka should negotiate with the IMF. The 32C respondent at the Monetary Board meeting held on 11th May 2021 also had reiterated the difficulty for the Central Bank to release foreign currency to commercial banks to meet their import bills. She had also remarked that the

Commercial Banks wasted USD 200 million of funds received from the China Development Bank by spending on non-essential imports such as telephones, sugar and garments.

It is in this backdrop the 30th respondent submitted the statutory report dated 30th June 2021, to the 2nd respondent.

In this report while recognising that the pandemic exacerbated the vulnerabilities and challenges to the economy, the 30th respondent recognised that the opportunities to access international financial markets were restricted due to downgrading of sovereign credit ratings. This report further provides details on further depletion of reserves. By May 2021 reserves had come down to USD 04 billion which was equivalent only to 2.7 months of imports whereas the minimum international standard is to maintain three months imports. In this report the 30th respondent reiterates that the Central Bank has been actively working with the Government to facilitate enhancing non-debt sources of foreign exchange inflows ***as the Government's stance is not to approach the International Monetary Fund***. Further, the report predicted that the reserves would deplete to USD 2.5 – 3 billion by end July 2021.This report further goes on to state that ***"by way of an advance warning, it is the duty of the Monetary Board to keep the Honourable Prime Miniter informed of debt service obligations falling due in 2022. There are Government foreign currency debt service obligations of around USD 6.6 billion….. Significant foreign exchange inflows have to be secured, to maintain reserves in 2022".***

However, on 8th July 2021, within a week of the said report the 2nd respondent had relinquished duties as Minister of Finance and the 2A respondent assumed duties as Minister of Finance.

The next report of the 30th respondent dated 26th July 2021 which is addressed to the 2A respondent who had assumed duties as the Minister of Finance by then makes reference to his earlier reports submitted to the 2nd respondent and copies of them had been annexed. In this report the 30th respondent reiterates the dire state of the economy and the challenges faced due to the pandemic. It recognises with all the guaranteed foreign exchange inflows, the gross official reserves *"are projected to remain at a critically low level of around USD 3.3 billion by end 2021".* The report predicts that the reserves will be further depleted to around USD 1.5 billion by end March 2022, *"without any further significant foreign exchange inflows in the pipeline"*. The above clearly indicated that the 2A respondent was put on notice that the reserves would deplete to around USD 1.5 billion by March 2022 [roughly about one month's imports] and there

were no foreign exchange inflows forthcoming. Thus, 2A respondent would have been alive to the precarious situation of the economy at that point of time.

This report further draws attention to the need to address the concerns raised by the rating agencies. It states *"The rating agencies have raised their concern on the ability of servicing Sri Lanka's foreign currency debt in the period ahead. Most recently, on 19 July 2021, Moody's Investor Service placed Sri Lanka's sovereign credit rating 'under review for downgrade'……It is important that the concerns of rating agencies are addressed urgently to prevent any further rating downgrades in the near future, failing which would keep international investors further away from Sri Lanka and would further reduce the possibility of accessing international capital markets. The decline in reserves below the critical levels would also prompt the friendly nations and central banks to reconsider the provision of financing that are being negotiated at present".*

In its concluding remarks *interalia* the report says: *"In the context of extremely challenging economic conditions, the Monetary Board is of the view that recent regulatory and policy measures to stabilise the external sector have helped to arrest the situation to a certain extent. However there is dire need of urgent implementation of drastic policy measures as proposed above aiming at resorting the stability of the external sector of the economy to reduce foreign exchange outflows and increase foreign exchange inflows, avoiding the sharp depletion of gross official reserves of the country and a resultant loss in confidence on the macroeconomic stability by key stakeholders including foreign lenders, potential investors, corresponding foreign banks of local banking sector. The Government may alternatively consider approaching the globally accepted lender of last resort for balance of payment needs, the International Monetary Fund (IMF).* ***The intervention of the IMF, whilst bolstering the confidence of international investors on Sri Lankan economy, may on the other hand require aggressive reforms in the fiscal sector, interest rates and the exchange rate, and even restructuring of the debt stock of the Government".***

This report, compared to the earlier reports submitted since August 2020, reflects a change of stance / strategy in relation to the need to seek assistance from the IMF. In this report, as it appears to us, the 30th respondent had recommended to the Government (2A respondent) to seek assistance from the IMF as an alternative to other possibilities. In this regard it is pertinent to

note that at a meeting of the Monetary Board held on 04th August 2021 the 32C respondent had remarked; that it will be the Monetary Board that will be summoned before a Commission of Inquiry in the event the Government or the CBSL defaults, in a backdrop where even China had reached out to IMF for assistance due to the situation caused following the COVID-19 pandemic. In response to the above remark, the 30th respondent had said that *"he is flexible on seeking IMF assistance if considered necessary and the Government also will have to be convinced if that option is to be pursued"*

However, the 2A respondent has not accepted this proposal - seeking IMF assistance - as a viable solution. The 2A respondent whilst noting the contents of the report dated 26th July 2021 has made the following observation in his letter addressed to the 30th respondent, dated 12th August 2021.

"Your report suggests to consider approaching IMF to address these challenges. It indicates that such involvement of IMF requires aggressive reforms in the fiscal sector, interest rates, exchange rate and even restructuring of debt stock of the Government. I would like the Central Bank of Sri Lanka to clearly advise me why such reforms cannot be done without resorting to IMF loan programme, for instance as Malaysia did, to manage the challenge of Asian Financial Crisis. The country may need a fresh thinking altogether as Sri Lanka has had 16 IMF programmes since 1965"

The 2A Respondent inter alia observes that *"There is also a shortage of foreign exchange in the Forex Market as has been reported by shipping lines, the business community and the media. This has resulted in a large number of containers at the Colombo port not being cleared. I have also noted that most of the cargo comprises of essential food and raw material which are essential for the smooth functioning of day-to-day life and country's economy".*

The above observation of the 2A respondent clearly demonstrates that the 2A respondent is fully aware of the critical status of the social and economic situation that prevailed by August 2021. It is pertinent to observe that the continued warnings sounded by the 30th respondent from his initial report to the 2nd respondent one year ago (04th August 2020) and repercussions predicted due to severe depletion of gross official reserves, have become the reality by this time.

The 2A respondent in the same letter had identified certain measures as necessary to be initiated by the Central Bank to *"signal market to move on to a stabilization path".* Despite the difficulties expressed by the 30th respondent in his earlier reports to continue providing foreign exchange to meet the Government's import bills, the 2A respondent has required the Central Bank to *"release of USD 250 million immediately to all Commercial Banks, since they are in need urgent foreign exchange to honour payments on account of imports under various trade instruments (DP term of payment, Sight LCs etc). This will enable all cargo currently at the ports to be cleared".* Furthermore, the 2A respondent had wanted the Central Bank to release another USD 250 million in early September 2021, to meet petroleum and LP gas financing.

The 30th respondent by his letter dated 14th September 2021, whilst acknowledging series of discussions and the close dialogue he had with the 2A respondent and officials of the Ministry of Finance, has observed that the gross official reserves had declined significantly as large external debt servicing requirements were met in the absence of adequate financial inflows. The 30th Respondent also observed that *"the recent interventions in the foreign exchange market by the Central Bank at the request of the Government has helped to ease conditions in the supply of essential imports, but could also weaken the country's external position further, if the expected inflows are further delayed".*

In relation to the 2A respondent's views on seeking assistance from the IMF, the 30th respondent while emphasising the need to implement an agenda of structural reforms to achieve economic prosperity have welcomed a reform package without the IMF, and had described it as the most preferred way forward as a country, as many other countries have graduated by implementing far-reaching economic reforms. However, having made this observation, the 30th respondent had further said that *"we are prepared to work with you, learning from past experiences of our own and other country experiences to get out of the present difficulties through required structural reforms**. Although under totally different domestic and international conditions, Sri Lanka also achieved external sector stability without an IMF intervention during early 1970s. In 2009, we obtained an IMF programme which was negotiated within the broader frame work of the Government Policy agenda of the time, Mahinda Chinthana**".*

The 30th respondent had further stated that *"While the Government with a strong commitment to long lasting structural reforms, may consider a decisive reform agenda to be implemented*

gradually, there are advantages of maintaining links with the IMF, backed by a well-structured policy. The countries which obtain financial assistance from the IMF are increasingly encouraged to implement home grown reforms. Accordingly, if Sri Lanka decides to obtain an IMF programme in 2021 as well, negotiations could be based on Government's policy framework "Vistas of Prosperity". ***The advantages that would be gained by indicating to the market that we are closely working with the IMF, even without any commitment to an IMF stabilisation programme, could boost confidence among international financial community, so that conditions for borrowing, if the need arises, could be made easy. Even a home-grown reform programme may entail significant sacrifices to be made".***

As a concluding remark, the 30th respondent *inter alia* had stated that *"some countries in the world even Sri Lanka, in some past occasions have successfully steered through crisis without the IMF support in the past. But as different country experience show, being engaged with the IMF even without an agreed programme would bring in much needed investor confidence and improve the sentiments of all other stakeholders, including multilateral and bilateral lenders and Sovereign rating agencies. This could prevent any further credit rating downgrades and may pave the way to attract foreign exchange inflows while helping to unlock the access to international markets gradually. This point is presented for the consideration of the Government".*

Ironically, the 30th respondent had resigned from the post of Governor Central Bank on the same day he sent the above report to the 2A respondent. In our view this report sent by the 30th respondent sufficiently demonstrates the advantages of seeking the assistance of the IMF in stabilising the critical condition in the economy.

In all the reports submitted by the 30th respondent to the Minister of Finance under section 68 of the Monetary Law, he had clearly set out the critical condition of the economy and the challenges to remedy the situation. The adverse consequences due to down-grades by the international agencies and the need to address their concerns were highlighted. While recognising the adverse impact the pandemic caused to the economy, they recognised the immediate need to secure foreign exchange inflows to curtail the depletion of gross official reserves and maintain the internationally accepted ratio between the gross official reserves and the foreign exchange requirement of import bills. Even though they do not contain a specific

recommendation to seek IMF assistance describing it as the only way out, they have provided material emphasising the critical condition and the advantages in seeking assistance from the IMF to mitigate the situation.

On 15th September 2021, the 29th respondent had assumed duties as Governor of the Central Bank.

The continued deterioration of the economy and the status it has reached by December 2021 is succinctly described by the 29th respondent in his statutory report to the 2A respondent submitted on 09th December 2021. The report states:

"The urgent attention of the Government is crucial to resolve the foreign currency liquidity issues faced by the state banks as well as the entire economy in order to prevent a banking and a sovereign default in the immediate future. Their continuous reliance on the Central Bank to honour payment obligations on essential imports has caused a severe stress on gross official reserves, which have already declined to a critical level at present with inadequate coverage for upcoming debt servicing or to finance essential imports".

The report further says that *"the shortage of foreign currency inflows to the government amidst the sovereign rating down grade aggravated the decline of gross official reserves. The Central Bank continued to provide foreign exchange to maturing debt obligations of the Government".* Having set out these factors and while reiterating the immediate and critical need of securing sizeable amount of foreign financing to maintain the macro-economic and financial system stability, the 29th respondent had expressed hope that the efforts the 2A respondent has currently undertaken, would bring necessary foreign financing through Government to Government collaboration, syndicated loan arrangements, credit lines for essential imports and monetisation of underutilised and non-strategic state assets. The specific details of these avenues, however, are not referred to in this report.

It is also interesting to note that the 29th respondent had expressed the view that this situation may not have arisen if envisaged inflows to the Government such as the monetisation of identified assets, including the shares of West Coast Power, East Container Terminal of the Colombo Port etc. Apart from this bare statement, this report does not further elaborate the reasons for such non-materialisation of such avenues. The critical situation in which the

economy was facing is further demonstrated by the fact that the Monetary Board at its meeting on 08th December 2021 has granted its approval to proceed with the disposal of gold on a staggered basis and had predicted the maximum amount that could be derived from disposal of gold would be USD 350-400 million.

The 29th respondent in his next report to the 2A respondent dated 31st December 2021 had drawn the attention of the 2A respondent the critical level to which Gross Official Reserves had depleted and had projected the foreign currency debt service payments for 2022 to be USD 7.3 billion which includes repayment of ISB of USD 500 million in January 2022. This report further reflects that the Net Foreign Assets of the Central Bank has deteriorated to negative levels of around Rs. 330 billion by end November 2021 mainly due to meeting the foreign currency debt service obligations of the Government and financing essential imports using the foreign exchange reserves of the Central Bank. According to this report Gross Official Reserves had depleted to USD 1.6 billion by November 2021 and recognises that such reserves were equivalent only to around one month of imports. The report claims that this amount was augmented to USD 3.1 billion by end 2021 with the activation of SWAP facility of People's Bank of China. However, he fails to disclose the conditions on which the SWAP facility was initiated and the inability to draw it unless the Gross Official Reserves would grow to the equivalent of three months of import. Even though the 29th respondent had observed the steps taken by the rating agencies which resulted in a significant loss of investor confidence, he has failed to make any recommendations to remedy this situation and win the investor confidence in order to obtain more investments to overcome the crisis situation.

Immediately after the said report, 2A respondent submitted a Cabinet Memorandum to the Cabinet of Ministers dated 03rd January2022 where he referred to the said SWAP facility as an opportunity the Government had got to strengthen the foreign reserves of the Country.

In the said Cabinet paper, the Minister, explaining the ill effects of an IMF programme had invited the Cabinet of Ministers to deliberate on a home-grown solution.

The Cabinet of Ministers after considering the said Cabinet Memorandum had decided as follows;

> ''සංදේශයේ 4 ඡේදයෙහි දක්වා ඇති කරුණු සැලකිල්ලට ගෙන දැනට ශ්‍රී ලංකාව මුහුණ දී ඇති ගැටලු සඳහා රටතුලම හඳුනා ගනු ලබන විසඳුමක් ක්‍රියාත්මක කිරීම සඳහා''

However, when considering the critical level of the Sri Lankan Economy as of 01st January 2022, with foreign reserves only to meet its import bill for only one month, a serious issue arises whether the Cabinet of Ministers were properly briefed or appraised of the critical situation of the economy in the said Cabinet paper in order to obtain objective views of the policy makers whether it is viable to resolve the economic ills by adopting a "home grown solution". Specially so when mechanics of a home grown solution were not placed before the Cabinet. It is to be noted that the Cabinet of Ministers were starved of the critical information relating to foreign reserves, a vital factor that ought to have been taken into account in deciding the viability of a home grown solution as an alternative to seeking IMF assistance. Question arises whether the Cabinet of Ministers was properly briefed of the said position in the said Cabinet Paper to obtain the decision to "identify a home-grown solution" without knowing what is the "so-called home-grown solution" that is going to bail out the Sri Lankan economy from its critical condition. It is also pertinent to observe that the Cabinet Memorandum dated 03rd January 2021 in which the 2A respondent invited the Cabinet of Ministers to deliberate on the issue whether to seek the assistance of the IMF, had not set out one of the most important factors enabling the Ministers of the Cabinet to take a well-considered decision. The Cabinet paper is silent on the critical situation in the Gross Official Reserves and the ill effects on the failure to secure inflow of foreign exchange on an urgent basis. As it was discussed herein before, the report of the 29th respondent dated 31st December 2021 clearly sets out *that "Gross Official Reserves had depleted to a critical level of USD 1.6 billion by end November 2021 which was equivalent only to around 1month imports".* In this report, the 29th respondent had proceeded to say that the reserves were augmented by USD 3.1 billion by end 2021 with the activation of the SWAP facility of the People's Republic of China.

In this regard it is also important to note that the pros and cons of adopting any measures to overcome the critical economic conditions need to be assessed in the proper context in a given situation, when a decision is to be taken on the viability of such measures. This was not a

straightforward case of assessing the suitability of seeking IMF assistance under normal circumstances but the call to seek IMF assistance was critically relevant given the unique circumstances our economy was placed in. The depleted official reserves; the need to secure foreign exchange on an urgent basis; the reluctance of the other agencies to extend support without an IMF programme were critical factors in deciding whether seeking assistance was in the best interest of the country at the relevant time.

In this backdrop was it not the duty or the responsibility of the 2A respondent to place all relevant factors referred to above before the Cabinet of Ministers when they were invited to deliberate and decide on matters that were so serious as they had a direct impact on the entire society?

In our view the 2A respondent has breached the public trust deposed in him in exercising his executive powers of the people in his capacity as the Minister of Finance in this regard by his failure to place all relevant facts with sufficient details in the Cabinet Memorandum when he invited the Cabinet of Ministers to make a choice between seeking assistance from the IMF and adopting a "home grown solution" at the given situation. As elaborated before, the following comment of the 30th respondent in his letter dated 14th September 2021 addressed to the 2A respondent reiterates this position:

> *"Although under totally different domestic and international conditions, Sri Lanka also achieved external sector stability without an IMF intervention during early 1970s"*

The report of the 29th respondent dated 27th January 2022 also sets out the critical condition in which the economy is ailing. Even though he emphasises the need to secure foreign currency inflows to avert an economic crisis, he maintains a stoic silence on the possibility of any engagement with the IMF for assistance.

The report of the 29th respondent dated 28th February 2022 describes the status of reserves and its' potential impact on the economy in the following manner: *"As the current reserve level is inadequate to meet this significant debt serving requirements, not having new foreign currency inflows into official reserves would result in a default by the Central Bank as well as the Government of Sri Lanka in the immediate future in which eventuality the economic management of the country will experience severe repercussions in the future. Such an event would be*

catastrophic, resulting in a serious loss of confidence in the Sri Lankan economy, including the rupee and it would even be developed to serious and far reaching social and political implications as well".

According to the material presented before this Court, the payment of ISB of USD 500 million took place before the February 2022 report was presented. By this time the Gross Official Reserves had come down to a critical level of USD 2.4 billion including the SWAP facility of USD 1500 million from the People's Bank of China, SWAP facility of USD 400 million from Reserve Bank of India and another SWAP facility of USD 200 million from the Bangladesh Bank.

Even though there is no reference to the restrictions imposed in the Chinese SWAP facility, in the said report, it appears that the Gross Official Reserves of Sri Lanka were only USD 300 million when the SWAP facilities referred to above are not factored in. This reserve was not sufficient to meet Sri Lanka's foreign expenditure even for one week, but this report except for the recommendation for import restrictions on non-essential goods and revision of energy prices, failed to make any recommendations to overcome the critical situation the country faced at that time, specially, in the context of there being no avenues for foreign exchange inflows.

It is surprising and hard to comprehend the reason for the 29th respondent to maintain a complete silence in all these reports on the possibility of remedying this situation by initiating a programme with the IMF. The 29th respondent has been fully aware of the critical condition in the Gross Official Reserves and the disaster the entire country would face without taking immediate steps to secure sufficient foreign funding inflows. However, he failed to make this recommendation without any justification whatsoever.

In this regard it is also pertinent to note that the Monetary Policy Committee of the Central Bank by a Board Paper titled "Review of the Monetary Policy Stance Monetary Policy Cycle No 2 – March 2022" had recommended to the Monetary Board for its consideration at its meeting on 03rd March 2022 *inter alia* to "initiate discussions with the IMF to have a credible anchor: Announce immediately to the public that the Monetary Board is prepared to propose to the Government to commence discussions with the IMF". At the Monetary Board meeting of 03rd March 2022, Director of Economic Research while summarising the contents of the aforementioned Board Paper had inter alia invited the Monetary Board to approve the

recommendations of the Monetary Policy Committee including the recommendation to initiate discussions with the IMF to have a credible anchor and to immediately make a public announcement that the Monetary Board is prepared to propose to the Government to commence discussions with the IMF. However, it is surprising and extremely difficult to comprehend the complete silence the Monetary Board maintained in regard to this recommendation. Records do not show that they at least considered this recommendation by the Monetary Policy Committee.

The learned President's Counsel who represented the 2nd and 2A respondents, whilst referring to some of the recommendations made in the reports submitted in terms of sections 64 and 68 by the Monetary Board, to the Minister, took up the position that it was the duty of the Monetary Board to advice the Minister, but the Monetary Board had failed to advice the Minister with the steps that should be followed to get over from the critical condition of the Sri Lankan economy. As already referred to, even though the few reports submitted by the 29th respondent do not explain the real situation the country was facing, the two detailed reports the 2A respondent received from the 30th respondent had placed the 2A respondent on notice of the critical condition of the Sri Lankan economy at that time. The 2A respondent had in fact responded strongly to the report submitted on 26th July 2021 by his letter dated 12th August 2021.

As already referred to above, the 30th respondent has submitted reports under Sections 64 and 68 to the 2nd respondent on 4th August 2020, 6th April 2021, and 30th June 2021 explaining the challenges faced by the Sri Lankan economy at that time. In the report, the 30th Respondent sent to the 2nd respondent on 4th August 2020, whilst explaining the sharp drop of international reserves, low level of Gross Official Reserves and urgent need to make available the foreign financing for the upcoming ISB payment, had said,

a) Most of the loans from the multilateral sources referred to above are likely to follow an IMF facility for which the IMF has indicated debt sustainability to be a significant impediment.
b) In the absence of an IMF program in the near future the options available are to seek bilateral financial assistance from friendly nations and to explore avenues of commercial borrowings.

In addition to the above 30th Respondent had further advised the 2nd Respondent,

a) The Monetary Board is of the view that the country's external sector stability remains vulnerable, necessitating corrective measures without delay.
b) Every possible initiative should be taken by all stakeholders in real, financial and fiscal sectors to prevent further depletion of the country's official reserves.

If the above recommendation of the Monetary Board is properly understood, it is clear that the Monetary Board wanted the 2nd respondent to consider the Government economic policy seriously in order to prevent further depletion of the country's official reserves.

During his submissions before this Court the 32B respondent referred to a meeting with the 2nd respondent by the Monetary Board. On a request made by the Monetary Board the said meeting was arranged on 1st July 2021 and all the members of the Monetary Board along with senior officials of the Central Bank had participated at the meeting. At the said meeting a presentation was made in Sinhala by the Central Bank and the critical condition of the Sri Lankan economy was explained. The said presentation specifically referred to an engagement with the IMF as the final resort in the following terms;

> ''එවැනි හදිසි ක්‍රියාමාර්ග ක්‍රියාත්මක නොවන්නේ නම් ජාත්‍යන්තර මට්ටමින් අවසාන ණය දෙන්නා වශයෙන් පිලිගත් ජාත්‍යන්තර මූල්‍ය අරමුදලින් සහාය ලබා ගැනීම අවශ්‍ය වනු ඇත''

According to the minutes of the said meeting Superintendent of Public Debt had explained the need for an internationally accepted anchor and the points referred to by him at the meeting was recorded under paragraph 3.7 of the said meeting as follows;

> "**3.7** Superintendent of Public Debt stated that in the recent discussions with Sovereign rating agencies they have highlighted concerns about the current situation, and there is a likelihood of such rating agencies issuing further adverse comments on the Sri Lankan economy. Rating agencies as well as foreign investors also constantly inquire about possible engagement with the International Monetary Fund (IMF) or the submission of a credible repayment plan from the Government".

On behalf of the 28th Respondent the Monetary Board, it was submitted that ***"it is the Government which has the responsibility to approach the IMF and agree on a programme, if***

any, with the IMF. The agreements must be concluded by the Government and no other. It is not possible for the Central Bank (Monetary Board) to approach the IMF if the Government is unwilling."

With regard to the above submission, it is necessary to consider the provisions in Sections 64 (1) and 68 (1) (2) of the Monetary Law.

As per the said provisions,

a) Whenever the Monetary Board anticipates economic disturbances that are likely to threaten domestic monetary stability or whenever abnormal movements in the money supply or in the price level are actually endangering such stability;
b) Whenever the Monetary Board anticipates that there may develop a deficit in the international balance of payment that cause a serious, decline in the international reserve or there is an imminent threat of such decline;

The Monetary Board has a duty to submit reports to the Minister explaining and making recommendations and the steps the Government should adopt.

As already observed in this judgement, during the period the 30th respondent was functioning as the Governor of the Central Bank and in that capacity heading the Monetary Board, several reports had been submitted explaining to the 2nd and 2A respondents the magnitude of the crisis faced by the Government of Sri Lanka.

However, when the 29th respondent was appointed the Governor, a significant difference was observed in the reports submitted to the 2A Respondent and a question arises whether the 29th respondent fulfilled his responsibilities as the Chairman of the Monetary Board in discharging the duty of the Monetary Board when submitting statutory reports to the 2A respondent.

The petitioners have produced several statements issued by the 29th respondent in his capacity as the Governor Central Bank, where he assured the public that the country is moving towards the correct path and it will recover soon.

According to the material available a decision to seek assistance from the IMF, was ultimately taken by the 32A respondent on 16th March 2022. On the 14th March 2022 the Cabinet of Ministers had decided "to authorise the Minister of Finance to take necessary action **to obtain**

technical assistance of the International Monetary Fund with a view to resolving the current situation encountered by the Sri Lankan economy" (emphasis added). The Cabinet of Ministers had taken this decision having given their mind to the note [to the Cabinet] of the 2A respondent on "Staff Report Recommendations for the 2021 Article IV Consultation of the International Monetary Fund (IMF)". The note of the 2A respondent was critical of the findings of the IMF after Article IV consultation and had observed that "some of these risks are overstated in the press release and the efforts of the authorities to address these challenges are understated". It is to be observed that the engagement with the IMF referred to in the Cabinet Decision in March 2022 was only "to obtain technical advise and the assistance of the IMF" which appears to be noncommittal and tentative as opposed to the request made by the 32A respondent in April 2022 for an appropriate fund supported programme to address the economic challenges the country was facing mainly from the balance of payment difficulties and broader macro-economic issues the country was confronted with at the time. It is to be noted the said letter was sent to the IMF with an assurance by the Government of Sri Lanka of its full commitment to achieve the objectives of such a programme. In the course of the submissions of the 32B respondent it was brought to the attention of Court that the sending of letter by 32A respondent in April 2022 was facilitated by him sequel to a one-on-one meeting he had with the 32A respondent.

Even Though, there were reports (referred to above) recommending an engagement with the IMF on an urgent basis from the two subcommittees (MBEDMC and DEDMC) and other officers of the Central Bank, the Monetary Board (28th respondent) failed to take a firm decision in this regard. The Monetary Board was fully aware of the crisis resulting from the continued depletion of Gross Official Reserves as well as the reserves of the Central Bank which reached critically low levels, yet no consensus could be reached by the members. The situation that prevailed within the Monetary Board is aptly reflected in the comments made by the 32nd respondent (Kumarasinghe) at the meeting held on 21st March 2022 and the views of the Deputy Governor (S) on the comments of the 32nd respondent. The 32nd respondent had said *"From the day I joined the Monetary Board in July 2020, for almost two years Dr Ranee Jayamaha and DG(S) have been tirelessly pushing the Monetary Board to go for an IMF programme but the majority including the past and present Governors were not willing to accept the path till the MB meeting held on 07.03.2022. However, now with the MB decisions taken on 07.03.2022, Dr Ranee*

Jayamaha and DG(S) have won the long fought battle on IMF within the MB meetings and I and the Governor(s) have been defeated".

These comments referred to above demonstrate the exact situation that prevailed within the Monetary Board. As discussed hereinbefore the 30th, and 31st respondents have continuously maintained that there was a government policy not to reach out to the IMF. However, there is no material before this Court as to the existence of any such policy prior to January 2022. The Cabinet of Ministers, however, approved the 2A respondent's proposal for a home grown solution without seeking the IMF assistance. During the course of this period, the Members of the Monetary Board were put on notice of the critical situation that prevailed in the Gross Official Reserves and the need to secure foreign exchange inflows on an urgent basis. They were also aware of the unlikelihood of receiving such inflows from other sources and further certain sources from which inflows could be obtained were insisting on an IMF anchor if they were to provide assistance. Severe hardships people underwent over this period was mainly due to the scarcity in essential items such as fuel and gas. The depletion of foreign reserves to meet the import bill was the main hurdle to secure such essentials.

The continued reluctance for a specific recommendation to the Government to seek assistance from the IMF by the majority of the members of the Monetary Board in these circumstances, in our view is a violation of public trust reposed in the Monetary Board as a collective body as well as on individual members who maintained such continued resistance despite severe depletion of Gross Official Reserves in the absence of any viable alternative to overcome this predicament. It also appears that their reluctance was not based solely on the purported policy of the Government but also due to their personal views and/or beliefs. The 32nd respondent having considered the decision of the Monetary Board to recommend to the government to seek IMF assistance as a personal defeat in a long fought battle had suggested that *"the best persons to get involved in way-forward discussions with the IMF are Dr Ranee Jayamaha and DG(S) who have the best relationships and influence with IMF".* On the following day (22nd March 2022) the said respondent had tendered his resignation from the Monetary Board. This conduct mirrors the aversion this respondent had towards reaching out to the IMF and the reluctance to consider issues objectively in the larger interest of the people who had deposed trust on him. When one accepts public office, they should have the capacity to look at issues objectively and resolve

them in the best interest of the people rather than being obsessed with their personal beliefs. Comments and the conduct of the officials of the Central Bank over this period clearly points to the direction that the need to seek assistance from IMF did exist over a period of time and any prudent person who did not act arbitrarily would have foreseen the serious repercussions in the failure to act swiftly to remedy the situation. Deputy Governor (S) in his comments says that *"the little experience I had in working with macroeconomic policy making enabled me to foresee well in advance the economic crisis that the country is experiencing at present. This is the exact reason for me to recommend and emphasize to the MB to approach IMF".* He further said *"It appears that at least at this very late stage, the Government has finally realized that there is no other option but to approach IMF. **The pain to the economy and the people of Sri Lanka would have been less if this decision was taken at least one year ago**"* (emphasis added). K.M.M.Siriwardane – Deputy Governor (S) in his note to the Monetary Board dated 04.04.2022 had listed out the board papers and submissions made to the Monetary Board since 11.11.2020 on "Macroeconomic development and foreign exchange reserves".

In this regard it is also pertinent to note that the Board Paper dated 11th November 2020 titled "Challenges in Government foreign currency debt service payments in 2021 and beyond" discusses the status of Gross Official Reserves as it stood by October 2020, the probability of the reserves dropping to critical levels in 2021, the advantages of an IMF assisted programme and the sentiments of other funding agencies on the absence of such programme. None of these matters, however, were taken up for discussion at the Monetary Board. The main reason for the non-discussion, appears to be the insistence of the 31st respondent to defer the discussion to a date after the presentation of the Budget speech in Parliament; this is despite the fact that the 32C respondent is urging paying urgent attention to the said issues.

In this regard it is also pertinent to note the conduct of the 38th respondent (Jayasundera) as revealed in the minutes of the Monetary Board meeting held on 21st April 2021. The Deputy Governor (S) has placed on record an incident that took place in the morning of that day. According to him there had been a meeting at the Presidential Secretariat chaired by the 38th respondent. This meeting was attended by the officials from the Ministry of Finance including the 31st Respondent, officials of the Central Bank including the 30th respondent, officials from the two state banks and officials from the Board of Investment. At this meeting the 38th

respondent had been critical of the officials of the Central Bank with an allegation of misleading the Monetary Board and their inability to send statutory reports required under sections 64 and 68 of the Monetary Law Act. Furthermore the 38th respondent had questioned the conduct of DG (S) at the Central Bank with insinuations that the latter is a person who tries to serve as per the needs of IMF. Two other Deputy Governors, DG(N) and DG(F) also have placed on record that at several occasions, the 38th respondent reprimands officials of the Central Bank in the presence of officials of the state banks and neither minutes of such meetings nor any official documents were shared of such meetings. The 38th respondent, however, had denied that he had caused "any intimidation" as alleged by the Central Bank officials who attended meetings chaired by him. The 30th respondent also had acknowledged that the 38th respondent was speaking to the Central Bank officials in a critical manner questioning their competencies and allegiances. Furthermore, the 30th respondent had observed that *"the interpretations given by officials of the Central Bank on matters relating to banks and market operations vary with that of market participants and Government authorities such as Dr Jayasundera".*

Learned President's Counsel for the Petitioners submitted that this conduct of the 38th respondent clearly exceeds the boundaries of the legitimate exercise of powers of the Secretary to the President. This conduct is a clear interference with the discharge of duties of public officials. In their submissions this arbitrary use of power is a breach of public trust placed on the 38th respondent.

All factors referred to above clearly establishes that the relevant state organs / officials demonstrated reluctance to reach out to the IMF in the face of the critical situation the country's economy was facing in spite of the fact there was no other viable alternative. This position, namely, the delay on the part of the Government and the Monetary Board in seeking assistance from the IMF has been commented upon by the Auditor-General as well.

It is apt to reiterate that the persons holding public office have a duty to ensure that they exercise due diligence and discharge their duties and responsibilities reasonably and rationally without acting arbitrarily. In our view, 2nd (Mahinda Rajapaksa), 2A (Basil Rajapaksa) 28th (Monetary Board), 29th (Ajith Nivard Cabraal), 30th, (W.D.Lakshman), 31st (S.R.Attygalle) and 32nd (Samantha Kumarasinghe) respondents failed to take remedial action, when the option to take such action was available, namely by not taking measures to seek assistance from the IMF in a

timely manner when they were under a duty to do so. The said inaction on the part of the said respondents, in our opinion was not only manifestly unreasonable but also irrational and arbitrary. Thus, the said respondents in our view had breached public trust reposed in them by the inaction referred to.

EXCHANGE RATE AND OUTFLOW OF FOREIGN EXCHANGE

The relevant provisions of the Monetary Law with regard to determining the par value of Sri Lanka Rupee, International Reserve and International stability of Sri Lanka Rupee reads as follows;

> Section 3. (1) The Monetary Board shall by unanimous decision, recommend to the Minister in charge of the subject of Finance that the par value of the Sri Lanka rupee be determined in terms of special drawing rights or in terms of such other common denominator as may be prescribed by the International Monetary Fund, and upon such recommendation, the Minister in charge of the subject of Finance shall, by Order published in the Gazette, determine and declare the par value of the Sri Lanka rupee in accordance with the terms specified in such recommendation:
>
> Provided, however, that if the Monetary Board is of the view that international economic conditions do not warrant the introduction or maintenance of exchange arrangements based on stable but adjustable par values, it may, by unanimous decision, recommend to the Minister in charge of the subject of Finance that no determination be made under the preceding provisions of this section or that any Order made under this section be revoked, and upon any such recommendation, the Minister in charge of the subject of Finance shall desist from making an Order under this section, or, as the case may be, revoke an Order made under this section.
>
> (2) The Monetary Board may by unanimous decision recommend to the Minister in charge of the subject of Finance the alteration of the par

value of the Sri Lanka rupee, if the Board is of the opinion that such alteration of the par value of the Sri Lanka rupee is rendered necessary in any of the following circumstances, that is to say–

(a) If the continuance of the existing par value hinders or is likely to hinder unduly, the achievement and maintenance of a high level of production, employment and real income and the full development of the productive resources of Sri Lanka, or results, or is likely to result, in a serious decline in the International Reserve of the Central Bank or in other utilizable external assets of Sri Lanka or if such decline cannot be prevented except by–

(i) a large scale increase in the external liabilities of Sri Lanka;

(ii) the persistent use of restrictions on the convertibility of the rupee into foreign currencies in settlement of current transactions; or

(iii) Undue or sustained Government assistance to one or more of the major export industries; or

(iv) Prolonged use of measures designed to restrict the volume of imports of essential commodities; or

(b) If the maintenance of the existing par value is producing, or is likely to produce, a persisting surplus in the balance of payments on current account and a monetary disequilibrium which cannot be adequately corrected by other Government or by Central Bank action authorized by this Act; or

(c) If uniform proportionate changes in the par values of currencies of its members are made by the International Monetary Fund, and upon such recommendation, the Minister in charge of the subject of Finance may, by Order published in the Gazette, amend, in

accordance with the terms specified in such recommendation, any Order made under subsection (1).

(3) Any Order made under subsection (1) or subsection (2) shall cease to have effect after a period of ten days from the date of publication thereof, unless such Order is approved by Parliament within that period:

Provided however, that if Parliament is not in session on the date of publication of the Order, the Order shall cease to have effect after a period of ten days from the date of the next meeting of Parliament, unless such Order is approved by Parliament within that period.

Section 65. In determining its international monetary policy the Monetary Board shall endeavour to maintain the par value of the Sri Lanka rupee, or where no determination of such par value has been made under section 3, maintain such exchange arrangements as are consistent with the underlying trends in the country and so relate its exchange with other currencies as to assure its free use for current international transactions.

Section 66. (1) In order to maintain the international stability of the Sri Lanka rupee and to assure the greatest possible freedom of its current international transactions, the Monetary Board shall endeavour to maintain among the assets of the Central Bank an international reserve adequate to meet any foreseeable deficits in the international balance of payments.

(2) In judging the adequacy of the International Reserve, the Monetary Board shall be guided by the estimates of prospective receipts and payments of foreign exchange by Sri Lanka; by the volume and maturity of the Central Bank's own liabilities in foreign currencies; and, in so far as they are known or can be estimated, by the volume and maturity of the foreign exchange assets and liabilities of the Government and of banking institutions and other persons in Sri Lanka. So long as any part of the foreign currency assets of Sri Lanka are held in currencies which are not freely convertible by the Central Bank, whether directly or indirectly, into

special drawing rights or such other common denominator prescribed by the International Monetary Fund or into foreign currencies freely usable in international transactions, or are frozen, the Monetary Board shall also take this factor into account in judging the adequacy of the International Reserve of the Central Bank.

Section 68. (1) Whenever the Monetary Board anticipates that there may develop a deficit in the international balance of payments of such magnitude as to cause a serious decline in the International Reserve, or whenever there is an imminent threat of a serious decline in the International Reserve, or whenever the International Reserve actually falls to a level which the board considers to be a threat to the international stability of the Sri Lanka rupee, or whenever international payments or remittances are being made which in the opinion of the board constitute an actual or a potential threat to such stability or are prejudicial to the national welfare, it shall be the duty of the board–

(a) To adopt such policies, and to cause such remedial measures to be taken, as are appropriate to the circumstances and authorized by this Act, and

(b) To submit to the Minister in charge of the subject of Finance a detailed report which shall include, as a minimum, an analysis of–

(i) The nature, causes, and magnitude of the actual or potential threat to the international stability of the Sri Lanka rupee; and

(ii) The measures which the board has already taken, and the further monetary, fiscal or administrative measures which it proposes to take or recommends for adoption by the Government.

(2) The Monetary Board shall submit further periodical reports to the Minister in charge of the subject of Finance until the threat to the international stability of the rupee has disappeared.

Section 3 (1) and (2) of the Monetary Law empower the Monetary Board, by a unanimous decision to recommend to the Minister with specified terms, to declare the par value of the Sri Lanka Rupee.

However according to the proviso to subsection (1) of section 3 of the Monetary Law, if the Monetary Board decides that the economic conditions do not warrant introducing par value, the said decision too may be communicated to the Minister.

As per the provisions in section 65 of the law it is the duty of the Monetary Board to maintain the international stability of the Sri Lanka Rupee and in order to maintain stability, there is a duty cast under Section 66 (of the said law) for the Monetary Board, to endeavour to maintain among the assets of the Central Bank an international reserve adequate to meet any foreseeable deficit in the international balance of payment.

Other than reporting and submitting periodic reports to the Minister when there is a potential threat to the international stability of Sri Lanka Rupee the Monetary Board is required under Section 68 (1) of the Monetary Law to adopt policies and remedial measures as are appropriate.

The case for the petitioners before this Court was that the Monetary Board as well as the Minister had failed to take correct decisions at the relevant time to float the rupee and thereby caused a loss to the Government.

As revealed before us, the exchange rate regime in Sri Lanka had gradually evolved from a fixed exchange regime in 1948 to an independently floating regime in 2002. However, at the time relevant to these applications Sri Lanka had a flexible exchange regime.

Export proceeds, worker remittances, tourist earnings, foreign direct investments, and foreign loans were the main sources of inflow to the country whereas import payments and loan repayments are the major outflows of foreign exchange.

One salient feature observed in our economy was the current account deficit due to the excessive outflow of foreign currency as opposed to the inflow of foreign exchange to the Country. In the

said circumstances the exchange rate is expected to be an automatic adjuster under the flexible exchange rate regime, but if the exchange rate is to be maintained at a stable rate, then a depletion of reserves would take place as foreign exchange will have to be pumped to the market to meet the demand.

As revealed before us the average exchange rate was around Rs. 185.00 per US Dollar towards the end of 2019 and was fluctuating between Rs.180.00-200.00 during 2020-2021. According to the reports published by the Central Bank, the buying rate of the US Dollar between 29.04.2021 and 06.09.2021 was between Rs. 195.0848- Rs.198.9023, and the selling rate was between Rs. 199.8700- Rs.204.8977.

As observed by the Auditor General, few members of the Monetary Board and some high-ranking Central Bank officials were not supportive of maintaining a fixed exchange rate at the cost of the foreign reserves of the country and were of the view that the exchange rate should be decided by the supply and demand for foreign exchange.

The Auditor General had observed, that the Central Bank however had made efforts to control the exchange rate using moral suasion, which was confirmed before us by several respondents.

During the period 2019 and 2021 (especially after March 2020) Sri Lankan economy experienced a drop in foreign remittances by Sri Lankan workers abroad due to the COVID-19 pandemic. There was a significant drop in Foreign Direct Investment and the inflow of foreign earnings from export markets too.

As revealed before us, it appears that although the need was to retain the meagre remittances received and creating a conducive environment to enhance the inflow, the Finance Ministry and the Central Bank however worked towards maintaining the exchange rate at around Rs 200 which mainly benefitted the importers. This is amply reflected in the letter sent by the 38th respondent to the Governor (30th respondent) requiring the Central Bank to maintain the exchange rate at Rs 185, which would have contributed towards the outflow of foreign exchange rather than boosting the inflows. In the said letter (dated 23rd March 2020), the 30th respondent had been directed to *"take immediate steps to stabilse exchange rate preferably around Rs 185/USD (commercial bank selling rate)* ***to prevent uncertainties to the business community*** *and unwarranted speculation."* The 38th respondent, having given the said direction, has stated

that the depreciation of the Sri Lanka Rupee will not help export promotion, import substitution and debt servicing. The said respondent in giving these directions stated that it was the President who directed him to take said measures referred to above.

The argument placed before us, in favour of not to depreciate the Sri Lanka Rupee was the additional fiscal burden that would result in debt servicing if the rupee was to depreciate. The Auditor General has opined, however, that it is a misconception that it would significantly increase the debt burden of the government due to the depreciation of the rupee. The comments of the Auditor General are reproduced below:

> *"Therefore, comments that the external debt burden of the government has increased significantly due to the depreciation of the rupee are misinterpretation of facts. The comments that if such depreciation of the rupee did not arise, the government could have saved billions and this money could have been used for other mega developments projects are not correct. If the exchange rate is overvalued/appreciated especially for a country like Sri Lanka, which continues to record a budget deficit and imposes significant tariffs on foreign trade, the budget deficit would further expand and this would necessitate to borrow more from domestic and external sources to finance the budget deficit."*

The Auditor General had referred to a meeting between the Governor and the licensed banks on 11th May 2021 where the banks had informed that due to the increase in imports and reluctance of exporters to convert foreign exchange, the outflow of foreign exchange remained high while inflows were low.

This matter was raised at the Monetary Board meeting held on the same day (i.e. on 11th May 2021) by the 30th respondent who chaired the meeting. He had informed the Board that the 10% conversion imposed on the exporters were insufficient and to enhance it to 25% in order to increase the liquidity situation in the forex market. Appointed member, Jayawardena (32B respondent) agreed with the said proposal but it was strongly objected to by the Secretary to the Treasury (31st respondent). The position he has taken at the said meeting was that, without ensuring the conversion of the 10 percent margin of exports, increasing the percentage of the conversion is futile. Appointed member Kumarasinghe (32nd respondent) too had agreed with the view expressed by the 31st respondent. At this stage 32B respondent whilst disagreeing with the

31st respondent had taken up the position, merely because 10% cannot be enforced, the decision to increase the margin to 25% should not be taken, is not rational. The 32B respondent has emphasised the importance of ensuring the enforcement while increasing the conversion percentage to an appropriate amount in order to improve the liquidity in the market; which was the most burning issue at that point of time.

In addition to the above discussion, the Monetary Board had made a strong plea to the 31st respondent to impose import duties on non-essential items or to agree to the Central Bank imposing LC margins on non-essential imports.

In this respect, a meeting was held at Temple Trees with the Prime Minister (2nd respondent) on 16th June 2021, to discuss the liquidity issues. The Central Bank had submitted a proposal to introduce LC margins, between 100%-150 % until 31st December 2021 as a temporary measure to resolve the liquidity crisis faced by the country. The 29th respondent as the State Minister of Finance (as he then was) had requested the Central Bank to implement the said proposal without delay.

However, even before the implementation of any decision of the Monetary Board, the 38th respondent addressing a letter to the 30th Respondent dated 21st June 2021 under the heading "Proposal to impose 150 percent deposit margin on letters of credit" had referred to the following matters:

> *"Secretary to the Treasury has brought to my notice that despite his objection the members of Monetary Board are pursuing a proposal to impose a 150 percent deposit margin on letters of credit to curtail imports to manage international reserves. [..]"*
>
> *"Furthermore, Government policy initiatives has put significant emphasis to curtail imports through the encouragement of viable import substitution production activities with food production including dairy, grains, fish and dried fish, organic fertilizer manufacturing, essential drugs and vaccines, renewable energy sources, IT and enabling services which are on the top of the list. These import substitutions are being pursued through rigorous and front loaded policy initiatives and actions. The targeted import is around USD 17,000Mn. to keep trade deficit below USD 5,000Mn.*

In this background, imposition of 150 percent deposit margin without clearly defined items being identified, may have serious repercussions on a much needed economic recovery in both domestic and in export industries and recreating employment and livelihood opportunities to the people."

Having referred to the above matter the 38th respondent had reproduced "Report on the Establishment of the Central Bank of Ceylon; Sessional paper XIV- explanatory note given to paragraph 08 in order to emphasize the importance of close working relation with the Government and had finally informed the 30th respondent in the final paragraph,

"Therefore, it is advisable that the Monetary Board refrains from the imposition of deposit margins on LC's without proper appraisal and approval of the Cabinet of Ministers."

We observe that the 38th respondent had generated the above letter neither on instructions nor on directions of the President as opposed to the letter of 23rd March 2020 referred to above. From the tenor of this letter (21st June 2021) it is apparent that the reason to generate this communication is the information conveyed to him by the 31st respondent. This Court also observes that this communication is a clear attempt by the 38th respondent to interfere with the functions of the Monetary Board / Central Bank without any authority whatsoever at a time the country was facing a major crisis due to lack of liquidity.

In this regard it is pertinent to note that at all times relevant to these applications, the Central Bank was placed as an institution coming within the purview of the Finance Minister and at no stage the portfolio of the Finance Minister was held by the President. In fact, the 38th respondent emphasises this fact in presenting his argument to counter the allegation that he interfered with the affairs of the Central Bank and/or the Monetary Board.

We further observe that the minutes of the Monetary Board meeting dated 07th July 2021 reveal that no approval to introduce LC margins as proposed by the Monetary Board had been received. The 30th respondent in his letter addressed to the 38th respondent on 13th July 2021 having described the circumstances under which the introduction of LC margins was proposed had confirmed that the said proposal was not given effect to as the Central Bank did not receive the approval of the Cabinet.

According to the reports of the Central Bank, there is a significant drop in foreign remittances from workers abroad and it came down from USD 580.9 million in January 2020 to USD 204.9 million in February 2022. However, a significant increase in the use of informal methods in transferring money such as Hawala / Undial by Sri Lankan workers abroad was observed mainly due to the high exchange rates offered in the "Gray market" compared to the exchange rate maintained by the Central Bank. Additional few rupees offered by the banks to encourage foreign remittances through the banking system showed no results.

As found out by the Auditor General, by April 2021 the Monetary Policy Committee (MPC) had observed the potential risks associated with foreign currency debt service payments and had recommended to take expeditious measures to attract financial flows through government intervention.

The Auditor General had not found in his report any meaningful decision taken by the Government to recover from this position until March 2022.

As further observed by the Auditor General under paragraph 3.1.35 of his report, the Central Bank, had maintained Sri Lanka Rupee at a static position using moral suasion for the period April 2021 to 5th September 2021 and 6th September 2021 to 7th March 2022. During this period the Central Bank had sold USD 1773.8 million and purchased USD 746.2 million from the Domestic Exchange Market making a net sale of USD 1,027.6 million. This outflow of USD had led to further depletion of the reserves.

There is also an observation by the Auditor General with regard to the interference by the 38th respondent P.B. Jayasundera in deciding the exchange rate even though he had absolutely no role to play under the Monetary Law. As observed in paragraph 3.2.1 there is reference to a discussion having taken place at the Monetary Board meeting on 21st April 2021 regarding carrying out a directive given by the 38th respondent to utilize 100 million USD out of a loan of 500 million USD received from the Chinese Development Bank. These monies were released mainly for the purpose of maintaining the rupee at the rate of Rs.192.00. The above instructions were given by the 38th respondent at a meeting where the Central Bank Officials were present at his office on 16th April 2021. They had been further instructed that in implementing the said directive, to issue to the two state banks USD 75 million each and the State Banks in turn had been instructed to sell USD 50 million at the domestic interbank Forex market at the rate of Rs.

192. Due to the above sale Sri Lanka Rupee appreciated to Rs 191.97 (on 19.04.2021) from Rs. 200 (on 12.04.2021). An appreciation by Rs. 8.03.

In this regard it is pertinent to note that on 20th April 2021, the 30th respondent in a note addressed to the 38th respondent had conveyed the observations of the Central Bank relating to the release of USD 150 million to two state banks and the appreciation of the rupee in the manner referred to above. According to these observations the sudden appreciation of the Rupee had resulted in an outflow of foreign exchange greater than the average customer foreign exchange outflows reported by the banks. Whereas outflows on 16th April 2021 remained at USD 92 million however, on 19th April 2021 it had increased to USD 137 million. They further observed that *"CBSL is of the view that it will be utmost difficult to maintain the exchange rate at around Rs 192.00 levels immediately without allowing gradual appreciation of LKR in a sustainable manner while creating sizable FX inflows to the banking system to ensure the smooth behaviour of the domestic FX market with a view to curb an undue volatility in the exchange rate".*

However, the response of the 38th respondent to these observations suggest that he disagrees with these views of the Central Bank. The 38th respondent in a note dated 27th April 2021 to the 30th respondent had observed that *"I am of the view that the release of USD 150 million to two state banks have worked well to ease the undue market scarcity. Further, infusion could have stabilized the rate since a US $ 175 Mn is expected by AIIB by this week to enhance forex cover of the two state banks"*. He further observes that *"however you seem to believe "gradualism" and "moral suasion" will stabilize the market. Since this is your subject, I do not wish to discuss this matter. However, I request a clarification as to how "gradualism" works and what and how the "moral suasion" is carried out by the CBSL to raise official reserve position of the country".* Furthermore the 38th respondent had observed that *"The management of external stability within Government Policy Framework is a responsibility of the Monetary Board and the Governor of the Central Bank of Sri Lanka".*

Even though the Monetary Board was using moral suasion in controlling the depreciation of Sri Lanka Rupee, the Board had finally observed the danger in continuing it for a longer period and in the report submitted to the Finance Minister (2A respondent) under section 64 and 68 of the Monetary Law dated 14th April 2021 had stated that;

*"**Exchange rate adjustment:** After following various types of exchange rate regimes in the world, we have moved to a flexible exchange rate regime since 2001, in which the rupee has been allowed to fluctuate according to market forces. Because of the extensive adverse side effects (on government debt, domestic price level, etc.) we have attempted over the last few months to maintain the exchange rate at around Rs. 202.00 per US dollar. To do this effectively for a long period of time, the Central Bank does not have the intervention strength in terms of reserves to be supplied to the market, and moral suasion on banks alone is unable to sustain exchange rate stability. If exchange rate stability could be maintained, it is better than continuous depreciation as it happened since late 1970s. To maintain such a policy;*

a) The policies being taken to achieve a current account balance (if not a surplus) need to indicate a gradual success and

b) A large replenishment of reserves through a significant inflow of funds is needed.

If these do not take place, then some sacrifice in the exchange rate stability objective of the Government may have to be made."

However, no progress was made in achieving the recommendations made in order to protect the official reserves until the official reserves dropped to a point that it was only sufficient for two weeks of imports. Finally, the Monetary Board floated the exchange rate with effect from 08th March 2022 and informed the public that *"greater flexibility in the exchange rate will be allowed to the markets with immediate effect. The Central Bank is also of the view that forex transactions would take place at levels which are not more than Rs. 230 per US dollar"*. The 29th respondent at a meeting of the CEOs of Licensed Commercial Banks and Licensed Specialised Banks on 9th March 2022 had stated that "certain trades may take place beyond the exchange rate stated by CBSL considering the greater flexibility that has been permitted". 32B respondent submitted that the above statement of the 29th respondent resulted in the sudden depreciation of the rupee between 225 to 364 (buying rate) and 229 to 377 (selling rate).

Within the statutory scheme of Monetary Law, the Central Bank is responsible for securing economic and price stability and mapping out the monetary policy. However, if a difference of opinion between the Minister of Finance and the Monetary Board exists as to whether the monetary policy of the Monetary Board is directed to the greatest advantage of the people, the Minister and the Board shall endeavour to reach an agreement. In the event such agreement

cannot be reached, the Minister may direct the Board to follow the policy in accordance with the opinion of the Government. In such situations the Minister should inform the Board that the Government accepts the responsibility for adoption of such policy. According to the Auditor-General there had been no such direction made by the Minister in relation to the manner in which exchange rate should be determined. He had expressed the view that until the Minister makes such a direction, the Monetary Board has the statutory power to decide on this issue. However, the Monetary Board had not taken a decision on this matter until 08th March 2022.

The situation that prevailed at the Monetary Board and surrounding circumstances is reflected in the minutes of the Monetary Board meeting held on 04th August 2021. These minutes relate to the discussions of the Monetary Board on the Board Paper titled "Performance of Foreign reserve management activities for the six months ended on 30th June 2021". At this meeting 32C respondent (Ranee Jayamaha) had said *"it is time for the Monetary Board to assess its own performance"* and had noted that by law, the Monetary Board had been given instruments to deal with situations like what prevailed at that time and had further observed that *"over the last one and half years the Monetary Board has only been debating about using these instruments".* Further elaborating on this the 32C respondent had identified the "exchange rate" as one such instrument and had said that the Monetary Board did not use it. The 32C respondent had observed that *"the exchange rate is fixed by moral suasion and it is currently at an unrealistic level with hardly any transactions taking place at that rate".* She had further stated that the Monetary Board had not used these instruments given by the statute and thereby has brought the Central Bank reserves to a negative level. At the same meeting the 30th respondent (W.D.Lakshman) had observed **that the government fears a political backlash due to the impact on the prices following an upward adjustment to the exchange rate.** The DG(S) had observed that the Monetary Board and the Government must understand and act swiftly as time is very critical. He had further said that *"these issues have been repeatedly brought to the attention of the Monetary Board by himself as well as by many departments over and over again and no tangible decisions have been taken by the Monetary Board".* The 30th respondent had said that the 2A respondent (Basil Rajapaksa) is not in favour of any adjustment to the exchange rate, but agreed to discuss the issue with the other members of the Cabinet. However, the 29th respondent in his capacity as the State Minister, was strongly against any adjustment being made to the exchange rate.

This Court observes, that the Monetary Board is empowered to intervene and take necessary measures in the face of a deficit in the international balance of payment by virtue of the provisions in the Monetary Law and is also under a duty to report to the Minister the steps so taken by virtue of Section 68 of the said Law. When we consider the material placed before us, this Court did not, however, observe any proactive measures taken by the Monetary Board to the challenges it faced either in bolstering the foreign reserves or preserving the meagre foreign reserve the country had during the period in question. Considering the sequence of events, it appears that the Monetary Board had succumbed to the dictates of officials who had no authority to intervene in the affairs of the Central Bank. We were also privy to material that disclosed that a series of discussions had been held with a view to permit the exchange rate to be determined by market forces, supply and demand of USD, but we note with dismay that no positive steps were taken to implement a 'moderate method' to protect the reserves and stem the depletion when the need to do so was felt but waited till the 11th hour to take the decision to float the Sri Lanka Rupee, by which time the reserves had dipped to such critical level and reserves were barely sufficient only for the purchases required for two weeks.

There is no material before us to draw the conclusion that the Monetary Board had acted in terms of Section 3 of the Monetary Law regarding the determination of the par value of the Sri Lanka Rupee. What can be seen from the available facts is that the Monetary Board had taken steps to maintain the Rupee value through 'moral suasion' which does not appear to have been effective in stemming the depletion of foreign reserves.

Apart from the failures referred to on the part of the Monetary Board, which is a pivotal institution in shaping the monetary policy of the country, this Court also cannot condone the conduct of the 31st and 38th respondents. The 31st respondent (S.R.Attygalle) being a top level senior public servant, as the Secretary of the Treasury having the full knowledge of the bleak situation in which the economy of the country was, yet stood in the way of the Monetary Board taking decisions which might have had a positive effect on the fiscal position. We also note with dismay the conduct of the 38th respondent (P.B.Jayasundera) who appears to have had considerable clout on the public servants. From the material placed before us it is clear that he had interfered with the functions of the Monetary Board and had prevailed upon the decision

making process of the Monetary Board. The directives he had given to the treasury officials and the Central Bank to use USD 100 million out of the USD 500 million loan received from the Chinese Bank and to maintain the par value of the Sri Lanka Rupee at Rs.192.00 as against the US Dollar and the directive on the Governor not to pursue the proposal to enhance the LC margin to 150 percent without Cabinet approval are two such instances, both of which are arbitrary and ultra vires of his powers.

In view of findings of this Court as elaborated hereinbefore, we observe that the Monetary Board (28th respondent) that has the statutory duty to take necessary initiatives regarding the par value and the exchange rate of the Sri Lanka Rupee and the power to determine international monetary policy, maintaining international stability of the Sri Lanka Rupee and to adopt necessary policies to cause remedial measures to remedy serious decline in the international reserves have failed to take meaningful measures in a timely manner. This inaction in our view breaches the public trust reposed on the 28th respondent. Furthermore, the arbitrary and irrational conduct of the 31st and 38th respondents as discussed hereinbefore had contributed to the aforementioned inaction of the 28th respondent. This conduct of the 31st and 38th respondents in our view breaches the public trust reposed in them.

CONCLUSION

When we considered these two applications, the main focus was on the economic situation of the country between November 2019 and April 2022. The reason for this focus was that the core issue the Court was invited to consider was whether the impact of the unprecedented economic crisis on the society resulted in the infringement of fundamental rights of the people and if so, whether any one or more of the respondents were responsible for such infringements due to their actions and / or inaction during this period, while holding office in executive and/or administrative branches of the Government. Many of the respondents argued that the root causes for this debacle spread well beyond this time period and therefore no responsibility could be attributed to these respondents in the manner alleged by the petitioners. They claimed that heavy borrowings of previous Governments and the mismanagement of such funds had a direct impact on the debt sustainability of the country. While we take note of this argument, in considering the responsibility of the respondents, our attention was drawn to the issue as to whether the conduct of the respondents during the relevant period directly contributed to the economic crisis.

In deciding this issue, we are of the view that the respondents ought to have known the factual situation that prevailed when they assumed public office and they should have fashioned their acts and efforts to ensure that the situation is not further aggravated but resolved. On assumption of public office, it was their duty to ensure that the existing issues were addressed and resolved in the best interest of the country and take every possible measure to avoid an aggravation to the detriment of the people.

Public trust reposed on them demands resolving of issues. Any conduct which is manifestly unreasonable, arbitrary or irrational that would lead to further aggravation of issues which are detrimental to the public, tantamount a breach of the trust bestowed on them. This is not the recognition of a 'new right' – a right to infallible decisions by the public authorities – but recognition of public officers requiring to discharge their duties to the satisfaction of their inherent core obligations, with due respect to the public trust reposed on them.

It is common ground that the country's economy deteriorated not overnight but over a period of time under consideration in the matters before us. It was evident from the material placed before us that the Gross Official Reserves and the Reserves of the Central Bank were depleted and had reached unprecedented low levels, creating a situation of which the effects were devastating on the entire citizenry without exception. The severe hardships the people had to suffer due to scarcities in essentials such as fuel, gas and medicines coupled with long hours of power shortages brought the lives of people to a standstill and the suffering the public had to undergo was undoubtedly immeasurable.

The respondents holding high public offices bestowed with powers which bear a direct impact on the lives of the people, we presume, were alive to the Directive Principles of State Policy and Fundamental Duties. They were duty bound to discharge in the manner spelt out in the directive principles in our Constitution.

"The directive principles of State policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to" per Prasanna Jayawardena, PCJ. in Ravindra Gunawaradane Kariyawasam v CEA, SC FR 141/2015 Sc minutes of 4.4.2019.

They cannot shirk their responsibilities by merely claiming that the decisions that were taken were "policy decisions" they were entitled to take. We note that Article 27 of the Constitution pledges a democratic socialist society the objectives of which include the realisation by all citizens of an adequate standard of living for themselves and their families including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities, which the public were deprived of during this unfortunate period due to mishandling of the economy when it was within the full power of the respondents to take meaningful action to prevent such a calamity. From the material placed before this Court it is as clear as can be, that the respondents had failed to act when they were not only put on notice but were fully alive to the predicament the country would face.

The respondents argued that they took all possible measures within their purview to remedy the situation. They further argued that the time period under consideration overlapped with the time period where serious challenges that resulted due to the COVID-19 pandemic that had to be overcome. As we have discussed hereinbefore, prolonged inaction due to arbitrary, irrational and/or manifestly unreasonable decisions and inadequate measures over the period under consideration had heavily contributed to disastrous consequences.

The following observations and/or comments as recorded in the minutes of the Monetary Board meeting held on 4th August 2021 shed light on the situation which prevailed at the relevant time. During the period between January and June 2021 – within a short period of six months - reserves of the Central Bank and Gross Official Reserves had decreased by 35 and 28 percent respectively. For the first time in the history of our country the net Central Bank foreign reserves recorded a negative balance of USD 78 million. As at 03rd August 2021 net Central Bank assets were negative by USD 124 million and net Gross Official Reserves remained at USD 155 million. The Deputy Governor (S) had observed that

"Government does not have foreign exchange and the Gross Official Reserves has declined to critical levels, government has no rupees either, government is depending on the CBSL for the foreign exchange as well as rupees for its domestic and foreign financing and very soon the CBSL will be required to meet the obligations of state banks and state entities such as CPC as well. Sri Lanka cannot go to the international market and borrow, foreign governments are not

lending to Sri Lanka because of the credit ratings of the country and its high default risk". The DG(N) had noted that the

"Minister himself (2A respondent) stated that it is difficult to expect any sizeable funds coming into the country at this stage".

The above quote aptly depicts the bleak picture and the disastrous state of our economy even by August 2021.

It is also pertinent to observe that in deciding the issues before us, this Court while considering each matter separately, had to consider all matters together in a holistic manner to decide the core issue, whether there was any infringement of fundamental rights. The reason being, the matters we considered are intrinsically interwoven and a focus on issues in isolation would fail to capture reality. In this regard, we are mindful of one of the arguments of the petitioners that the purported imprudent decision brought about a domino effect and led to a series of events to which we paid attention. Such an event being the tax revision introduced in December 2019, which resulted in downgrading by rating agencies, depletion of foreign reserves, losing access to international financing institutions and single digit inflation spiralling to double digits. Additionally, the continued maintenance of an artificial exchange rate and the failure to reverse tax reliefs and seek assistance from the IMF in a timely manner collectively, contributed towards the rapid deterioration of the economy. The cumulative effect of the conduct of the respondents, in our view, is what contributed to the ultimate debacle. Gross Official Reserves which stood at USD 7,642 million by end 2019 had depleted to USD 155 million by August 2021. The scarcity of foreign exchange with the Government and the Central Bank brought about severe hardships to the people.

The trust reposed in the respondents was not a higher principle or epithet unique to their offices. 'Public trust' is an inherent responsibility bestowed on all officers who exercise powers which emanate from the sovereignty of the People. Therefore, as public officers, the respondents were obliged, at all times, to act in a manner which honoured the trust reposed in them. We are of the view that by the actions, omissions, decisions and conduct hereinbefore identified to have demonstrably contributed to the economic crisis and we are of the view that the 2nd (Mahinda Rajapaksa), 2A (Basil Rajapaksa), 28th (Monetary Board), 29th (Nivard Cabraal), 30th (W.D.Lakshman), 31st (S.R.Attygalle), 32nd (Samantha Kumarasinghe), 32A (Gotabaya

Rajapaksa) and 38th (P.B.Jayasundra) respondents had violated the Public Trust reposed in them and we hold that they were in breach of the fundamental right to equal protection of the law ordained by Article 12(1) of the Constitution.

These petitioners both in applications SC FR 195/2022 and SC FR 212/2022 have invoked the fundamental rights jurisdiction of this Court in the interest of the public. We note that none of the petitioners are claiming any loss had impacted on the petitioners on an individual basis but their assertion is as a result of the conduct of the respondents the entire citizenry had to undergo hardships which could have been avoided. In the circumstances aforesaid, we are of the view that it would not be appropriate to order the respondents to pay compensation to the petitioners and as such we are not inclined to order compensation. We order however that each petitioner in both applications would be entitled to costs in sum of rupees 150,000.00 each.

Jayantha Jayasuriya, PC.
Chief Justice

Buwaneka Aluwihare, PC.
Judge of the Supreme Court

Vijith K. Malalgoda, PC.
Judge of the Supreme Court

Murdu N.B. Fernando, PC.
Judge of the Supreme Court

Priyantha Jayawardena PC, J

Both the aforementioned applications were taken up together for hearing. Accordingly, one judgment is delivered in respect of both applications. I am afraid I am not in agreement with the majority judgment.

The petitioners in both applications stated that they filed the instant applications on behalf of their own interests and on behalf of the interests of the public.

SC/FR/Application No. 195/2022

The Fundamental Rights Application No. 195/2022 was filed on the 3rd of June, 2022 and an amended application was filed on the 18th of July, 2022.

In the said application, *inter alia*, the following persons were made respondents;

(a) The 2nd, 2A, and 2B respondents are the former Cabinet Ministers charged with the subject of Finance,
(b) The 3rd to the 27th respondents are the remaining members of the Cabinet of Ministers at the time the Cabinet made the decision to reduce taxes,
(c) The 28th respondent is the Monetary Board of the Central Bank. The 29th to 31st respondents are the former Governors of the Central Bank and the Secretary to the Treasury of the Republic, who were members of the 28th respondent. The 32nd respondent is a former appointed member of the 28th respondent,
(d) The 38th respondent is the former Secretary to the President,
(e) The 32A respondent is the former President of the Republic (hereinafter referred to as the "former President"), and the Head of State, Head of Executive, the Cabinet of Ministers, and the Government at the time material to this application.

Later, two members of the Monetary board were added as the 32B and 32C respondents. However, leave was not granted against them.

Facts averred in the SC/FR/Application No. 195/2022

In the said petition, under the heading "The petitioners' application in a nutshell", the petitioners stated that a significant economic hardship was faced by the citizens of the Republic, including high levels of inflation, the non-availability of vital resources, goods, commodities and other essential items, including fuel, liquid petroleum gas, medicine and food, and the dearth of foreign currency, all of which arose consequent to the mismanagement of the economy of the Republic by the respondents to the said application.

Furthermore, the acts of the 29th to 32nd respondents in their official capacities as members of the 28th respondent, by **neglect and wilful default,** caused loss and damage to the Central Bank of Sri Lanka and consequently, to the citizens of Sri Lanka at large.

The petitioners further stated that since 2008, the various governments of the Republic have increased their reliance on foreign sources for financing the debt of the Republic. Further, between the years 2015 and 2019, 46% of the Republic's fiscal debt was financed by foreign financing means. Consequently, the exposure to foreign debt commensurately increased.

Moreover, the policy decisions taken by consecutive governments resulted in the foreign debt owed by the Republic to foreign nations being almost equivalent to the local debt when the 1st respondent was appointed as the Prime Minister of the Republic in 2019.

Further, when the former President was elected in 2019 as the President of the Republic, the fiscal debt of the Republic had risen to a proportion as high as 86.6% of the Republic's GDP. Furthermore, he was also faced with increasing foreign debt.

The petitioners stated that the former President Gotabaya Rajapaksa published an election manifesto titled "Vistas of Prosperity and Splendour", containing **several policy changes,** *inter alia,* for the purpose of providing **"emergency relief"** to people and local ventures who were suffering under the policies of the previous government. Further, he promised to deliver a **"new**

people-oriented policy on economics focused on reducing the cost of living and taxes imposed". Moreover, in the said Manifesto, the former President undertook to replace the Inland Revenue Act with a system that would achieve an economic revival of the country.

Further, after the former President assumed duties as the President of the Republic, the government reduced the taxes payable by the people of the country. Accordingly, the petitioners stated that the former President, together with the 2nd respondent, reduced the taxes for the sole purpose of delivering the election promises made. Hence, the decision to reduce taxes was purely politically motivated. Furthermore, due to the said reduction in taxation, the Republic suffered enormous and unprecedented economic damage.

The petitioners further stated that at the time the instant application was filed, the people of the Republic were facing unprecedented economic hardships, with extreme levels of inflation causing the prices of essential goods and services to increase at extreme rates. In particular, the petitioners stated that in April 2022, the price of essential goods had increased from the previous year. Thus, people are unable to buy basic commodities. Moreover, because of the high levels of inflation, a large portion of the public staged protests throughout the country.

Furthermore, the severity of the Republic's **intentional depletion of foreign currency reserves** under the watch of the 28th to the 32nd respondents, the 2nd and the 2A respondents and/or one or more of them is evident by default in servicing foreign debt.

The petitioners stated that the aforementioned circumstances, effecting the economic situation, can be attributed to the **wilful mismanagement of the economy by the 38th, 2nd, 2A, and the 29th to the 32nd respondents, who were in control of the 28th respondent** at the time material to the instant application.

Further, the petitioners stated that the 2B respondent, during his brief tenure as the Cabinet Minister of Finance of the Republic, provided in his speech a realistic and transparent overview of the state of the economy of the country on the 4th of May, 2022.

The petitioners further stated that it was only on the 25th of May, 2022 that they became aware of the acts perpetuated by the 29th to the 32nd, and 38th respondents, which caused the mismanagement of the economy of the Republic.

Moreover, the Central Bank of Sri Lanka is the apex body and authority of the Republic, responsible for the administration, supervision and regulation of the monetary, financial, and payment systems of Sri Lanka, and is charged with the duty of securing economic and price stability, as well as financial system stability, with a view to encouraging and promoting the development of productive resources belonging to the Republic. The 28th respondent is vested with the powers, duties, and functions of the Central Bank and is responsible for the management, operations, and administration of the Central Bank.

Accordingly, the 28th respondent failed and/or neglected to maintain an international reserve adequate to meet any foreseeable deficits in the international balance of payments, so as to maintain the international stability of the rupee, and thus acted in contravention of section 66 of the Monetary Law Act.

Furthermore, in January 2022, the Republic took steps to pay an International Sovereign Bond in a sum of US$ 500,000,000/-, notwithstanding the depleting foreign reserves available to the Republic.

Moreover, fixing the exchange rate to a value below Rs. 203 to the US$ caused loss and damage to the Central Bank of Sri Lanka and irreparable loss and damage to the citizens of the Republic.

The petitioners stated that, as far as the petitioners are aware, the 28th respondent has not sought to pursue any form of legal proceedings and/or disciplinary action against the 29th to 32nd respondents and/or any one or more of them, despite their contravention of the provisions of the Monetary Law Act and by wilful default and/or by misconduct causing loss and damage to the Central Bank of Sri Lanka.

The petitioners further stated that the actions and decisions of the former President, and/or the 2nd to 27th respondents, and/or the 28th to the 32nd respondents and/or the 33rd respondent and/or any one or more of them in mismanaging the economy of the Republic and failing to abide by the mandatory provisions of the Monetary Law Act have violated and/or imminently violated and/or continuously violated the Fundamental Right to equality and equal protection of the Law guaranteed to the petitioners and to the people of the Republic under Article 12(1) of the Constitution. Further, the said decisions violated the Fundamental Right to the freedom to

engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise guaranteed to the citizens of the Republic under Article 14(1)(g) of the Constitution.

In the circumstances, petitioners prayed for the following;

"

(a) *Grant Leave to Proceed with this Application;*

(b) ***Declare*** *that the Fundamental Right guaranteed to the petitioners under Article 12(1) of the Constitution is being imminently infringed and/or has been infringed and/or is continuously being infringed by the 1st to 32nd Respondents (save and except for the 2B Respondent) and/or the 33rd Respondent (in his representative capacity) and/or any one or more of the Respondents;*

(c) ***Declare*** *that the Fundamental Right guaranteed to the Petitioner under Article 14(1)(g) of the Constitution is being imminently infringed and/or has been infringed and/or is continuously being infringed by the 1st to 32nd Respondents (save and except for the 2B Respondent) and/or the 33rd Respondent (in his representative capacity) and/or any one or more of the Respondents;*

(d) ***Declare*** *that the Fundamental Right guaranteed to the Petitioner under Article 14(1)(g) of the Constitution is being imminently infringed and/or has been infringed and/or is continuously being infringed by the 28th, 29th, 31st and 32nd Respondent by causing the Republic to settle the International Sovereign Bond in January 2022 as evinced by P21(a);*

(e) ***Make Order*** *directing the 28th Respondent to recover and/or take steps to recover all losses and damages occasioned onto the Central Bank of Sri Lanka by officers of the 28th Respondent and/or former officers of the Central Bank of Sri Lanka, including the 29th to the 32nd Respondents and/or any one or more of them, consequent to the decision made to set the value of the Sri Lankan Rupee at a value of and/or around Rs. 203/-, which may be uncovered by an audit prayed for hereinunder and/or otherwise;*

(f) ***Make Order*** *directing the 28th Respondent to recover all losses and damages occasioned onto the Central Bank of Sri Lanka by officers of the 28th Respondent and/or former officers of the Central Bank of Sri Lanka, including the 29th to the 32nd Respondents and/or any one or more of them, consequent to the decision made to settle the payment referred to in P21(a), which may be uncovered by an audit prayed for hereinunder and/or otherwise;*

(g) *Grant an* ***Interim Order*** *directing the 35th to 37th Respondents to expeditiously look into the matters contained in the Application (P22) and submit its observations to Your Lordships' Court within 3 months, or such other time which Your Lordships' Court may deem reasonable;*

(h) *Grant an* ***Interim Order*** *directing the 34th respondent to conduct an audit into the affairs of the 28th Respondent, and determine the loss caused to the Central Bark of Sri Lanka by*

i. *the decision made to set the value of the Sri Lankan Rupee at a value of and/or around Rs. 203/- in a manner contrary to Section 66 of the Monetary Law Act, and further determine;*

ii. *the delay in obtaining facilities from the IMF by the Republic consequent to the decisions made by the 29th Respondent.*

(i) *Grant an* ***Interim Order*** *preventing the 29th and/or the 30th and/or the 31st and/or the 32nd Respondents from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships' Court;*

(j) *Grant an* ***Interim Order*** *preventing the 2nd and/or the 2A and/or the 38th Respondents from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships' Court;*

(k) *Grant an* ***Interim Order*** *directing the 28th Respondent to produce to Your Lordships Court the documents made reference to by Mr. Jayawardena PC and Dr. Ranee Jayamaha at the Committee On Public Enterprise meeting held on 25.05.2022*

wherein it was suggested that the Republic should seek relief and/or other financial assistance from the International Monetary Fund;

(l) *Grant an **Interim Order** directing the 28th Respondent to produce to Your Lordships' Court the documents made reference to by Mr. Jayawardena PC and Dr. Ranee Jayamaha at the Committee on Public Enterprise meeting held on 25.05.2022 wherein it is recorded that the appointed members of the 28th Respondent objected to and/ or otherwise disagreed with the artificial maintenance exchange rate of the Sri Lanka Rupee at and/or at a level below Rs. 203/-;*

(m) *Grant an **Interim Order** directing the 39th Respondent to produce to Your Lordships' Court, the minutes of the Committee on Public Enterprise meeting held on 25.05.2022;*

*(mm) Grant an **Interim Order** preventing the 2nd Respondent and/or the 2A Respondent and / or the 32A Respondent, and/ or any one or more of the 29th to the 32nd Respondents and / or the 38th Respondent from leaving the Democratic Socialist Republic of Sri Lanka without obtaining the prior permission of Your Lordships Court;*

*(mmm) Grant an **Interim Order** preventing the 32A Respondent from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships Court:*

(n) Costs;

*(o) **Such other and further relief as Your Lordships Court shall seem meet**."*

[emphasis added]

Facts averred in the SC/FR Application No. 212/2022

The SC/FR Application No. 212/2022 was made on the 17th of June, 2022. Thereafter, an amended petition was filed on the 15th of July, 2022, naming, *inter alia*, the following respondents;

a) the 1(b) respondent is the former President of Sri Lanka and was the President of the Republic at all times material to the instant application,

b) the 2nd respondent is the former Prime Minister and the former Minister of Finance, *inter alia*, from the 21st of November, 2019 to the 2nd of March, 2020, from the 9th of August, 2020 to the 8th of July, 2021,

c) the 3rd respondent was the Minister of Finance from the 28th of July, 2021 to the 3rd of April, 2022,

d) the 6th respondent was the Governor of the Central Bank from December, 2019 to September, 2021 and the Chief Executive Officer of the Central Bank and the Head of the Monetary Board of the Central Bank,

e) the 7th respondent was the Governor of the Central Bank from the 15th of September, 2021 to the 4th of April, 2022 and the Chief Executive Officer of the Central Bank and the Head of the Monetary Board of the Central Bank,

f) the 9th respondent is the Monetary Board of the Central Bank of Sri Lanka which has the power to do and perform all such acts as maybe necessary for carrying out the duties under the Monetary Law Act,

g) the 10th respondent was the Secretary to the Ministry of Finance of Sri Lanka from the 20th of November, 2019 to the 7th of April, 2022.

The petitioners in SC/FR/Application No. 212/2022 stated that the former President and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents made a series of irrational, arbitrary, patently illegal and wrongful decisions in complete dereliction of their statutory duties and fiduciary responsibility, for collateral and extraneous purposes, during the years 2019 to 2022. As a result, the petitioners

and the public were denied their right to equality, equal protection of the law, and their right to life as guaranteed by the Constitution.

The petitioners further stated that the aforesaid series of irrational, arbitrary, patently illegal, and wrongful acts on the part of the former President and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents resulted in catastrophic long-term and short-term ramifications to the economy, caused the country to default on the repayment of foreign debts for the first time in its history, and relegated Sri Lanka to declare bankruptcy.

Further, the actions and/or inaction and gross mismanagement of the economy by the former President of the Republic and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents have resulted in an unprecedented economic crisis driven by debt unsustainability.

Moreover, the International Monetary Fund (hereinafter referred to as the "IMF"), in its IMF-Sri Lanka Staff Report for the 2021 Article IV Consultation dated 10th of February, 2022, categorised, for the first time, the sovereign debt of Sri Lanka as "unsustainable" in general and the external debt portfolio in particular. Thereafter, Sri Lanka issued a Notice of Default dated 12th of April, 2022 whereby Sri Lanka informed its creditors that all foreign debt repayments would be suspended, which included the following categories of debt;

(a) all outstanding series of bonds issued in international capital markets,
(b) certain bilateral (government to government) credit,
(c) all foreign-currency denominated loan agreements or credit facilities with commercial banks or institutional lenders, including those owned by foreign governments, and
(d) all amounts payable following a call during the said interim period upon a guarantee issued in respect of a debt of a third party.

Furthermore, on or around the 19th of May, 2022, Sri Lanka defaulted on loans that fell due and was downgraded by rating agencies as a defaulting nation.

The petitioners further stated that they invoked the Fundamental Rights jurisdiction of this court on the basis that the former President of the Republic and the 2nd, 3rd, 6th, 7th, 9th and 10th

respondents, by a series of actions commencing from 2019 and continuing to date, including acts that have necessitated the defaulting of Sovereign debt, have infringed and/or violated and continue to infringe and/or violate the Fundamental Rights of the petitioners and of all citizens of Sri Lanka.

Moreover, at the Committee on Public Enterprises (COPE) meeting held on or about the 25th of May, 2022, it transpired that the actions of the said respondents, *inter alia,* the RFI facility (Rapid Financing Instrument) of the IMF and the management of the rupee, had engendered the present crisis.

Further, the petitioners stated that the actions and/or inactions of the former President of the Republic and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents can be broadly categorised as follows;

(i) the illegal, arbitrary and unreasonable abolition, removal and/or reduction of taxes effected in the year 2019 and the consequent reduction in government revenue,

(ii) the refusal to change the aforesaid illegal, irrational and arbitrary decisions to reduce taxes despite the consequent downgrading of Sri Lanka's credit rating and the emergence of the COVID-19 Pandemic,

(iii) the failures and/or omissions to take remedial measures subsequent to rating downgrade caused, *inter alia,* by the illegal, arbitrary and unlawful actions of the 2nd, 3rd, 6th, 7th, 9th and 10th respondents,

(iv) the refusal and failure of the 2nd, 3rd, 6th, 7th, 9th and 10th respondents to ensure conditions were met in a manner that would permit Sri Lanka to avail itself of the sum of money agreed to be given to Sri Lanka by the IMF in terms of the Extended Fund Facility agreement as set out hereinafter,

(v) the failure to obtain available aid to combat the economic hardships faced as a consequence of COVID-19, especially in the face of a lack of government revenue,

(vi) the failure to act in terms of the Monetary Law of Sri Lanka, to maintain international reserves and the international stability of the rupee,

(vii) the failure to devalue the Sri Lankan rupee in a timely, orderly and appropriate manner, despite widespread calls and demands to do so,

(viii) the failure and/or omissions to appropriately devalue the rupee which resulted in fluctuations in worker remittances, and subsequently, the country's foreign reserves and Sri Lanka's balance of payment,

(ix) the decision to continue to service Sovereign debt without any restructuring, despite the futility and grievous prejudice in doing so,

(x) the continued refusal to seek the assistance of the IMF, despite widespread calls and demands to do so,

(xi) the subsequent admission by the former President of the Republic that the aforementioned refusal to seek the assistance of the IMF was wrong and misconceived, and

(xii) the unreasonable, arbitrary actions and / or omissions which resulted in a default of the country's foreign debt.

As such, the petitioners stated that the aforementioned respondents are directly responsible, *inter alia,* for the unsustainability of Sri Lanka's foreign debt, its default on foreign loan repayments, and the current state of the economy of Sri Lanka, and must be held accountable for the illegal, arbitrary and unreasonable acts and/or omissions that culminated in the above.

Thus, the respondents have violated the Fundamental Rights guaranteed to the citizens of Sri Lanka under Articles 12(1) and 14(1)(g) of the Constitution.

In the circumstances, the petitioners prayed for the following;

“

1. *Grant the petitioners, Leave to Proceed;*

2. ***Declare*** *that the Fundamental Rights of the Petitioners and / or the citizens of Sri Lanka to Equality and Equal Protection of the Law, as guaranteed by Article 12 (1), 14(1)(g) and 14A of the Constitution, have been infringed by the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, and/or their servants or their agents, and that there is a continuing violation of their said rights;*

3. ***Declare*** *that the Fundamental Rights of the Petitioners and/ or the citizens of Sri Lanka to Equality and Equal Protection of the Law, as guaranteed by Articles 12(1), 14(1)(g) and 14A of the Constitution are in imminent danger of infringement by the actions and/or inactions of the State including the actions/ inactions of the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents;*

4. *Grant and issue the following* ***interim reliefs****/orders:*

   a) *Make Order in terms of Article 126(4) of the Constitution, and call for and examine the following record, including, but not limited to:*

      i. All records pertaining to communications and recommendations received by and / or given to the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents by the Central Bank;

      ii. All communications between the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents in respect of the decisions taken with regard to the matters impugned in this Application;

      iii. The fiscal records, all reports published and or given to the 2nd, 3rd and /or 9th respondents of and by the 9th Respondent Board under and in terms of Sections 64 and 68 of the Monetary Law Act, No. 37 of 1974;

      iv. Relevant Cabinet decisions in respect of the Ministry of Finance and the 2nd and 3rd Respondents, as well as decisions and Regulations by the 2nd and 3rd Respondents with regard to the matters impugned in this Application;

      v. A transcript of the proceedings of the Committee on Public Enterprises (COPE) held on or about 25th May 2022.

b) ***Direct*** *the appointment of a committee under the auspices of Your Lordships' Court to investigate the causes, steps taken by the aforementioned Respondents, and compile a report on the financial irregularities and mismanagement of the economy in relation to the specific instances enunciated in the present Application;*

c) *Restrain the 2nd, 3rd, 6th, 7th and 10th Respondents, from overseas travel without the prior approval of the Supreme Court, pending the investigation by the aforementioned Committee;*

5. ***Upon the submission of a report by the said Committee (appointed under the auspices of Your Lordships' Court) to direct the Hon. Attorney General or any other appropriate authorities or officers of the State to consider initiation of investigations and prosecutions against any persons (as necessary) based on the findings from the said report.***

6. ***Make such further and other just and equitable orders as Your Lordship's Court shall seem fit in the circumstances of this Application, under and in terms of Article 126(4) of the Constitution;***

7. *Grant Costs;*

8. ***Grant further and such other relief as Your Lordships Court may seem meet****."*

[emphasis added]

Main issues raised by the petitioners in both applications are as follows;

The grounds urged by the petitioners can be broadly set out as follows;

(i) the introduction of tax cuts and the failure to reverse them,

(ii) delay in seeking assistance from the IMF,

(iii) the decision by the Monetary Board not to float the rupee, and thereafter floating the same without any safeguards, and

(iv) the pay out of International Sovereign Bond of US$ 500 million on the 18th of January, 2022.

Granting of leave to proceed by the Supreme Court

After the aforementioned applications were supported in court by the counsel for the petitioners and after the hearing of the counsel for the respondents, the court made the following Orders on the 7th of October, 2022;

> *"The court is inclined to grant leave to proceed in both applications for alleged violations of Fundamental Rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution. Accordingly, leave to proceed is granted for the said violations in terms of Article 126(2) of the Constitution in both applications.*

Court made the following orders in SC/FR/195/2022:

1. *Leave to proceed is granted against 2nd, 2A, 2B, 3rd to 27th, 28th to 32nd, 32A and 38th respondents;*

2. *In view of Court's decision to grant leave to proceed against the 28th respondent board and the fact that two of former Governors of the Central Bank and two of the members who served in the 28th respondent board during the period relevant to this application have been cited as respondents in this application, Court is of the view that the remaining members of the 28th respondent board who served during the said period should also be made respondents.*

   Hence, ***petitioners*** *are directed to add Dr. Sanjeewa Jayawardane P.C and Dr. Ranee Jayamaha who are current members of the 28th respondent board, as* ***32B & 32C respondents.*** *Petitioners are further*

directed to amend the Caption accordingly and the amended caption should be filed within two weeks from today;

3. ***34th respondent - Auditor General - is directed to conduct an audit upon examining all relevant material and submit a report on the following:***
    a. ***the decision made by the 28th respondent (Monetary Board) to set the value of the Sri Lankan Rupee at or around 203/- as against the US Dollar and all matters connected to the said decision;***
    b. ***the delay in seeking facilities from the IMF by the Republic;***
    c. ***all matters relating to the settlement of International Sovereign Bond/s to the value of US$ 500 million on 18.01.2022, utilising foreign reserves;***

The said report should comprise observations, including whether any loss has been caused to the Central Bank due to one or more of the three matters referred to above. 34th respondent is further directed to submit to this court the report titled "Special Audit Report on Financial Management and Public Debt Control in Sri Lanka 2018-2022" dated 4th July 2022.

34th respondent *is further required to comply with the above directions not later than 2nd January 2023;*

4. ***28th respondent*** *- The Monetary Board of the Central Bank of Sri Lanka - is directed to produce all documents, relating to matters referred to by Dr. Sanjeewa Jayawardane P.C and Dr. Ranee Jayamaha, at the meeting of the Committee on Public Enterprise held on 25.05.2022, specifically;*
    a. *the suggestion said to have been made, that the Republic should seek relief and / or other financial assistance from the International Monetary Fund,*
    b. *objection to and/or otherwise disagreement expressed regarding the artificial maintenance of exchange rate of the Sri*

Lankan Rupee at / or at a level below 203/- as against the US Dollar.

Said documents are required to be submitted to this Court not later than 30th November 2022

5. ***Petitioners** are directed to issue notices through the Registrar of this Court on all the respondents against whom leave to proceed is granted and 32B and 32C respondents within one week of filing the further amended caption as per the direction (2) above.*

6. ***Registrar** is directed to communicate this order to the 28th and 34th respondents forthwith.*

Court makes the following orders in SC/FR/212/2022:

7. *Leave to proceed is granted against **1(b), 2nd, 3rd, 6th, 7th, 9th and 10th** respondents;*

8. ***8th respondent** - Governor of the Central Bank - is directed to produce copies of communications and recommendations given to the 1(b), 2nd, 3rd, 6th, 7th, 9th and 10th respondents by the Central Bank with regard to the matters impugned in this application during the time material to this application, not later than 30th November 2022;*

9. ***9th respondent** - The Monetary Board of the Central Bank of Sri Lanka - is directed to produce copies of all reports given to the 2nd and 3rd respondents in terms of sections 64 and 68 of the Monetary Law Act, No 37 of 1974, during the time relevant to this application, not later than 30th November 2022*

10. ***Petitioners** are directed to issue notices through the Registrar of this Court on all the respondents against whom leave to proceed is granted within one week.*

11. ***Registrar*** *is directed to communicate this order to the 8th and 9th respondents, forthwith…"*

[emphasis added]

Objections filed by the respondents

Thereafter, the 28th, 32B, 32C, 29th to 34th, 38th and 39th respondents of SC/FR Application No. 195/2022 and the 1(a), 2nd, 3rd, 6th, 7th, 9th, 10th and 11th respondents of SC/FR Application No. 212/2022 filed objections denying responsibility with regard to the allegations set out in both petitions and proceeded to justify their actions during the time material to the instant application. Further, some of the respondents raised the following objections to the maintainability of the instant applications;

(a) the Applications are misconceived in law,

(b) the subject matter of both the applications relates to policy of the government and thus, this Court has no jurisdiction to hear and determine the said applications,

(c) the reliefs sought in both the Applications are beyond the scope of the Fundamental Rights jurisdiction of this Court and contrary to the doctrine of Separation of Powers enshrined in Articles 3 and 4 of the Constitution,

(d) there is no evidence whatsoever to show that the respondents have carried out any act *ultra vires* or in violation of any law during their tenure,

(e) the petitions do not disclose any specific infringement of any particular Fundamental Right of the petitioners by any particular executive or administrative act within the meaning of the Constitution,

(f) the petitioners have not disclosed whether they are citizens of Sri Lanka in the petition and therefore, are not entitled to any relief prayed for in terms of Article 14(1)(g) of the Constitution,

(g) institutional incapacity,

(h) the doctrine of political question and judicially discoverable and manageable standards,

(i) the applications are out of time and ought to be dismissed in *limine* in terms of Article 126(2) of the Constitution,

(j) the Parliament of Sri Lanka has now appointed a Select Committee to look into the same matters that have been urged by the petitioners in both the Applications, and therefore this court has no jurisdiction to entertain the applications.

Did the respondents violate the Fundamental Rights of the petitioners by introducing tax cuts and thereafter failing to revive them?

Events Leading to the Introduction of the New Tax Policy

The 32A respondent (in SR/FR/195/22 application) and the 1(b) respondent (in SR/FR/212/22 application), the former President published an election manifesto titled "Vistas of Prosperity and Splendour", containing several policy changes, *inter alia*, for the purpose of providing "emergency relief" to the people and local ventures who were suffering under the previous government's policies. Further, he promised to deliver a "new people oriented policy on economics focused on reducing the cost of living and taxes imposed".

The said Manifesto stated;

> *"The prevailing tax system has contributed to the collapse of the domestic economy by entirely discouraging domestic entrepreneur. We would instead, introduce a tax system that would help promote production in the country.*
>
> *The current Inland Revenue Act will be replaced by a new tax law. A new taxpayer friendly simple tax system will be introduced so that it will remain active for several years without changing haphazardly and frequently."*

Thus, a new tax regime with the following would be introduced;

"

(a) *Income tax on productive enterprises will be reduced from 28 to 18 percent,*

(b) *The Economic Service Charge (ESC) and Withholding Tax (WHT) will be scrapped,*

(c) *A simple value added tax of 8 percent will be introduced replacing both the current VAT of 15 percent and the Nation Building Tax (NBT) of 2 percent,*

(d) *PAYE tax will be scrapped and personal income tax will be subject to a ceiling of 15 percent,*

(e) *A five year moratorium will be granted on taxes payable by agriculturists and small and medium enterprises,*

(f) *Various taxes that contribute to the inefficiency, irregularities, corruption and lack of transparency of the tax system will be abandoned. Instead, a special tax will be introduced for different categories of goods and services,*

(g) *Import tariff on goods competing with domestically produced substitutes will be raised,*

(h) *A simple taxation system will be introduced to cover annual vehicle registrations and charges for relevant annual services, replacing the cumbersome systems that prevails now,*

(i) *Various taxes imposed on religious institutions will be scrapped,*

(j) *A zero VAT scheme will be adopted in the case of businesses providing services to Tourist hotels and tourists, if they purchase over 60% of the food, raw materials, cloths and other consumer items locally,*

(k) *Service charges levied on telephones and Internet will be reduced by 50%,*

(l) *Special promotional schemes will be implemented to encourage foreign investments,*

(m) *A tax free package will be introduced to promote investment in identified subject areas,*

(n) *A clear and uncomplicated system of taxing will be in place with the use of internet facilities, special software and other technological services,*

(o) *Information Technology (IT) services, will be totally free from taxes (Zero Tax), considering said industry as a major force in the national manufacturing process,*

(p) *All the Sri Lankans and Foreigners, who bring foreign exchange to Sri Lanka through consultancy services are exempted from income tax."*

At the Presidential Elections held on the 16th of November, 2019, the former President was elected by the people, by a majority vote, as the President of the Republic.

On the 21st of November, 2019, the 2nd respondent was appointed as the Minister of Finance. Thereafter, the former President forwarded a note to the Cabinet of Ministers dated 26th of November, 2019 under the heading **"An Economic Revival Initiative".** It stated, *inter alia,* that the tax system of the country will be restructured as follows;

"As a matter of priority, I recommend the implementation of following measures pending parliamentary approval for amendments to the relevant tax statutes.

(i) *Replace the 15 per cent VAT and 2 per cent NBT on Goods and Services at 8 per cent with effect from 1st December, 2019.*

(ii) *VAT on banking, financial services and insurance to be maintained at 15 per cent and NBT on such services to be removed along with the proposal No. 1.*

(iii) *Tax free threshold for turnover for VAT to be raised from Rs. 1 Mn per month to Rs. 25 million per month or Rs. 300Mn per annum along with the implementation of proposal 1 to provide immediate relief particularly to small and medium businesses in all sectors in the economy.*

(iv) *Tourism business will be treated as export for zero rate provided that 60 per cent of turnover is sourced from local supplies. Tourism industry will be beneficial to local agriculture and locally made manufacturing businesses.*

(v) *Construction Industry to be placed on 14 per cent income tax instead of 28 per cent.*

(vi) *Farm income from agriculture, fishing & livestock to be made income tax free to motivate those engaged in agricultural farming including fish and livestock farming to get the maximum production from the already commenced 2019/2020 Maha season which has been blessed by favourable weather.*

(vii) *Tax imposed on religious institutions to be removed with effect from 1st December 2019.*

(viii) *Pay As You Earn (PAYE) taxes to be removed for these earnings on all inclusive monthly income of Rs. 250,000/= in place of current ceiling of Rs. 125,000/= per month for all public and private sector employees with effect from 1st January 2020.*

(ix) *Withholding Tax on interest income to be removed for those monthly interest income less than Rs. 250,000/=.*

(x) *Monthly income in excess of Rs. 250,000/- in any source of income will be liable to pay personal income tax at progressive weights of 6 per cent, 12 per cent, 18 per cent for every Rs. 250,000/= tax slabs.*

(xi) *Sri Lankans providing professional services for the receipt of foreign currency, the foreign currency earnings to be exempted from income tax with effect from 1st December 2019.*

(xii) *IT and enabling services to be made tax free from all taxes.*

(xiii) *Telecommunication Levy to be reduced by 25 per cent.*

It is possible that the proposed measures will have some reduction in revenue. However, potential benefits from re-engineering the tax system will eventually revive revenue.

As it will take some time to recoup Government revenue, it is necessary to go-slow on public spending in order to manage fiscal imbalances. I urge the line Ministries and agencies to curtail all non-essential and non-priority expenditure including those spent on vehicles, travel, building, facilities etc. The Government expenditure including those incurred by semi-Government agencies and SOEs should also decline as taxes on goods and services are to be lower.

Therefore, I request the Minister of Finance, Economy & Policy Development to take appropriate action to implement this programme."

[emphasis added]

At the Cabinet meeting held on the 27th of November, 2019, the Cabinet Paper No.19/3337/201/001 and a Note to the Cabinet dated 26th of November, 2019, by the former President on "**An Economic Revival Initiative**" were considered, along with the "*desirability of the immediate impact on the economy and the well-being of the people"* in the country. After discussion, the Cabinet of Ministers decided, *inter alia*;

"1) *to grant approval-*

(a) to implement the proposals as stated in the above Note by the President;

(b) for the implementation of the proposals to cut taxes pending Parliamentary approval;

2) to instruct the Legal Draftsman to draft amending legislation for the respective laws and legislation for new laws to implement the said proposals in the above Note;

3) to direct the Secretary, Ministry of Finance, Economy and Policy Development

(i) *to take expeditious action for the implementation of the decision,*

(ii) *to submit the draft legislation prepared by the Legal Draftsman together with the clearance of the Attorney General for the same, to the Cabinet through the Minister for consideration, and*

(iii) *to issue circular instructions to all Secretaries to Ministries and other relevant authorities, to curtail all non-essential and non-priority expenditure."*

On the 4th of December, 2019, the former Minister of Finance, the 2nd respondent, submitted a Memorandum to the Cabinet of Ministers with the heading "**National Policy Framework of the Government: A Reconstructed Country with a Future Vistas of Prosperity and Splendour".**

In the said Memorandum, it was stated that the former President *"took office as the 7th Executive President of the Republic on the 18th of November, 2019".* In his manifesto, it was stated;

> *"Gotabaya Presents to you a Reconstructed Country with a Future, Vistas of Prosperity and Splendour."*

It was further stated that "*the President's objective was to convert the above manifesto into a reality and achieve the outcome forthwith. Hence, it was imperative for all Ministries, Departments, Public Institutions, Provincial Councils and Local Authorities etc. to accept the above manifesto as the national policy framework of the government in their functions and duties and take maximum effort to make it a reality".*

Having considered the said Memorandum, the Cabinet of Ministers granted approval to accept *"A Reconstructed Country with a Future-Vistas of Prosperity and Splendour"* as the national policy framework of the government.

Thereafter, on the instructions of the Minister of Finance, the Commissioner General of Inland Revenue published notices in the newspapers informing the public of the reduction of taxes and the new taxes that were to be implemented, subject to the approval of Parliament.

It is pertinent to note that, at the time of the implementation of the said taxes, Parliament had not enacted the necessary legislation to implement the newly introduced taxes.

Thereafter, the General Election was held on the 5th of August, 2020 to elect the members of Parliament. At the said election, Sri Lanka Podujana Peramuna (SLPP) won the majority seats in

Parliament and formed a government. At the inaugural meeting of the ninth (9th) Parliament held on the 9th of August, 2020, the former President stated in his **Policy Statement**, *inter alia;*

> *"To develop the country, the right vision and plans are needed. The Policy statement, "Vistas of Prosperity and Splendour", placed before the people at the Presidential Election by me contains a national programme that was crafted during a period of nearly four years by incorporating my vision with the ideas and recommendations of national organisations such as Viyathmaga, the findings of the "Conversation with the Village" programme conducted by the Sri Lanka Podujana Peramuna, the discussions held with other political parties, and the ideas contributed by the general public.*
>
> ***In accordance with that programme, we have already taken several steps including the easing of taxes that were unduly burdening the public, introducing a high degree of transparency and efficiency to the Government administration, and curtailing unnecessary Government expenditure.***
>
> ***After we assumed office, we provided tax concessions targeting local entrepreneurs. Interest rates were brought down to encourage businesses. Competitive imports were restricted in order to protect local entrepreneurs and industrialists."***
>
> [emphasis added]

Further, such reductions were detailed by the 2nd respondent during the Budget Speech made on the 17th of November, 2020, for the year 2021. At the aforementioned Budget Speech, the 2nd respondent stated as follows;

> ***"(a) As stated in "Vistas of Prosperity and Splendour", the government simplified the tax policy with effect from January 2020 in order to better facilitate tax payers and to make the tax administration more efficient;***
>
> ***(b) I propose to maintain the VAT unchanged at 8 percent, for businesses with a turnover of more than Rs. 25 million per month engaged in the import and***

manufacture of goods or provision of services, except in the case of banking, financial and insurance sectors;

Personal Income Tax will apply on earnings from employment, rent, interest, dividends or any other source only if it exceeds Rs.250,000 per month. Withholding tax on rent, interest or dividends and the PAYE tax (Pay As You Earn) and taxes on interest have been abolished;"

Furthermore, the 2nd respondent proposed to effect further reductions in taxes in the aforementioned Budget Speech, in the following manner;

"

(a) Individuals and companies engaged in farming, including agriculture, fisheries and livestock farming will be exempted from taxes in the next 5 years. Earnings from both domestic and foreign sources by those engaged in businesses in Information Technology and enabling services and also their earnings when made while being resident or non-resident will also be exempted from income taxes,

(b) So as to promote the listing of local companies with the Colombo Stock Exchange, I propose to provide a 50 percent tax concession for the years 2021/2022 for such companies that are listed before 31 December 2021 and to maintain a corporate tax rate of 14 percent for the subsequent three years,

(c)I propose to simplify the Taxes on Capital Gains, where such taxes will be calculated based on the sale price of a property or the assessed value of a property whichever is higher. I propose to exempt the tax on dividends of foreign companies for three years if such dividends are reinvested on expansion of their businesses or in the money or stock market or in Sri Lanka International sovereign bonds,

(d) In order to promote the Colombo and Hambanthota ports as commodity trading hubs in international trading, and to encourage investments in bonded warehouses and warehouses related to offshore business I propose to exempt such investments from all taxes."

Moreover, the new government took steps to enact new legislation with retrospective effect in respect of the tax cuts introduced after the said Presidential election.

Accordingly, the approval of the Cabinet of Ministers was obtained to enact the said legislation, and the Legal Draftsman drafted the necessary Bills.

On the 12th of March, 2021, the Minister of Finance presented to the Cabinet of Ministers a Cabinet Paper No.21/0475/304/033-1 under the heading "**Implementation of New Tax Proposals**", which was considered by the Cabinet of Ministers along with Cabinet decisions dated 26th of August and 27th of November, 2019 and the certificates issued by the Attorney General inferring Article 77(1) of the Constitution with regard to the constitutionality of the draft Bills.

After discussion, the Cabinet of Ministers decided to grant approval to publish the necessary Bills in the government *Gazette*s, subject to the amendments proposed by the Attorney General, and to place them in Parliament in order to enact the necessary fiscal legislation to reduce taxes. Accordingly, the said Bills were published in the government *Gazettes* and tabled in Parliament.

It is pertinent to note that after the said Bills were tabled in Parliament, the Value Added Tax Bill and the Inland Revenue (Amendment) Bill were challenged in the Supreme Court under Article 121(1) of the Constitution. After the hearing, the Supreme Court determined that the said Bills can be passed in Parliament, subject to the amendments suggested by the court.

Paragraph 2.9.2 of the Auditor General's Report stated;

"The following matters are included in the Road map 2020 delivered by the Governor of the Central Bank, Prof. W D Lakshman on 06 January 2020.

a) *Recent tax reform initiatives constitute a much needed transformation of country's tax system towards greater simplicity. The already announced tax relief measures are expected to stimulate the economy while actively contributing to improve business confidence. Any revenue shortfall due to the changes in taxes announced recently is expected to be largely offset by action taken to eliminate unproductive current expenditures and to priorities capital expenditure.*

b) *It is expected that the fiscal consolidation path remains intact and level of public debt stock remains sustainable.*

c) *The central Bank will continue to allow greater flexibility in determining the exchange rate based on market forces and will allow the exchange rate to act as shock absorber in the envisaged monetary policy framework. Accordingly, Central Bank's intervention in the domestic foreign exchange market will be limited only to curtail any excessive volatility in the exchange rate.*

d) *The continuation of the EFF program with the IMF is likely to be instrumental in supporting external sector stability in the medium term. A sustained improvement in the external sector requires policies aimed at promoting domestic production and exports of goods and services and inflows of the non-debt creating types.*

e) *External borrowing contributes to widen the deficit in the external current account further. In addition, the increased foreign debt service payments drain the country's international reserves, which serve as a buffer for external shocks. Therefore, while fiscal consolidation efforts continue, it is important to maintain the current account deficit in the balance of payments at sustainable levels by strengthening the trade sector."*

Fiscal Policy

Fiscal policy consists of the government's income and spending, which influence economic conditions, especially macroeconomic conditions such as demand for goods and services, employment, inflation, and economic growth. Further, fiscal policy is decided by the government. During a recession, governments may lower tax rates or increase spending to encourage demand and increase economic activity. Tax cuts boost demand by increasing disposable income and by encouraging businesses to hire and invest more. In contrast, tax increases do the reverse. Thus, to combat inflation, governments raise taxes or cut government spending to stabilise the economy.

Economic activity reflects a balance between what people, businesses, and governments want to buy and what they want to sell. When the economy is weak, governments try to boost consumer and business demand by cutting interest rates or purchasing financial securities. Further, such demand is boosted by increasing spending and cutting taxes. Tax cuts increase household demand by increasing workers' take-home pay. Moreover, it can boost business demand by increasing the after-tax cash flow of business enterprises, which can be used to pay dividends, expand activity, recruit new employees, expand investments, etc.

The effect of tax cuts depends on the sensitivity of households and businesses. Further, households divide increased income between consumption and saving, and businesses choose to hire and invest more. Tax cuts are expected to free up disposable income and the circulation of money in the economy and push positive growth values in the medium and long term. Furthermore, reducing taxes improves the economy by boosting spending. Moreover, a corporate income tax cut leads to a sustained increase in Gross Domestic Product (GDP) and productivity. Tax cuts also increase funding available for businesses and may increase production and investment.

Moreover, high taxes discourage work and investment. Taxes create a "wedge" between what the employer pays and what the employee receives, so some jobs are not created. High marginal

tax rates also discourage people from working overtime or from making new investments. However, tax cuts reduce government revenue and lead to budget deficits or growth in government debt.

In his first address to the Congress on the 28th of February, 2001, George W. Bush said, *"To create economic growth and opportunity, we must put money back into the hands of the people who buy goods and create jobs."*

Do courts interfere with the fiscal policy of the government?

The petitioners alleged that the reduction of taxes by the government was a contributing factor to the economic crisis. In particular, the petitioners complained of the following three acts and/or inactions related to taxation, i.e.,

(i) arbitrary tax reductions based on the election manifesto without adequate consideration as to the consequences of such reductions,

(ii) failure to make and/or recommend timely changes to tax policy despite clear evidence as to the failure of the said policy and of the negative effects of such tax policy, and

(iii) arbitrary financial decisions without obtaining or giving effect to the advice of the Central Bank and without adequate plans or forecasts as to the result of the said decisions.

Article 148 of the Constitution reads as follows;

> **"*Parliament shall have full control over public finance.*** *No tax, rate or any other levy shall be imposed by any local authority or any other public authority except by or under the authority of a law passed by Parliament or of any existing law."*
>
> [emphasis added]

Hence, it is clear that the taxes which fall within the scope of public finance comes within the purview of Parliament. A similar view was expressed in the determination of the ***Value Added Tax (Amendment) Bill*** **(2016) S.C. (S.D.) No. 30/2016 to S.C. (S.D.) No. 33/2016,** where it was observed;

> *"Article 148 makes it mandatory that no tax, rate or any other levy shall be imposed by any local authority or any other public authority,* ***except by or under the authority of a law passed by Parliament or of any existing law.***
>
> *Accordingly, Article 152 is a special provision dealing with the manner in which a Bill affecting public revenue shall be introduced in Parliament."*
>
> [emphasis added]

The laws passed by Parliament to reduce taxes were as follows;

Date Certified by the Speaker	**Name of the Act**
31st October, **2019**	Removing of Carbon Tax **Finance Act, No. 21 of 2019**
12th October, **2020**	Removing NBT (Nation Building Tax) **NBT (Amendment) Act, No. 03 of 2020**
12th October, **2020**	Removing economic service charge **Economic Service Charge (Amendment) Act, No. 4 of 2020**

12th October, **2020** Debt Repayment Levy removed.

Finance (Amendment) Act, No. 2 of 2020

13th May, **2021** Reducing VAT (Value Added Tax) rate to 8% from 15%

Threshold for registration of Value Added Tax increased to Rs. 300 million per annum from Rs. 12 million per annum and Information Technology and enabling services exempted from Value Added Tax.

Value Added Tax (Amendment) Act, No. 9 of 2021

13th May, **2021** WHT (Withholding tax) on any payments made to any resident person removed except for:

- WHT at a rate of 14% on the amounts paid as winning from lottery, reward, betting or gambling.
- WHT at the rate of 2.5% on sale of any gem at an auction conducted by the National Gem and Jewellery Authority.
- WHT on payments made to non-resident persons.

PAYE (Pay As You Earn) tax on any employment receipts to any resident or non-resident person was removed. Accordingly, such employment receipts are subject to personal income tax rates of 6%, 12% and 18%.

Personal income tax revised to 6%, 12% and 18% from 4%, 8%, 16%, 20% and 24%.

Tax free threshold increased to 3 million per annum on any income from 1.2 million per annum from employment income

and 500,000 from personal income.

Income tax slabs increased to 3 million per annum from 600,000 per annum.

Corporate income tax reduced.

Standard corporate income tax rate reduced to 24% from 28%.

For construction reduced to 14% from 28%.
For manufacturing revised to 18%

Inland Revenue (Amendment) Act, No. 10 of 2021

8th of April, 2022 Surcharge tax was introduced

Surcharge Tax Act, No. 14 of 2022

Further, the Telecommunication Levy was reduced from 15% to 11.25% by a *Gazette* Notification with effect from the 1st of December, 2019. Moreover, on or about the 6th of December, 2019, concessionary rates and exemptions were granted for the importation of some items.

Thus, it is evident that the said fiscal legislation was passed in Parliament under Article 148 of the Constitution with retrospective effect.

Legislative Power of Parliament

Enacting legislation is the function of Parliament in terms of and under Chapters X and XI of the Constitution.

Article 1 of the Constitution states that Sri Lanka is a Free, **Sovereign**, Independent and Democratic Socialist Republic. Further, Article 3 states that the sovereignty is in the People and is inalienable. Article 4 states how the said sovereignty of the People is exercised and enjoyed.

Accordingly, the legislative power is exercised by Parliament and by the People at a Referendum, the executive power, including the defence of the Republic, is exercised by the President, and the judicial power is exercised by Parliament through courts, tribunals, and institutions created and established, or recognised, by the Constitution or created and established by law, except in regard to matters relating to the privileges, immunities, and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law.

A critical analysis of the Constitution shows that there is a separation of powers between the legislature, executive and the judiciary. Therefore, the aforementioned three organs act independently from each other in their own sphere. Hence, none of the said organs of the State have authority to supervise or interfere with the other organs except as permitted by law.

It is pertinent to note that while Article 118 of the Constitution deals with the general constitutional jurisdiction of the Supreme Court, Articles 120, 121 and 122 refer to the ordinary and special exercise of the constitutional jurisdiction in respect of parliamentary Bills. Further, Article 123 has conferred jurisdiction on the Supreme Court to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution. In addition to the aforementioned powers, Article 124 of the Constitution has conferred jurisdiction on the Supreme Court to determine the **legislative process** in respect of Bills.

Post legislative review and the jurisdiction of courts

Article 80(3) of the Constitution reads as follows;

> "***Where a Bill becomes law*** *upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question,* ***the validity of such Act*** *on any ground whatsoever*."
>
> [emphasis added]

Accordingly, Article 80(3) of the Constitution has ousted the jurisdiction of courts and tribunals in considering the validity of the Acts passed by Parliament once they are certified by the President of the Republic or the Speaker of Parliament.

Legislative Process

Our Constitution and the Standing Orders of Parliament provides to present two types of Bills in Parliament. Namely, Private Member's Bills and government Bills. (Only government Bills are discussed in this judgment) A government Bill is initiated by the line Ministry, and the Minister in charge of the subject presenting a Memorandum to the Cabinet of Ministers **setting out the policy and the justification to enact legislation** and seeking approval from the Cabinet of Ministers to enact the necessary legislation, and to request the Legal Draftsman to draft the Bill. If the Cabinet of Ministers consents to the enacting of the law, they will authorise the line Ministry to request the Legal Draftsman to draft the necessary legislation.

Once the Legal Draftsman prepares the Bill, it will be sent to the Attorney General to consider the constitutionality of the Bill. Thereafter, the said Minister will present the draft Bill to the Cabinet of Ministers along with the 'certificate' issued by the Attorney General in terms of Article 77(1) of the Constitution and seek the approval to publish the Bill in the government *Gazette* and to table it in Parliament.

However, the Constitution sets out certain steps that are required to be followed by the Cabinet of Ministers and also before a Bill is placed on the Order Paper in Parliament. Particularly, in respect of fiscal matters, urgent Bills and Bills that are applicable to the subjects in the 9th Schedule to the Constitution.

Further, Article 124 of the Constitution states;

> *"Save as otherwise provided in Articles 120, 121 and 122, no court or tribunal created and established for the administration of justice, or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill* ***or its due compliance with the legislative process, on any ground whatsoever.****"*
>
> [emphasis added]

A careful consideration of the phrase 'its due compliance with the legislative process' in Article 124 shows that the Supreme Court has the jurisdiction to consider the legislative process applicable to Bills subject to Articles 120, 121 and 122 of the Constitution. As stated above, in terms of Article 4(a) of the Constitution, the legislative power of the People is exercised by Parliament and by the People at a Referendum. Further, another instance where people exercise legislative power is when a Bill is considered by the Supreme Court in terms of and under the aforementioned Articles in the Constitution. This was discussed in the determination in the ***Municipal Councils (Amendment) Bill, Urban Councils (Amendment) Bill, and Pradeshiya Sabha (Amendment) Bill*** **S.C. (S.D.) Nos. 25-33, 36-41, 43-52, 54, 56/ 2023.**

Thus, when the constitutional jurisdiction of the Supreme Court is invoked under Articles 120, 121 and 122 in respect of a Bill, the Supreme Court will consider not only the constitutionality of the Bill but also its due compliance with the legislative process.

Similar views were expressed in the ***Divineguma Bill*** **S.C. (S.D.) No. 04/2012 to S.C. (S.D.) No. 14/2012,** where the Supreme Court observed;

> *"... In such circumstances, we determine that the Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon, the Constitutionality of a Bill and* ***its procedural compliance, before such Bill is placed on the Order Paper of Parliament."***
>
> [emphasis added]

Further, the ***Water Services Reform Bill*** **S.C. (S.D.) Nos. 24 and 25/2023** considered the requirement to comply with Article 154G of the Constitution and observed;

> *"For the reasons set out above we make a determination in terms of Article 120 read with Article 123 and 154G of the Constitution that the Bill is in respect of a matter set out in the Provincial Council List and shall not become law unless it has been referred by the President to every Provincial Council as required by Article 154G(3)G of the Constitution. Since the Bill has been placed on the Order Paper of Parliament without compliance with provisions of Article 154G(3) we*

would not at this stage make a determination as to the other two grounds of challenge referred to above."

[emphasis added]

Moreover, in the ***Value Added Tax (Amendment) Bill*** **S.C. (S.D.) No. 30/2016 to S.C. (S.D.) No. 33/2016** the Supreme Court observed;

"... Thus, in the same way Article 148 had to be complied with, Article 152 too should be strictly complied with and the Court can't brush aside the words used in Article 152 as being inappropriate or surplus.

Since the due process had not been complied with in terms of Article 78 (2) and 152 of the Constitution before the Bill was introduced in Parliament, *we make a determination in terms of Articles 120 and 121 read with Article 123 and 152 of the Constitution that no determination would be made at this stage on the other grounds of challenge raised by the Petitioners."*

[emphasis added]

Further, in urgent Bills, the Supreme Court will inquire into whether there was a decision of the Cabinet of Ministers to consider the Bill as an urgent Bill.

In the ***Nominations Commission Bill*** **S.C. (S.D.) No. 1/91**, it was observed;

"A Bill titled "An Act to establish a Nominations Commission; and to provide for matters connected therewith or incidental thereto" ["the Nominations Commission Act, No. of 1990"] was referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in view of the Cabinet of Minister the Bill is urgent in the national interest."

Thus, it shows that though the legislative power is vested with Parliament in terms of Article 4(a) of the Constitution and the said power begins with a Member of Parliament presenting a Bill to

Parliament, **the legislative process commences with a Minister submitting a Cabinet Memorandum to the Cabinet of Ministers setting out the policy and the justification for the need to enact legislation in respect of a particular matter.**

Further, matters of finance, initiation and administration are within the purview of the executive, while control is vested with Parliament. A similar observation was made in the ***Appropriation Bill*** **(1986) 29;**

> *"The machinery of national finance is based on the fundamental distinction between the* ***functions of initiation and administration which are vested in the Executive****, and of control which is vested in Parliament. To keep intact the principle of the financial initiate of the Executive there developed the restrictions on the power of amendment…"*
>
> [emphasis added]

Hence, I am also of the opinion that the legislative process commences not from the time a Bill is placed on the Order Paper in Parliament but from the time a Cabinet Memorandum is submitted to the Cabinet of Ministers seeking approval to commence drafting the Bill.

In the circumstances, once a Bill becomes a law upon the certification of the President or the Speaker, in terms of Article 80(3) of the Constitution, **no court or tribunal can inquire into, pronounce upon or call into question the validity of such Act or its due compliance with the legislative process** on any ground whatsoever.

Further, the scope of Article 124 of the Constitution was discussed by a full bench of the Supreme Court in ***Wijewickrema v. Attorney General*** **(1982) 2 SLR 775** where it was held;

> *"On the alleged ground that 144 members of Parliament had signed and delivered undated letters resigning their office to His Excellency the President, the plaintiff contends that "the said 144 members of Parliament were incapable of voting according to the law and the Constitution for the Fourth Amendment to the Constitution on the 4th November, 1982, and that notwithstanding the purported certification of the Speaker of the Parliament that the Fourth Amendment to the Constitution has been duly passed by a two-thirds majority of*

Parliament, the Fourth Amendment to the Constitution is not a Bill that has been duly passed by the Parliament at all and cannot therefore be submitted to the People at a Referendum.

…

…

The fundamental question involved in this action is whether Article 124 of the Constitution bars the jurisdiction of any Court to decide the constitutional issue raised by plaintiff.

In our view the plaintiff's action involves basically the question whether the Fourth Amendment to the Constitution has been validly voted upon as a Bill for the amendment of the Constitution. Our unanimous decision in this basic question is that the Court is barred by the provisions of Article 124 of the Constitution which provides:

> *"Save as otherwise provided in Article 120, 121 and 122 no Court ……shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process, on any ground whatsoever."*

from inquiring into or pronouncing upon the validity of the Bill for the amendment of the Constitution, referred to in the plaint."

A careful consideration of Articles 80(3) and 124 of the Constitution show that Article 80(3) is applicable to the Bills passed by Parliament, and the certificate is issued by the President of the Republic or the Speaker. On the converse, Article 124 applies to, *inter alia*, the legislative process which takes place prior to a Bill being presented to Parliament by a Member of Parliament.

In the circumstances, I am of the view that the policy decision taken by the Cabinet of Ministers to enact legislation with retrospective effect to reduce taxes cannot be challenged in courts now

as the said decision forms part of the legislative process in enacting the Acts that are under reference.

Further, though at the time of introducing the tax cuts there was no legislation in place, subsequently the legislation was enacted with retrospective effect to cover the said period. Hence, this court lacks jurisdiction to review the policy of the government to reduce taxes prior to the enactment of legislation applicable to the said period.

However, the issues with policy or its appropriateness are not matters for consideration by the judicial branch of government. In the ***Nation Building Tax (Amendment) Bill*** **S.C. (S.D.) No. 34/2016** it was observed;

> *"As Warrington L.J. in Short Vs. Poole Corp (1926) C.H. Division 60(91) stated that "**With the question whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."***
>
> [emphasis added]

Further in the ***Fiscal Management (Responsibility) (Amendment) Bill*** **S.C. (S.D.) No. 28/2016 and S.C. (S.D.) No. 29/2016** this court observed;

> *"Thus, it becomes the policy decision of the Government to increase the Government guarantee limit from 7 percent to 10 percent. **The Court cannot strike down a policy decision taken by the Government merely because it feels another policy decision would be wiser or logical. The Courts is not expected to express its opinion as to whether at a particular situation any such policy should have been adopted or not. It is best left to the Government to decide on such matters which affects the interests of the economic progress and fiscal management of the country."***
>
> [emphasis added]

The reviewability of policy was also adverted to in the ***Special Goods and Service Tax Bill*** **S.C. (S.D.) Nos. 1-9/2022** where it was observed;

> *"Following on with the comment made by the Supreme Court in the Nation Building Tax (Amendment) Bill, [SC SD 34/2016], it is necessary for this Court to observe that* ***this Court is devoid of jurisdiction to comment on the prudence or otherwise of a particular policy formulated by the Executive and sought to be converted into legislation by the enactment of a law by Parliament. Thus, this Court will refrain from doing so, even in instances where there appears to be compelling public and national interest considerations which may warrant an adverse comment being made."***
>
> [emphasis added]

However, if an Act requires the executive to promulgate subordinate legislation and the executive fails and/or neglects to do so, courts have the power to compel the executive to promulgate the necessary subordinate legislation that are required to be made under the Act.

A careful consideration of the reduced taxes, the Note to the Cabinet dated 26th of November, 2019 under the title "An Economic Revival Initiative" shows that the sole purpose of the reduction of taxes was to resurrect the economy that was adversely affected by the Easter Sunday bombings in the year, 2019. Moreover, the said policy to reduce taxes benefited the workforce in this country, business enterprises and the public in general. Thus, it is apparent that the policy of the then government to reduce taxes was mainly a people-centric move and in line with one of the accepted economic policies of the world in addressing recession.

Does the court have jurisdiction to pronounce on the failure to enact legislation by the executive?

As stated above, the legislative process commences by a Minister submitting a Memorandum to the Cabinet of Ministers seeking approval to enact legislation. However, in terms of Article 4(a) of the Constitution, the legislative power of the people shall be exercised by the Parliament. Thus, enacting legislation fairly and squarely falls within the purview of Parliament and not within the powers of the executive.

Erskine May Parliamentary Practice (Twenty-fourth edition) at page 183 states;

> *"The authority of Parliament over all matters and persons within its jurisdiction was formally unlimited. A law might be unjust or contrary to sound principles of government; but Parliament was not controlled its discretion, and* ***when it erred, its errors could be corrected only by itself."***
>
> [emphasis added]

Hence, in view of the separation of powers enshrined in the Constitution, the courts cannot compel either the executive, the Cabinet of Ministers, or Parliament to enact legislation or to pronounce on the failure to enact legislation by any of the said organs of the State.

In any event, even if (in a hypothetical situation) the courts were to direct the executive to enact legislation, Parliament is not bound to give effect to such a direction. Hence, no purpose could be achieved by such a direction or observation issued by court. It is pertinent to note that Sri Lanka has experienced two instances where the court granted directions to Parliament and on both occasions, Parliament refused to comply with the same, citing separation of powers set out in Article 4 of the Constitution.

Further, enacting, amending or repealing laws falls within the scope of the legislature, and therefore, even the executive cannot compel Parliament to enact legislation.

Furthermore, any pronouncement by the courts with regard to the legislative procedure in respect of an Act passed by Parliament is a collateral attack on the said Act, which is excluded from the jurisdiction of court by Article 80(3) of the Constitution.

Hence, I am of the view that the respondents cannot be held responsible for the introduction of tax cuts and not enacting, repealing or amending the legislation brought to reduce taxes.

Moreover, any pronouncement of the legislative process or the failure to repeal or amend an Act by court would violate Article 80(3) of the Constitution as it would be a collateral attack on the existing Act.

In any event, it is evident from the Cabinet Memorandum dated 3rd of January, 2022 and the Note to the Cabinet dated 6th of March, 2022, the government had taken steps to introduce fiscal legislation in respect of Surcharge Tax and to increase Value Added Tax.

Was There A Delay In Seeking Assistance From The International Monetary Fund?

Events leading to the decision of the Cabinet of Ministers not to seek the assistance of the IMF

The IMF was created in the wake of World War II to manage the global regime of exchange rates and international payments. Since the collapse of fixed exchange rates in the year 1973, the fund has taken on a more active role. The IMF assists member nations in different capacities. Its most important function is the ability to provide loans to member nations in need of bailouts. Further, if a country has a deficit in its balance of payments, the IMF can step in to fill the gap. However, borrowing governments must adhere to the conditions attached to these loans by the IMF, including prescribing economic and fiscal policies.

Moreover, such conditions may cause severe hardships to the general public of the country that seeks assistance from the IMF. Hence, some countries are reluctant to seek the assistance of the IMF. Furthermore, there are instances where countries seek the assistance of the IMF as a last resort and may give up the IMF programmes without completing them due to their inability to comply with the stringent conditions imposed by the IMF. In fact, on several occasions, Sri Lanka has discontinued IMF programmes due to its inability to comply with the conditions laid down by the IMF.

The staff of the IMF visited Sri Lanka from 29th of January, 2020 to 7th of February, 2020. Afterwards, the press release issued by them on the 7th of February, 2020 stated, *inter alia*, that the economy is gradually recovering from the terrorist attacks, the recovery is supported by a solid performance of the manufacturing sector and a rebound in tourism and related services in the second half of the year, high frequency indicators continue to improve, and growth is projected to rebound to 3.7 percent in 2020 as a result of the recovery in tourism, and inflation is projected to remain at 4.5 percent in line with the Central Bank of Sri Lanka, etc.

The IMF-Sri Lanka Staff Report for the 2021 Article IV Consultation dated 10th of February, 2022, categorised, for the first time, the sovereign debt of Sri Lanka as "unsustainable" in general and the external debt portfolio in particular.

Further, after the Executive Board of the IMF concluded the Article IV consultation with Sri Lanka on the 25th of February, 2022, it released a press release on the 2nd of March, 2022.

Policy decision of the Cabinet of Ministers in respect of seeking IMF assistance

Memorandum

It is pertinent to note that when the Central Bank and the government became aware of the financial and economic difficulties that the government had to face, particularly in repayment of local and international loans obtained by Sri Lanka, the Minister of Finance submitted a Cabinet Memorandum dated 2nd of January, 2022 under the heading **"Economy 2022 and the way forward**" to the Cabinet of Ministers and stated, *inter alia, "while the budget for 2022 has been approved, the external outlook remains a matter of concern and requires careful analysis".*

Moreover, the said Memorandum stated that the expected outflows of the country are;

- *"Total debt servicing payments in 2022, inclusive of debt stock of Sri Lanka Development Bonds and Foreign Currency Banking Units, approximately is USD 6.9 billion. Further, it includes international sovereign bonds maturing in January, amounting to USD 500 million international sovereign bonds maturing in July, amounting to USD 1,000 million.*

- *USD 1,300 million is needed in January, 2022 itself for foreign debt servicing payments with USD 3,100 million being required for foreign debt servicing payments during the first quarter of 2022.*

- *Goods imports expected to be approximately USD 22 billion."*

-

Further, expected inflows to the country during 2022 are;

"Approximately USD 32 billion is expected as total foreign currency inflows from goods and services exports. i.e.,

- *Exports of goods that are expected to reach around USD 20.7 billion, while export income from services are expected to yield USD 7 billion. Export income from apparels alone is expected to reach around USD 6.8 billion. In the case of services IT and related services are expected to yield an income of around USD 2.3 billion.*
- *Tourism is showing signs of returning to normalcy and inflows from tourism is expected to be around USD 1.8 billion. While all effort should be taken to ensure that number of tourists exceed 2 million, and it is important that new regulations, insurance schemes that discourages such influx of tourist not be pursued.*

- *During 2020, around $3,000 had pursued employment opportunities overseas while in 2021, it had been around 116,000. It is expected to increase to 300,000, broaden job opportunities, that is, by new jobs with higher salaries and focus on new job markets to increase foreign remittance to USD 7.5 billion level.*

- ***Foreign Direct Investment should increase up to USD 1 billion."***

[emphasis added]

Furthermore, in the said Cabinet Memorandum, it was stated that the short and medium-term proposals are;

"The Budget 2022 outlined clearly the state of the economy since independence, including the issues that have arisen due to foreign commercial borrowings, the highly bureaucratic and outdated systems that have been inimical not only in attracting foreign investments but also in encouraging local entrepreneurs to operate, and the impact of the non-implementation of reforms compared to peer

countries in the Asian region. It is apparent that although the short term issues could be resolved, there is a significant requirement to engage in long term strategies and reforms in all sectors that address the structural issues in the economy to create a more sustainable path.

(i) *In this context, a package which addresses the liquidity issues and provides direct support for import was discussed during my visit to India. Annual imports from India is approximately USD 3,000 million on average and includes about 70% of country's requirement of imported medicine and food items. Postponement of payments on imports from India facilitates easy financing of other imports.*

(ii) *Government has also been supported by China with the extension of a SWAP facility amounting to USD 1,500 million has had a significant impact in helping to strengthen the CBSL reserve position by the end of 2021.*

(iii) *It is required to engage with both China and Japan is negotiating a package similar to India given that 20% of the outstanding foreign debt of the government is attributable to both China and Japan. At the same time given the imports from both countries exceed the exports, i.e., the Terms of Trade with both China and Japan are not favourable to Sri Lanka, the government should engage with China and Japan to create a facility that supports trade and repayment of their debt. Such support will further enhance the liquidity position. As such, it was proposed to appoint Members of the Cabinet of Ministers to engage discussion with China and Japan to engage in discussion as noted.*

(iv) *Apart from the inflows from export of goods and services, remittances and FDI's, during 2022 if the high end real estate and lands identified by the Urban Development Authority (UDA) could be given on long term lease, another USD 1-1.5 billion could be raised.*

(v) *In this regard, a sustainable strategy will have to be implemented to address the issues emanating from the debt stock exceeding the GDP where the ISB's are*

expected to mature every year until 2029 at around USD 1,000- 1,500 million per annum. The government will work with Multilateral and Bilateral Agencies and investment Banks to exploit the green financing market to raise debt at a lower interest rate and create the space to manage the stock of debt leveraging on the interest rate differential.

(vi) *The space available to finance large infrastructure financed by debt is limited. As such, infrastructure requirements with in particular with commercial value specially in the electricity and energy sectors, the port sector requires to attract investments into such sectors. This requires the government to be in possession of such investment attracting strategies.*

(vii) *The renewable energy sector in particular has seen significant number of inquiries from top credible investors and it is regrettable that in the last 24 months only 15 MW of renewable energy had been added to the main grid. It is therefore clear that the line Ministry nor the CEB is yet in possession of a cohesive strategy to attract investments. The Budget 2020 required idle land belonging to the government and Mahaweli was to be given to the investors to engage in agriculture and other activities. It appears that this process has not been implemented as expected. Hence, the entire government machinery needs to turn around their operations to facilitate a more efficient and effective investment climate."*

Moreover, it stated;

"

(I) *To provide Public Servants with a monthly allowance of Rs. 5,000 from January. From January employees in corporates and boards will also be entitled to this. Given that there are 1,450,450 employees currently in the public sector, such payment of allowance will result in the incurring of an additional expenditure of Rs. 87 billion.*

(II) *To provide to the pensioners a monthly allowance of Rs. 5,000. Given that 666,480 pensioners are already in the system, the Government will incur an additional cost of Rs. 40 billion.*

(III) *To request the Hon. Minister of Labour to engage in discussion with the required parties to extend the aforementioned benefits to the employees in the private sector as well.*

(IV) *To provide an extra monthly allowance of Rs. 1,000 to Samurdhi beneficiaries receiving Rs. 3,500 per month. This extra allowance will also be made available to other Samurdhi beneficiaries as appropriate.*

(V) *To secure the incomes or to mitigate any loss of income that may occur due to a decline in harvest of rice farmers, the government will provide an additional Rs. 25 per kilogramme in addition to the Rs. 50 per kilogramme i.e., the guaranteed price. It is expected that such assistance to farmers will have no impact on the retail prices paid by the consumer.*

(VI) *Conduct a home gardening program to encourage growing of vegetables and fruits for self-consumption. To support such programme which includes the preparation of land, obtaining seeds, and other inputs required home gardens up to 20 perches will be provided with of Rs. 5,000 while those between 20 perches and less than 1 acre will be provided Rs. 10,000. The total cost to the government will be around Rs. 31 billion.*

(VII) *Flour Subsidy- It is decided to provide 15Kg wheat flour monthly at Rs. 80 to plantation worker families. It is further expected that such support will be provided to those plantation workers already registered with the Employees Provident Fund (EPF).*

(VIII) *The import taxes on potatoes and big onions have been reduced by Rs.30/Kg with effect from January 2022.*

(IX) *To completely exempt import of essential food and medicines taxes. These taxes will be revised only in instances where it is necessary to protect the local farmer and producer."*

Further, it stated;

> ***"interest costs, wages and salaries of public servants, and transfers to the vulnerable, including Samurdhi and pensions for the elderly, account for the recurrent expenditures, which will be difficult to curtail. As such, it would require capital expenditures to be curtailed. This would mean that to accommodate the direct costs, as noted alone, around 30% of the capital expenditure will have to be reduced. The impact of the course would be that the government's envisaged growth and development objectives will not be met."***
>
> [emphasis added]

Moreover, it stated;

> *"import of consumer goods which include food, wheat and maize, medicines, sugar, pulses, etc and fuel, coal, fertilizer accounts for almost 40% of the total imports or around USD 8 billion in a year. This would mean, that around an extra Rs. 240 billion will have to be spent on imports, which will also mean that on average, the cost of food stuff will have to increase at the minimum by 20% or so. e.g.;*
>
> - *Price of Dhal which has no tax except a Special Commodity Levy (SCL) of Rs 25 cents will see an increase in the prices to almost Rs. 350- 400 a Kilogramme from the existing Rs. 280 a Kilogramme.*
>
> - *The impact on fuel prices will be such that the cost reflective price of Diesel will mean that diesel prices will increase by around Rs.25 per litre to Rs. 146 per litre.*
>
> *The impact on the entire economy will be enormous. It is also important to take into account the fact that Sri Lanka, like many other countries, is faced with supply side disruptions, which are also likely to continue into 2022 as well. The impact of such disruptions will further push the price of staples and essentials and increase the cost of living at a faster rate than experienced now, and inflation on food items alone will remain at elevated levels.*

The direct beneficiaries of a currency depreciation will be the exporters and the overseas workers remitting foreign funds into the country. While exports of primary products such as tea in bulk form will experience an increase in their income in local currency, the bulk of the other exporters, including exporters of value-added tea, apparels will have a sizable import content, cost of which could increase with a depreciation of the currency, resulting in redactions in profit margins. Local exporters, especially those with significant import components will find that their competitiveness is somewhat compromised."

The said Cabinet Memorandum further stated;

"The impact of an increase in taxes, especially the indirect taxes such as VAT, will be instantaneous and will immediately have an impact on the cost of goods and services to the end consumer. An increase in VAT, since it is a final tax on the retail consumer, will see the retail consumers being subjected to a price increase in excess of 10%. At the same time, apart from the revision in fuel prices as noted above, electricity tariff revisions will also have to be affected. This requires the average revenue per unit of electricity to increase to Rs. 25 per unit from the existing Rs. 16 per unit. Water tariffs too will have to be revised on average by at least Rs. 10 per unit.

While it is ideal to have cost reflective prices, it should also be complemented by a mechanism to buffer the impact of such increased prices on the vulnerable in society through a direct, targeted transfer of assistance. But we have still not been able to put in place the electronic Identity card system (e-ID) that would have supported the identification of the most vulnerable and the most deserved, although it was envisaged to be there by at least December 2021. The absence of such a mechanism to enable the Government to provide assistance in a targeted manner to the most vulnerable will compromise the effectiveness of such targeted support.

It would not be incorrect to state that an IMF programme will require the country to accept conditions that will further disrupt the social fabric of the country. While it is acknowledged that an IMF programme will enable the country to access the

capital markets with better ease, it is our experience that none of the IMF programmes since the late 60's, have resulted in any lasting reforms being implemented in the country.

In fact, it would be pertinent to note that the economic challenges of today are due to two key decisions of the Yahapalana Government, which are;

- *The aggressive borrowing in the International Bond markets resulted in the country borrowing USD 12 billion dollars during 2015-2019 with USD 6.9 billion being borrowed during a 14 months period of April 2018 to May 2019. As a result, the country's foreign currency debt stock reached almost 50% of the total debt stock at the end of 2019 with the stock of ISB's at wound USD 15 billion. This has now reduced to USD 13 billion.*

- *Reduction in the price of Petrol and Diesel in 2015, without any thought to recouping the losses of Ceylon Petroleum Corporation (CPC) or the Ceylon Electricity Board (CEB) or to the possibility of an increase in global oil prices.*

- *It is noted that of the USD 12 billion so raised only around USD 2 billion had been utilized to settle ISBs, while the bulk seems to have been utilized to finance the imports, especially cars and other passenger vehicles. In fact consumption of fuel which had decreased by end 2014 has increased surpassing the previous consumption volumes, although economic growth saw a steady decline. The shortsighted decisions taken for political expediency and the failure of the Yahapalana government to aggressively implement a renewable and a clean energy strategy to use solar and wind in particular as sources of energy together with LNG, complemented by a robust mechanism to support the exporters country's has resulted in the country facing the liquidity crunch that is faced with at present."*

[emphasis added]

In the circumstances, the said Cabinet Memorandum invited the **"*Cabinet of Ministers to deliberate on the aforementioned, bearing in mind that the Government has the capacity to implement a home-grown solution to the issues that the country is faced with".***

The Cabinet of Ministers considered the said Cabinet Memorandum, the clarifications made by the Minister of Finance on the matters stated in the Memorandum, the views expressed by the Minister of Industries stating that the appropriateness of exploring the possibility of obtaining a Credit Line for the importation of essential raw materials required for industries after negotiating with the countries from where such raw materials are imported, the views expressed by the Minister of Trade stating the appropriateness of introducing a mechanism whereby Sri Lankans serving in foreign countries could remit a certain amount of foreign currency monthly to their foreign currency accounts maintained in Sri Lanka and also introducing a special loan scheme either for the construction of a house or for the purchase of other property based on the savings in the account, with a view to encouraging such account holders; and the views expressed by several other Members of the Cabinet pertaining to the course of action proposed in the Memorandum.

Decision of the Cabinet of Ministers

Thereafter, on the 3rd of January, 2022 the Cabinet of Ministers decided, *inter alia*;

"(i) to grant the concurrence of the Cabinet-

(a) *to take the necessary action in implement the proposals in the Memorandum with immediate effect;*
(b) *to take the necessary action on the short term and medium term proposals referred to in the Memorandum;*
(c) ***to implement a home grown solution for the economic issues currently encountered by Sri Lanka, taking into consideration the matters stated in the Memorandum;***

and, "*to request the Secretary to the President to take necessary action to nominate Ministers in consultation with H.E. the President, to negotiate with the relevant countries as proposed in the Memorandum".*

[emphasis added]

Accordingly, it is clear that the Cabinet of Ministers took a policy decision not to seek the assistance of the IMF but to implement a home-grown plan to address the issues that the country was facing. Similarly, as stated above, the Cabinet of Ministers took a policy decision to reduce the taxes referred to above. Thus, in terms of Article 43(1) of the Constitution, all members of the Cabinet of Ministers are collectively responsible for the said decisions and are answerable to Parliament.

Should policy decisions of the government be disturbed or interfered with unless they are found to be grossly arbitrary or irrational?

As stated above, our Constitution is based on the principle of separation of powers, though there are some overlapping Articles in the Constitution with regard to executive and legislative powers. In terms of the Constitution, the three branches of the State are: the legislature, the executive and the judiciary. Separation of powers enshrined in the Constitution was discussed in detail in the judgment delivered in ***Hadabima Authority v. Jathika Seveka Sangamaya*** **(SC Appeal 15/2013) (SC Minutes dated 26th of February, 2015).** Further, each branch of the State has the power to act in its own sphere of activity. The legislature is entrusted with the power to make laws, the executive is to make policies and implement them, and the judiciary is to apply laws, including Fundamental Rights, and interpret laws.

Therefore, making policies and executing them fall within the sphere of activities of the executive and are not within the power of the legislature or the judiciary. Moreover, other than the executive, the other two organs do not have the expertise and knowledge required to make policies. On the other hand, the executive has experts, professionals, administrators, advisors,

etc., in a given field and has the expertise to make policies after taking into consideration all aspects of a matter. Hence, the court would leave policy matters for those who are qualified to address the issues, unless the policy or action is inconsistent with the Constitution and laws, grossly arbitrary or irrational.

A similar view was expressed in ***Film Festivals & Ors. v Gaurav Ashwin Jain & Ors*. (2007) 4 SCC 737**, where the court held;

> *"The scope of judicial review of* ***governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy.*** *Nor are courts Advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary.* ***Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review."***
>
> [emphasis added]

Further, in ***State of Punjab & Ors. Vs Ram Lubhaya Bagga & Ors*. (1998) 4 SCC 117,** it was held;

> *".....When Government forms its policy, it is based on number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion.* ***It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits.*** *The Court would dissuade itself from entering into this realm which belongs to the executive."*
>
> [emphasis added]

Furthermore, the courts cannot express their opinion as to whether, at a particular point in time or in a particular situation, any such policy should have been introduced or not, or repealed, particularly when a policy is accepted by Parliament either at reading of the budget or in any other instances. Hence, it should be left to the discretion of the government.

A similar view was expressed in ***Delhi Science Forum v. Union of India*** **(AIR 1996 SC 1356) at 1359,** where it was held;

> "***What has been said in respect of legislations is applicable even in respect of policies which have been adopted by the Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not*** *.... Courts have their limitations - because these issues rest with the policy makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the Constitutional or statutory provision... This Court cannot review and examine as to whether said policy should have been adopted. Of course, whether there is any legal or Constitutional bar in adopting such policy can certainly be examined by the court."*
>
> [emphasis added]

Further, the power of judicial review would not extend to determining the correctness of a policy or to indulge in the exercise of finding out whether there could be more appropriate or better alternatives. As policymaking is within the domain of the executive, the courts, under the garb of judicial review, cannot usurp the jurisdiction of the decision-maker and make the decision itself. Neither can it act as an appellate authority.

Moreover, complex executive decisions in economic matters may be empirical or based on experimentation. Its validity cannot be tested on rigid principles or the application of any straitjacket formula. In such matters, even experts may seriously or doubtlessly differ. Courts cannot be expected to decide them, even with the aid of experts.

Thus, the courts do not interfere with policy matters or economic decisions, as such matters are highly technical and even experts in that field hold different opinions on the same point. Similar views were expressed in the following judgments.

In ***M/s. Prag Ice & Oil Mills and Another v. Union of India*** **(AIR 1978 SC 1296) at 1305** the Indian Supreme Court held;

> ***"We do not think that it is the function of this Court or of any Court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide.*** *Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts."*
>
> [emphasis added]

Moreover, in ***Shri Sitaram Sugar Company Limited v. Union of India*** **(AIR 1990 SC 1277) at 1299**, it was held;

> ***"Judicial review is not concerned with matters of economic policy.*** *The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the "feel of the experts" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness... and whether such findings are consistent with the laws of the land."*
>
> [emphasis added]

Further, in ***Sujeewa Arjune Senasinghe v. Ajith Nivard Cabraal and others*** **(SC/FR/457/2012) (SC Minutes dated 18th of September, 2014)** it was held;

> *"We must not forget that in complex economic policy matters every decision is necessarily empiric and therefore its validity cannot be tested on any rigid formula*

or strict consideration. The Court while adjudicating the constitutional validity of the decision of the Governor or Members of the Monetary Board must grant a certain measure of freedom considering the complexity of the economic activities. ***The Court cannot strike down a decision merely because it feels another policy decision would have been fairer or wiser or more scientific or logical. The Court is not expected to express its opinion as to whether at a particular point of time or in a particular situation any such decision should have been adopted or not. It is best left to the discretion of the authority concerned."***

[emphasis added]

It is pertinent to note that the aforementioned two IMF press releases did not recommend or advise the government to seek its assistance to address possible financial and economic issues.

The aforementioned IMF findings were reproduced in the Auditor General's Report furnished to court. It stated;

"2.7.6 ***IMF Staff had concluded its visit to Sri Lanka during January 29 to February 7, 2020*** *to meet with the new administration and discuss its policy agenda. The press release No. 20/42 including statements of IMF staff teams that convey preliminary findings after a visit to a country had* ***been issued on 07 February 2020.*** *Highlights of the preliminary findings of the visit are as follows.*

a) ***The economy is gradually recovering from the terrorist attacks last April. Real GDP growth is estimated at 2.6 percent in 2019.***
b) ***The recovery is supported by a solid performance of the manufacturing sector and a rebound in tourism and related services in the second half of the year.***
c) ***High frequency indicators continue to improve and growth is projected to rebound to 3.7 percent in 2020****, on the back of the recovery in tourism, and assuming that the Novel Coronavirus will have only limited negative effect on tourism arrivals and other economic activities.*

d) ***Inflation is projected to remain at around 4½ percent, in line with the Central Bank of Sri Lanka (CBSL) target***. *After a sharp import contraction in 2019, the current account deficit is expected to widen to nearly 3 percent of GDP in 2020.*

e) *Preliminary data indicate that the primary surplus target under the program supported by the Extended Fund Facility (EFF) was missed by a sizable margin in 2019 with a recorded deficit of 0.3 percent of GDP, due to weak revenue performance and expenditure overruns.*

f) ***Under current policies, as discussed with the authorities during the visit, the primary deficit could widen further to 1.9 percent of GDP in 2020, due to newly implemented tax cuts and exemptions, clearance of domestic arrears, and backloaded capital spending from 2019.***

g) ***Given risks to debt sustainability and large refinancing needs over the medium term, renewed efforts to advance fiscal consolidation will be essential for macroeconomic stability.***

h) *Measures to improve efficiency in the public administration and strengthen revenue mobilization can help reduce the high public debt, while preserving space for critical social and investment needs. Advancing relevant legislation to strengthen fiscal rules would anchor policy commitments, restore confidence, and safeguard sustainability over the medium term.*

i) *The CBSL should continue to follow a prudent and data-dependent monetary policy and stand ready to adjust rates to evolving macroeconomic conditions.*

j) ***Net International Reserves fell short of the end-December target under the EFF supported program in 2019 by about $100 million amid market pressures after the Presidential elections and announced tax cuts. However, conditions have since stabilized***. *Renewed efforts are needed to rebuild reserve buffers to safeguard resilience to shocks, under a flexible exchange rate.*

k) *Approval of the new Central Bank Law in line with international best practices is a critical step to further strengthen the independence and governance of the CBSL and support the adoption of flexible inflation targeting.*

2.7.7 The Executive Board of the International Monetary Fund (IMF) concluded the Article IV consultation with Sri Lanka on 25 February 2022. ***The press release*** *No. 22/54 in this regard had been issued on 02 March 2022. Highlights of the press release are as follows.*

a) ***Sri Lanka has been hit hard by COVID-19. On the eve of the pandemic, the country was highly vulnerable to external shocks owing to inadequate external buffers and high risks to public debt sustainability, exacerbated by the Easter Sunday terrorist attacks in 2019 and major policy changes including large tax cuts at late 2019. Real GDP contracted by 3.6 percent in 2020, due to a loss of tourism receipts and necessary lockdown measures. Sri Lanka lost access to international sovereign bond market at the onset of the pandemic.***

b) ***The authorities deployed a prompt and broad-based set of relief measures to cope with the impact of the pandemic, including macroeconomic policy stimulus, an increase in social safety net spending, and loan repayment moratoria for affected businesses. These measures were complemented by a strong vaccination drive. GDP growth is projected to have recovered to 3.6 percent in 2021, with mobility indicators largely back to their pre-pandemic levels and tourist arrivals starting to recover in late 2021.***

c) *Nonetheless, annual fiscal deficits exceeded 10 percent of GDP in 2020 and 2021, due to the pre-pandemic tax cuts, weak revenue performance in the wake of the pandemic, and expenditure measures to combat the pandemic. Limited availability of external financing for the government has resulted in a large amount of central bank direct financing of the budget. Public debt is projected to have risen from 94 percent of GDP in*

2019 to 119 percent of GDP in 2021. Large foreign exchange (FX) debt service payments by the government and a wider current account deficit have led to a significant FX shortage in the economy. The official exchange rate has been effectively pegged to the U.S. dollar since April 2021.

d) *The economic outlook is constrained by Sri Lanka's debt overhang as well as persistently large fiscal and balance-of-payments financing needs. GDP growth is projected to be negatively affected by the impact of the FX shortage and macroeconomic imbalances on economic activities and business confidence. Inflation recently accelerated to 14 percent (y/y) in January 2022 and is projected*

to remain double-digit in the coming quarters, exceeding the target band of 4–6 percent, as strong inflationary pressures have built up from both supply and demand sides sincemid- 2021. Under current policies and the authorities' commitment to preserve the tax cuts, fiscal deficit is projected to remain large over 2022–26, raising public debt further over the medium term. Due to persistent external debt service burden, international reserves would remain inadequate, despite the authorities' ongoing efforts to secure FX financing from external sources.

e) *The outlook is subject to large uncertainties with risks tilted to the downside. Unless the fiscal and balance-of-payments financing needs are met, the country could experience significant contractions in imports and private credit growth, or monetary instability in case of further central bank financing of fiscal deficits. Additional downside risks include a COVID-19 resurgence, rising commodity prices, worse-than-expected agricultural production, a potential deterioration in banks' asset quality, and extreme weather events. Upside risks include a faster than-expected tourism recovery and stronger-than-projected FDI inflows.*

f) ***Executive Directors commended the Sri Lankan authorities for the prompt policy response and successful vaccination drive, which have***

cushioned the impact of the pandemic. Despite the ongoing economic recovery, Directors noted that the country faces mounting challenges, including public debt that has risen to unsustainable levels, low international reserves, and persistently large financing needs in the coming years. Against this backdrop, they stressed the urgency of implementing a credible and coherent strategy to restore macroeconomic stability and debt sustainability, while protecting vulnerable groups and reducing poverty through strengthened, well-targeted social safety nets.

g) *Directors emphasized the need for an ambitious fiscal consolidation that is based on high-quality revenue measures. Noting Sri Lanka's low tax-to-GDP ratio, they saw scope for raising income tax and VAT rates and minimizing exemptions, complemented with revenue administration reform. Directors encouraged continued improvements to expenditure rationalization, budget formulation and execution, and the fiscal rule. They also encouraged the authorities to reform state-owned enterprises and adopt cost-recovery energy pricing.*

h) *Directors agreed that a tighter monetary policy stance is needed to contain rising inflationary pressures, while phasing out the central bank's direct financing of budget deficits. They also recommended a gradual return to a market-determined and flexible exchange rate to facilitate external adjustment and rebuild international reserves. Directors called on the authorities to gradually unwind capital flow management measures as conditions permit.*

i) ***Directors welcomed the policy actions that helped mitigate the impact of the pandemic on the financial sector. Noting financial stability risks from the public debt overhang and sovereign-bank nexus, they recommended close monitoring of underlying asset quality and identifying vulnerabilities through stress testing. Directors welcomed ongoing legislative reforms to strengthen the regulatory, supervisory, and resolution frameworks.***

j) *Directors called for renewed efforts on growth-enhancing structural reforms. They stressed the importance of increasing female labor force participation and reducing youth unemployment. Further efforts are needed to diversify the economy, phase out import restrictions, and improve the business and investment climate in general. Directors also called for a prudent management of the Colombo Port City project, and continued efforts to strengthen governance and fight corruption. They noted the country's vulnerability to climate change and welcomed efforts to increase resilience."*

[emphasis added]

Conclusion of the Auditor General

Further, the Auditor General's Report states (page 439);

"3.4 ඉහත 3.1, 3.2 සහ 3.3 හි සඳහන් කරුණු එකක් හෝ කීපයක් හේතුවෙන් ශ්‍රී ලංකා මහබැංකුවට යම් අලාභයකට හේතු වී තිබේද යන්න පිළිබඳ නිරීක්ෂණ

(අ) අධිකරණ නියෝගය ප්‍රකාරව, ප්‍රශ්නූත කරුණු එකක් හෝ ඊට වැඩි ගණනක් හේතුවෙන් ශ්‍රී ලංකා මහබැංකුවට යම් අලාභයක් සිදු වී තිබේද යන්න පිළිබඳව නිරීක්ෂණ ඉදිරිපත් කරන ලෙස සඳහන් කර තිබුණි. එසේ වුවද, මා විසින් මෙහිදී අධිකරණ නියෝගයක් පරිදි සිය විගණන කාර්යය සිදුකලද මෙවැනි සිද්ධීන් හේතුවෙන් යම් අලාභයක් සිදුවී තිබේද යන්න නිගමනය කිරීමට පහත තත්වයන් හේතුවෙන් නොහැකි වී ඇත.

i. **විෂයගත කරුණු තුනම රජයේ ප්‍රතිපත්තිමය තීරණ ලෙස බැලු බැල්මට විද්‍යාමාන වන හෙයින්** රජයේ/මහබැංකුවේ ප්‍රතිපත්තිමය තීරණ හේතුවෙන් සිදුවන යහපත් හෝ අයහපත් ලෙස විවිධාකාරයෙන් විවිධ පාර්ශව විසින් අර්ථ දැක්විය හැකි ප්‍රතිඵලයන්ගේ හිතකර හෝ අහිතකර මුල්‍ය ප්‍රති විපාක මා විසින් ගණනය කිරීම අභියෝගයට ලක් කිරීමට හැකි වීම.

ii. **විෂයගත කරුණු තුන ක්‍රියාත්මක කළ කාලය හා ඒවායේ ප්‍රතිඵලයන් අපේක්ෂා කළ හැකි කාලය තුළ එකී කරුණු තුනට අමතරව රටේ සමස්ථ ආර්ථික ක්‍රියාවලියට බලපෑම් ඇති කළ වසංගත තත්වයක් දිවයින තුළ පැවතීම හා ගෝලීය වශයෙන්ද පැවති එම වසංගත තත්වය**

සහ ඒවායේ යහපත් සහ හෝ අයහපත් ප්‍රතිඵල දේශීය ආර්ථිකයට ද බලපෑම් කිරීම හේතුවෙන් විෂයගත කරුණු තුන හේතුවෙන් පමණක්ම මහ බැංකුවට සිදුවූ මූල්‍යමය බලපෑම නිෂ්චිතව ගණනය කල නොහැකි වීම.

iii. සීමිත විදේශ සංචිත උපයෝගී කරගෙන ගත යුතු වූ ප්‍රශස්ථම තීරණය කුමක්ද යන්න මා හට හට නිර්ණය කළ නොහැකිවීම සහ විවිධ වෘත්තිමය හා සමාජීය තත්වයන් යටතේ එම තීරණය සමපාත වියයුතු යයි නිගමනය කළ නොහැකි වීම.

(ආ) කෙසේ වෙතත්, මෙම කරුණු එකක් හෝ කිහිපයක් හේතුකොටගෙන ශ්‍රී ලංකා මහබැංකුවට යම් අලාභයක් සිදු වී තිබේද යන්න සම්බන්ධ නිශ්චිත නිරීක්ෂණ මෙම වාර්තාවේ අන්තර්ගත නොවුනද ප්‍රශ්නගත එකිනෙක කරුණු සිදු වී ඇති පසුබිම සහ එම ඒකිනෙක කරුණු අනෙකුත් කරුණුවලට සෘජුව හෝ සහ වක්‍රව බලපා ඇති ආකාරය මෙම වාර්තාව පරිශීලනයේ දී නිරීක්ෂණය වනු ඇත.”

[emphasis added]

Accordingly, the Auditor General stated that he is unable to decide whether there is any loss to the Central Bank of Sri Lanka. However, though the said report stated there are delays in taking decisions by the Monetary Board and the government, it does not set out any specific violations of the law by the respondents. Hence, I am of the view that there is no expert evidence before this court to decide on the economic and fiscal issues raised in the said two applications.

Moreover, it is pertinent to note that the effects of COVID-19 were similar or more adverse to the effects that were caused during the ‘Great Depression’ economic crisis in 1929. It adversely affected our export income, which brought forex to the country. Similarly, the said pandemic reduced foreign employment opportunities and thereby adversely affected one of Sri Lanka’s main foreign earnings.

In fact, the effects of the Easter Sunday bombings and the adverse effects of COVID-19, particularly, the unexpectedly large expenditure incurred for island-wide vaccination programmes and quarantine centres, long periods of lockdowns, island-wide curfews, political uncertainty and rivalry, public protests against implementing the economic policies of the government, specifically with regard to privatisation, litigation challenging the privatisation of State entites and geopolitical issues, disturbed the implementation of the policies of the

government. Further, such matters adversely affected the income from tourism and witnessed the withdrawal of overseas and local investors from Sri Lanka. Hence, all such unexpected intervening factors immensely contributed to the economic and financial collapse in Sri Lanka.

Conclusion

In the circumstances, I am of the view that the petitioners have not established that the policy decision of the government not to go to the IMF was grossly arbitrary or irrational. On the contrary, the Auditor General's Report tendered to court, and the material filed by the respondents, particularly the aforementioned Cabinet Memoranda and the decisions of the Cabinet of Ministers, show that the government has considered the pros and cons of going to the IMF, the past experiences with the IMF, the effects of obtaining assistance from the IMF will have on the economy and the people, and thereafter taken the policy decision not to go to the IMF. Moreover, the Cabinet of Ministers and the Monetary Board of the Central Bank of Sri Lanka had taken all possible steps to address economic and fiscal matters to avert a possible crisis. Further, it is common ground that the impugned decisions are policy decisions of the government, except the decision of the Monetary Board. However, the petitioners did not establish that any of those policy decisions violated the law or were grossly arbitrary. Furthermore, as stated in the Auditor General's Report, such decisions were based on various economic theories applicable to macroeconomics. Hence, it is not possible to come to a finding in respect of the issues referred to him by the court.

Did the government take steps to manage the economy without going to the IMF?

Decisions taken by the Cabinet of Ministers under Article 43 of the Constitution to improve the fiscal and economic status of the country

The former Minister of Finance presented Cabinet Memorandum No.20/0804/204/078, on ***"Foreign Resource Mobilization 2020-2025",*** dated 13th of May, 2020, to the Cabinet of Ministers, seeking approval for the following proposals;

“

1. *The proposed external resource mobilization strategy and recommendations,*

2. *Authorize Secretary to the Treasury to appoint a Project Evaluation Committee headed by Dr Lalithasiri Gunaruwan,*

3. *Authorize Secretary Power and Energy, Chairman BOI, and Chainman CEB to ensure the implementation of construction of fourth unit of 300 MW coal power plant as an extension of the Lakvijaya Power Plant as a joint investment by a Chinese investor and Ceylon Electricity Board (CEB) as a foreign investment project under which the equity contribution of CEB is also arranged by the investing Company,*

4. *Authorize Chairman BOI and Secretary to the Ministry of Highways to finalize the investment proposal received on Construction of Elevated Expressway from Athurigiriya Interchange of Outer Circular Expressway to New Kelaniya Bridge via Rajagiriya to be done as a foreign investment project to be structured by the BOI, RDA and UDA on a BOT basis,*

5. *Authorize Secretary to the Treasury and Secretary Ministry of Highways to conduct contract negotiation on Central Expressway Section 3 and Section 4 as hundred percent foreign funded Turnkey projects with at least two local contractors' involvement in such projects and report to the Cabinet,*

6. *Any deviation from this policy framework requires prior Cabinet approval."*

Further, the background and reasonings for these proposals were stated in detail in the said Memorandum.

It was stated that "*at present about forty percent of the public investment expenditure is financed through external financing".* In this background, it was encouraged that foreign direct

investment and sustainable financial arrangements should be implemented to reduce pressure on public investment. Moreover, the need to repay foreign debt service obligations was also stressed upon.

Furthermore, the impact of the *"forced global shut down"* due to COVID-19 was referred to in the said Memorandum. It was pointed out that it resulted in a significant impact on all countries, especially countries such as Sri Lanka, which experienced a substantial dip in foreign currency inflows due to the reduction of tourism, exports, and remittances. In fact, preliminary estimates indicated a decline in both exports and remittances by almost 50 percent. It was stated that it would create significant pressure on the foreign currency reserves, which at the time stood at only around US$ 7.1 billion.

In view of the above, it was pointed out that further accumulation of foreign debt would have serious ramifications on the country's capacity to service and repay such loans, with rating agencies taking a less positive outlook on the country.

In this background, with the impact of COVID-19 and with fiscal space being limited and government revenues being almost 25-30 percent less than expected in normal situations, the increase in foreign currency debt needed to be managed prudently. The new foreign currency borrowings that the country can accommodate per annum will have to be limited to less than US$ 2.5 billion per annum, out of which US$ 1 billion for project loans, bearing in mind that if programme loans are not forthcoming in large quantities, then commercial borrowings will have to be accommodated at least for refinancing arrangements. There were almost another US$ 9 billion of loans with committed undisbursed amounts yet to be disbursed within the next 5-6 years, and the project pipeline worth US$ 8 billion must be revisited to ensure these projects are well within the priorities of the government's policy after the outbreak of COVID-19.

The said Memorandum further stated that the government should shift to a long-term maturity structure for commercial foreign loans while focusing on efficiency in resource utilisation with selected projects and programmes. Furthermore, the government would explore other liability management options as well as the cost of borrowing and incorporate reasonable grace periods. In the meantime, the government should take further steps to diversify its external debt portfolio to accommodate a sizable portion of Asian currencies and maintain an evenly distributed risk

profile. It would be prudent to invite Asian-based rating agencies to the country for a better and more balanced risk assessment.

Moreover, the public investment strategy of the country should be governed by a debt reduction investment approach with an increase in foreign investments in commercial projects. The rate of domestic savings and investment supplemented with foreign direct investment will be the most pertinent determinants to achieve sustained economic growth. Hence, it is imperative to increase domestic savings and attract higher amounts of foreign investments in commercial infrastructure development projects such as ports, airports, refineries, power generation, etc., which can generate substantial economic value addition to the nation to achieve the desired growth rate. Thus, by adopting such a strategy, the national budget has the space to accommodate non-commercial financing from multilateral and bilateral sources for economic sectors such as health, education, skill development, agriculture, rural infrastructure, etc.

Further, other topics that were discussed included foreign funding for development, the project pipeline for foreign financing for the forthcoming three years, and how financing modality could be implemented.

After discussion, the Cabinet of Ministers granted approval to those proposals and authorised the Secretary to the Cabinet of Ministers to convey the decision to the relevant authorities to carry out the necessary actions accordingly.

Furthermore, the Minister of Finance, Economic, and Policy Development chaired a meeting on the 22nd of July, 2021 to **discuss the Credit Ratings** of the country, the possible impacts of the downgrade on the credit ratings given by the rating agencies, ways of managing such impacts and how it could be addressed. The Ministers, Members of Parliament, the Central Bank of Sri Lanka, the Ministry of Finance, and other organisations, including the Presidential Task Force for Economic Revival and Poverty Alleviation, participated at the said meeting.

Moreover, at the said meeting, the Central Bank of Sri Lanka made a presentation on "Recent Development Sovereign Ratings and its Macroeconomic Challenges" and stated, *inter alia*;

"There had been 124 downgrades across the globe in 2020 and 16 downgrades in 2021.

Major factors considered for a downgrade were;

a. *Low and declining foreign exchange reserves adequacy*
b. *Limited and narrow external financing options*
c. *Extremely weak debt affordability*
d. *Unavailability of a credible and sustainable debt servicing plan in the medium term*

The following will be the immediate challenges of a downgrade;

- *Withdrawing of portfolio investment by investors*
- *Further constraining of market access*
- *Challenges to financial institutions in terms of mobilizing funds from abroad*
- *Requests to repay the existing debt obligations prematurely*
- *Spillover to other sectors including exchange rate*

For ratings to be improved, it is required to

- *Improve the fiscal outlook (through sustainable debt practices, reducing the burden on public finance from business ventures and correlating public investments with private capital or new revenue possibilities).*
- *Gradual build-up of reserves in the light of short-term obligations*
- *Near-term plan of external financing options and realizing sizable volume inflows/financing in the immediate term*
- *Adhering and effectively implementing Medium Term Debt Management Strategy (MTDS)"*

Further, at the said meeting*;*

(a) The Governor of CBSL highlighted key steps undertaken to mitigate the negative effects to the economy including;

i) *"The foreign reserves can be fortified through the SWAP agreements (USD 600 million) and SDR facility of the IMF (around USD 700-800 million)*

ii) *Foreign exposure of debt has been contained to 40 percent"*

(b) *"Steps to be taken to avoid a downgrade",*

(c) *"the impact of economic variables on the economy;*

i) *Vaccination programme will ease the pressures on the economy with the reduction of risk of the disease.*

ii) *There needs to be a detailed plan for financing the budget deficit 2022.*

iii) *Foreign debt accounts for about USD 35 billion. DG/ERD will submit a detailed list of foreign funded projects.*

iv) *The perception that the Sri Lanka is in a position to honour all its debt obligations should be upheld."*

Once again on the 17th of August, 2021, the Minister of Finance submitted a Note to the Cabinet of Ministers with the title of *"**Short Term Macro Economic Policy Initiatives"*** and requested the Cabinet of Ministers to consider it and take an appropriate decision. The said Cabinet Memorandum, *inter alia,* stated;

> *"The Governor of the Central Bank of Sri Lanka, submitting a report as required under Section 64 and 68 of the Monetary Law Act has brought to my notice some of the important economic challenges the country is currently facing, including the following;*
>
> - *Continuously increasing debt service payments due to rolling over of large external debt of the country and the increasing dependence in external debt creating sources on financing the budget deficit over the past several decades.*
> - *Vulnerabilities stemming from COVID 19 pandemic; loss of earning from tourism as well as some moderation of exports, limited foreign investment*

inflows and intensified portfolio outflows, particularly foreign investment to the government securities market.

- *Country's access to international financial markets remains restricted with the severing credit rating downgrading.*
- *Declining of gross official reserves and challenges relating to defending the Exchange Rate*

In this context, I would like to highlight that the Government is in a critical juncture since the country is confronted with the COVID 19, 3rd wave having implications on all aspects of socio economic life. The Government has devoted its attention and resources to undertake an intensified vaccination programme which envisages to vaccinate 100% of the target group by end of 2021, enabling the country to operate in the "new normal" environment."

It further stated;

"The Government has already taken steps to avoid external debt creating financing for development activities and relying on investments as well as expanding foreign earning avenues. *In this regard, the Government has taken serious measures including the following to increase Capital inflow through Foreign Direct Investment.*

1. ***Treasury is on a constant dialog with the Chinese Authorities to get them to expeditiously disburse the loan of RMB 2,000 million (USD 350 Million) from China Development Bank towards end august 2021.***
2. ***Foreign investment agreement for West Coast Power Project is been finalized. The investment agreement for West Terminal of Colombo port and the Athurugiriya Expressway have been executed to raise USD 1500 FDI over next three years.***
3. ***The Colombo Port City Economic Commission Act was enacted paving way to create an impetus of FDIs within the special Economic zone - Colombo Port City.***
4. ***Tax/Foreign Exchange Amnesty Bill and the Special Goods and Services Tax legislation are expected to take up in Parliament.***

5. ***Actions have taken to curtail non-priority public spending and costly Capital Projects.***
6. ***Several legislation including emigration and immigration laws to relax restrictions to attract foreign inflows and legislative changes to improve doing business have been lined up to place before Parliament.***
7. ***Steps have been taken to regain tourism based on bubble concept applicable for hotels above 3 stars category."***

Moreover, it will prevent speculations that have created a situation where exporters are not converting their export proceeds and importers are engaged in panic buying and selling as well as piling stocks.

Further, it stated;

> *"In this background, it was suggested that the following measures would be necessary to be initiated by the Central Bank of Sri Lanka, to signal market to move on to a stabilization path.*
>
> 1. *Release total of USD 250 Mn immediately to all Commercial Banks, enabling all cargo currently at the ports to be cleared. This should be subject to the CBSL instructing that selling rate of each Commercial Bank shall not exceed LKR 202 per USD. A further USD 250 Mn be released in early September 2021, to meet petroleum and LP gas financing.*
> 2. *Increase the present policy rate by 50 basis points to raise the prevailing Central Bank deposit rate and lending rate from 4.5% and 5.5% to 5.5% and 6% respectively.*
> 3. *Conduct open market operations aggressively to reduce its Treasury Bills holdings while allowing the maximum Treasury Bill rate to increase by 75-100 basis points.*
> 4. *Increase the interest rate on local overdraft and term loan facility of BOI Companies from domestic Banking Systems to encourage the inflow of foreign remittance and prevent interest rate arbitrage.*

5. *Impose and interest rate celling on interest payable on Forex Deposits by Commercial Banks.*
6. *Introduce letters of credit as a mandatory requirement for all imports (in place of imports being made under various trade instruments) till 31 December 2021 and impose a 2% tax on LC's other than medicine, essential food items and raw materials.*
7. *Increase the statutory reserve ratio by 2 percentage points to 4 percent and earmark such funds (approximately LKR 250 Bn) to set up a "Green Finance facility" (GFF) to lend through Commercial Banks at 4% for organic fertilizer manufacturing, renewable energy projects, forestry and organic agricultural development.*
8. *Increase the limit of inward cash declaration at customs from USD 10,000 to USD 25,000 for visiting travellers and Sri Lankan arriving the country from overseas travel.*
9. *The Ministry of Finance will request all major import companies to organize USD 15 Mn to 250 Mn medium term Credit Lines from the respective countries that they import, so that heavy import payments will not exert pressure on the FOREX market."*

Moreover, on the 23rd of November, 2021, the Minister of Finance presented to the Cabinet of Ministers a Cabinet Memorandum seeking approval to proceed with the ***"Proposed Senior Secured Revolving Credit Facility Offered by the Bank of China Limited to the Central Bank of Sri Lanka".***

The said Cabinet Memorandum, *inter alia,* stated;

"1. Bank of China Limited (BoCL) has submitted a proposal of a Senior Secured Revolving Credit facility to the Central Bank of Sri Lanka (CBSL) up to 02 billion Chinese yuan (CNY), also known as renminbi (RMB), (equivalent to USD 300 million approximately), with the possibility of increasing in the event of an over subscription depending on the syndication demand.

2. *Following multiple rounds of discussions and negotiations, BoCL agreed that the full amount (equivalent to USD 300 million approximately) can be drawn on the day the facility is available for the CBSL and maintain in a nostro account opened in BoCL Mainland China.*

   …

   …

   Hence, those funds will be considered as a part of the CBSL foreign reserves from the date of withdrawal."

As the earlier decision of the Cabinet of Ministers to sell shares to the Chinese Company did not materialise, the Minister of Finance submitted a Cabinet Memorandum dated 23rd of November, 2021 to the Cabinet of Ministers with the title ***"Investments into the West Coast Power (Private) Limited (WCPL), to reduce the cost of Electricity Generation"*** to sell shares of the said company to a company based in the United States.

Having considered the said Memorandum and the decision by the Cabinet of Ministers dated 6th of September, 2021, the Cabinet of Ministers approved the said Memorandum and authorised the Secretary to the Treasury to enter into a Share Sale and Purchase Agreement (SSPA) with New Fortress Energy Limited (NFE) with the clearance of the Attorney General.

Once again, on the 4th of December, 2021, another Cabinet Memorandum was submitted by the Minister of Finance to the Cabinet of Ministers, seeking their approval to obtain the ***"Approval of Parliament to issue an Order to extend the validity period of the Order issued under section 22 of Foreign Exchange Act No. 12 of 2017 on Restriction of Foreign Exchange Outflows".***

In the said Cabinet Memorandum, it was stated, *inter alia;*

> *"As the Order in force is to be expired on January 01, 2022, the Central Bank of Sri Lanka is of the view that regulatory measures to limit / restrict outward remittance of foreign exchange are continued to be implemented in order to minimize the potential risks in the foreign exchange market. Some of the potential risks appeared in the foreign exchange market are;*

- *Pressure on exchange rate and foreign exchange reserves emerged with negative impact on tourism and exports due to continuation of the COVID-19 pandemic.*
- *Several foreign debt payments due during the rest of the year while significant foreign debt service requirements falling due in 2022.*
- *Continuous demand for foreign exchange, arising from repayments of foreign currency debt and payments on imports of essential goods.*
- *Such risks may ultimately be transmitted to the financial system causing threats to the financial system, thereby overall economic stability as well."*

Further, it stated;

> *"Approval of the Cabinet of Ministers is sought to place the Resolution before the Parliament for its approval to make an Order in terms of section 22 (3) of the FEA to extend the validity of the Order issued under section 22 of the FEA published in the Gazette No. 2234/49 of 2nd July, 2021, for a period of six months from January 01, 2022."*

Accordingly, with the approval of the Cabinet of Ministers, the said *Gazette* was placed before Parliament for approval.

Moreover, on the 5th of December, 2021, the Minister of Finance submitted a Note to the Cabinet of Ministers titled ***"Official Visit to India"***, stating that they discussed four pillars for short and medium-term corporation in this regard;

1. *"Ensure the Food and health security it was agreed to extend a line of credit facilities for food, medicine and other essential items import from India.*
2. *Energy security package that would include a line of credit to cover import of oil from India and early modernization Trincomalee Oil tank farm*
3. *Offer of a currency Swap to help Sri Lanka address the currant balance of payment issues.*
4. *Facilitating India investments in different sectors in Sri Lanka that would contribute to growth & explained employment."*

Furthermore, as stated above, the Cabinet Paper No. 22/0009/304/002, dated 3rd of January, 2022, was presented to the Cabinet of Ministers by the Minister of Finance regarding ***"Economy 2022 and the Way Forward***" and **the Cabinet of Ministers took a policy decision not to seek the advice of the IMF.**

Once again, on the 24th of January, 2022, the Minister of Finance presented a Cabinet Memorandum titled *"**Surcharge Tax Bill**"* to the Cabinet of Ministers, seeking approval to publish the said Bill in the government *Gazette* to present it to Parliament.

> *"Budget 2022 introduced a number of proposals to strengthen the fiscal position of the country and help regain the economic activities that were affected by the COVID-19 pandemic. As such, a onetime surcharge tax of 25 percent on taxable income is proposed to be imposed on persons or companies with taxable income over Rs. 2,000 million for the year of assessment 2020/2021."*

Further, the said Memorandum stated;

> *"The approval of the Cabinet of Ministers is sought to:*
>
> (I) *Publish the Draft Surcharge Tax Bill prepared by the Legal Draftsman attached to this Memorandum as Annexure I in the Government Gazette, and*
> (II) *Submit the said Bill for the approval of Parliament."*

Moreover, after the Cabinet of Ministers approved the said Memorandum, the government took steps to enact the Surcharge Tax Act, No. 14 of 2022, which was certified by the Speaker on the 8th of April, 2022.

Furthermore, the Minister of Finance submitted to the Cabinet of Ministers, a Cabinet Memorandum dated 31st of January, 2022, titled ***"Prudent Control of Public Expenditure".***

In the said Cabinet Memorandum, it was stated;

> *"I wish to point out the need of paying close attention towards minimizing public expenditure as a country in the way most countries in the world follow for speedy results.*
>
> *I have imposed certain orders to control expenditure by budget proposals 2022, the budget circular No. 03/2021 dated 21.12.2021 issued providing guidelines to incur expenditure and Public Finance Circular 01/2020(1) dated 12.01.2022."*

Further, in said Cabinet Memorandum, it was stated;

> *"As a considerable cost has to be incurred for the implementation of the proposals made by me providing relief to minimize the economic difficulties that the public is faced with due to the above circumstances and the rising prices at present, all ministers are requested to direct their Secretaries to Ministries to thoroughly follow the below mentioned activities to restrict expenditure that have been already introduced.*

1. ***Implementing the following instructions on the public expenditure management set out in the Budget Circular No. 03/2021 dated 21.12.2021 with strict supervision.***

    i. ***Expenditure should be managed within the limits of the Appropriation Act for the year 2022 and requests for additional allocations should not be made.***

    ii. ***Reduce the fuel allowance provided to Hon. Ministers/Members of Parliament and all Government officers who are paid fuel allowance through the Consolidated Fund by 5 litres or an equivalent amount in cash per month.***

    iii. ***Prepare methods to reduce electricity cost by 10 percent***

iv. ***Suspend the construction of new office buildings except the buildings which are being constructed for a period of two years as proposed by budget proposals.***

v. ***Suspend the purchasing of vehicles for Government institutions during the year 2022.***

vi. ***Suspend the recruitment of new staff for institutions for which expenditure is incurred by the Consolidated Fund except to fill vacancies required for the wellbeing of the institution.***

vii. ***New buildings should not be obtained on rent and additional allocations will not be provided to pay rents for buildings which are obtained without provisions***

viii. ***Foreign study tours should not be organized by using local funds and officers should not be encouraged to participate in seminars/workshops etc. by using local funds unless any official/ Government participation is required on behalf of Sri Lanka.***

ix. ***Various allowances should not be paid upon internal instructions issued at ministerial or institutional level without a proper authority.***

x. ***New projects should not be commenced without allocating provisions for the settlement of bills in hand or unsettled bills regarding ongoing projects***

xi. ***State institution of the commercial nature which are not financed through the annual budget should take every possible step to cover their expenditure and provisions should not be requested from the Treasury considering the deficit of revenue. State institutions financed through the budget should manage commitments upon the limits of provisions provided to them. Action should be taken to obtain prior approval for capital expenditure without delay.***

2. *Controlling telephone expenditure through implementation of the Public Finance Circular 01/2020(1) dated 12.01.2022."*

[emphasis added]

Moreover, on the 11th of February, 2022, the Minister of Finance submitted a Note to the Cabinet of Ministers on ***"Economy 2022 and Way Forward"*** to supplement the Cabinet Memorandum dated 3rd of January, 2022. The following documents were furnished to the Cabinet of Ministers along with the said Note;

1. Foreign Currency Outflows

2. Distribution of responsibility on Foreign Currency Inflow

Once again, a Cabinet Memorandum was presented to the Cabinet of Ministers by the Minister of Finance, dated 19th of February, 2022 regarding the *"**Indian Credit Line for Importation of Essential Commodities".*** It stated, *inter alia;*

> *"The Government of India has agreed to provide its assistance import essential food commodities, medicinal drugs, fuel oils, Portland cement and industrial raw materials under an Indian Credit Line as a result of discussions had with the Indian authorities during my recent visit to India.*
>
> *Indian Credit Line*
>
> *The Government of India has agreed to grant a loan of US $1 billion under a Credit Line to import identified essential food commodities including the aforementioned food items, medicinal drugs, fuel oils, Portland cement and industrial raw materials and the Department of External Resources will negotiate with the Indian Authorities on the loan conditions to make the repayment in three 3 years.*
>
> *...*
>
> *...*
>
> *To get the approval of the Government of Sri Lanka to obtain the loan amount of US$ 1 billion from India under the Indian Credit Line towards importation of essential*

food commodities, medicinal drugs, fuel oils, Portland cement and industrial raw materials.

To finalize the loan conditions pertaining to repayment of the said loan amount of US$ one billion in 3 years with the Indian Authorities by the Department of External Resources."

Moreover, on the 28th of February, 2022, the Minister of Finance submitted a Cabinet Memorandum to the Cabinet of Ministers, seeking the ***"Withdrawal of the Bill for the Imposition of the Special Goods and Services Tax and Committee Stage Amendments to the Bill to amend Value Added Tax Act, No. 14 of 2002".*** In the said Memorandum it was stated;

"The Budgets 2021 and 2022 proposed an online-managed single Special Goods and Services Tax (SGST) in place of multiple taxes and levies imposed under several legal statutes on (i) Liquor, (ii) Cigarette, (iii) Telecommunication, (iv) Betting and Gaming and (v) Vehicles to improve the efficiency of tax collection."

Further, on the 4th of March, 2022, the Minister of Labour submitted a Cabinet Memorandum to the Cabinet of Ministers seeking approval for ***"Granting Incentives for the Promotion of Remittances from Migrant Workers".*** In the said Memorandum it was stated;

"Approximately 7 to 8 billion United State of America (US) dollars is remitted annually to this country by the foreign employment sector, which is a major sector through which Sri Lanka receives foreign exchange. At a time when Sri Lanka had faced a severe foreign exchange crisis due to setbacks in the apparel and other export sectors and the collapse of tourism due to restrictions imposed on movement and air navigation faced because of the COVID-19 global pandemic that prevailed during the last two years, the contribution made by the remittances by migrant workers towards strengthening the economy of this country to an extent was immense.

Therefore, steps have been taken to send a large number of Sri Lankan workers to foreign jobs following various strategies with the full intervention by the Sri Lanka

Bureau of Foreign Employment in collaboration with the Ministry of Labour, the Central Bank of Sri Lanka, the Ministry of Sports and Youth, the State Ministry of Foreign Employment Promotion and Market Diversification and the State Ministry of Skills Development, Vocational Education, Research and New Inventions for the purpose of promoting the foreign employment sector and thereby enhancing remittances by migrant workers.

…

…

I expect the foreign exchange remitted to this country could be increased by increasing the incentive given for each dollar from Rs.10/- at present to Rs. 38/- in order to encourage and appreciate remitting to this country the foreign exchange earned by migrant workers who shoulder the strengthening of this country's economy by shedding their sweat and hard work and ensure more economic benefits to dependents and family members of migrant workers during this coming New Year Season. In addition, I observe that some support will be given to minimize the dollar crisis which prevails in the country at present by giving this concession for remitting foreign exchange received by foreign employment agents of this country as broker charges from employers in foreign countries.

Further, this kind of processes will also enable us to minimize foreign exchange frauds that are illegally committed.

…

…

Therefore, banking all the above-mentioned facts into consideration, I wish to propose to the Cabinet of Ministers that it is suitable to increase the incentive given for remittances from the present rate of Rs. 10 per dollar to Rs. 38/- per dollar when remitting

a. *foreign exchange earned by engaging in migrant work and*
b. *foreign exchange received by foreign employment agents as broker fees from employers in oversees to this country."*

Having considered the said Memorandum, the Cabinet of Ministers approved the same.

Moreover, the Ministry of Finance, ERD – ME & SA Division on the 4th of March, 2022 presented to the Cabinet of Ministers, a Cabinet Memorandum with the title ***"USD 1000 Million Credit Line Facility Agreement between the Government of Sri Lanka and State Bank of India for Import of Essential Goods from India".***

Thereafter, on the 5th of March, 2022, the Minister of Finance submitted a Cabinet Memorandum titled ***"Importation of Essential Commodities for year 2022 under Indian Credit Facility",*** to the Cabinet of Ministers.

It stated, *inter alia;*

> *"Indian Credit Line for Importation of Essential Commodities" and the decision of the Cabinet of Ministers dated 21st February, 2022. Accordingly, the GOSL has decided to obtain a USD 1 billion loan facility from the Government of India for the importation of essential commodities for the year 2022.*
>
> *This will enable registered importers to import essential food items, essential pharmaceuticals and raw materials for local production based etc. on monthly requirement, and Government will take steps to implement a proper program to ensure the market consumer needs without shortage, even during the festive season.*
>
> *The credit facility will be beneficial in terms of meeting the external resource gap for the time being until the foreign currency inflows to the country become favorable during the recovery process.*
>
> *Accordingly, approval of the Cabinet of Ministers is sought to authorize the Secretary Ministry of Finance to sign the Credit Facility Agreement according to the format attached as Annex-1 with State Bank of India to borrow USD 1,000 million for importation of essential commodities."*

After deliberating the said Memorandum, the Cabinet of Ministers has authorised the Secretary to the Ministry of Finance to sign the said agreement.

Moreover, a Cabinet Memorandum was submitted to the Cabinet of Ministers by the Minister of Finance on the 5th of March, 2022 seeking the *"**Implementation of an Incentive Scheme based on Progress of Export".***

The said Memorandum stated;

> *"Cabinet Meeting held on 14.02.2022 regarding the Note to the Cabinet Paper No.22/0228/301/002 dated 11.02.2022 submitted by His Excellency the President under the title "2022 Economic and the way Forward" and the Cabinet Paper No. 22/0231/304/002-IV dated 11.02.2022 submitted by the Hon. Minister of Finance under the title "2022 Economic and the way Forward.*
>
> *I propose to implement an incentive scheme though Sri Lanka Export Development Board for development and promotion of exports to achieve the expected foreign exchange inflow of the Sri Lanka Export Development Board and the Department of Commerce which comes under the Ministry of Trade were also entrusted responsibilities as mentioned in Annexure I to the Cabinet Paper No. 22/0231/304/002-IV dated 11.022022."*

The said Memorandum was also approved by the Cabinet of Ministers.

Further, on the 6th of March, 2022 the Minister of Finance submitted a Note titled ***"Economy 2022 and Way Forward"*** to the Cabinet of Ministers. The said Note, *inter alia*, stated;

> ***"The impact of the COVID-19 pandemic was largely felt by all sectors of the economy and affected the lives of the people particularly during the year of 2020. However, the country is on its path to recovery with economic growth expected to be above 4 percent in 2021 with the committed aggressive vaccination drive of the Government. Exports have risen significantly considerably recording over USD 1 billion continuously since June 2021 up to February 2022. The economy is poised to take off with a growth over 5 percent in 2022.***

However, the external sector suffered due to setbacks in the tourism sector, the drop in workers' remittances and the decline in foreign direct investments. In addition, inflation as per the Colombo Consumer Price Index (CCPI) has risen 15.1 percent in February due to both supply and demand side shocks emanating from the increase in fuel and world commodity prices, supply chain disruptions and increased demand.

…

A monthly allowance of Rs. 5,000 has been granted to public servants, employees in public corporations and pensioners since January 2022. The increase in Samurdhi payments and provision of allowances to incentivize home gardening will be implemented in due course.

With regard to strengthening the external sector, the Government aims to facilitate non-debt foreign currency inflows through facilitating foreign investments, raising tourism to pre-pandemic levels, increasing workers" remittances through additional foreign employment opportunities and through promotion of exports in potential sectors such as port and shipping and boat manufacturing and establishment of pharmaceutical [Sir, this sentence seems incomplete]

Tourism sector

…

…

The following policy decisions have been taken to attract more tourists to visit the country.

- *Providing on arrival and on-line visa*
- *Extending of Initial Electronic Travel Authorization (ETA) from one month to six months for which Cabinet has granted approval.*
- *Introducing a Digital Tourism Visa (digital nomad) for a period of one year at a cost of USD 600.*

- *Initiating several global tourism promotion campaign programmes by the Ministry of Tourism targeting major markets – UK, Germany, India, China, Russia, Middle East, USA, Australia, Japan, Korea, Spain and Scandinavia (International media campaigns through BBC, CNN, Al-Jazeera and CNBC; Publication in international journals – Lonely Planet, Conde Nast traveler; wellness tourism promotion in selected European countries and Joint marketing).*
- *Conducting joint promotions by Tour Operators and Airlines for which approval of the Cabinet of Ministers has been obtained.*

…

…

Workers' Remittances

As the largest single source of foreign exchange inflow in Sri Lanka of over the past decades, workers' remittances play a vital role by contributing to offset BOP deficits, improved liquidity conditions in the domestic foreign exchange market, augment the international reserve levels and thereby improving the country's credit worthiness, poverty reduction and promotion of savings and investments.

Amidst the pandemic, workers' remittances which stood at USD 6.7 billion in 2019, increased by 5.75 percent to USD 7.1 billion in 2020. However, the number of departures for foreign employment has declined heavily 73 percent to 38,875 in 2020 from 203,075 in 2019. In 2021, although the number of departures increased to 122,263 showing signs of recovery, the workers' remittances declined by 22 percent to USD 5.5 billion in 2021 in comparison to 2020 mainly due to foreign currency being remitted via informal channels.

By facilitating foreign employment opportunities, it is expected to send over 300,000 employees for foreign employment in 2022 and 35,892 departures for foreign employment have been recorded up to mid-February. Accordingly, it is expected to earn up to USD 7.5 billion in workers' remittances in 2022.

In order to maximize the positive effects of remittances on economic growth and development, the Government is in the process of implementing the following policy initiatives in this regard.

…

…

Pharmaceutical Production

The pharmaceutical zones are established with the view of expanding the local manufacturing of pharmaceuticals and facilitating investments therein with the ultimate objective of reducing pharmaceutical imports and promote exports in the long run, while also contributing the economy through job creation.

…

…

Port and Shipping Services

Earnings from sea transport services, recorded as USD 318 Mn in 2020 from Sri Lanka Ports Authority (5LPA), South Asia Gateway Terminals (SAGT), Colombo International Container Terminals (CICT) and other maritime services, declined marginally to 315 USD Mn in 2021. Earnings from ports and shipping services expect to Increase up to USD 350 Mn in 2022.

Earnings from Ports and Shipping is further expected to increase with the following policy measures:

- *Development of East Container Terminal (ECT) second Phase expected to be completed by 2024 with*
- *12 giant cranes and 40 normal cranes. West Container Terminal (WCT)- Cabinet of Ministers has granted approval to develop the WCT with Public Private Partnership (PPP) arrangement and Agreement has been signed between SLPA, Adani Group of India and John Keels Holdings PLC.*

- *Development of Kakesanthurai Port-Feasibility study completed*
- *Trincomalee-Approval of Cabinet of Ministers has been granted and Expression of Interest (EOI) is being developed.*
- *Galle-EOS/Request for Proposals (RFPs) are called*

Non-debt creating inflows such as earnings from tourism, workers' remittances, import substitutive industries such as pharmaceuticals, earnings from sources including ports and shipping together with the details on strategic interventions to increase foreign currency inflows and to reduce foreign currency outflows aimed at improving the external sector outlook of the country, are submitted for the information of the Cabinet of Ministers.

Accordingly, the approval of the Cabinet of Ministers was sought;

- *To provide public servants with monthly allowance of Rs. 5,000/- from January.*
- *To provide to the pensioners a monthly allowance of Rs. 5,000/-.*
- *To provide extra monthly allowance of Rs. 1,000/- to Samurdhi beneficiaries.*
- *To support the programme that to conduct home gardening programme to encourage growing of vegetables and fruits for self-consumptions.*
- *Flour Subsidy – To provide 15Kg wheat flour monthly at Rs. 80 to plantation worker families.*
- *To completely exempt import of essential food and medicines taxes."*

The Cabinet of Ministers approved the said Memorandum having considered the hardships faced by the general public in this country.

Thereafter, the Minister of Finance, on the 6th of March, 2022 submitted a Note to the Cabinet of Ministers, detailing the *"**Staff Report Recommendations for the 2021 Article IV Consultation of the International Monetary Fund (IMF)".*** The said report stated;

"Usually every year, under Article IV of the IMF's Articles of Agreement, the IMF holds bilateral discussions with member countries including Sri Lanka. A staff team visits the member country, gathers economic and financial data, and discusses the

country's economic developments and policies with authorities. On return to headquarters, the staff prepares a report, which forms the basis for discussions by the Executive Board. Accordingly, the 2021 Article IV discussions with Sri Lankan authorities ***took place in Colombo during December 7-20, 2021."***

[emphasis added]

Summary of Key Recommendations as per the Press Release on the 2nd of March, 2022, by the staff of the IMF stated;

"

i. ***Urgently implementing a credible and coherent strategy to restore macroeconomic stability and debt sustainability, while protecting vulnerable groups and reducing poverty through strengthened, well-targeted social safety nets.***

ii. *Fiscal consolidation based on high-quality revenue measures through raising income tax and VAT rates, minimizing exemptions together with revenue administration reforms.*

iii. *Continuously improving expenditure rationalization, budget formulation, and execution and the fiscal rule.*

iv. *Reforming State-Owned Enterprises and adopting cost-recovery energy pricing,*

v. *Implementing a tighter monetary policy stance to contain rising inflationary pressures and phasing out Central Bank's direct financing of budget deficits.*

vi. ***Gradually returning to a market-determined and flexible exchange rate to facilitate external adjustment and rebuild international reserves.***

vii. ***Gradually unwinding capital flow management measures as conditions permit.***

viii. *Closely monitoring of underlying asset quality and identifying vulnerabilities through stress testing to mitigate financial stability risks while strengthening the regulatory, supervision and resolution frameworks.*

ix. *Renewed efforts on growth-enhancing structural reforms such as increasing female labour force participation and reducing youth unemployment.*

x. *Diversifying the economy**, phasing out import restrictions**, and improving the business and investment climate in general.*

xi. *Prudent management of the Colombo Port City project, and continued efforts to strengthen governance and fight corruption.*

xii. *Increase climate resilience."*

[emphasis added]

Further**,** the Note included the following observations made by the Minister of Finance;

> ***"The Sri Lankan economy was not in a healthy position when the COVID-19 pandemic hit the country. The economy was crippled by the Easter Sunday Attacks which adversely affected tourism and investor confidence. The improvement in business sentiments following the Presidential elections held in November 2019 and the implementation of the new policy agenda of the Government were disturbed by the pandemic and the required containment and remedial measures. The Government embarked on a reform agenda to strengthen non-debt foreign exchange inflows such as exports, remittances and foreign direct investments and to absorb a part of such inflows towards rebuilding foreign exchange reserves. Exports recorded a historic high in 2021 and surpassed over USD 1 Billion exports consecutively since June 2021 upto February 2022 with an ongoing rebound in tourism.***
>
> ***The government remains committed to ensuring medium term fiscal consolidation. Efforts are underway to recoup revenue losses observed during the pandemic,***

particularly through a one-time surcharge tax, social security contribution levy and increasing the Value Added Tax (VAT) on financial services while strengthening the tax administration in line with digitalization drive of the Government. Expenditure management has been strengthened by the introduction of quarterly commitment ceilings in the Budget 2022. Ongoing digitalization of the economy including in delivery public services is expected to support both revenue enhancement and expenditure management.

Reforms to State Owned Enterprises (SOEs) are also being carried out, albeit under difficult circumstances caused by rising energy prices and other pandemic related effects on key SOES. Revision of domestic petroleum prices in June and December 2021 helped improve the balance sheet of Ceylon Petroleum Corporation (CPC), and the Government stands ready to revise prices to reflect international market trends while minimizing the adverse effect of such revision on the economy.

A gradual reduction In the Government's external debt exposure is already observed, and the exposure to the International Sovereign Debt market is expected to decline from US$ 14.55 billion at end 2019 to US 11.55 by end 2022. Sri Lanka commits to maintaining its impeccable track record of debt servicing.

I acknowledge that the recent rise in inflation, driven mainly by food inflation (latest at 25 percent), rising petroleum prices, and supply chain disruptions, remains a major concern. The Government has taken measures to mitigate the impact of rising cost of living on the general public, while the Central Bank has tightened monetary policy to dampen demand driven pressures on inflation.

The Sri Lankan economy is going through one of the most difficult episodes in its long history, and I am confident that Sri Lanka will rebound, as it has done in the past, as the effects of the pandemic subside, aided by policies that are being put in place to strengthen its resilience and uplift the lives of our people on a sustainable

basis." (It is pertinent to note that these observations are similar to the views expressed by the IMF team in the year 2020.)

…

…

I wish to inform the Cabinet of Ministers the key recommendations made by the Executive Board of the IMF concluded the Article IV consultation with Sri Lanka on February 25, 2022 and my observations.

[emphasis added]

The Cabinet Paper No.22/0404/304/028 dated 14th of March, 2022 and the Note presented to the Cabinet of Ministers dated 6th of March, 2022 by the Minister of Finance on ***"Staff Report Recommendations for the 2021 Article IV Consultation of the International Monetary Fund (IMF)"*** were considered by the Cabinet of Ministers along with further clarifications made by the Minister of Finance. After discussion, the Cabinet of Ministers decided to authorise the Minister of Finance to take the necessary steps to obtain technical advice and the assistance of the IMF to resolve the current situation encountered by the Sri Lankan economy.

Thereafter, the Minister of Finance on the 7th of March, 2022 submitted a Cabinet Memorandum seeking the approval of the Cabinet of Ministers, for the ***"Allocation of the required budgetary provisions for fulfilment of the Energy requirement".*** It was stated, *inter alia;*

"The Covid-19 pandemic has affected not only the Sri Lankan economy but economy of the entire world which has led to a highest crude oil prices during the last ten years which severely affected the economy of the country and lead to severe fuel crises. However, the Government has taken some control measures without shifting entire burden to the general public.

…

…

Furthermore, due to the above fuel crises, the Government of Sri Lanka has made arrangement to obtain a loan facility USD 500 million through the Exim Bank of India for fuel supply."

Accordingly, the approval of Cabinet of Ministers was sought for the following;

"To obtain the covering approval for Rs. 15 billion which has been provided by General Treasury to the CPC as CEB equity infusion.

To grant the authority to the General Treasury for the allocation of Rs. 86.7 billion including Rs. 15 billion as a capital infusion to meet the financial requirements of the CEB and empower the Director General of the Department of National Budget to provide necessary additional allocation for this purpose and authority to collect through Treasury Bills issued by the Central Bank of Sri Lanka."

The said Memorandum was also approved by the Cabinet of Ministers.

Further, the Minister of Finance submitted a Note to the Cabinet of Ministers dated 10th of March, 2022, with the title *"**General Direction to Accept Bona - Fide Investment of Non-Resident Companies by Resident Companies".*** The said Note stated, *inter alia;*

"Accordingly, approval has been granted as recommended by the Monetary Board of the Central Bank of Sri Lanka, to issue a direction under Section 7 (10) of the Foreign Exchange Act No. 12 of 2017 as follows:

(a) *Grant permission on case by case basis to the request of Resident Companies to issue shares to Non-Resident investors, who have remitted funds directly to the account of such resident companies instead of remitting through the Inward Investment account of such Non-Resident Investors"*

(b) *"Grant permission to the relevant dealers to credit any income and capital proceeds of the shares to be issued by Resident Companies to Non- Resident Investors under the permission granted by the Monetary Board"*

On the 11th of March, 2022 the Minister of Finance submitted another Cabinet Memorandum to the Cabinet of Ministers to consider implementing decisions regarding ***"Managing Foreign Exchange Inflows through Banks and Registered Financial Institutions".***

The said Memorandum stated, *inter alia;*

> *"Due to Covid-19 pandemic, Sri Lanka faced a severe foreign exchange crisis due to the collapse in the tourism sector and the downturn of foreign employment sector, which is a main source of foreign exchange earnings of Sri Lanka. This foreign exchange crisis in the country further intensified with the migrant workers and exporters, in particular, resorted to using illegal money transfer methods to get a higher rupee value for foreign exchange and delaying the remittances into the country in the hope that the United State Dollar (USD) would appreciate further against the rupee.*
>
> *Taking these factors into consideration, the Central Bank of Sri Lanka has allowed the exchange rate to be determined on the market forces with effect from 07.03.2022. Since it is guaranteed to provide greater economic returns on the foreign exchange earned by migrant workers, who are committed to strengthening the economy of Sri Lanka, through this decision, there is no need to further implement the Government's incentive programme to promote migrant workers' remittances at a cost of over Rs. 20 billion per month. Also, foreign exchange earnings of exporters also have high economic benefits through determining exchange rates based on market mechanisms, they are no longer encourage to delay the remittances of foreign exchange assuming the dollar continues to appreciate or to exchange foreign earnings through risky illegal means. Therefore, there is no need to further implement the incentive scheme to bring in the foreign exchange earned by exporters.*
>
> *In view of the above, this Cabinet Memorandum is submitted to reconsider whether the following decisions taken on the Cabinet Memorandum referred in paragraphs 1.2 and above need to be implemented with the relaxation of the Foreign Exchange Policy.*

(a) to provide incentives to encourage remittances of migrant workers and brokerage fees receive to foreign employment agents as foreign currencies, and

(b) to implement an incentive scheme based on export progress to encourage short-term repatriation of foreign exchange earned by exporters."

Thereafter, the said incentive programme was discontinued with the approval of the Cabinet of Ministers.

Moreover, the Minister of Finance submitted to the Cabinet of Ministers on the 18th of March, 2022, a Cabinet Memorandum seeking *"**Approval for Promulgation of Regulation to extend the Validity Period to open Special Deposit Accounts introduced under the Foreign Exchange Act No. 12 of 2017".*** It was, *inter alia,* stated*;*

> *"Purpose of this Cabinet Memorandum is to obtain approval of the Cabinet of Ministers to promulgate Regulations to further extend the validity period of the "Special Deposit Accounts" introduced under the Foreign Exchange Act, No. 12 of 2017.*
>
> …
>
> …
>
> *Given the above, it is proposed to promulgate Regulations made under Section 7 (1) of Foreign Exchange Act, No. 12 of 2017 as described in the Annexure II, to extend the validly period for opening and maintaining of Special Deposit Accounts for another year, which will be recorded as 36 months from April 08, 2020."*

Accordingly, the approval of the Cabinet of Ministers was sought to;

"

(a) Promulgate Regulations under Section 7 (1) of Foreign Exchange Act, No. 12 of 2017

(b) Submit the Regulations for approval of Parliament"

Once again, on the 21st of March, 2022, a Cabinet Memorandum seeking approval to issue *"**Foreign Exchange Regulations to facilitate Investments in the Colombo Port City"*** was submitted to the Cabinet of Ministers by the Minister of Finance. It stated, *inter alia;*

> *"The purpose of this Cabinet Memorandum is to obtain approval of the Cabinet of Ministers to issue Regulations under the Foreign Exchange Act. No. 12 of 2017 in respect of foreign exchange transactions relating to the investments in the area of authority of the Colombo Port City Economic Commission.*
>
> *Colombo Port City Economic Commission (the Commission) and M/s CHEC Port City Colombo (Pvt.) Ltd (the Company) have made a request to the Central Bank of Sri Lanka (Central Bank) to issue Regulations and Directions under the provisions of the Foreign Exchange Act (the Act), as an interim measure until the necessary Rules and Regulations are issued/promulgated by the Commission.*
>
> *Given the above, approval of the Cabinet of Ministers is sought to:*
>
> *(a) Promulgate Regulations under Section 7(1) of the Foreign Exchange Act No. 12 of 2017, as largely set out in the Annexure I and Annexure II as described in the Paragraph No. 4 above.*
> *(b) Submit the Regulations referred in (a) above for approval of Parliament"*

Furthermore, on the 25th of March, 2022, the Minister of Finance submitted to the Cabinet of Ministers, a Cabinet Memorandum titled ***"Rapid Action Plan for Economic Revival".*** The said Memorandum, *inter alia*, stated*;*

> *"As **approved by the Cabinet of Ministers by their decision dated 21st March, 2022** and as noted under proposal 2 (1) of the Cabinet Memorandum titled "Rapid Action Plan for Economic Revival"; a Technical Committee comprising of officers from the Central Bank of Sri Lanka and the General Treasury, was appointed to engage with the International Monetary Fund (IMF) and this Committee comprises of the following members. (Annexure 01)"*

The above Memorandum was considered by the Cabinet of Ministers and approved the same.

On the 26th of March, 2022, another Cabinet Memorandum was submitted to the Cabinet of Ministers by the Minister of Finance seeking approval for the *"**Submission of the 2021 Article IV Report of the International Monetary Fund (IMF) to the Parliament".*** The said Memorandum stated, *inter alia;*

> *"Accordingly, the 2021 Article IV discussions with Sri Lankan authorities took place in Colombo during December 7-20, 2021.*
>
> *...*
>
> *...*
>
> *The key recommendations include revenue-based fiscal consolidation, restoring debt sustainability, near-term monetary policy tightening, restoring market-determined and flexible exchange rate and strengthening social safety net programmes. My observations on the commendations have already been informed to the Cabinet of Ministers through Note to the Cabinet bearing No. 22/0404/304/028 dated March 06, 2022, which has been noted by the Cabinet of Ministers as per the Cabinet Decision dated March 14, 2022.*
>
> *...*
>
> *...*
>
> *Approval of the Cabinet of Ministers is sought to submit the 2021 Article IV report prepared by the International Monetary Fund (Annexure) to the Parliament for information."*

On the 28th of March, 2022, after the discussion regarding the Cabinet Memorandum was submitted to the Cabinet of Ministers by the Minister of Finance on the 26th of March, 2022, *"it was decided to grant approval to submit the 2021 Article IV report prepared by the International Monetary Fund in respect of Sri Lanka, attached to the Memorandum, to Parliament".*

Further, the Cabinet Memorandum dated 26th of March, 2022, submitted by the Minister of Finance on ***"Expeditious Measures for Economic Revival"*** was considered by the Cabinet of Ministers.

After discussion, the Cabinet noted the measures taken by the Minister of Finance for the appointment of the Technical Committee comprising of Officials of the Central Bank of Sri Lanka and the General Treasury to arrange the programme to engage with the IMF and for the appointment of the Committee for Sustainable Management of Public Debt, as per the Cabinet decision dated 21st of March, 2022 on CP No. 22/0477/304/036. Hence, it was decided to authorise the Secretary to the Cabinet of Ministers to convey the said decision immediately to the relevant authorities for necessary action.

On the 3rd of April, 2022 the Minister of Finance submitted a Cabinet Memorandum to the Cabinet of Ministers, detailing the *"**Proposed Emergency Crisis Response Package to be funded by World Bank".*** He stated, *inter alia;*

> *"I will be having discussions with the World Bank on 11 April 2022 on strengthening social protection system in Sri Lanka and also the liquidity crisis faced by the country. I expect to provide emergency support for households affected by the pandemic situation in the country and to help them cope with the effects of the economic crisis and also for laying the ground for the strengthening of the country's social protection system for increased future resilience.*
>
> …
>
> …
>
> ***Proposed Financing Arrangement***
>
> *The total estimated financing envelope of the proposed Emergency Crisis Response Package is USS 340 million, of which;*
>
> (i) *USS 40 million would be secured through the repurposing from the existing loans and*

(ii) *US$ 300 million would be obtained as a new IBRD loan to implement the proposed, Emergency Social Safety Net Project (ESSNP).”*

In the above context, the approval of the Cabinet of Ministers was sought to;

“

1. *Make necessary arrangements to repurpose US$ 40 million from the identified ongoing Projects in the World Bank portfolio;*

2. *Initiate discussion with the World Bank to formulate and negotiate Emergency Social Safety Net Project (ESSNP) and borrow US$ 300 million from the IBRD.*

3. *Authorize Secretary, Ministry of Finance to enter into a loan agreement, once the discussions are concluded with the World Bank, to borrow USS 300 million from the 18RO to implement the proposed Emergency Social Safety Net Project (ESSNP)”*

Some of the steps that were taken by the Central Bank of Sri Lanka and the Ministry of Finance to improve the economy of the country -

The Auditor General’s Report stated thus;

“Table No. 30 - Instructions on the repatriation of worker remittances

Date	**Type of Instruction**	**Description**
22.12.2020	Operating Instructions (OIs)	Operating instructions were issued to pay Rs. 2 per dollar above the normal exchange rate for the foreign exchange remittances sent by foreign workers to banks in Sri Lanka
01.01.2021	OIs	Foreign currency earned through an employment by a Sri

		Lankan national who is working has worked abroad or Sri Lankan national who resides in Sri Lanka and earns foreign currency through rendering services in nature of employment abroad will qualify to receive an additional LKR 2.00 per US dollar with effect from 28.12.2020.
27.01.2021	OIs	All LBs are required to sell to the CBSL 10% of the Inward worker remittances which are converted to LKR, in USD with immediate effect.
17.03.2021	OI	The requirement of LBs to sell 10% of inward worker remittances to the CBSL is suspended in respect of conversion of worker remittances which have taken place from 17.03.2021 onwards.
28.05.2021	OIs	All LBs are required to sell to the CBSL 10% of the Inward worker remittances which are converted to LKR, in USD with effect from 28.05.2021 on weekly basis.
01.12.2021	OIs	MB decided to pay an additional Rs. 8 per dollar for workers' remittances from 01.12.2021 to 31.12.2021. (Total incentive Rs.10). This was extended till 31.01.2022 by OIs dated 27.12.2021. Extended until further notice by OIs dated 31.01.2022 This was discontinued with effect from 09.03.2022
27.12.2021	OIs	All LBs are required to sell to the CBSL 25% of the Inward worker remittances which are converted to LKR, in USD with effect from 27.12.2021 on weekly basis. This was continued by OIs issued on 08.03.2022.
22.03.2022	OIs	All LBs are required to sell to the CBSL 50% of the Inward worker remittances which are converted to LKR, in USD from

		week commencing from 21.03 2022-until the week ending on 29.07 2022 on weekly basis
11.04.2022	OIs	All LBs are required to sell to the CBSL 25% of the Inward worker remittances which are converted to LKR. in USD from week commencing from 11.04.2022 until the week ending on 29.07.2022 on weekly basis.

2.8.16 Instructions issued by the CBSL during the period from 18 February 2021 to 11 April 2022 in relation to repatriation, conversion and mandatory sale of export proceeds are summarised in the following table.

Table No. 31 - Instructions on the repatriation, conversion and mandatory sale of export proceeds

Date	**Type of Instruction**	**Description**
18.02.2021	Gazette No. 2215/39	Every exporter of goods shall receive the export proceeds in Sri Lanka in respect of all goods exported within 180 days from the date of shipment.
	Gazette No. 2215/39	Ever exporter of goods shall, immediately upon the receipt of such export proceeds into Sri Lanka, convert 25% from and out of the total export proceeds received in Sri Lanka into Sri Lankan Rupees through a Licensed bank (Gazette- No. 2215/39 dated 18.02.2021.

18.02.2021	OIs	All Licensed Banks are required to sell 50% of the export proceeds in various currencies purchased from exporters of goods, to CBSL in US dollars with immediate effect.
09.03.2021	Gazette No. 2218/38	Every exporter of goods shall, within fourteen (14) days upon the receipt of such export proceeds into Sri Lanka as required under Rule 3 above, convert Twenty-five per centum (25%) from and out of the total of the said exports proceeds received in Sri Lanka into Sri Lanka Rupees through a licensed bank.
17.03.2021	OIs	The requirement to sell 50% of the conversions of export proceeds received as from 17.03.2021 onwards is suspended with immediate effect
09.04.2021	Gazette No. 2222/6	Every exporter of goods shall, within thirty (30) days upon the receipt of such export proceeds into Sri Lanka as required under Rule 3 above, convert Ten per centum (10%) from and out of the total of the said exports proceeds received in Sri Lanka into Sri Lanka Rupees through a licensed bank.
28.05.2021	Gazette No. 2229/9	Every exporter of goods shall, within thirty (30) days upon the receipt of such export proceeds into Sri Lanka as required under Rule 3 above, convert not less than Twenty- five per centum (25%) from and out of the total of the said export proceeds received in Sri Lanka, into Sri Lanka Rupees, through a licensed bank.
		The Monetary Board may however determine the specific export sectors or industries or individual

		exporters, who or which may be permitted to convert less than 25% of the total of the export proceeds received in Sri Lanka, if the Monetary Board is satisfied, in its discretion, that the export goods and processes of such export sector, industry or exporter, utilize a very high percentage of imported goods that cannot be sourced domestically. Provided however, that in no instance, shall any such partial exemption that the Monetary Board may grant in its discretion, as referred to immediately above, be below ten per centum (10% of the total export proceeds"
28.05.2021	OIs	All LBS are required to sell 10% from and out of the 25% export proceeds so converted into LKR, to the CBSL on weekly basis with effect from 28.05.2021.
28.10.2021	Gazette No. 2251/42	Every exporter of pods and services who receives export proceeds in Sri Lanka, in terms of Rule 3 above, shift mandatorily convert residual of the export proceeds received in Sri Lanka, into Sri Lanka Rupees upon utilizing such proceeds only in respect of the below mentioned authorized payments, on or before the seventh (7th) day of the following month
		Previous Gazettes were repealed.
01.11.2021	OIs	All LBs are required to sell 10% of such residual of the export proceeds which are mandatorily converted into LKR to the CBSL in USD on a weekly basis with effect from 01.11.2021
27.12.2021	OIs	All LBs are required to sell 25% of such residual of the

		export proceeds which are mandatorily converted into LKR. to the CBSL in USD on a weekly basis with effect from 27.12.2021
22.03.2022	OIs	All LBs are required to sell to the CBSL 50% of the residual of export proceeds which are converted to LKR, in USD from week commencing from 21.03.2022 until the week ending on 29.07.2022 on weekly basis.
11.04.2022	OIs	All LBs are required to sell to the CBSL 25% of the residual of export proceeds which are converted to LKR, in USD from week commencing from 11.04.2022 on weekly basis.

2.8.17 Import restrictions imposed by the Minister of Finance, Economic and Policy Development during the period from 16 April 2020 to 09 March 2022 are summarised in the following table.

Gazette No and Date	**Name**	**Person Who promulgate**	**Effective Date**	**Regulations**
2171/5 2020.04.16	Imports Exports (Control) and Regulations No. 02 of 2020	Minister of Finance, Economic and Policy Development	From April 16, 2020 to July 15, 2020	Temporarily suspended importation of list of goods and to impose minimum of 30-day credit facility on importation of another list of goods.
2126/19 2020.05.22	Imports Exports (Control) Regulations No. 02 of 2020	Minister of Finance, Economic and Policy Development	2020.05.22	Extended the validity period of Extraordinary Gazette Notification No. 2171/5 by three months to introduce a list of exceptions and other regulatory and Administrative measures

2182/10 2020.06.30	Imports Exports (Control) Regulations No. 3 of 2020	Minister of Finance, Economic and Policy Development	2020.06.30	Updated the Extraordinary Gazette Notification No. 2176/19 22.05.2020.
2184/21 2020.07.16	Imports Exports (Control) Regulations No. 04 of 2020	Minister of Finance, Economic and Policy Development	2020.07.17	Repealed Imports and Exports Control Regulations No. 02 and 03. Issued updated lists of goods for temporary suspension and importing only under a mandatory credit facility provided by foreign supplier. Issued list of exemptions and other regulatory and administrative measures.
2189/4 2020.08 17	Imports Exports (Control) Regulations No. 05 of 2020	Minister of Finance	2020.08.18	Issued an unspecified validity period suspending the list of goods specified in the gazette that require import licenses.
2189/5 2020.08.17	Imports Exports (Control) Regulations No. 06 of 2020	Minister of Finance	2020.08.18	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2193/9 2020.09.15	Imports Exports (Control) Regulations No. 07 of 2020	Minister of Finance	2020.09.16	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2198/2 2020.10.19	Imports Exports (Control) Regulations No. 08 of 2020	Minister of Finance	2020.10.19	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2206/5	Imports Exports	Minister of	2020.12.15	Amended the lists of

2020.12.14	(Control) Regulations No.10 of 2020	Finance		goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2207/15 2020.12.24	Imports Exports (Control) Regulations No. 11 of 2020	Minister of Finance	2020.12.15	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2209/18 2021.01.05	Imports Exports (Control) Regulations No. 01 of 2021	Minister of Finance	2021.01.05	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2214/56 2021.02.11	Imports Exports (Control) Regulations No. 03 of 2021	Minister of Finance	2021.02.11	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2222/31 2021.04.06	Imports Exports (Control) Regulations No. 04 of 2021	Minister of Finance	2021.04.07	Regulate the importation of palm oil
2224/43 2021.04.23	Imports Exports (Control) Regulations No. 05 of 2021	Minister of Finance	2021.04.23	Impose requirement of Import Control License (ICL) for mobile workshops.
2224/44 2021.04.23	Imports Exports (Control) Regulations No. 06 of 2021	Minister of Finance	2021.04.23	Temporary suspended the importation of brand-new mobile workshops.
2226/48 2021.05.06	Imports Exports (Control) Regulations No. 07 of 2021	Minister of Finance	2021.05.06	Control Importation of Chemical fertilizers, pesticides & herbicides.

2231/16 2021.06.11	Imports Exports (Control) Regulations No. 08 of 2021	Minister of Finance	2021.06.11	Imposed requirement of ICL importation of facemasks, gold ani metal
2231/17 2021.06.11	Imports Exports (Control) Regulations No. 09 of 2021	Minister of Finance	2021.06.11	Empower the recommendation to National Medicines Regulatory Authority to exports the good specified in the Schedule I including oxygen
2231/18 2021.06.11	Imports Exports (Control) Regulations No. 10 of 2021	Minister of Finance	2021.06.10	Temporary suspended the lists of goods in Schedule I that are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2238/45 2021.07.31	Imports Exports (Control) Regulations No. 11 of 2021	Minister of Finance	2021.07.31	Impose requirement of ICL for mineral or chemical fertilizers.
2247/12 2021.09.29	Imports Exports (Control) Regulations No. 12 of 2021	Minister of Finance	2021.09.29	Eliminated requirement of ICL on white crystalline sugar.
2252/30 2021.11.03	Imports Exports (Control) Regulations No. 14 of 2021	Minister of Finance	2021.11.03	Removed temporary suspension importation of rice.
2256/23 2021.11.30	Imports Exports (Control) Regulations No. 15 of 2021	Minister of Finance	2021.11.30	Removed restrictions on importation of chemical fertilizers, pesticides & herbicides. Imposed requirement of ICL on radio navigational aid apparatus. Banned importation of Glyphosate

2262/17 2022.01.11	Imports Exports (Control) Regulations No. 02 of 2022	Minister of Finance	2022.01.12	Amendments to the Schedule 1 of the Special Import License Regulations, published in the Gazette Extraordinary No. 2044/40 dated 09th November 2017.
2262/18 2022.01.11	Imports Exports (Control) Regulations No. 03 of 2022	Minister of Finance	2022.01.12	Removed temporary suspension on long grain rice. Continue restrictions on fish fillet as per new Hs codes.
2270/18 2022.03.09	Imports Exports (Control) Regulations No. 05 of 2022	Minister of Finance	2022.03.10	Impose requirement of ICL on selected items.

The Auditor General's Report states;

"*2.9.8 Secretary to the President, Dr. P B Jayasundera had sent a letter on 08 April 2020 to the Managing Director of IMF, Ms.Kristalina Georgieva requesting a Rapid Financing Instrument – RFI. A summary of the content of the said letter is as follows.*

a) *The Sri Lanka economy is experiencing the devastating impact of the novel coronavirus (covid -19) pandemic.*
b) *Lower tourist arrivals due to international travel bans have reduced economic activities in hotel, restaurant, trade, transport, and other sectors, with large impact on growth, employment, and income.*
c) *The disruption in global supply chain have affected our exports and imports, reducing our foreign exchange receipts and fiscal revenues.*
d) *The slowdown in major overseas employment markets for Sri Lankan workers and disruption to remit their funds have substantially lowered our remittance inflows.*

e) *Our preliminary estimates suggests that sharp decline in our economic growth, fiscal revenues, and foreign exchange receipts would create large and urgent fiscal and balance of payment needs.*

f) *Against this background, we would like to request emergency financing from the IMF under the Rapid Financing Instrument (RFI). At this stage, we would like to replace the current Extended Fund Facility (EFF) arrangement with RFI, but we are open to your suggestion.*

g) *We are also requesting additional support from other development partners, particularly Japan, the Peoples' Republic of China, the world Bank and Asian Development Bank (ADB)."*

Moreover, the Auditor General in the Audit Report produced marked as 'Z' has evaluated the three issues on which he was directed to report to this court. In his report, he has stated that it is not possible to determine whether a loss had been caused to the Central Bank. **Further, he has not specified any violations with regard to any of the matters that were referred to him by the court**.

Therefore, I am further of the opinion that the petitioners did not establish any violations of the laws by the respondents. Hence, it is not possible to hold that the respondents have violated the Fundamental Rights of the petitioners guaranteed by the Constitution as pleaded in the two petitions. A similar view was expressed in ***Wijesinghe v. Attorney General and Others*** **(1978-79-80) 1 SLR 102 at 106** where it was held;

> ***"Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights***. *Where a transgression of the law takes place, due to some corruption, negligence or error of judgment, I do not think a person can be allowed to come under Article 126 and allege that there has been a violation of constitutional guarantees. There may also be other instances where mistakes or wrongful acts are done in the course of proceedings for which ordinarily there are built-in safe-guards or adequate procedures for obtaining relief."*
>
> [emphasis added]

Time Bar Objection

As stated above, some of the respondents pleaded that the two applications were not filed within the period of one month stipulated in Article 126(2) of the Constitution.

Article 17 of the Constitution states;

> *"Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the* ***infringement*** *or* ***imminent infringement****, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter."*
>
> [emphasis added]

Further, Article 126 (1) and (2) of the Constitution states;

> *"(1) The Supreme Court shall have sole and executive jurisdiction to hear and determine any question relating to the* ***infringement*** *or* ***imminent infringement*** *by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.*
>
> (2) *Where any person alleges that any such fundamental right or language right relating to such person* ***has been infringed*** *or* ***is about to be infringement*** *by executive or administrative action, he may himself or by an attorney-at-law on his behalf,* ***within one month thereof****,* ***in accordance with such rules or court as may be in force****, apply to the Supreme Court by way of petition in writing addressed to such Court* ***praying for relief or redress*** *in respect of such infringement. Such application my be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges."*
>
> [emphasis added]

Moreover, Supreme Court Rule 44 states:

> *"44. (1) Where any person applies to the Supreme Court by a petition in writing, under and in terms of Article 126 (2) of the Constitution, for* ***relief or redress*** *in respect of an* ***infringement*** *or an* ***imminent infringement****, of any fundamental right or language right, by executive or administrative action, he shall –*
>
> (a) *set out in his petition a plain and concise statement of the facts and* ***circumstances relating to such right and the infringement or imminent infringement thereof****, including particulars of the executive or administrative action whereby such right has been, or is about to be, infringed; where more than one right has been, or is about to be, infringed, the* ***facts and circumstances relating to each such right and the infringement, or imminent infringement*** *thereof shall be clearly and distinctly set out. He shall, also refer to the specific provisions of the Constitution under which any such right is claimed."*
>
> [emphasis added]

A careful consideration of the two petitions show that the petitioners allege different infringements in each of those petitions, though some are identical. Further, both petitions do not specifically set out the dates on which each of the alleged infringements occurred. Thus, it is necessary to consider the averments in the two petitions to ascertain the alleged dates of the infringements in order to decide on the objection on time bar.

SC/FR Application No. 195/2022

Averments relating to alleged infringements **SC/FR Application No. 195/2022**

Paragraphs 15, 16, 22, 23, 36, 40, 45, 76 and 77 of the petition filed in the aforementioned application states;

> "*15. The Petitioners state that to upon promising to effect several tax reductions in "Vistas of Prosperity and Splendour", the Government of the Republic as*

directed by His Excellency the President caused the taxes payable by the general citizenry of the Republic to reduce.

16. Such reductions were detailed by the 2nd Respondent during the budget speech made thereby for the year 2021.

*A true copy of the **budget speech for the year 2021** made by the 2nd Respondent is annexed hereto marked as P4 and is pleaded as part and parcel hereof.*

….

…

High Levels of Inflation

*22. The Petitioners state that the citizenry of the Republic at present is facing unprecedent economic hardship, with extreme levels inflation causing the price essential goods and services to increase at extreme rates. In particular, the Petitioners state that as at **April 2022**, the price of essential goods had increased from the previous year in the following extents:*

(a) The price of Petrol had increased by 85%;

(b) The price of Diesel had increased by 69%;

(c) The price of a cylinder of Liquid Petroleum Gas had increased by 84%;

(d) The price of Turmeric had increased by 443%,

(e) The price of Bread had increased by 433%;

(f) The price of Rice had increased by 93%;

(g) The price of Dhal had increased by 171%

23. The Petitioners further state that since such article was published, the price of several and/or all of the aforementioned goods has further increased, to wit:

(b) *On the **27th of April 2022**, the price of Gas Cylinders was further increased, causing a 12.5kg cylinder of Liquid Petroleum Gas to cost Rs. 4,860/-;*

(c) *On the **19th of May 2022**, the price of a loaf of bread was increased by Rs. 30/-, to Rs. 170/*

(d) *On the **2nd of May 2022**, the Consumer Affairs Authority impose a Maximum Retail Price on certain varieties of rice, setting the maximum price at which a kilogram of "Red Nadu Rice", "Red and White Samba" and "Keen Samba" could be sold at Rs. 220/-, Rs. 230/, and Rs. 260/- respectively;*

(e) *On the **19th of April 2022**, the Ceylon Petroleum Corporation increased the price of Petrol (92 Octane) to Rs. 338 per liter*

True copies of article published in the Island Online dated 23rd May 2022. NewsFirst.lk dated 19th May 2022, NewsFirst.lk dated 3rd May 2022, and Outlook India dated 23rd May 2022 are annexed hereto marked as P6(a), P6(b), P6(c), and P6(d), respectively and are pleaded as part and parcel hereof.

...

...

*36. The Petitioners further state that the overall rate of inflation as measured by the National Consumer Price Index on a year on year basis is 33.8% in **April 2022**, which is the highest recorded in the history of the Republic, and the South Asian Region.*

37. However, the Petitioners state that since 2019, the foreign currency reserves available to the Republic were intentionally depleted by the 28th Respondent, to wit, the value of the usable Foreign Exchange reserves maintained by the Republic:

(a) As at February 2022 amounted to USD 2,300,000,000/-;
(b) As at March 2022 amounted to USD 1,930,000,000/-;
(c) As at May 2022 amounted to a sum below USD 50,000,000/-;"

....

…

40. *Furthermore, the Petitioners state that at the **COPE Committee Meeting** held on **25.05.2022**, Dr. Nandalal Weerasinghe, the Governor of the Central Bank of Sri Lanka and member of the 28th Respondent stated that the Republic does not possess any and/ or sufficient liquid foreign currency reserves to pay its foreign debts or to purchase necessary imported goods, and the assistance of the International Monetary Fund and foreign nations is required to assist the Republic in this regard (vide P20(a) and P20(b) below).*

45. *The Petitioners state that the views expressed by the Hon. 2B Respondent have further been reiterated by the officials of the International Monetary Fund (hereinafter referred to as the "IMF") who have been liaising with the Republic for the purpose of alleviating the present economic crisis faced thereby. Specifically, the Managing Director of the IMF, Mrs. Kristalina Georgieva when speaking to NDTV stated as follows:*

*"It is breaking my heart to watch the pictures of what is happening in the country that was once quite prosperous. **It is a result of mismanagement** and therefore the most important thing to be done is to put the country back on a sound microeconomic footing"*

A true copy of the article published on the Daily FT on 27.05.2022 is annexed hereto marked as P15, and is pleaded as part and parcel hereof."

….

….

INVOCATION OF THE JURISDICTION OF YOUR LORDSHIPS' COURT

76. *In the circumstances aforesaid, the Petitioners state that the actions and decision of His Excellency the President, and/or the 2nd to 27th Respondents, and/or the 28th to the 32nd Respondents and/or the 33rd Respondent (in his representative capacity) and/or any one or more of them in mismanaging the economy of the Republic in the manner morefully set out above, and failing to abide by the mandatory provisions of the Monetary Law Act has violated and /or imminently*

violates and/or continuously violates the Fundamental Right to Equality and Equal Protection of the Law guaranteed to the Petitioner and to the citizens of the Republic under Article 12(1) of the Constitution and further violates the Fundamental Right to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise guaranteed to the citizens of the Republic under Article 14(1)(g) of the Constitution, in as much as:

(a) The mismanagement of the economy of the Republic and the acts of the 2nd, 2A, 29th to 32nd Respondents, and 38th Respondents set out above have caused high levels of inflation to arise, preventing and/ or hindering the performance of lawful trade and occupation inasmuch as the citizens of the Republic may not be able to afford the essential raw materials used for such business/trade;

(b) The scarcity of essential imported items including petrol and diesel has prevented and/or hindered the ability of citizens of the Republic to attend to their business and/or trade, inasmuch as the same are prevented and/ or hindered from travelling thereto,

(c) The sharp rise in the cost of living caused by the high levels of inflation referred to above has rendered several businesses commercially unviable, and/or have caused the said businesses/trades to be rendered insolvent and/or approach insolvency,

(d) The citizens of the Republic are vulnerable to succumbing to illness and/ or are denied access to effective healthcare due and owing the inability of the Republic to import vital medicines which are used to healthcare professionals and hospitals when treating patients;

(e) The 28th, 29th, 30th, 31st and 32nd Respondents and/ or any one or more of them have failed and / or neglected to abide by the mandatory provisions contained in Section 66 of the Monetary Law Act, and have by willful default and/or by misconduct have caused loss and damage to the Central Bank of Sri Lanka and consequently to the citizens at large, by failing to maintain any exchange

arrangements as are consistent with the underlying trends in the country, by artificially causing the exchange rate of the rupee to be held at arbitrary values;

(f) The 28th, 29th, 30th, 31st and 32nd Respondents and/or any one or more of them have failed and/or neglected to abide by the mandatory provisions contained in Section 68 of the Monetary Law Act, and have by willful default and/or by misconduct have caused loss and damage to the Central Bank of Sri Lanka and consequently to the citizens at large, by settling and /or failing to prevent the settlement of the International Sovereign Bond payment due in January 2022 notwithstanding the lack of foreign exchange reserves with the 28th Respondent;

(g) The 28th Respondent has failed to take any necessary steps to recover any loss and/or damage suffered by the Central Bank of Sri Lanka consequent to the decisions made by the 29th, 30th, 31st and 32nd Respondent, and has therefore allowed any losses sustained thereby to remain;

(h) His Excellency the President, and the 1st to 27th Respondents and/or any one or more of them have acted arbitrarily in reducing the tax revenue available to the Republic by reducing the levels of taxation imposed on the citizens;

(i) The lack of essential imports, high levels of inflation, and depletion of foreign currency reserves was caused by the arbitrary and misconceived acts of the 1st to 32nd Respondents and the 38th Respondent and/or any one or more of them;

(j) His Excellency the President, and the 1st to 27th Respondents and the 38th Respondent and/or any one or more of them have taken into account irrelevant considerations and failed to take into account relevant considerations inter alia by effecting reductions in tax on the sole premise of the election promise made by His Excellency the President,

(k) His Excellency the President, and the 1st to 27th Respondents, and the 38th Respondent and/or any one or more of them are in beach of the principles of natural justice and fairness;

(l) The said the 1st to 27th Respondents and the 38th Respondent and / or any one or more of them have acted in breach of public trust and confidence reposed in them.

77. In all the aforesaid circumstances, the Petitioner states that the conduct of His Excellency the President, and the 1st to 32nd Respondents and any one or more of them are thus and otherwise ultra vires, illegal, irrational, unjustifiable, ad hoc, arbitrary and capricious. The aforesaid conduct offends the principles of natural justice, rule of law, transparency, and good governance."

Prayer to the petition in SC/FR/Application No. 195/2022

"WHEREFORE THE PETITIONERS PLEAD THAT YOUR LORDSHIPS BE PLEASED TO:

(a) *Grant Leave to Proceed with this Application;*

(b) ***Declare*** *that the Fundamental Right guaranteed to the petitioners under Article 12(1) of the Constitution* ***is being imminently infringed*** *and/or* ***has been infringed*** *and/or* ***is continuously being infringed*** *by the 1st to 32nd Respondents (save and except for the 2B Respondent) and/or the 33rd Respondent (in his representative capacity) and/or any one or more of the Respondents;*

(c) ***Declare*** *that the Fundamental Right guaranteed to the Petitioner under Article 14(1)(g) of the Constitution* ***is being imminently infringed*** *and/or* ***has been infringed*** *and/or* ***is continuously being infringed*** *by the 1st to 32nd Respondents (save and except for the 2B Respondent) and/or the 33rd Respondent (in his representative capacity and/or any one or more of the Respondents;*

(d) ***Declare*** *that the Fundamental Right guaranteed to the Petitioner under Article 14(1)(g) of the Constitution* ***is being imminently infringed*** *and/or* ***has been infringed***

and/or ***is continuously being infringed*** *by the 28th, 29th, 31st and 32nd Respondent by causing the Republic to settle the International Sovereign Bond in January 2022 as evinced by P21(a);*

(e) ***Make Order*** *directing the 28th Respondent to recover and / or take steps to recover all losses and damages occasioned onto the Central Bank of Sri Lanka by officers of the 28th Respondent and/or former officers of the Central Bank of Sri Lanka, including the 29th to the 32nd Respondents and/or any one or more of them,* ***consequent to the decision made to set the value of the Sri Lankan Rupee at a value of and / or around Rs. 203/-, which may be uncovered by an audit prayed for hereinunder and/or otherwise;***

(f) ***Make Order*** *directing the 28th Respondent to recover all losses and damages occasioned onto the Central Bank of Sri Lanka by* ***officers of the 28th Respondent and / or former officers of the Central Bank of Sri Lanka, including the 29th to the 32nd Respondents*** *and/or any one or more of them, consequent to the decision made to settle the payment referred to in P21(a), which may be uncovered by an audit prayed for hereinunder and/or otherwise;*

(g) *Grant an* ***Interim Order*** *directing, the 35th to 37th Respondents to expeditiously look into the matters contained in the Application (P22) and submit its observations to Your Lordships' Court within 3 months, or such other time which Your Lordships' Court may deem reasonable;*

(h) *Grant an* ***Interim Order*** *directing the 34th respondent to conduct an audit into the affairs of the 28th Respondent, and determine the loss caused to the Central Bark of Sri Lanka by*

i *the decision made to set the value of the Sri Lankan Rupee at a value of and/or around Rs. 203/- in a manner contrary to Section 66 of the Monetary Law Act, and further determine;*

ii *the delay in obtaining facilities from the IMF by the Republic consequent to the decisions made by the 29th Respondent."*

(i) *Grant an **Interim Order** preventing the 29th and/or the 30th and / or the 31st and / or the 32nd Respondents from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships' Court;*

(j) *Grant an **Interim Order** preventing the 2nd and/or the 2A and / or the 38th Respondents from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships' Court;*

(k) *Grant an **Interim Order** directing the 28th Respondent to produce to Your Lordships Court the documents made reference to by Mr. Jayawardena PC and Dr. Ranee Jayamaha at the Committee On Public Enterprise meeting held on 25.05.2022 wherein it was suggested that the Republic should seek relief and /or other financial assistance from the International Monetary Fund;*

(l) *Grant an **Interim Order** directing the 28th Respondent to produce to Your Lordships' Court the documents made reference to by Mr. Jayawardena PC and Dr. Ranee Jayamaha at the Committee On Public Enterprise meeting held on 25.05.2022 wherein it is recorded that the appointed members of the 28th Respondent objected to and/ or otherwise disagreed with the artificial maintenance exchange rate of the Sri Lanka Rupee at and/or at a level below Rs. 203/-;*

(m) *Grant an **Interim Order** directing the 39th Respondent to produce to Your Lordships' Court, the minutes of the Committee On Public Enterprise meeting held on 25.05.2022;*

*(mm) Grant an **Interim Order** preventing the 2nd Respondent and/or the 2A Respondent and / or the 32A Respondent, and/ or any one or more of the 29th to the 32nd Respondents and / or the 38th Respondent from leaving the Democratic Socialist Republic of Sri Lanka without obtaining the prior permission of Your Lordships Court;*

*(mmm) Grant an **Interim Order** preventing the 32A Respondent from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships Court:*

(n) *Costs;*

(o) Such other and further relief as Your Lordships Court shall seem meet."

[emphasis added]

SC/FR Application No. 212/2022

***Averments relating to the alleged infringements in* SC/FR Application No. 212/2022**

The following averments in the petition of the said application stated;

*"8. The Petitioners state that the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents **made a series of irrational, arbitrary, patently illegal, wrongful decisions, in complete dereliction of their statutory duties and fiduciary responsibility, for collateral and extraneous purposes, during the years 2019 to 2022**, which has resulted in the Petitioners and the public of Sri Lanka being denied their right to equality, equal protection of the law and their right to life as guaranteed by the Constitution of Sri Lanka.*

*9. (a) The Petitioners state that the aforesaid series of irrational, arbitrary, patently illegal, and wrongful acts on the part of the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, has **resulted in catastrophic long-term and short-term ramifications to the economy**, and **caused the country to default on the repayment of foreign debts**, for the first time in its history, and has relegated Sri Lanka to a state of bankruptcy / insolvency, as will be morefully elaborated in this Application.*

....

....

10. (a)The Petitioners state that, as morefully set out in this Application, the said actions / inaction and gross mismanagement of the economy by the 1(b)

Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, have resulted in an unprecedented economic crisis driven by debt unsustainability, which has garnered the attention of the world at large

(b) The Petitioners state that the International Monetary Fund (hereinafter referred to as the "IMF") by its IMF-Sri Lanka Staff Report for the 2021 Article IV Consultation dated 10/02/2022, categorized, for the first time the sovereign debt of Sri Lanka as "unsustainable" thereby bringing into effect a cascade of inimical repercussions to the economy of Sri Lanka in general and the external debt portfolio in particular, and thereby leading the State to issue a Notice of Default dated 12/04/2022 (P-2(a)), whereby the State of Sri Lanka informed all its creditors that all foreign debt repayment would be suspended, which debt repayments included the following categories of debt:

b. All outstanding series of bonds issued in international capital markets

c. Certain bilateral (government to government) credits

d. All foreign currency denominated loan agreements or credit facilities with commercial banks or institutional lenders, including those owned by foreign governments

e. All amounts payable following a call during the said interim period upon a guarantee issued in respect of a debt of a third party.

A true copy of the IMF Country Report No.22/91 (2021 Article IV consultation Press Release: Staff Report and Statement by the Executive Director for Sri Lanka) is annexed to the original Petition filed in this Application dated 16 June 2022, marked as "P-3" and is pleaded as part and parcel hereof.

11. The Petitioner states that thereafter, ***on or around the 19th of May 2022, Sri Lanka defaulted on loans that fell due*** *and has now been downgraded by rating agencies as a defaulting nation, as will be morefully elaborated on in this Application.*

12. The Petitioners state that the Petitioners are invoking the fundamental rights jurisdiction of Your Lordships' Court on the basis that the 1(b) Respondent and

the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents by a series of actions, commencing in 2019 and continuing to date, (as morefully set out hereinafter) including acts that have necessitated the defaulting of Sovereign debt, have infringed and/or violates and continue to infringe and/or violate the fundamental rights of the Petitioners and of all citizens of Sri Lanka, as made abundantly clear at the recent meeting of the Committee on Public Enterprises (COPE) on or about 25% May 2020, where it transpired that the actions of the said Respondents in respect of inter alia, the RFI facility (Rapid Financing Instrument) of the IME and the management of the rupee, had engendered the present crisis, as will be morefully elaborated in this Application.

...

...

13. *The Petitioners state that such actions and/or inactions of the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, are broadly categorized as follows:*

    (i) ***the illegal, arbitrary and unreasonable abolition, removal and/or reduction of taxes effected in the year 2019*** *and the consequent reduction in government revenue,*

    (ii) ***the refusal to change*** *the aforesaid illegal, irrational and arbitrary decisions to reduce taxes despite the consequent downgrading of Sri Lanka's credit rating and the emergence of the COVID-19 Pandemic,*

    (iii) ***the failures and/or omissions to take remedial measures subsequent to rating downgrade caused****, inter alia, by the illegal, arbitrary and unlawful actions of the 2nd, 3rd, 6th, 7th, 9th and 10th respondents,*

    (iv) ***the refusal and failure*** *of the 2nd, 3rd, 6th, 7th, 9th and 10th respondents to ensure conditions were met in a manner that would permit Sri Lanka to avail itself of the sum of money agreed to be given to Sri Lanka by the* ***IMF in terms of the Extended Fund Facility*** *agreement as set out hereinafter,*

(v) ***the failure to obtain available aid*** *to combat the economic hardships faced as a consequence of COVID-19, especially in the face of a lack of government revenue,*

(vi) ***the failure to act in terms of the Monetary Law of Sri Lanka****, to maintain international reserves and the international stability of the rupee,*

(vii) ***the failure to devalue the Sri Lankan rupee in a timely, orderly and appropriate manner****, despite widespread calls and demands to do so,*

(viii) ***the failure and / or omissions to appropriately devalue the rupee*** *which resulted in fluctuations in worker remittances, and subsequently, the country's foreign reserves and Sri Lanka's balance of payment,*

(ix) ***the decision to continue to service Sovereign debt without any restructuring****, despite the futility and grievous prejudice in doing so,*

(x) ***the continued refusal to seek the assistance of the IMF****, despite widespread calls and demands to do so,*

(xi) *the subsequent admission by the former President of the Republic that the aforementioned refusal to seek the assistance of the IMF was wrong and misconceived, and*

(xii) *the unreasonable, arbitrary actions and / or omissions which resulted in a default of the country's foreign debt.*

16. The Petitioners state that ***in or around November/December 2019, the Commissioner General of Inland Revenue issued a number of notices on the instructions of the 2nd Respondent which sought to reduce a number of taxes*** *[hereinafter referred to as 'tax revisions'] by inter alia:*

a. Removing/abolishing the Taxes set out by Parliament under the Nation Building Tax Act, No. 9 of 2009 as last amended by Act, No. 20 of 2019

b. *Removing/ abolishing the Taxes set out Parliament under the Economic Service Charge Act, No. 13 of 2006*
c. *Removing/Abolishing the Debt Repayment Levy*
d. *Reducing the threshold for payment for Value Added Tax from 12%- 8%*
e. *Increasing the VAT registration threshold from LKR 12,000,000 million- LKR 300,000,000*
f. *Increasing the rate of Taxable Income on Personal Income Tax from LKR 500,000 to LKR 3,000,000.00*
g. *Reducing the Top Marginal Tax Rate on Personal Income tax from 245-18%*
h. *Abolishing the mandatory withholding tax for most employees*
i. *Reducing the Standard Corporate Income Tax from 28%-24%"*

...

...

a) *"**Notice dated 18th February, 2020** issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance on the 31.2020- Implementation of proposed changes to Inland Revenue Act No. 24 of 2017*

(Pending Parliamentary Approval)

b) *Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Implementation of New Tax Proposals on Value Added Tax and Nation Building Tax.*

c)Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Removal of Economic Service Charge (ESC)

*d)**Notice dated 5th February 2020** issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Instruction on Withholding Tax (WHT) - (Pending formal amendment to the Inland Revenue Act 24 of 2017)*

e) *Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Guideline for Deduction of PAYE Tax, Period from*

01.01.2020 to 31.03.2020, (subject to formal amendment to the Inland Revenue Act, No. 24 of 2017, to be passed in Parliament).

f) *Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance-Change of Nation Building Tax (NBI), pending parliamentary approval for amendment to the Nation Building Tax Act, No. 9 of 2009.*

g) *Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Exemption of Value Added Tax (VAT) on supply of Residential Accommodation*

h) ***Notice dated 20th of January, 2020*** *issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Removal of Debt Repayment Levy (DRL) pending parliamentary approval for amendment to the Finance Act, No. 35 of 2018."*

(c) "The revenue from VAT declined from Rs. 443,877 million in 2019 to 233,786 million in 2019, which is a reduction of 47.3%."

....

...

24. "The Petitioners state that the said notices issued by the Commissioner General of Inland Revenue on the instructions of the Executive was patently illegal at the time it was made, as it sought to amend an ***Act of Parliament by administrative action,*** *and reduced the revenue of the State in a manner contrary to that set out in Article 148 of the Constitution and to thereby remove and reduce the very basic constitutional protections by which Parliament has been given full control over Public Finance."*

...

...

"The downgrading of Sri Lanka's credit ratings as a consequence of, inter alia, the tax revisions made in 2019, the refusal to change these taxes and the emergence of the Covid-19 Pandemic

39. The Petitioners state that as a result of, inter alia, the aforementioned tax revisions implemented by the 2nd Respondent, Sri Lanka began to experience a ***sharp decline in its credit ratings in the latter portion of 2019 onwards****, with its Long- Term Foreign-Currency Issuer Default Rating (IDR) stipulated by Fitch Rating (hereinafter referred to as 'Fitch') falling to 'C' in the year 2022 from B1. The Petitioners state that as repeatedly stated by Fitch, the said downgrading was due to inter alia, "Sri Lanka's worsening external liquidity position."*

A true copy of the Fitch Ratings reports for Sri Lanka dated ***25th October 2019, 2nd July 2021*** *and* ***4th January 2022*** *and the Fitch Rating Action Commentary dated* ***13th April 2022****, is annexed to the original Petition filed in this Application dated 16th June 2022 marked P-14(a), P14(b), P14 (c) and P14(d), and are pleaded as part and parcel hereof."*

....

...

54. "The Petitioner states that subsequent to a public outcry against the mishandling of the economy, the ***3rd Respondent resigned from his post as Finance Minister in April 2022****. No members of the 9th Respondent have however resigned or taken responsibility for their complicity in the actions that resulted in a serious downturn of the economy of Sri Lanka. In these circumstances the Petitioners state that it is necessary to ascertain whether the Monetary Board had fulfilled their duties in terms of section 65, 66 and 68 of the Monetary Law.*

The failure by the 3rd, 7th, 9th and 10th Respondents to devalue the Sri Lankan Rupee in a timely and appropriate manner, despite widespread calls and demands to do so."

…

…

56. "The Petitioners state that the ***rupee to USD exchange rate depreciated sharply from Rs 185 in September 2020, to approximately Rs.200 by May 2021. Since May, it***

remained relatively stable until it depreciated to approximately Rs. 256 in March 2022*."*

...

...

97. "The Petitioners state that the 1(b) Respondent, as the Head of the Executive, as well as any one or more of the Respondents abovenamed, have, most conspicuously, failed to manage the critical fiscal needs of the country, and in doing so, have grievously violated the fundamental rights of the public, as will be morefully elaborated hereinbelow."

....

...

98. "The Petitioners state that the actions and / or failures and/ or omissions on the part of the 1(b) Respondent, as well as the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, constituted grievous mismanagement of the economy, and which were a series of illegal, arbitrary and unreasonable actions and inactions, which necessitated the present decision to default on repayment of foreign loans. The Petitioners further state that in the totality of the foregoing, it is patently clear that the fundamental rights guaranteed to the citizens of Sri Lanka, under Articles 12 (1), 14(1)(g) and 14A have been violated most grievously."

Prayer to the petition in SC/FR/Application No. 212/2022

"*Wherefore the Petitioners pray that Your Lordships' Court be pleased to:*

1. *Grant the petitioners, Leave to Proceed;*

2. ***Declare*** *that the Fundamental Rights of the Petitioners and / or the citizens of Sri Lanka to Equality and Equal Protection of the Law, as guaranteed by Article 12 (1), 14(1)(g) and 14A of the Constitution, have been infringed by the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, and/or their servants or their agents, and that there* ***is a continuing violation*** *of their said rights;*

3. ***Declare*** *that the Fundamental Rights of the Petitioners and/ or the citizens of Sri Lanka to Equality and Equal Protection of the Law, as guaranteed by Articles 12(1), 14(1)(g) and 14A of the Constitution are in* ***imminent danger of infringement*** *by the actions and/or* ***inactions*** *of the State including the actions/ inactions of the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents;*

4. *Grant and issue the following* ***interim reliefs/orders****:*

    a. ***Make Order*** *in terms of Article 126(4) of the Constitution, and call for and examine the following record, including, but not limited to:*

        i. *All records pertaining to communications and recommendations received by and / or given to the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents by the Central Bank;*

        ii. *All communications between the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents in respect of the decisions taken with regard to the matters impugned in this Application;*

        iii. *The fiscal records, all reports published and or given to the 2nd, 3rd and /or 9th respondents of and by the 9th Respondent Board under and in terms of Sections 64 and 68 of the Monetary Law Act, No. 37 of 1974;*

        iv. *Relevant Cabinet decisions in respect of the Ministry of Finance and the 2nd and 3rd Respondents, as well as decisions and Regulations by the 2nd and 3rd Respondents with regard to the matters impugned in this Application;*

        v. *A transcript of the proceedings of the Committee on Public Enterprises (COPE) held on or about 25th May 2022.*

    b. ***Direct*** *the appointment of a committee under the auspices of Your Lordships' Court to investigate the causes, steps taken by the aforementioned Respondents, and compile a report on the financial irregularities and mismanagement of the economy in relation to the specific instances enunciated in the present Application;*

c. *Restrain the 2nd, 3rd, 6th, 7th and 10th Respondents, from overseas travel without the prior approval of the Supreme Court, pending the investigation by the aforementioned Committee;*

5. *Upon the submission of a report by the said Committee (appointed under the auspices of Your Lordships' Court) to direct the Hon. Attorney General or any other appropriate authorities or officers of the State to consider* ***initiation of investigations and prosecutions*** *against any persons (as necessary) based on the findings from the said report.*

6. ***Make such further and other just and equitable orders as Your Lordship's Court shall seem fit in the circumstances of this Application, under and in terms of Article 126(4) of the Constitution****;*

7. *Grant Costs;*

8. ***Grant further and such other relief as Your Lordships Court may seem meet****."*

Facts relevant to the time bar objection

As stated above, after the former President assumed duties as the President of the Republic in November 2019, the government reduced the taxes payable by the people of the country. The petitioners stated that the former President, together with the 2nd respondent, reduced the taxes for the sole purpose of delivering the election promises made. Hence, it was submitted that the decision to reduce taxes was purely politically motivated. Further, due to the said reduction in taxation, the Republic suffered enormous and unprecedented economic damage.

The petitioners further stated that at the time the instant application was filed, the people of the Republic were facing unprecedented economic hardships, with extreme levels of inflation causing the price of essential goods and services to increase at extreme rates. Thus, people were unable to buy basic commodities. Moreover, because of the high levels of inflation, a large portion of the public staged protests throughout the country.

Furthermore, the severity of the Republic's **intentional depletion of foreign currency reserves under the watch of the 28th to the 32nd respondents, the 2nd and the 2A respondents and/or**

one or more of them is evident by default in servicing foreign debt. Accordingly, the petitioners stated that the aforementioned circumstances effecting the economic situation can be attributed to the wilful mismanagement of the economy by the 38th, 2nd, 2A, and the 29th to the 32nd respondents, who were in control of the 28th respondent at the time material to the instant application.

Dates of filling the Fundamental Rights Applications

The SC/FR Application No. 195/2022 was filed in the Supreme Court on the 3rd of June, 2022 and the amended petition was filed on the 18th of July, 2022. Further, the SC/FR Application No. 212/2022 was filed in the Supreme Court on the 17th of June, 2022. Thereafter, an amended petition was filed on the 15th of July, 2022.

As stated above, the petitioners in their petitions stated that the taxes were reduced with effect from November, 2019 and the tax cuts were informed to the general public by the Commissioner General of the Inland Revenue Department by public notice in the same month. Further, the petitioners alleged that their Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution were infringed by the respondents reducing taxes when the financial status of the country was not stable.

Moreover, it was stated that as soon as the tax cuts were introduced, the rating agencies downgraded Sri Lanka on the basis that the country would not be able to honour its liabilities to the creditors. Further, at the Committee on Public Enterprises (COPE) meeting held on or about the 25th of May, 2022, it transpired that the actions of the said respondents, *inter alia,* the RFI facility (Rapid Financing Instrument) of the IMF and the management of the rupee, had led to the present crisis.

The petitioners stated that the former President and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents (in SC/FR/212/2022) made a series of irrational, arbitrary, patently illegal and wrongful decisions in complete dereliction of their statutory duties and fiduciary responsibility, for collateral and extraneous purposes, during the years 2019 to 2022, which has resulted in the

petitioners and the public being denied of their right to equality, equal protection of the law, and their right to life as guaranteed by the Constitution.

Moreover, the petitioners stated that the aforementioned respondents are directly responsible, *inter alia*, for the unsustainability of Sri Lanka's foreign debt, its default on foreign loan repayments, and the current state of the economy of Sri Lanka at the time of filing the two applications, and must be held accountable for the illegal, arbitrary, and unreasonable acts and/or omissions that culminated in the above.

Further, the petitioners stated that they became aware of the real economic situation of the country only after the Finance Minister, 2nd respondent, made a statement in Parliament on the 4th of May, 2022 and when the facts were revealed at the COPE meeting on the 25th of May, 2022.

Thus, it was stated that the respondents have violated the Fundamental Rights guaranteed to the citizens of Sri Lanka under Articles 12(1) and 14(1)(g) of the Constitution.

The learned President's Counsel for the 2nd respondent and 2A respondent in SC/FR/195/22 (and 3rd respondent in SC/FR/212/2022) submitted that the 2nd respondent ceased to hold office as the Minister of Finance on the 8th of July, 2021 and the 2A respondent ceased to hold office as the Minister of Finance on the 4th of April, 2022. Thus, as the 2nd respondent and the 2A respondent resigned from their portfolios of Minister of Finance more than one month prior to the filing of the instant applications, the applications are out of time and ought to be dismissed in *limine* in terms of Article 126(2) of the Constitution. It was also submitted that, in any event, the aforesaid alleged events took place prior to one month from the date of filing the two applications in this court.

The learned Additional Solicitor General submitted the following table, which contains significant dates and events involved in the instant applications based on the petitions and the Auditor General's report furnished to court.

Date	Event
2016.06.03	Executive Board of the International Monetary Fund (IMF) approved a 36-month extended arrangement under the Extended Fund Facility with Sri Lanka for an amount equivalent to USD 1.5 Billion to support economic reform.
2019.10.31	Finance (Amendment) Act No. 21 of 2019 (abolished carbon tax)
2019.11.01	**Start of period audited by Auditor General in Z** Date on which IMF approved release of seventh and final instalment under the Extended Fund Facility approved by the IMF on 2016.06.03.
2019.11.18	1(b)/32A respondent was elected and took oaths as President of the Republic.
2019.11.20	Mahinda Rajapakse (2nd respondent) appointed as the Prime Minister and Minister of Finance.
2019.11.26	By note to Cabinet the President (1(b)/32A respondent) stated that at the recently concluded Presidential election he had promised simplification of taxes and recommended implementation of certain measure revising taxes pending Parliamentary approval.
2019.11.27	Cabinet approval granted for priority measures mentioned in note to Cabinet by President.

November-January 2019	Commissioner General of Inland Revenue issued notices to taxpayers on instructions of the 2nd respondent which sought to reduce number of taxes (tax revisions).
2020	Decline of Government revenue, as per the petitioners due to effect of tax revisions and COVID 19 pandemic.
2020.04.08	Rapid Financing Instrument requested by letter written by Secretary to the President (38th respondent in SC/FR/195/2022) to the IMF
2020.08.05	General Election
2020.10.12	**Finance (Amendment) Act No. 2 of 2020** **Nation Building Tax Amendment No. 3 of 2020** **Economic Service Charge Amendment Act No. 4 of 2020**
2021.04.09	**Speaker informs Parliament regarding Supreme Court Special Determination on the Inland Revenue (Amendment) Bill 2021.**
2021.05.13	**Value Added Tax Amendment Act No. 9 of 2021** **Inland Revenue Amendment Act No. 10 of 2021**
2021.12.10	**2A/3rd respondent states in Parliament that Sri Lanka should not seek the support of the IMF.**
May, 2021	Rupee depreciates to Rs. 200 against the dollar from Rs. 185 in September 2020.
2021.09.06	Fixing of an upper limit of the exchange rate.

2021	Gross official reserves fallen to USD 3.1 Billion from USD 5.6 Billion in 2020 and USD 7.6 Billion in 2019.
2022.02.10	**IMF stated that the sovereign debt of SL is unsustainable.**
March, 2022	**Rupee depreciates to Rs. 256 against the dollar from Rs. 200 in May 2021**
2022.03.18	End of period audited by Auditor General in Z1. Date on which former President 1(b)/32A respondent decides to officially begin talks with the IMF according to Monetary Board paper MB/DG(S)/9/30/2022.
2022.04.12	**Sri Lanka issued a Notice of Default informing all creditors that all foreign debt repayments would be suspended.**
2022.04.07	2(b)/4th respondent states in Parliament that the country should have sought IMF assistance long ago.
2022.05.19	Sri Lanka defaulted on loans that fell due.
2022.06.03	Petition filed by the petitioners (SC/FR/195/2022)
2022.06.16	Petition filed by the petitioners (SC/FR/212/2022)
2022.07.15	Amended petition of the petitioners (SC/FR/212/2022)
2022.07.18	Amended petition of the petitioners (SC/FR/195/2022)

[emphasis added]

Further, the Auditor General's report produced the names of the Ministers of Finance, Secretary to the President, Governors of the Central Bank, and Members of the Monetary Board holding office during the period applicable to the Audit Report filed in court, as Table No." 33. It stated;

Table No. 33 – Names of the Finance Ministers and officers

Name	**Position**	**Period**
Mr. Mahinda Rajapaksa	Minister of Finance	2019.11.22 to **2021.07.08**
Mr. Basil Rajapaksa	Minister of Finance	2021.07.08 to **2022.04.04**
M.U.M. Ali Sabry (PC)	Minister of Finance	2022.04.04 to 2022.05.09
Dr. P.B Jayasundara	Secretary to the President	2019.11.19 to **2022.01.14**
Mr. Gamini Sedara Senarath	Secretary to the President	2022.01.19 to 2022,07 21
Dr. Indrajit Coomaraswamy	Governor	2016.07.02 to 2019.12.20
Prof. W D Lakshman	Governor	2019.11.19 to 2022.01.14
Mr. Ajith Nivard Cabraal	Governor	2021.09.15 to **2022.04.04**
Dr. P Nandalal Weerasinghe	Governor	2022.04.08 up to now
Dr. RHS Samaratunga	Official Member- Secretary to the Ministry of Finance	2018.12.31 to 2019.11.19
Mr. S R Attygalle	Official Member- Secretary to the Ministry of Finance	2020.11.20 to **2022.04.07**
Mr.K M M Siriwardena	Official Member- Secretary to the Ministry of Finance	2022.04.08 up to now
Mrs. M Ramanathan	Appointed Member	2013.07.18 to 2019.07.17
Mr. CPR Perera	Appointed Member	2015.06.26 to 2020.01.20
Mr. A N Fonseka	Appointed Member	2016.07.27 to 2020.05.31 2022.07.27 up to now
Ms. Dushni Weerakoon	Appointed Member	2019.07.29 to 2020.05.31
Sanjeewa Jayawardena (PC)	Appointed Member	2020.02.26 up to now
Dr. Ranee Jayamaha	Appointed Member	2020.02.29 up to now
Mr. Samantha Kumarasinghe	Appointed Member	2020.02.29 to **2022.03.31**

(a) the introduction of tax cuts and the failure to reverse them

According to the Auditor General's Report filed in court, the downgrading of the sovereign credit ratings of Sri Lanka by the credit rating agencies commenced on the 18th of December, 2019 and thereafter continued to downgrade the sovereign credit rating of Sri Lanka.

In terms of Article 126(2) of the Constitution, where a person alleges that his Fundamental Rights have been infringed or are about to be infringed by an executive or administrative action, he must invoke the jurisdiction of the Supreme Court **within one month** from such infringement or such an application may be made to court within one month of the petitioner becoming aware of the act of the infringement alleged by him.

A similar view was expressed in ***Siriwardena v. Brigadier J. Rodrigo*** **(1986) 1 SLR 384 at 387** where it was held;

> *"The period of one month specified in Sub-Article (2) of Article 126 of the Constitution would ordinarily begin to run from the very date the executive or administrative act, which is said to constitute the infringement, or the imminent infringement as the case may be, of the Fundamental Right relied on, was in fact committed. Where, however, a petitioner establishes that he became aware of such infringement, or the imminent infringement, not on the very day the act complained of was so committed, but only subsequently on a later date, then, in such a case,* ***the said period of one month will be computed only from the date on which such petitioner did in fact become aware of such infringement*** *and was in a position to take effective steps to come before this Court …"*
>
> [emphasis added]

It is paramount to adhere to the time limit stipulated in the aforesaid Article because the more time that passes after an event occurs, the more difficult it is to ascertain the truth and come to a clear and correct decision about what did and did not happen. Moreover, documents or other essential evidence might not be available with certain parties to an application. Further, people's memories of events fade away, and therefore, the court will not be able to deliver a 'just and equitable' judgment in the case.

However, our courts have entertained applications filed after 30 days from the alleged violation if there is material to satisfy court that there was an inability to invoke the jurisdiction of the Supreme Court due to reasons beyond the control of the person invoking the jurisdiction court and it is 'just and equitable' to entertain such an application due to the facts and circumstances of

the application. This view was expressed in ***Namasivayam v. Gunawardena*** **(1989) 1 SLR 394** where the court held;

> *"The one month prescribed by Article 126(2) for making an application for relief by a person for infraction of his fundamental right applies to the case of the applicant having free access to his lawyer and to the Supreme Court. Hence, if the Petitioner was obstructed by reason of his detention from having access to his lawyer and to the Supreme Court and thus prevented from making his application within the one month of the infraction complained of his delayed application for relief under Article 126 should not be ruled out, if he made his application as soon as he was free from that constraint to make the application."*

On the contrary, it is not possible to exercise such discretion in litigation other than in a Fundamental Rights Application, as such matters are not decided on a 'just and equitable' basis.

In Fundamental Rights Applications, the court is required to consider not only the rights of the petitioner but also the rights of the respondent when making an order granting 'just and equitable' relief. This is particularly difficult if the facts are not straightforward and are interwoven with each other.

Further, when the alleged infringement was published in notice boards, newspapers, regulations, circulations, etc., the petitioners cannot plead ignorance of such publications. The sole purpose of such publications is to inform the general public of an administrative decision. Hence, the computation of time should be considered from the date of such publications.

Furthermore, there was a significant disclosure of information by the government on the state of the economy. In fact, the Parliament was informed by the Minister of Finance on the 10th of December, 2021 that Sri Lanka will not be seeking the assistance of the IMF. Moreover, section 35 of the Monetary Law Act provides for the publication of the annual report of the Central Bank within four months after the end of each financial year. Thus, this information was made available to the public.

Further, according to the petitioners, the rating agencies downgraded Sri Lanka immediately after the tax cuts were announced. Hence, according to the petitioners own showing, the alleged

infringement took place on the day that the Commissioner General of the Inland Revenue published the public notices informing the tax cuts in the years 2019 and 2020.

As stated earlier, in this judgment. the tax reductions referred to in the two petitions were implemented pursuant to a **policy decision taken by the Cabinet of Ministers**, which, in turn, has been enacted into law in terms of the Inland Revenue Act of 2021, the Value Added Tax Act of 2021, the Economic Service Charge Act of 2021 and the Nation Building Tax Act of 2021, etc., by Parliament, by virtue of the power vested in Parliament in terms of Chapters X and XVII of the Constitution. Moreover, the petitioners stated that, in this regard, it is pertinent to note that some of the Bills relating to fiscal legislation were challenged in the Supreme Court.

However, the petitioners did not challenge any of the said legislation during the legislative process, though the Inland Revenue (Amendment) Bill 2021 was challenged in the Supreme Court. Hence, they are now estopped from challenging the legislative process. In any event, anyone who sleeps over their rights is not entitled to challenge any decisions after the stipulated time period imposed by law.

(b) Delay in going to the IMF

Similarly, as evident from the Cabinet Memorandum dated 2nd of January, 2022 and the decision of the Cabinet of Ministers dated 3rd of January, 2022, it shows that the Cabinet of Ministers has taken a decision not to get the assistance of the IMF. Instead, it was decided to have a home-grown solution to the fiscal and economic issues that were faced by the country at the time. **Moreover, the said decision had been informed to the Parliament on the 10th of December, 2021 by the 2A (3rd) respondent**.

Furthermore, the IMF, in its IMF-Sri Lanka Staff Report for the 2021 Article IV Consultation dated 10th of February, 2022, stated that the sovereign debt of Sri Lanka was unsustainable. **Thereafter, on the 12th of April, 2022 the government of Sri Lanka issued an official notice informing all its creditors that all repayment of loans would be suspended** until all debts are restructured and the notice was published in local and foreign media. Thereafter, Sri Lanka defaulted on its payment of the Sovereign Bond on the 19th of May, 2022.

Hence, when the government informed the Parliament that it will not be seeking the assistance of the IMF on the 10th of December, 2022, the alleged violation had taken place on the said date.

Furthermore, according to the Auditor General's Report filed in court, the Central Bank floated the rupee on the 8th of March, 2022. The details of its effects are stated in paragraph 56 of the petition filed in SC/FR Application No. 212/2022.

Moreover, the Central Bank of Sri Lanka honoured the payment of International Sovereign Bond of US $ 500 million on the 18th of January, 2022.

A close scrutiny of the materials filed by all the parties and the Auditor General's Report filed in court relating to the said events shows that the reduction of taxes, the decision of the Monetary Board not to float the rupee, and thereafter, floating of the same, payment of International Sovereign Bonds and the delay in seeking assistance from the IMF are separate and distinct decisions. Particularly, the decision not to go to the IMF had been taken by the Cabinet of Ministers in terms of and under Article 43 of the Constitution, which was later informed to Parliament. Further, according to the Auditor General's Report, the decision to float the rupee was taken by the Monetary Board, and later, it was informed to the Cabinet of Ministers on the 11th of March, 2022 by the Minister of Finance that the decision to pay the International Sovereign Bond was taken by the government to prevent a hard default of International Sovereign Bonds and the secretary to the Ministry informed it to the Governor of the Central Bank, and the decision to reduce taxes was taken consequent to a Cabinet Memorandum submitted by the former President.

Furthermore, the dates and events referred to above in this judgment show that the said events took place long before the two Fundamental Rights Applications were filed in court.

Was there a continuing violation of the Fundamental Rights enshrined in the Constitution?

In addition to the prayer that the petitioner's Fundamental Rights were infringed by the respondents, the petitioners pleaded that there were continuing violations of their Fundamental Rights at the time the two applications were filed in court. Hence, it is necessary to ascertain -

(a) whether there was a continuing violation at the time the two applications were filed in this court,

(b) whether the alleged continuing violations ceased within one month from the filling of the two applications, or

(c) whether the alleged continuing violation ceased one month prior to filling the two applications.

Wharton's Concise Law Dictionary (Fifteenth Edition, 2009 – Reprint 2010) defines a 'Continuing wrong' as;

> *"If a duty continues from day to day, the non-performance from day to day, the non-performance of that duty from day to day is a continuing wrong."*

A continuing violation consists of multiple wrongful acts, failures to act, or taking wrongful decisions contrary to law. However, a continuing violation ceases either when the alleged violation is rectified or the alleged violation ceases or the alleged violator is no longer in a position to continue with the violation.

The '*Continuing Violation Doctrine'* may extend beyond the one-month time limitation if it can be shown that the acts complained of **are sufficiently linked to an unlawful act within the limitation period**.

The said doctrine also requires a showing of –

(1) the acts occurring within the limitations period is similar,

(2) the conduct was frequent, and

(3) the alleged conduct is continuing even at the time the jurisdiction of court is invoked.

Hence, if an aggrieved party fails to challenge the violation when and where it occurs, it is not possible to seek the benefit of the '*doctrine of continuing violation/infringement'*.

As pointed out by the learned Additional Solicitor General and the Auditor General in his Report filed in this court, some of the alleged wrongdoers named as respondents in both petitions have ceased to hold office one month prior to invoking the jurisdiction of this court under Article 126(2) of the Constitution. Thus, the said respondents were not holding any positions that can

reverse the alleged 'continuing violations'. In any event, it is the Cabinet of Ministers who are empowered to take decisions on behalf of the government in terms of and under Article 43(1) of the Constitution, other than the decision taken by the Monetary Board of Sri Lanka prior to the institution of both applications.

In the circumstances, I hold that there was no 'continuing infringement' of the alleged violations referred to in the petitions within the meaning of Article 126 of the Constitution.

Reliefs that can be granted by court in a Fundamental Rights Application

(a) Just and equitable remedy

Article 126(4) of the Constitution states;

> *"The Supreme Court* ***shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition*** *or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right."*
>
> [emphasis added]

The phrase 'just and equitable' allows the court to consider relevant factors connected with the averments in the petition and the prayer to the petition. The word 'just' denotes fairness and reasonableness, and not arbitrariness. The word 'equitable' has the meaning of 'just'. The phrase 'just and equitable' falls within the branch of civil law that is connected with fairness and justness. It ensures that the law will not impose unnecessary or unintended harsh outcomes which unfairly prejudice some of the parties in a case. Further, it provides to grant reliefs that are not strict orders of the law but comply with the principles of justice. Accordingly, as stated above, 'just and equitable' reliefs referred to in Article 126(4) of the Constitution should not apply only to the petitioners but also to the respondents.

Further, due process and the applicable law should be followed in granting 'just and equitable' reliefs. Any reliefs that have not been pleaded in the petition filed in a Fundamental Rights

Application cannot be granted as it violates the principles of natural justice, which is contrary to the *'doctrine of just and equitable remedy'*. In this regard, the court is mindful of the need to follow due process and fair play in granting relief in Fundamental Right Applications.

A similar view was expressed in ***Dayaratne v. National Savings Bank*** **(2002) 3 SLR 116 at** 132 to 133;

> *"In the alternative, the petitioners have prayed for quashing, not of all, but only the promotions of the 7th, 12th, 16th, 19th, 20th, 21st, 23rd, 25th, 27th, 40th, 41st, 42nd, and 46th respondents – on the basis that there were all junior to the petitioners.* ***While the entire process was flawed, I do not consider it just and equitable to quash the other promotions, as the petitioners have not sought that relief****. The petitioners have also asked for an order directing the 1st respondent to promote them to Grade III-II. However, the circumstances do not justify such an order."*
>
> [emphasis added]

When making a just and equitable order, the court is required to follow the principles of natural justice too. Thus, in making a just and equitable order, the court should take the following into consideration;

i. No amount of evidence can be looked into which was never put forward in the pleadings filed in court. A question which did not arise from the pleadings cannot be decided by the court.
ii. The court cannot make out a case not pleaded by the parties. The court should confine its decision to the pleadings and the prayer.
iii. The court cannot grant the relief which is not pleaded in the prayer to the petition.
iv. Parties shall not be allowed to change the scope of the application after the pleadings are completed. Particularly, at the time of hearing of an application.

Further, the object and purpose of filing pleadings in court are to ensure that litigants come to court after identifying the case put forward by the opposing party. Furthermore, it gives an indication that the orders will be made by the court at the end of the hearing.

Moreover, when there is no prayer for a particular relief, the court will not grant any reliefs that have not been prayed for, as it will lead to a miscarriage of justice. Thus, no amount of evidence will justify granting relief that has not been prayed for in the petition. Further, granting any relief that has not been prayed for would be contrary to the doctrine of 'just and equitable' enshrined in Article 126(4) of the Constitution. Similarly, if a petitioner fails to prove the alleged infringement by adducing evidence before the court, the court cannot grant any relief to the petitioner.

A careful consideration of the two petitions, particularly the specific time period applicable to the subject matter of the said applications, shows that the petitioners are focusing on a particular period where the respondents were in office, as disclosed in the Auditor General's Report filed in court. The IMF country reports and the Cabinet Memorandums filed in court show that the fiscal and economic issues that arose in the year 2022 were partly as a result of accumulated debts that have taken place for several decades. Thus, it is not 'just and equitable' to hold the respondents responsible for violations of Fundamental Rights only by considering limited materials filed in court for the period commencing from 2019. Hence, the court could have granted a 'just and equitable relief' if all the materials were available to consider the economic situation in the country prior to 2019.

(b) Prayer to the petition in a Fundamental Rights Application

As stated above, Fundamental Rights Applications fall within the realm of civil law. As held in the case of ***Dayaratne v. National Savings Bank*** *(supra),* it is settled law that the courts cannot grant reliefs not prayed for in the pleadings or in excess of what is being sought by the petitioner. The due process considerations require the judgments to conform to the pleadings filed in court and the evidence presented in court.

Further, the word **"relief"** in the phrase "to grant such **relief** or make such directions as it may deem just and equitable in the circumstances in respect of any petition…" in Article 126(4) of the Constitution refers to the word **"relief"** in the phrase "praying for **relief** or redress in respect of such infringement …" in Articles 126(1) of the Constitution.

Thus, the court cannot grant any relief that has not been prayed for in the petition filed in court.

A similar provision is found in section 40(e) of the Civil Procedure Code where it states;

> *"A demand of the relief which the plaintiff claims;"*

Moreover, it is necessary to give reasons in the judgment for the reliefs granted by court.

Furthermore, unlike in the Indian Constitution, the Supreme Court of Sri Lanka is not conferred with the powers to supervise the implementation of its orders or judgments. Hence, it is not possible to make orders directing the parties to comply with the orders or judgments pronounced by the Supreme Court and report back to the Supreme Court. The finality of the judgments delivered by the Supreme Court was discussed in the judgment delivered in ***Jeyaraj Fernandopulle v. Premachandra de Silva*** **(1996) 1 SLR 70.** However, non-compliance with the orders or judgments of the Supreme Court would give rise to a charge of contempt of court.

Moreover, the due process considerations shall not exceed the scope of the reliefs sought in the prayer. Further, granting reliefs that have not been prayed for in the prayer violates the principles of natural justice, which requires all the parties to be given an opportunity to be heard prior to granting reliefs against a party.

Furthermore, in SC/FR Application No. 195/2022, the petitioners have prayed, *inter alia,* for *"Such other and further relief as Your Lordships Court shall seem meet"*. Further, in SC/FR Application 212/2022, the petitioners have prayed, *inter alia,* to *"Grant further and such other relief as Your Lordships Court may seem meet".*

The aforementioned prayers are similar to the prayer set out in Form No. 14 of the Civil Procedure Code, which sets out the formal parts of the plaint. It states *"and for such further or other relief as to the court shall seem meet".* However, the courts have held that the said prayer does not confer jurisdiction on the courts to grant reliefs that have not been specifically prayed for in the "prayer" to the petition or plaint filed in court.

In ***Sirinivasa Thero v. Sudassi Thero*** **63 NLR 31 at 33** it was held;

> *"Since the decree was on in respect of which, under the Code, the judgment-creditor could not ask for, and the Court had not power to issue, a writ of possession,* ***it seems to me that the Court was acting without jurisdiction in issuing such a writ****. The foundation of a writ of possession is a decree for possession, and a* ***writ of possession which is not founded on such a decree is a nullity, because in issuing it the Court acts in excess of its jurisdiction****. Where a Court make an order without jurisdiction, as in this case, it has inherent power to set it aside; and the person affected by the order is entitled ex debito justitiae to have it set aside. It is not necessary to appeal from such an order, which is a nullity: see the judgment of the Privy Council in Kofi Forfie v Seifah."*
>
> [emphasis added]

Further, in ***Surangi v. Rodrigo*** **(2003) 3 SLR 35 at 38** it was held;

> ***"No court is entitled or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer to the plaint."***
>
> [emphasis added]

Moreover, in ***Pathmawathie v. Jayasekare*** **(1997) 1 SLR 248 at 250** it was held;

> *"It must always be remembered by judges that the systems of Civil Law that prevail in our country is confrontational and therefore the jurisdiction of the judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties. For example, the plaintiff presents to Court a dispute and prays for adjudication and the defendant or party from whom a relief is sought denies or opposes the claim of the plaintiff. The adjudicator or judge thereafter proceeds to determine the issues in conflict. After deciding as to who should prove what is asserted he proceeds to receive evidence viva voce and/or documentary and thereafter evaluate the evidence of facts and law and proceeds to give his finding. In that situation* ***our Civil Law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make as he pleases may be on what he thinks is right or wrong,***

moral or immoral or what should be the correct situation. The adjudicator or judge is duty bound to determine the dispute presented to his and his jurisdiction is circumscribed by that dispute and no more*."*

[emphasis added]

(c) The need to support the prayer by evidence

The petitioners in SC/FR Application No. 212/2022 pleaded, *inter alia,* as follows;

"5. Upon the submission of a report by the said Committee (appointed under the auspices of Your Lordships' Court) to direct the Hon. Attorney General or any other appropriate authorities or officers of the State to consider initiation of investigations and prosecutions against any persons (as necessary) based on the findings from the said report.

6. Make such further and other just and equitable orders as Your Lordship's Court shall seem fit in the circumstances of this Application, under and in terms of Article 126(4) of the Constitution;"

However, there is no iota of evidence to warrant institution of criminal proceedings against the respondents. Further, the said matter was not argued by the parties at the time of the hearing. Hence, the question of directing either the Attorney General or any other authority to institute criminal proceedings will not arise.

As stated above, this court cannot grant any relief other than the reliefs specifically pleaded in the prayer under Article 126(4) of the Constitution. The aforementioned prayer is too vague and not borne out by the averments in the petition.

Furthermore, as Fundamental Rights Applications fall within the realm of civil law, it is not 'just and equitable' to grant relief or make orders that are available in criminal law and the criminal procedure or other remedies available in other laws, such as in the Companies Act No. 7 of 2007, etc. Moreover, no petitioner is entitled to obtain the remedies that are available in civil law or criminal law in a Fundamental Rights Application. For instance, a party who is entitled in law to claim damages for losses from a respondent is not entitled to obtain such damages in a Fundamental Rights Application. Hence, the Supreme Court will only grant a relief which is

'just and equitable' taking into consideration the facts and circumstances of each case. Accordingly, it could not be 'just and equitable' to award a relief or interim relief that should be obtained by a civil or criminal court in a Fundamental Rights Application.

Appointment of a Select Committee to investigate the economic setback

The Parliament has appointed a Select Committee to investigate the economic setbacks and report to Parliament, and submit its proposals and recommendations in that regard. Hence, the learned President's Counsel appearing for the 2 and 2A respondents in SC/FR Application No. 195/2022 submitted that this court has no jurisdiction to entertain the two applications under consideration as Parliament is vested with full control over public finance and the said Select Committee was looking into the same issues that have been urged by the petitioners before this court.

However, in view of the findings already made in this judgment, it is not necessary to consider the aforementioned objections placed by the learned President's Counsel.

Conclusion

It is pertinent to note that;

(a) in January 2022, India pledged a total of US$2.415 billion to overcome dire financial constraints caused by external debt payments and a lack of US dollars in Sri Lanka for business. Under SAARC currency swap arrangement, India extended a $400 million and also deferred an Asian Clearing Union settlement of around $500 million. India granted a new line of credit worth $500 million for the purchase of petroleum products.

(b) in March 2022, spontaneous and organised protests by political parties and non-partisan groups over the government's mishandling of the economy were reported from several areas in the country. Several protests were staged by the opposition demanding the then administration to solve the financial crisis and to immediately resign in wake of the economic crisis.

(c) on the 17th of March, 2022, Sri Lanka received a $1 billion credit line as a lifeline from India in order to buy urgently needed essential items such as food and medicine. The

credit line was activated after India and Sri Lanka formally entered into a credit agreement during the 2A respondent's (in SC/FR/195/2022) visit to New Delhi.

(d) on the 22nd of March, 2022, the government posted soldiers at various gas and fuel filling stations to curb the tensions among people who line up in queues and to ease the fuel distribution. Power cuts were seen throughout March, 2022.

(e) on the 6th of April, 2022 the Sri Lankan Rupee plunged to a record low to become the worst performing currency in the world with US$1 trading at Rs. 355/-.

(f) on the 12th of April, 2022 the Government of Sri Lanka declared that it has taken a decision to default all of its debts in order to avoid the hard default.

(g) Fuel queues continued even till the 23rd of May, 2022.

In addition to the above, I have considered all the materials filed in court along with the Auditor General's Report and particularly, the two applications filed in court, and I am unable to agree with the said position of the petitioners that they became aware of the alleged infringement of their rights on the 4th of May, 2022, when the former Minister of Finance, the 2B respondent, made the statement in Parliament and also when the Governor of the Central Bank made the statement before COPE on the 25th of May, 2022. It is pertinent to note that on their own showing, the petitioners stated that they came to know that the reduction of taxes were implemented in November, 2019 and the alleged adverse effects took place immediately after the rating agencies downgraded Sri Lanka on the 19th of May, 2022.

Further, the country had to undergo unprecedented hardships during the years 2019 to 2022 due to a lack of essential items and the escalation of fuel and gas prices. However, the petitioners filed SC/FR Application No. 195/2022 and SC/FR Application No. 212/2022 on the 3rd of June, 2022 and 17th of June, 2022, respectively.

Article 126(2) of the Constitution states that a person should invoke the jurisdiction of the Supreme Court within one month from the date of the infringement of the Fundamental Rights.

A careful consideration of the two applications and the materials filed in court show that the alleged infringements took place on the dates specified in the aforementioned two charts furnished to court by the Auditor General and the learned Additional Solicitor General.

Moreover, as stated above, all the facts and circumstances show that the alleged infringements are not continuing infringements. On the contrary, they are specific decisions and acts, either taken or implemented by the Cabinet of Ministers or by the Monetary Board of Sri Lanka.

Furthermore, a critical analysis of the averments in both petitions shows that the petitioners did not invoke the jurisdiction of this court within one month of the alleged violations that have been pleaded in the two petitions. Hence, I am of the opinion that in light of the aforementioned overwhelming evidence with regard to the public awareness of the fiscal and economic crisis in Sri Lanka, it would not be 'just and equitable' to hold that the petitioners became aware of the said infringements within 30 days of the filing of the two applications in court or that there were continuing infringements of the Fundamental Rights of the petitioners at the time the two applications were filed in court. Hence, I hold that the parties have not invoked the jurisdiction of this court within one month of the alleged infringements as required by Article 126(2) of the Constitution.

Further, I am of the view that the petitioners have not established on a balance of probability that the respondents have infringed the Fundamental Rights of the petitioners guaranteed by Article 12(1) and 14(1) (g) of the Constitution. Hence, I dismiss the SC/FR/Application No. 195/2022 and SC/FR/Application/212/2022.

I order no costs.

Priyantha Jayawardena, PC.
Judge of the Supreme Court