

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

***In the matter of an application made in terms  
of Article 126 and Article 17 of the  
Constitution of the Republic of Sri Lanka.***

**SC (F/R) Application  
No. 282/2018**

Justice A.H.M. Upaly Abeyrathne,  
No. 42/10, Beddagana North,  
Pitakotte.

**PETITIONER**

-Vs.-

1. A. Jagath D. Dias,  
The Director General of Pensions,  
Department of Pensions,  
Maligawatte,  
Colombo 10.
2. H.M. Gamini Wijesinghe  
The Auditor General of Sri Lanka,  
Auditor General's Department  
No. 306/72, Polduwa Road,  
Battaramulla.
3. Hon. Attorney General  
Attorney General's Department,  
Colombo 12.

4. Hon. Minister of Defence, Minister of Finance, Economic Stabilisation and National Policies, Minister of Technology, Minister of Women. Child Affairs and Social Empowerment, Minister of Investment Promotion,  
Ministry of Defence,  
Defence Headquarters Complex,  
Sri Jayawardenapura Kotte.
5. Hon. Dinesh Chandra Rupasingha  
Gunawardena,  
MP (Hon. Prime Minister),  
Minister of Public Administration, Home Affairs, Provincial Councils and Local Government,  
Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government,  
Independence Square,  
Independence Avenue,  
Colombo 7.
6. Hon. Nimal Siripala de Silva,  
Minister of Ports, Shipping and Aviation,  
No. 19, 1,  
Chethiya Road,  
Colombo 1.

7. Hon. (Mrs.) Pavithra Devi Wanniarachchi,  
Minister of Wildlife and Forest  
Conservation,  
Ministry of Wildlife and Forest  
Conservation,  
No. 1090, Jayawardenapura Mawatha,  
Sri Jayawardenapura Kotte.
8. Hon. Douglas Devananda,  
Minister of Fisheries,  
Ministry of Fisheries,  
New Secretariat, Maligawatta,  
Colombo 10.
9. Hon. Susil Prema Jayantha,  
Minister of Education,  
Isurupaya,  
Battaramulla.
10. Hon. Bandula Gunawardena,  
Minister of Transport and Highways,  
Minister of Mass Media,  
Ministry of Transport and Highways,  
Ministry of Mass Media,  
7<sup>th</sup> Floor, Sethsiripaya Stage II,  
Battaramulla

11. Hon. Keheliya Rambukwella,  
Minister of Health,  
Ministry of Health,  
Suwasiripaya,  
No. 385, Ven. Baddegama Wimalasena  
Thero Mawatha,  
Colombo 10.
12. Hon. Mahinda Amaraweera,  
Minister of Agriculture,  
Ministry of Agriculture,  
No. 80/5, 'Govijana Mandiraya'  
Rajamalwatta Lane, Battaramulla.
13. Hon. Wijedasa Rajapaksha,  
Minister of Justice,  
Ministry of Justice,  
Superior Courts Complex,  
Adhikarana Mawatha,  
Colombo 01.
14. Hon. Nalaka Jude Harin Fernando, MP,  
Minister of Tourism and Lands,  
6<sup>th</sup> Floor,  
Rakshana Mandiraya,  
No. 21, Vauxhall Street,  
Colombo 02.

15. Hon. Ramesh Pathirana,  
Minister of Plantation Industries,  
Ministry of Industries, Ministry of Plantation  
Industries,  
11<sup>th</sup> Floor,  
2<sup>nd</sup> Stage, Sethsiripaya,  
Battaramulla.
16. Hon. Prasanna Ranathunga,  
Minister of Urban Development and  
Housing,  
Ministry of Urban Development and  
Housing,  
17<sup>th</sup> Floor, 'Suhurupaya',  
Sri Subhuthipura Road,  
Battaramulla.
17. Hon. Ali Sabry,  
Minister of Foreign Affairs,  
Ministry of Foreign Affairs,  
Consular Affairs Division,  
2<sup>nd</sup> Floor, Ceylinco Building,  
Janadhipathi Mawatha,  
Colombo 10.
18. Hon. Vidura Wikramanayaka,  
Minister of Buddhasasana, Religious and  
Cultural Affairs,

Ministry of Buddhasasana, Religious and  
Cultural Affairs,  
No. 135, Srimath Anagarika Dharmapala  
Mawatha,  
Colombo 07.

19. Hon. Kanchana Wijesekera,  
Minister of Power and Energy,  
Ministry of Power and Energy,  
No. 72, Ananda Coomaraswamy Mawatha,  
Colombo 07.

20. Hon. Ahamed Zenulabdeen Naseer,  
Minister of Environment,  
Ministry of Environment,  
'Sobadam Piyasa',  
No. 416/C/1, Robert Gunawardana  
Mawatha,  
Battaramulla.

21. Hon. Anuruddha Ranasinghe Arachchige  
Roshan,  
Minister of Sports and Youth Affairs,  
Minister of Irrigation,  
Ministry of Sports and Youth Affairs,  
Ministry of Irrigation,  
No. 9, Phillip Gunawardana Mawatha,  
Colombo 07.

22. Hon. Maligaspe Koralege Nalin Manusha  
Nanayakkara,  
Minister of Labour and Employment,  
Ministry of Labour and Employment,  
6<sup>th</sup> Floor, 'Mehewara Piyesa',  
Narahenpita, Colombo 05.
23. Hon. Tiran Alles,  
Minister of Public Security,  
Ministry of Public Security,  
14<sup>th</sup> Floor, 'Suhurupaya',  
Battaramulla.
24. Hon. Kachchakaduge Nalin Ruwanjika  
Fernando,  
Minister of Trade, Commerce and Food  
Security,  
Ministry of Trade, Commerce and Food  
Security,  
No. 492, R.A. De Mel Mawatha,  
Colombo 03.
25. Hon. Jeevan Thondaman,  
Minister of Water Supply,  
Ministry of Water Supply,  
'Lakdiya Medura',  
No. 35, New Parliament Road,  
Sri Jayawardenapura Kotte.

26. Registrar,  
Supreme Court,  
Hulftsdorp Street,  
Colombo 12.

27. Secretary,  
Ministry of Public Administration, Home  
Affairs, Provincial Councils and Local  
Government,  
Independence Square.  
Independence Avenue,  
Colombo 07.

**RESPONDENTS**

**BEFORE:**            **S. THURAIRAJA, PC, J.**  
**A.L. SHIRAN GOONERATNE, J. AND**  
**MAHINDA SAMAYAWARDHENA, J (DISSENTING)**

**COUNSEL:**        Ikram Mohamed, PC, with Roshaan Hettiaratchi and Harish  
Balakrishnan instructed by S.B. Dissanayake Associates for the  
Petitioners  
  
Fazly Razik, DSG, instructed by Ms. Rizni Firdous for all the  
Respondents

**WRITTEN**            Petitioner on 29<sup>th</sup> May 2024 and 10<sup>th</sup> September 2025  
**SUBMISSIONS:**    Respondents on 30<sup>th</sup> May 2024 and 02<sup>nd</sup> October 2025



**ARGUED ON:** 05<sup>th</sup> June 2024, 25<sup>th</sup> July 2025

**DECIDED ON:** 14<sup>th</sup> January 2026

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**THURAIRAJA, PC, J.**

1. The Petitioner, a retired Judge of the Supreme Court, filed this fundamental rights application before this Court on 07<sup>th</sup> August 2018, alleging a continuous violation of his fundamental rights guaranteed under Article 12(1) of the Constitution by the conduct of the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondents, for their failure to duly pay His Lordship's pension entitlements.
2. At the time of instituting the instant fundamental rights application, the Petitioner was not being paid his monthly pension without any valid reason. Having heard both parties, on 04<sup>th</sup> November 2022, this Court granted leave to proceed in terms of Article 12(1) of the Constitution.
3. Consequent to clarifications sought by the Attorney-General from the Secretary, Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government, material documents which were previously not made available to the Attorney-General's

Department were furnished to the said department by the Ministry's letter dated 17<sup>th</sup> March 2023.

4. Maintaining the highest traditions of the Attorney-General's Department and that of the legal profession, the learned Deputy Solicitor General filed all such documents by motion dated 24<sup>th</sup> March 2023, owing to their significant in duly considering the questions before us.
5. Subsequently, as the learned Deputy Solicitor General filed such additional documents, which were not previously available to the Petitioner, the Petitioner was granted permission to file an Amended Petition. On the same date, the Petitioner was permitted to add the Registrar of the Supreme Court and the Secretary of the Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government (hereinafter referred to as 'Secretary to the Ministry of Public Administration' or 'Secretary to the Ministry') as the 26<sup>th</sup> and 27<sup>th</sup> Respondents. Thereafter, the Amended Petition dated 27<sup>th</sup> September 2023 was filed by the Petitioner as permitted.
6. Objections were filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 27<sup>th</sup> Respondents on 19<sup>th</sup> April 2023, 25<sup>th</sup> March 2024 and 28<sup>th</sup> March 2024, respectively. The Petitioner filed his Counter Affidavit on 14<sup>th</sup> May 2024.

## **THE FACTUAL BACKGROUND OF THE APPLICATION**

### **The Petitioner's Submissions**

7. Petitioner states that he was compelled to file the instant application on 07<sup>th</sup> August 2018, as the full monthly pension entitlement payable to the Petitioner was entirely denied by the 1<sup>st</sup> Respondent. However, shortly after filing this application, the 1<sup>st</sup> Respondent had commenced the payment of his monthly pension, thus altering the scope of the initial application.

8. Although the Petitioner's pension is now being paid to him, the Petitioner claims that the deduction of certain percentages towards the recovery of the lump sum—which is termed 'commuted pension'—paid to the Petitioner upon his retirement to be blatantly violative of Article 108(2) of the Constitution and his own fundamental rights enshrined in Article 12(1) of the Constitution.
9. Having begun his career as a judicial officer on 01<sup>st</sup> January 1983, the Petitioner had served as a Magistrate, a District Judge, a Judge of the High Court of the Republic, as well as a Civil Appellate High Court Judge before being elevated to the Court of Appeal on 27<sup>th</sup> March 2008 and, thereafter, the Supreme Court on 17<sup>th</sup> December 2014.
10. Having served well over nine years as a Judge of the Superior Courts, the Petitioner had retired on 07<sup>th</sup> August 2017, after thirty-four years and seven months of judicial service.
11. However, the Petitioner states that he was not paid his monthly pension entitlement for a long period of time, which compelled him to write a letter to the 1<sup>st</sup> Respondent dated 25<sup>th</sup> May 2018,<sup>1</sup> through his Attorneys-at-Law, demanding the due payment of his monthly pension. However, the Petitioner had not even received a response to this letter
12. The 1<sup>st</sup> Respondent admitted this delay in paragraph 29 of his Statement of Objections.<sup>2</sup> The 1<sup>st</sup> Respondent admits therein that the payment of pension to the Petitioner, which ought to have commenced on or about 10<sup>th</sup> September 2017, was not paid to him until 27<sup>th</sup> September 2018, i.e. until after the institution of this fundamental rights application.
13. Explaining the reasons for this extreme delay of over a year in paying the Petitioner's pension, the 1<sup>st</sup> Respondent claims that the Petitioner failed to attend the initial interview

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<sup>1</sup> Marked 'M', appended to the Amended Petition

<sup>2</sup> By Affidavit dated 10<sup>th</sup> April 2024

at the Department of Pensions, as is the usual practice when receiving a pension.

14. In this regard, the Petitioner submitted that there is no legal requirement to attend such an interview and that the Director General of Pensions had no legal authority whatsoever to require any person to attend such an interview or to withhold any person's pension benefits on the basis of not attending such an interview, when all documents that are necessary to process his or her application for pension has been properly submitted.
15. The Petitioner further submits that, even when his pension benefits were paid, he had not received the entire pension benefit that he is entitled to.
16. According to the Petitioner, under and by virtue of the Public Administration Circular No. 44/90 dated 18<sup>th</sup> October 1990, which was given effect to by Gazette Notification No. 709 dated 03<sup>rd</sup> April 1992, a judge who retires after 30 years of reckonable service was eligible to receive a commuted pension and an unreduced pension of 90% of his or her salary as of the date of retirement, notwithstanding the fact that such judge had drawn a commuted pension.
17. What concerns the instant application now, in essence, relates to several decisions taken by one or more of the Respondents to discontinue the paying of pension without any deductions where a judge of a Superior Court opts to obtain the 'commuted pension' and subsequent steps taken by the Respondent to recover the same from some retired judges to whom this benefit has already been accrued.
18. Admittedly, the decision-making process and the steps taken by the government authorities towards this end is far from straightforward. However, the Post-Argument Written Submissions of the Respondents and the Statements of Objections filed by the 1<sup>st</sup> Respondent, the Director General of Pensions,<sup>3</sup> as well as the 27<sup>th</sup> Respondent, the

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<sup>3</sup> By Affidavit dated 10<sup>th</sup> April 2024

Secretary to the Ministry of Public Administration,<sup>4</sup> gave this Court with a much clearer picture of this convoluted process. According to their Objections, the sequence of events is as follows.

**The Sequence of Events Leading to the Instant Application as Revealed by the Statements of Objections of the 1<sup>st</sup> and 27<sup>th</sup> Respondents**

***Pension Entitlements of Superior Court Judges***

19. The 1<sup>st</sup> and the 27<sup>th</sup> Respondents state that the pension benefits of judges of the Court of Appeal and of the Supreme Court (collectively referred to as the ‘Superior Courts’ in this Judgment), other judicial officers, as well as the public officers in general, are governed by the Minutes on Pensions.
20. According to Section 51 of the said Minutes, the Minister of Public Administration, Local Government and Home Affairs may, from time to time, by Notification published in the Gazette, alter, add to or otherwise amend the said Minutes on Pensions.
21. According to the 1<sup>st</sup> Respondent, as at 17<sup>th</sup> October 1990—prior to Circular No. 44/90 coming into effect—judges of Superior Courts were entitled to a maximum monthly pension of 85% of their salary upon completing 3 years of service in terms of Gazette No. 359 dated 19<sup>th</sup> July 1985. The said 3-year period was subsequently amended to read as 36 months by Gazette No. 1190/18 dated 28<sup>th</sup> June 2001.
22. If a judge elected to receive the commuted pension during this period, they were then paid a reduced pension for the first 120 months, in terms of Section 2A of the Minutes of Pensions. The exact averment in the 1<sup>st</sup> Respondent’s Objections is as follows:

*“As per the records available with the Department of Pensions, the Judges of the*

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<sup>4</sup> By Affidavit dated 25<sup>th</sup> March 2024

*Superior Courts were entitled to the monthly pension at the rates mentioned in the above Gazettes. If they elected to receive the commuted pension/gratuity, then they were paid a reduced monthly pension for the first 120 months, in terms of Section 2A of the said Minutes [Minutes on Pensions]...”<sup>5</sup>*

***Additional Benefits Introduced by P.A. Circular No. 44/90***

23. However, by the aforementioned Public Administration Circular No. 44/90 dated 18<sup>th</sup> October 1990,<sup>6</sup> several benefits were made available to public officers, and Section 2A of the Minutes on Pensions was amended by Gazette No. 709 dated 03<sup>rd</sup> April 1992<sup>7</sup> to give effect to the same.

24. The said benefits as reflected in Paragraph 3(C) of the said Circular are as follows:

*“A public Officer who has completed 30 years of services of services and over, will be eligible, on retirement, to receive a pension calculated on the basis of 90% his salary at retirement as follows;*

*(i) the commuted pension and*

*(ii) the unreduced monthly pension (90% of his salary at retirement) **notwithstanding the fact that he has drawn a commuted pension, on retirement.**”<sup>8</sup>*

25. The Respondents further state that the judges of the Superior Courts, too, were eligible to the same benefits under and in terms of Section 25 read with Section 2A of the Minutes

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<sup>5</sup> 1<sup>st</sup> Respondent’s Statement of Objections, para 10(f)

<sup>6</sup> Marked ‘G’, appended to the Amended Petition; also marked ‘1R4’, appended to 1<sup>st</sup> Respondent’s Statement of Objections

<sup>7</sup> Produced with the set of documents marked ‘G-1’, appended to the Amended Petition; also marked ‘1R5’, appended to 1<sup>st</sup> Respondent’s Statement of Objections

<sup>8</sup> Emphasis added

on Pensions, and this benefit was accordingly granted to the judges of Superior Courts.

***P.A. Circulars Nos. 32/96 & 32/96(1) and Gazette No. 981***

26. However, the operation of Circular No. 44/90 was subsequently brought to an end with effect from 24<sup>th</sup> December 1996 by Public Administration Circular No. 32/96 dated 12<sup>th</sup> November 1996<sup>9</sup> read with Public Administration Circular No. 32/96(1) dated 16<sup>th</sup> December 1996<sup>10</sup>. Minutes on Pensions were accordingly amended by Gazette No. 981 dated 19<sup>th</sup> June 1997<sup>11</sup>.
27. The Respondents state that, following the aforementioned changes, judges of the Superior Courts were to receive 85% of the last drawn salary as a pension without any deductions, and if any judge opted for a commuted pension, then such judge would have received a reduced pension of 75% of the last drawn salary for the first 120 months.
28. This scheme sought to not only reduce the pension entitlements by 5%, but also to remove the benefit of continuing to receive an unreduced pension where a judge opts for commuted pension/gratuity. According to the 1<sup>st</sup> Respondent, these provisions reflect the scheme which existed before Circular No. 44/90 came into force.
29. As the 1<sup>st</sup> Respondent points out, Justice H.W. Senanayake, who retired on or about 10<sup>th</sup> March 1997, had been paid a reduced monthly pension purportedly in accordance with Gazette No. 981 dated 19<sup>th</sup> June 1997.

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<sup>9</sup> Marked '1R6', appended to 1<sup>st</sup> Respondent's Statement of Objections

<sup>10</sup> Marked '1R7', appended to 1<sup>st</sup> Respondent's Statement of Objections

<sup>11</sup> Produced with the set of documents marked 'G-1', appended to the Amended Petition; also marked '1R8', appended to 1<sup>st</sup> Respondent's Statement of Objections



***Advice Sought from the Attorney-General in 1997 [Attorney-General's First Opinion, dated 15<sup>th</sup> September 1997] & Why Pension Payments of Superior Court Judges Continued under P.A. Circular No. 44/90 till 2017***

30. Prior to the retirement of late Justice P. Ramanathan, the Registrar of the Supreme Court, by letter dated 11<sup>th</sup> August 1997, had sought clarification from the Secretary to the Ministry of Public Administration, Home Affairs & Plantation Industries regarding the applicability of said Gazette No. 981 to the judges of Superior Courts in light of Article 108(2) of the Constitution.
31. The said Secretary had thereafter consulted the Attorney-General and the Attorney-General had accordingly tendered advice to the Secretary by letter dated 15<sup>th</sup> September 1997.<sup>12</sup> In this letter, late K.C. Kamalasabayson, PC, Additional Solicitor General (subsequently the Attorney-General), on behalf of the then Attorney-General, had specifically advised, in light of Article 108(2) of the Constitution, as follows:

*"...upon the appointment of a judge, even though his pension entitlement could be increased at any stage, once increased such entitlement cannot be varied or altered, if such variation or alteration would have the effect of reducing the pension payable to him.*

*In the circumstances, I am of the opinion that the pension payable to Hon. P. Ramanathan has to be computed on the basis of the Public Administration Circular No. 44/90. In this context, Gazette No. 981 of 19.6.97 has no application to the judges referred to in Article 108(2) as it has the effect of reducing their pension entitlement."*

32. Very clearly, the Attorney-General has opined that Justice Ramanathan's pension ought to be computed in line with Circular No. 44/90 and that Gazette No. 981 of 19<sup>th</sup> June 1997

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<sup>12</sup> Marked 'G', appended to the Amended Petition

has no application to the judges referred to in Article 108 of the Constitution.

33. This is, in fact, the first of many instances when Attorney-General's advice has been sought in relation to this same matter. In all such instances, successive Attorney-Generals have consistently reiterated the same position. I shall advert to this morefully later on.
34. Upon receiving the Attorney-General's advice, the said Secretary to the Ministry has directed the Director General of Pensions, by letter dated 01<sup>st</sup> October 1997, to proceed to calculate the pension entitlements of Justice Ramanathan in light of that advice.
35. The 1<sup>st</sup> Respondent also states that following these events, during the period of October 1997 and May 2001, he made various requests, directly and through the Secretary to the Ministry of Public Administration, to several authorities, such as the legal draftsman, to ensure the amendment of the Minutes on Pensions in accordance with said advice.
36. According to the said Respondent, pursuant to such requests, Section 25 of the Minutes on Pension was amended, by Gazette No. 1190/18 dated 28<sup>th</sup> June 2001, to take effect retrospectively from 24<sup>th</sup> December 1996. By this amendment, the monthly pension of the judges of the Superior Courts who serve more than 36 months was set to be 90% of the last salary. However, this Gazette does not appear to have amended or introduced any provisions relating to the deduction of commuted pensions.

***Audit Query in 2015 and the Audit and Management Committee Meeting***

37. Whilst the pension was so being paid without any deductions to the judges of the Superior Courts, in accordance with the Attorney-General's advice, the Department of Pensions had received an Audit Query dated 16<sup>th</sup> February 2015<sup>13</sup> from the Auditor-General's Department relating to the non-recovery of the commuted pension from the

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<sup>13</sup> Marked '1R22', appended to 1<sup>st</sup> Respondent's Statement of Objections

judges of the Superior Courts by the Department of Pensions. This matter had been further discussed at the *Audit and Management Committee Meeting* of the Ministry of Public Administration,<sup>14</sup> with the Secretary of the said Ministry [27<sup>th</sup> Respondent] and the Director General of Pensions [1<sup>st</sup> Respondent] in attendance. Before this matter was considered at the said meeting, the Audit Query had been taken up before the *Parliament Committee on Public Accounts (COPA)*.

38. At the aforementioned *Audit and Management Committee Meeting*, a decision had been made to recover the commuted pension from the judges of the Superior Courts. The 1<sup>st</sup> Respondent in the affidavit states that he was not aware of the matters adverted to above, regarding the Circular No. 44/90, the clarification sought by the Registrar of the Supreme Court and the Attorney-General's advice regarding the pension of judges, etc., at the time of attending the said meeting. Accordingly, said matter had not been considered during the meeting when the decision to recover the commuted pension was made.
39. The 2<sup>nd</sup> Respondent, the incumbent Auditor-General of Sri Lanka, in his Statement of Objections,<sup>15</sup> states that the letter of the Secretary to the Ministry of Public Administration, dated 03<sup>rd</sup> September 1997, addressed to the Attorney-General and the Attorney-General's advice pursuant to such letter, as well as the subsequent opinion given by the Attorney-General in 2018, were all brought to his attention for the first time by the Amended Petition of the Petitioner dated 27<sup>th</sup> September 2023.
40. Accordingly, it is clear that the Auditor-General, at the time of issuing the above Audit Query, as well as the Director General of Pensions and the aforementioned *Audit and Management Committee* of the Ministry, were unaware of the factual context and the legal

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<sup>14</sup> Meeting minutes are produced marked '1R24', appended to 1<sup>st</sup> Respondent's Statement of Objections

<sup>15</sup> By Affidavit dated 21<sup>st</sup> March 2024

basis of continuing the payment of pension to the Superior Court judges without recovering the 'commuted pension'.

41. In spite of this, following the decision taken at the *Audit and Management Committee Meeting* of the Ministry of Public Administration, the Department of Pensions had effected deductions from the pension paid to the former Chief Justice K. Sripavan, who retired on or about 01<sup>st</sup> March 2017.
42. The 1<sup>st</sup> Respondent states that such deductions were thereafter effected from all retired judges of the Superior Court to date.

***Advice Sought from the Attorney-General in 2017 [Attorney-General's  
Second Opinion, January 2018]***

43. Following a letter dated 28<sup>th</sup> June 2017 by the Registrar of this Court, highlighting the unconstitutionality of such deduction, the Director General of Pensions had once again sought legal advice from the Attorney-General by letter dated 14<sup>th</sup> July 2017. Accordingly, in January 2018, the Attorney-General had sent his advice to the Director General of Pensions.<sup>16</sup>
44. In this advice, Mr. Nerin Pulle, then Deputy Solicitor General (now Additional Solicitor General and President's Counsel), countersigned by M.N.B. Fernando, PC, Senior Additional Solicitor General (as Her Ladyship the former Chief Justice was then) on behalf of the Attorney-General, has opined that judges of the Superior Courts are to be considered a distinct class of persons, in line with Article 108 of the Constitution, and that their salaries or pension benefits cannot be reduced after appointment.

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<sup>16</sup> Marked 'L', appended to the Amended Petition; also marked '1R26', appended to 1<sup>st</sup> Respondent's Statement of Objections

45. In the said advice, the Attorney-General has further noted the fact that such power to deal with matters relating to judges' salaries has been reposed in the parliament by the Constitution and that any form of interference with this power, in contravention of the Constitution, would adversely affect the independence of the judiciary.

***Cabinet Decisions in 2019 and 2020***

46. By **Cabinet Memorandum [No. PS/CP/149/2019] dated 24<sup>th</sup> June 2019**,<sup>17</sup> then President, Maithripala Sirisena, had sought the Cabinet approval '*to recover the commuted pension of Judges of the Superior Court in 120 months in accordance with the laws in force*' and '*to present a resolution to Parliament in this regard.*' Thereafter, having considered the recommendations of a Cabinet-appointed Sub-Committee,<sup>18</sup> the Cabinet of Ministers had granted its approval to the above two proposals on 19<sup>th</sup> July 2019.
47. The aforesaid Cabinet Memorandum was filed of record, and I shall proceed to address several other concerns relating to the same further along in this judgment.
48. Once again, on 16<sup>th</sup> November 2020, the Cabinet of Ministers had decided that the earlier Cabinet Decision dated 19<sup>th</sup> July 2019 '*should stand*' and instructed the Secretary to the Cabinet to intimate the said decision to the Attorney-General for necessary action with regard to the instant case, as this fundamental rights application was pending before this Court at this point in time. This second Cabinet Decision had been taken pursuant to a **Note to the Cabinet of Ministers dated 12<sup>th</sup> November 2020** by the Secretary to the Cabinet.
49. It is noteworthy that, as the 1<sup>st</sup> and 27<sup>th</sup> Respondents reveal in their Statements of Objections, the aforementioned Cabinet Memorandum and the **Note to the Cabinet of**

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<sup>17</sup> Marked 'I', appended to the Amended Petition

<sup>18</sup> A different Sub-Committee to that which has been specifically considered later in this Judgment

**Ministers** make no mention of Circular No. 44/90, clarifications sought by the Registrar of the Supreme Court, legal advice given by the Attorney-General or the documentary material and other matters relating to the promulgation of Gazette No. 1190/18.

50. As such, it appears that, much like the *Audit and Management Committee* of the Ministry of Public Administration, the Cabinet of Ministers, too, had made the decisions to recover the commuted pension from judges of the Superior Courts without considering such vital material relating to the factual and legal circumstances of the matter.
51. This is further clear from the fact that, upon becoming aware of the aforementioned documents during the course of the instant application, the 1<sup>st</sup> Respondent, by letter dated 25<sup>th</sup> May 2023, addressed to the Ministry of Public Administration, had requested that the same be brought to the attention of the President and the Cabinet of Ministers.
52. Accordingly, the attention of the Cabinet of Ministers had only been drawn to these documentary materials by the **Cabinet Memorandum dated 14<sup>th</sup> December 2023** by then President, Ranil Wickremasinghe. Subsequent to this Memorandum, by Decision dated 18<sup>th</sup> December 2023, the Cabinet had referred the matter to a **Cabinet Sub-Committee, chaired by the Minister of Justice**, to further consider this matter and provide recommendations.<sup>19</sup>
53. The Report containing the recommendations of this Cabinet Sub-Committee was made available to this Court by the Attorney-General, and much like the previously mentioned Cabinet Memorandum dated 24<sup>th</sup> June 2019, this Report, too, contains some constitutionally precarious findings which warrant closer scrutiny.

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<sup>19</sup> Both the Memorandum and the Cabinet Decision are marked '1R29', appended to 1<sup>st</sup> Respondent's Statement of Objections

### ***Parliamentary Resolutions***

54. Pursuant to this Cabinet Decision dated 19<sup>th</sup> July 2019, two Order Papers have been placed before the Parliament, seeking a determination to recover the pension gratuity of judges of the Superior Courts within 12 months in accordance with the law. As the first Order Paper dated 23<sup>rd</sup> August 2019 had not been proceeded with, the second Order Paper dated 23<sup>rd</sup> October 2019 had then been placed before the Parliament.
55. As the Petitioner submits, the Parliament was prorogued on 02<sup>nd</sup> December 2019 and no determination had been made in this regard.

### **ANALYSIS & OPINION OF THE COURT**

56. The questions this Court ought to consider in deciding this matter, and the matter itself in general, considered in its proper context, transcend the rights of the Petitioner himself as well as that of other retired judicial officers affected by the impugned actions and/or decisions of the Respondents. This is a matter that strikes at the very core of the State apparatus, for it concerns the manner in which the sovereignty of the people is exercised by the three organs of government and the friction between such organs that may be created by even the simplest of administrative acts, whether deliberate or inadvertent.
57. As I pen down this judgment, where this Court is called to interpret the provisions relating to the salaries and pensions of its own judges, whilst speaking of the independence of the judiciary as a principle to which this matter so intimately relates in the same breath, it is not lost on me that some may perceive this exercise with a sense of irony. Some might see it as a judge sitting his own case. They might murmur that it would have been more expedient—perhaps even judicious—to resolve this administratively, as was done in the United Kingdom when some of our British counterparts were confronted with a similar quandary. I am compelled to note that the Petitioner has come before this Court having exhausted all alternatives, in a setting where he had received not a penny in pension for

well over a year after his retirement. This is plainly apparent on the face of the Petition and from the material placed before this Court by the Director General of Pensions.

58. However undesirable an ostensible impression of prejudgment may be, the Petitioner has been compelled, by the continued denial of his pension entitlements, to invoke the sole and exclusive constitutional jurisdiction of this Court—not only to canvass his own rights but also to champion the very integrity of our constitutional scheme, which clearly places the independence of the judiciary as an institution in high regard—for no other authority is constitutionally empowered to answer the questions before us as Article 125(1) of the Constitution sets out.
59. This would also not be the first time that a judicial officer had to seek judicial intervention to secure their dues. Chief Judge of New York famously sued the state legislature in 2008 for denying the judges' constitutional right to an *adequate* salary.<sup>20</sup> US Federal judges have also followed suit and pursued litigation. Long before, in 1997, another group of US judges filed a lawsuit when they were excluded from automatic pay adjustments by Congress, arguing that such exclusion, preventing them from receiving pay raises, was violative of the Compensation Clause of the US Constitution.<sup>21</sup> While I shall deal with such provisions from comparative jurisdictions later, what I wish to emphasise for the moment is that suits of this nature are by no means an anomaly.<sup>22</sup> When every other avenue proves

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<sup>20</sup> *Kaye v. Silver*, No. 400763/08 (N.Y. App. Div.)

<sup>21</sup> See *Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999); *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001)

<sup>22</sup> See also *United States v. Will* (1980) 449 US 200; *All India Judge's Association v. Union of India And Others* AIR (1993) SC 2493; *R.N. Mittal (Mr. Justice) (Retd.) & Anr v. Government of the Nct of Delhi*, 1999 III AD (DELHI) 297, 78 (1999) DLT 849, 1999 (49) DRJ 532 (where similar issues were canvassed before the Delhi High Court); For many other examples, see Justin S. Teff, 'The Judges v. The State: Obtaining Adequate Judicial Compensation and New York's Current Constitutional Crisis' (2009) 72 Albany Law Review 191



futile, it is to the law that we ultimately turn, for it remains the last refuge of all—judge or not.

60. I am also reminded of how this Court was similarly called to walk the tightropes of judicial interpretation more than once before when it was called to consider provisions relating to tenure, appointment, and dismissal of judges. In all such instances, this Court has been most careful, exercising restraint and only interpreting such provisions in a manner that manifests the norms embedded therein in line with its constitutional mandate. I do not see why this instance should be any different. The Petitioner has anchored his claims in sound and enduring principles of law, not in abstractions of thought or emotive appeals; and the legal provisions at issue are framed in a clarity of language seldom encountered.
61. In addition, it also appears that some guidance may be available from several other jurisdictions where similar issues have previously arisen and from numerous academic commentaries and scholarly studies focussing on the connexion between judicial independence and judge's emolument or pension with reference to many cautionary accounts from history.<sup>23</sup>

### **Article 108 of the Constitution and Judicial Independence**

62. Article 108 of the Constitution of Sri Lanka states as follows:

*(1) The salaries of the Judges of the Supreme Court and of the Court of Appeal shall*

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<sup>23</sup> See for example, Justin S. Teff (2009) *supra* note 22; James M Anderson & Eric Helland, 'How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench' (2012) 64 Stanford Law Review 1277 – which I myself found greatly helpful; Joanna M Shepherd, 'Money, Politics, and Impartial Justice' (2009) 58:4 Duke Law Journal 623; James E Pfander, 'Judicial Compensation and the Definition of Judicial Power in the Early Republic' (2008) 107:1 Michigan Law Review 1; Irvin R Kaufman, 'The Essence of Judicial Independence' (1980) 80:4 Columbia Law Review 671; Sam J Ervin Jr., 'Separation of Powers: Judicial Independence' (1970) 35:1 Law and Contemporary Problems 108

*be determined by Parliament and shall be charged on the Consolidated Fund.*

(2) The **salary payable to, and the pension entitlement** of a Judge of the Supreme Court and a Judge of the Court of Appeal **shall not be reduced after his appointment**.<sup>24</sup>

63. The construction of Article 108, as well as the placement in the constitutional text, lucidly manifest the effect of this provision. However, it would still serve us well to examine the apparent purpose of this Article, so that we may ensure the full efficacy of its normative force.
64. As the Attorney-General has repeatedly emphasised in several advisory correspondence they have issued on request, salaries and pension entitlements of judges relate directly to the independence of individual judges, and *ipso facto* to the independence of the judiciary as an institution. This is made very clear within the constitutional text by placing Article 108 under the heading 'Independence of the Judiciary'.
65. This topic of judicial independence is one of the first constitutional principles a student of law gets exposed to. The solemn importance attached to the independence of the judicial branch historically derives from Baron de Montesquieu's conception of the separation of powers, which evolved in its various forms to be a touchstone of constitutional governance.
66. As Montesquieu cautioned in his celebrated work ***De l'esprit des lois*** [The Spirit of Laws],  
*"Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator.*

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<sup>24</sup> Emphasis added

*Were it joined to the executive power, the judge might behave with violence and oppression.”<sup>25</sup>*

67. How we conceive the term ‘judicial independence’, or the strict legal meaning thereof, has not remained stagnant over the years. Judicial independence, according to *Anderson & Helland*,<sup>26</sup> has at least two conceptual dimensions: Firstly, who should be independent? Is it the judiciary in general, the specific court in general or the individual judge who hears the case? Secondly, from whom should they be independent?<sup>27</sup> The Montesquieuan conception, as mentioned earlier, sees independence from the executive and legislative branches of government as paramount. However, other forces such as public opinion, litigants or even attorneys may potentially operate disruptively, more than ever in today’s climate.
68. It is well understood that such independence must encompass both substantive and compositional, applying not only to the judiciary as an institution but also to its individual members. And it is axiomatic that such independence greatly depends in some shape or form on the financial independence of individual judges. The salary and pension afforded to the members of the judiciary, in my view, is one matter that impacts both these dimensions of independence.

### **Salaries, Pension Entitlements, and the Independence of the Judiciary**

69. There is no denying that Judges are expected to lead a significantly different life, both personally and professionally, from that of other legal professionals. As Winston Churchill once observed:

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<sup>25</sup> Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans., 1752) at p. 173

<sup>26</sup> James M Anderson & Eric Helland, ‘How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench’ (2012) 64 *Stanford Law Review* 1277, at p. 1293

<sup>27</sup> *ibid*, at p. 1293, fn 60

*"A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct..."<sup>28</sup>*

70. Such restrictions on the life and conduct of a superior court judge do not end with their tenure. The life of a retired judge must continue to uphold the sanctity of the office he or she once held. Our Constitutional text itself is plenty clear on this.

71. As Article 110 of the Constitution provides:

*"...*

*(2) No Judge of the Supreme Court or Court of Appeal shall perform any other office (whether paid or not) or accept any place of profit or emolument, except as authorized by the Constitution or by written law or with the written consent of the President.*

*(3) No person who has held office as a permanent Judge of the Supreme Court or of the Court of Appeal may appear, plead, act or practise in any court, tribunal or institution as an Attorney-at-Law at any time without the written consent of the President."*

72. As it is evident, the Constitution itself imposes restrictions on judges' freedom of occupation and profession. This, by extension, limits the sources from which such judges may lawfully derive an income. Restrictions of this nature make it necessary that judges be given a salary and pension that corresponds properly to the standing and dignity of judicial office.

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<sup>28</sup> Robert Rhodes James (ed), *8 Winston S. Churchill: His Complete Speeches 1897-1963* (1974), at p. 8548

73. This is an issue that has received widespread attention. As I noted earlier, much of the formal accounts and reports on concerns relating to judicial salaries come from the United States.
74. It is apparent that this concern goes far back. In fact, one of the twenty-seven grievances set out in the **US Declaration of Independence (1776)** was that “[George III] *has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.*”
75. While the **Articles of Confederation (1777)** made no mention of the judicial branch,<sup>29</sup> the 1787 Constitution Convention set out what is known as the ‘Compensation Clause’ in Article III, Section 1 of the **Constitution of the United States**. It provides that,

*“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. **The Judges**, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and **shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.**”*

76. Before settling on this provision, which prohibits diminution of judges’ salaries, draft constitutions sought to prohibit both decreases and increases,<sup>30</sup> so that judges are placed beyond all forms of financial persuasions. The necessity of periodic increments was later recognised, inflation being inevitable. James Madison had taken the view that judges ought to be afforded a permanent, inflation-adjusted salary—secured against something of permanent value—in order to better secure judicial independence, so that judicial

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<sup>29</sup> Chief Justice John G. Roberts, Jr., ‘2024 Year End Report on the Federal Judiciary’ (December 31, 2024), at p. 2

<sup>30</sup> Anderson & Helland (2012) *supra* note 26, at p. 1295

officers would not be tempted to curry favour with the legislature to see their pay increased.<sup>31</sup>

77. As the US Supreme Court observed in **United States v. Will et al.**,<sup>32</sup>

*"The **Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary.** A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government..."*

78. *Anderson & Helland* observe that the framers of the US Constitution were primarily concerned with making the judicial branch independent from the executive and legislative. However, the focus has later shifted to also pay attention to the relationship between judicial independence and other financial interests or stakes a judge might have in their own commercial ventures.<sup>33</sup>

79. In the US, debate on judicial pay and judicial independence has persisted since the days of its founding fathers. In 2003, the **Volcker Commission Report**<sup>34</sup> observed, regarding judicial salaries in the US, as follows:

*"The lag in judicial salaries has gone on too long, and the potential for diminished quality in American jurisprudence is now too large. Too many of America's best lawyers have declined judicial appointments. Too many senior judges have sought private sector employment—and compensation—rather than making the important*

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<sup>31</sup> *ibid* at pp. 1295-1297

<sup>32</sup> 449 US 200, at pp. 217-218 (Emphasis added)

<sup>33</sup> *ibid* at p. 1298

<sup>34</sup> 'Urgent Business for America: Revitalizing the Federal Government for the 21<sup>st</sup> Century' (Report of the National Commission on the Public Service, January 2003), at p. 23

*contributions we have long received from judges in senior status.*

*Unless this is revised soon, the American people will pay a high price for the low salaries we impose on the men and women in whom we invest responsibility for the dispensation of justice. We are not suggesting that we should pay judges at levels comparable to those of the partners at our nation's most prestigious law firms. Most judges take special satisfaction in their work and in public service. The more reasonable comparisons are with the leading academic centers and not-for-profit institutions..."*

80. As the Volcker Commission has recognised, where remuneration and pension benefits of judges are inadequate, the best lawyers will continue to reject judicial appointments. Even those who have accepted appointments will leave office for better prospects. In this sense, as Chief Justice William Rehnquist comments, judicial salaries also affect the inclusivity and diversity of the judicial branch.<sup>35</sup>
81. Late Chief Justice Rehnquist, perhaps the most outspoken out of those who canvassed for better judicial salaries in the United States, habitually commented on the inexorable impact of judicial salaries on the independence of the judiciary in his *Year-End Reports*.
82. In the *2002 Year-End Report*, His Lordship observed as follows:

*"Diminishing judicial salaries affects not only those who have become judges, but also the pool of those willing to be considered for a position on the federal bench. I am not suggesting that there is a shortage of lawyers lined up to apply for vacant judgeships. But many of the very best lawyers, those with a great deal of experience, are not willing to accept a position knowing that their salary will not even keep pace with inflation. Our judges will not continue to represent the diverse face of America*

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<sup>35</sup> Anderson & Helland (2012) *supra* note 26, at p. 1289

*if only the well-to-do or the mediocre are willing to become judges.*

*...Those lawyers who are most qualified to serve as federal judges have opportunities to earn far more in private law practice or business than as judges. I am not suggesting that we match the pay of the private sector—but the large and growing disparity must be decreased if we hope to continue to provide our nation a capable and effective federal judicial system. Providing adequate compensation for judges is basic to attracting and retaining experienced, well-qualified and diverse men and women to perform a demanding position in the public service. We need judges from different backgrounds and we want them to stay for life.”<sup>36</sup>*

83. The learned Chief Justice’s successor, John G. Roberts, Jr., in the *2006 Year-End Report*, once again brought the concerns regarding the continued failure to raise judicial pay to the fore, describing it as a “...constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.”<sup>37</sup>

84. As Chief Justice Roberts further observed in the said Report,

*“The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge. Our judiciary will not properly serve its constitutional role if it is restricted to (1) persons so wealthy that they can afford to be indifferent to the level of judicial compensation, or (2) people for whom the judicial salary represents a pay increase. Do not get me wrong—there are very good judges in both of those categories. But a judiciary drawn more and more from only those categories would not be the sort of*

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<sup>36</sup> Chief Justice Rehnquist ‘2002 Year-End Report on the Federal Judiciary’ (January 1, 2003) available at: <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>

<sup>37</sup> Chief Justice John G. Roberts, Jr, ‘2006 Year-End Report on the Federal Judiciary’ (January 1, 2007), at p. 1



*judiciary on which we have historically depended to protect the rule of law in this country.*"<sup>38</sup>

85. Another danger seldom spoken of is how low pay, coupled with restrictions on other employment, may potentially lead officials towards corruption. Where the workload is near herculean, if the pay is derisory, it could understandably leave them open to being enticed by unscrupulous bargains. It is also to be noted that judicial officers do not have the option of resorting to industrial or union action, in order to vindicate any rights relating to their wages.

86. As noted in the ***South African case of Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)***,<sup>39</sup>

*"Judicial officers ought not to be put in a position of having to do this, or to engage in negotiations with the executive over their salaries. They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such matters, than others who can advance their interest through normal bargaining processes open to them"*

87. Another well-founded criticism of low pension entitlements is that it may lead judges to appease authorities expecting lucrative post-retirement appointments. This would especially be true if executive and legislative authorities are left free to adjust judicial pensions on a whim. As US Chief Justice Roberts observed *2006 Year-End Report*,

*"...If judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the*

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<sup>38</sup> *ibid* at p. 7

<sup>39</sup> 2002 (8) BCLR 810 (CC)

*Framers' goal of a truly independent judiciary will be placed in serious jeopardy."*

88. In this regard, Dr. Jayampathy Wickramaratne, PC observes as follows in his treatise **Fundamental Rights in Sri Lanka**:<sup>40</sup>

*"Yet another way in which the prestige of the judiciary has been undermined is the appointment of handpicked retired judges of the superior courts to positions in the executive and its agencies. **It is suggested that the Constitution should provide that the pension of a retired judge of a superior court should be equivalent to the salary of a sitting judge** and that such a judge should not hold any office or be appointed to any position to which he could not have been appointed if he had been a judge..."*

89. It is for such reasons that the reduction of salaries and pensions of judges is generally frowned upon. I believe Alexander Hamilton explained it best, in **Federalist No. 79**: *"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support... In the general course of human nature, a power over a man's subsistence amounts to a power over his will."*<sup>41</sup>
90. This is hardly a feature unique to our own Constitution or to that of the United States. It is a universally accepted norm that is ubiquitous in constitutional texts as well as international frameworks and guidelines.
91. **International Bar Association's Minimum Standards of Judicial Independence** (Adopted in 1982) provides in Articles 14 and 15 as follows:

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<sup>40</sup> Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (Stamford Lake 2021) 118 (Emphasis added)

<sup>41</sup> Alexander Hamilton, 'Federalist No. 79: The Judiciary Continued' (McLEAN's Edition, New York)

*"14 Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.*

*15*

*a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.*

*b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure."*

92. The **Venice Commission** remarked in its *Report on the Independence of the Judicial System*,<sup>42</sup>

*"45. The CCJE [Consultative Council of European Judges] adds in Opinion No. 1:*

*"62. While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living."*

*46. The Venice Commission shares the opinion that the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference..."*

93. **Commonwealth (Latimer House) Principles**, under its guidelines for preserving judicial independence, provides that,

*"...Appropriate salaries and benefits, supporting staff, resources and equipment are*

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<sup>42</sup> European Commission for Democracy Through Law (Venice Commission), 'Report on the Independence of the Judicial System, Part 1: The Independence of Judges', CDL-AD(2010)004 (Strasbourg 16 March 2010)

*essential to the proper functioning of the judiciary.*

*As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.”<sup>43</sup>*

94. In addition, Principle 11 of the **UN Basic Principles on the Independence of the Judiciary**<sup>44</sup> states that,

*“The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”*

95. Numerous constitutions around the world have followed the same model as the Compensation Clause in the United States Constitution. Article 110 of the *National Constitution of Argentina (1853)*, Section 72(iii) of the *Commonwealth of Australia Constitution Act (1901)*, Article 125 of the *Constitution of India (1949)*, Article 79 of the *Constitution of Japan (1946)*, Article 94 of the *Political Constitution of the United Mexican States (1917)*, Section 176(3) of the *Constitution of the Republic of South Africa (1996)*, Section 24 of the *Constitution Act 1986* of New Zealand, Article VIII, Section 3 of the *Constitution of the Republic of the Philippines (1987)* and Article 180 of the *Political Constitution of the State of Bolivia* are some of the constitutional provisions that explicitly prohibit any reductions to judicial salaries.

96. The 1980 Peruvian Constitution<sup>45</sup> took a somewhat different approach by guaranteeing

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<sup>43</sup> ANNEX: PARLIAMENTARY SUPREMACY AND JUDICIAL INDEPENDENCE - Latimer House Guidelines for the Commonwealth (19 June 1998) in Commonwealth Parliament Association, ‘Commonwealth (Latimer House) Principles on the Three Branches of Government’ (November 2003), Guideline II (2)

<sup>44</sup> Adopted on 06<sup>th</sup> September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985

<sup>45</sup> Now replaced by the *Political Constitution of the Republic of Peru (1993)*

the judiciary a minimum percentage of the country's budget.<sup>46</sup> However, the present Constitution of Peru, enacted in 1993, does not appear to contain a similar provision. Article 213 of the *Constitution of Panama (1972)*, on the other hand, declares that salaries and allowances for Justices of the Supreme Court shall not be less than those of the Ministers of State.

97. The connection between judicial salaries and the independence of the judiciary has also been recognised by the Constitutional Court of the Republic of Slovenia.<sup>47</sup> The Constitutional Court found that Article 125 of the Constitution of the Republic of Slovenia required the legislature to also provide a mechanism to prevent the reduction of judicial salaries resulting from the 'fall in their real value'. It is noteworthy to this end that, said Article 125 of the Slovenian Constitution does not expressly prohibit the reduction of judges' salaries but rather merely provides that '*the Judges shall independently exercise their duties and functions in accordance with this Constitution and with the law*'.<sup>48</sup>
98. It is amply clear, then, that this notion of *irreducibility of judicial salaries* is one of the more widely utilised measures in protecting personal independence of judicial officers from economic pressure. The drafters of our own Constitution have opted for the same approach.

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<sup>46</sup> Keith S. Rosenn, 'The Protection of Judicial Independence in Latin America' (1987) 19:1 University of Miami Inter-American Law Review 1, at p. 17

<sup>47</sup> The Constitutional Court of the Republic of Slovenia Decision No. U-I-772/21, dated 01 June 2023 (Official Gazette RS, No. 72/2023) at para 120, with reference to the Constitutional Court of the Republic of Slovenia Decision No. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006 (Official Gazette RS, No. 1/07, and OdlUS XV, 84) paras 64 and 84; Constitutional Court of the Republic of Slovenia in Decision No. U-I-159/08, dated 11 December 2008 (Official Gazette RS, No. 120/08, and OdlUS XVII, 71) para 30

<sup>48</sup> See The Constitution of the Republic of Slovenia, Article 125

99. While most authorities I have adverted to mention of judicial salaries, the same naturally extends to the pension entitlements of judges as well. As I mentioned earlier, a judge is saddled with legal and ethical restrictions and limitations not only during their tenure but also after their retirement. As such, their subsistence and livelihood must involve a degree of certainty if individual judges are to be truly beyond external pressure. To this extent, the pension entitlements of a Superior Court Judge constitute an extension of the compensation awarded for past service, as well as for the lifelong restrictions to which the Judge is subject.
100. There is, indeed, a general principle that the salaries of judges in general—not only the Judges of Superior Courts—should not be reduced during their tenure of office.<sup>49</sup> However, in addition to this general principle, an express constitutional guarantee is set out vis-à-vis the Judges of Superior Courts, to better protect the independence of such Judges. This is hardly surprising considering the nature of the matters that are generally canvassed before the Superior Courts. As opposed to purely personal disputes, various actions and applications against the State are taken up before Superior Court Judges on a daily basis.
101. As Wanasundera, J opined in ***Hewamanne v. De Silvas and Another***,<sup>50</sup>
- "These constitutional provisions have established and constituted the **Judiciary as one of the three principal organs of the State** and have also proceeded to ensure the independence of the judiciary as its essential feature. **The peculiar standing and position of judges in our Constitution** are very much similar to the position of judges in the U.K. Sir Winston Churchill, in a speech made in the House of Commons when the increase of the salaries of judges was being discussed in the*

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<sup>49</sup> *Re Inland Revenue (Amendment) Bill* S.C. S.D. Nos 64/2022 to 71/2022, at pp. 41-42

<sup>50</sup> [1983] 1 Sri L.R. 1, at pp. 23-24

House, described with his characteristic eloquence the unique position the judges occupy in the framework of government. The quotation is taken from a lecture entitled "Independence and Impartiality of Judges" given by Lord Denning at the Faculty of Law Witswatersrand University, S. Africa. and contained in S.A.L.J., page 349

*'There is nothing like them at all in our island. They are appointed for life. They cannot be dismissed by the executive Government. They cannot be dismissed by the Crown either by the Prerogative or on the advice of Ministers. They have to interpret the law according to their learning and conscience. **They are distinguishable from the great officers of State and other servants of the Executive, high or low, and from the leaders of commerce and industry. They are also clearly distinguishable from the holders of less exalted judicial office.** Nothing but an address from both Houses of Parliament, assented to by the Crown, can remove them.'*

Sir Winston continued:

*'The **principle of the complete independence of the Judiciary from the Executive is the foundation of many things in our island life.** It has been widely imitated in varying degrees throughout the free world. **It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule.** The only subordination which a judge knows in his judicial capacity is that which he owes to the existing body of legal doctrine enunciated in years past by his brethren on the bench, past and present, and upon the **laws passed by Parliament** which have received the Royal assent. The judge has not only to do justice between man and man. He also - and this is one of his most important functions considered incomprehensible in some large parts of the world - has to do justice between the citizens and the State . . .*

*The British Judiciary, with its traditions and record, is one of the greatest living assets of our race and people and the independence of the Judiciary is a part of our message to the ever-growing world which is rising so swiftly around us.*"<sup>51</sup>

102. It is very clear that, as this Court has recognised, time and time again, the sacrosanct principle of judicial independence is a central norm embedded in our Constitution. It is also clear that framers of our Constitution have deployed the widely accepted principle of *irreducibility of judicial salaries/pension entitlements* as a key device to this end.

### **Judicial Independence and the Sovereignty of the People**

103. As observed in ***Re Inland Revenue (Amendment) Bill***,<sup>52</sup> this Court held in ***Re Industrial Disputes (Special Provisions) Bill***<sup>53</sup> that Sovereignty in Article 3 of the Constitution must be interpreted to include the right to an independent judiciary.
104. In ***Re Inland Revenue (Amendment) Bill***,<sup>54</sup> this Court further opined that "[a]ny Constitutional amendment to the retirement age or the period of office impacting on incumbent judges, whether directly or indirectly, **will impinge on the independence of the judiciary and [be] violative of Article 3 which requires a Referendum.**"<sup>55</sup>
105. The Petitioner contended that any amendment to the salaries and pension entitlements would impinge on the independence of the judiciary and be violative of Article 3 read with Article 108 of the Constitution, just as much as an amendment to the retirement age

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<sup>51</sup> Emphasis added

<sup>52</sup> S.C. S.D. Nos. 64/2022 to 71/2022, at pp. 41

<sup>53</sup> S.C.(S.D.) No. 30/2022

<sup>54</sup> S.C. S.D. Nos. 64/2022 to 71/2022, at pp. 47

<sup>55</sup> Emphasis added



or term of office would. Accordingly, it was the Petitioner's submission that any reduction to the pension and salary entitlements of judges would require a resolution in Parliament passed by a two-thirds majority as well as a referendum.

106. This submission of the Petitioner is also supported by the Irish Constitutional experience. In 2011, when Ireland attempted to reduce the salaries of Irish judges, the question had to be placed before the people at a referendum. The decision to reduce the salaries was then carried out, after being approved by a referendum on 27<sup>th</sup> October 2011.
107. Considering the decisions of this Court I have considered in the immediately preceding section of this judgment and the views expressed therein, I am of the opinion that the Petitioner's contention in this regard is well-founded. As I have already explained, salaries and pension entitlements of judges directly relate to the independence of the judiciary, and the independence of the judiciary is a matter so clearly embedded in Articles 3 and 4 of the Constitution, for the Rule of Law itself pre-supposes an independent judiciary.
108. As Sharvananda, J (as His Lordship then was) very aptly observed in **Visuvalingam v. Liyanage**,<sup>56</sup>

*"The main aspirations of the Constitution are set down in its luminous preamble. Rule of law is the foundation of the Constitution and independence of the judiciary and fundamental human rights are basic and essential features of the Constitution. It is a lesson of history that the most valued constitutional rights pre-suppose an independent judiciary, through which alone they can be vindicated. There can be no free society without law, administered through an independent judiciary. It is and should be the pride of a democratic government that it maintains and upholds independent courts of justice where even its own acts*

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<sup>56</sup> [1983] 1 Sri L.R. 203

**can be tested. The supremacy of the Constitution is protected by the authority of an independent judiciary to act as the interpreter of the Constitution.** So solicitous were the framers of the Constitution to make the position of the Judges independent and entrenched that they invested them with the status of irremovability save on the limited grounds and manner specifically set out in its provisions. **The Judges of the Supreme Court and of the Court of Appeal, unlike Public Officers of whatever rank, do not hold office during pleasure.** The Constitution endeavours to secure the independence of the judiciary by setting up well-known mechanisms to assure their security of tenure. The vital need of security of tenure can scarcely be over-emphasised. It is significant that the Article 107 appears under the caption "Independence of the Judiciary."

Article 108 provides that their salaries shall be determined by Parliament and are charged on to the Consolidated Fund and that the salary payable to and pension entitlement of a Judge of the said Courts shall not be reduced after his appointment. **It is manifest that these provisions are designed to safeguard the independence of the Judges by affording them security of tenure. These provisions have not been put into the Constitution merely for the individual benefit of the Judges; they have been put there as a matter of public policy.** The security of tenure of Judges has been vouched to the Judges, not only for their own protection but **for the protection of the State itself.** The framers of the Constitution had considered it to be in the interest of the public and not merely of the individual Judges that their security of tenure should be sacrosanct and sanctioned by the Constitution.<sup>57</sup>

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<sup>57</sup> *ibid* at pp. 236-238 (Emphasis added)

**Cabinet Memorandum dated 24<sup>th</sup> June 2019**

109. The aforesaid Memorandum dated 24<sup>th</sup> June 2019<sup>58</sup> sought the approval of the Cabinet of Minister to (i) to recover the commuted pension paid to the Judges of the Superior Courts in 120 months *in accordance with the laws in force*, and (ii) to present a resolution to the parliament in that regard.
110. Said Memorandum first sets out the background of the issue, highlighting that commuted pension paid to the Superior Court Judges amounting to 24 times their monthly pension were not deducted from their monthly pension for a long period of time and that said Judges had accordingly been paid an unreduced monthly pension. It categorically states that there had been *no legal basis for this purpose*. While it also highlights the audit queries by the Auditor-General and the subsequent inquiry by *Parliaments Committee on Public Accounts (COPA)*, it makes no mention of the opinions given by the Attorney-General up to that point in time as to why such a deduction should not be made according to Article 108(2) of the Constitution.
111. It highlights that there had been requests from Superior Court Judges to not make such deductions, as well as to effect increments to their salaries, and further explains the steps taken to increase the allowances of the judges.
112. While the Memorandum also makes reference to Article 108 of the Constitution and its effect in general, the opinion of the Attorney-General with respect to how this constitutional provision operates is not duly set out. Instead, the Memorandum simply states that,

*"... the Honourable Attorney General has pointed out that the powers relating to the reduction of pensions of the Judges of the Supreme Court and the Court of Appeal or*

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<sup>58</sup> Marked '27R20', appended to 27<sup>th</sup> Respondent's Statement of Objections

*matters incidental thereto has [sic] been conferred on Parliament by the Constitution."*

113. The Memorandum makes no mention of when this opinion was given and how it was communicated. Therefore, it is unclear whether the Attorney-General has in fact given such an opinion. Be that as it may, the above statement is not a mere misinterpretation, but a complete and utter misrepresentation of the constitutional provisions, as it contains a position that is precisely the opposite of what the Constitution states.

114. Following the said error, the Memorandum further states,

*"...I observe that the recovery of the commuted pension would not affect the interpretation of the Article 108(2) of the Constitution"*

115. I would be remiss if I fail to point out at this stage that sole and exclusive jurisdiction to interpret the Constitution is vested with the Supreme Court by Article 125 of the Constitution. The then President has acted in contravention of this provision by forming an opinion on the interpretation of Article 108(2) and thereafter taking affirmative action based on such opinion. What is even more striking is that this course of action was pursued despite the explicit advice given by the Attorney-General, the principal legal advisor to the State, to the contrary.

116. The Memorandum further states as follows:

*"I observe that it is not appropriate to grant a non-recoverable allowance to any person of whatever rank out of public funds and that if this allowance is granted to the Judges of Superior Courts whose salaries are met out of the Consolidated Fund, it will be a precedent for the entire public service to make similar requests for this allowance resulting in the government having to meet an additional commitment."*

117. This apprehension, I am inclined to observe, is fundamentally misplaced. The protection specifically afforded to the Judges of Superior Courts by Article 108(2) of the Constitution is not applicable to the entire public service. As I explained above in detail, the provision affords this special protection to judicial officers to prevent other organs of government from potentially utilising judicial salaries as a 'bargaining chip' as it were. To this extent, judicial officers constitute a special class of officers, and Superior Court Judges are a distinct class within this special class of officers. As previously noted, many restrictions are imposed on the Judges of Superior Courts by the Constitution itself, both during and after their tenure—restrictions that do not apply for other public officers. Understandably, such unique restrictions are coupled with a distinctive set of protections and benefits.

118. As K. Ramamoorthy, J opined in **R.N. Mittal & Anr v. Government of the NCT of Delhi**,<sup>59</sup>

*"Society, therefore, must understand the problem. Solution to the problem would depend upon realisation of the fact that the more capable people at the Bar are not willing to accept offers of judicial appointments. The plea that the other wings in the States would demand improvement in their scales or pay is not a relevant feature at all when the problem is viewed from this angle. **We hope and trust that society would generate the appropriate understanding of the matter and no Government would come forward to take the stand that if the pay scales and perks of the Judicial Officers are improved similar demands would come from other wings of Government.**"*

119. The aforementioned distinction between judicial officers and public officers is one clearly recognized in our Constitution. Article 170 of the Constitution expressly sets out two distinct definitions for the terms 'judicial officer' and 'public officer' for the purpose of the

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<sup>59</sup> R.N. Mittal (Mr. Justice) (Retd.) & Anr v. Government of the Nct of Delhi, 1999 III AD (DELHI) 297, 78 (1999) DLT 849, 1999 (49) DRJ 532, at para 8 with reference to *All India Judges' Association v. Union of India & Ors.* JT 1991 (4) SC 285, at para 50

Constitution. Moreover, the definition of 'public officer' therein<sup>60</sup> clearly excludes judicial officers from its ambit.

120. This distinction is also very clearly recognised in many other jurisdictions.<sup>61</sup> As observed in ***All India Judges' Association v. Union of India and Others***,<sup>62</sup>

*"...The judicial service is not service in the sense of 'employment'. The judges are not: employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature."*

121. On top of all such errors on the facts and law, as I noted previously, said Memorandum does not place before the Cabinet all material documents required to be taken into consideration to make a decision, including the several opinions given by the Attorney-General. As the Respondent admitted before this Court, said documents were only submitted to the Cabinet in December 2023.
122. It is in this context that the Cabinet has granted approval to both proposals set out in this Memorandum by Decision dated 24<sup>th</sup> July 2019.

### **Cabinet Memorandum dated 14<sup>th</sup> December 2023**

123. By Memorandum dated 14<sup>th</sup> December 2023, then President Ranil Wickremasinghe has placed before the Cabinet a more complete picture of the sequence of events leading to

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<sup>60</sup> As amended by the Twenty First Amendment to the Constitution

<sup>61</sup> *Gilham (Appellant) v. Ministry of Justice (Respondent)* [2019] UKSC 44; *Van Rooyen and Others v. The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (8) BCLR 810 (CC); *Re Australian Education Union & Australian Nursing Federation; ex parte Victoria* (1995) 69 ALJR 451; [1995] HCA 71; 184 CLR 188; 128 ALR 610

<sup>62</sup> AIR 1993 SC 2493

the instant fundamental rights application as well as the proceedings before this Court up to that stage. This Memorandum, *inter alia*, states the following:

*"....*

*1.7 With the cancellation of the Public Administration Circular No.44/90, the privilege of receiving a pension calculated on the basis of 90% of the salary and the commuted gratuity which was not recovered from the pension ceased with effect from 1996-12-24. The Secretary to the then Ministry of Public Administration had sought the opinion of the Attorney General on inquiry made by the Registrar of the Supreme Court pertaining to the pension of Justice P. Ramanathan, retired judge of the Supreme Court, being calculated on the basis of 85% of the salary in keeping with the provisions which prevailed prior to 1990-10-18. The Attorney General by his letter dated 1997-09-15 has intimated that, even though the pension entitlement of a Judge of the Superior Courts could be increased at any time after his appointment, varying or altering which has the effect of reducing such entitlement once it is increased, contravenes Article 108(2) of the Constitution. Accordingly, it has been informed that the relevant retired Judge should be awarded a pension calculated on the basis of 90% of the salary under the cancelled Public Administration Circular No.44/90.*

*1.8 Accordingly, action had been taken as per the advice of the Attorney General, to pay the retired Judges of the Supreme Courts, an un-reduced pension of 90% of the salary together with a commuted gratuity continuously, which is not recovered. But, no provisions to that effect have been included in the Minutes on Pensions.*

*1.9 To regularise this situation, section 25 of the Minutes on Pensions has been repealed by the Gazette Notification No.1190/18 dated 2021-06-28 and a new section incorporated therefor in terms of which, a Judge of the Supreme Court or Court of Appeal retiring with 36 months service as a Judge of the Supreme Court or*

*a Judge of the Court of Appeal or in both positions, is entitled to receive a pension calculated on the basis of 90% of his/her last drawn salary at retirement. Public Officers and judicial officers are not entitled to this privilege.*

*1.10 But in parallel to this amendment, the applicability of the provisions of in section '2A' and '2B' of the Minutes on Pensions to receive the commuted gratuity and death gratuity pertaining to the Judges of the Supreme Court or the Court of Appeal, have been removed. This has removed the entitlement of obtaining the commuted gratuity at the time of retirement or the death gratuity in the event of death while on duty, for Judges of the Supreme Court.*

*1.11 In the above backdrop, although the Minutes on Pensions does not contain a legal authority or a provision for the Director General of Pensions to pay the commuted gratuity and the death gratuity to the Judges of the Superior Courts, payments have been continuously made to date, based on the advice of the Attorney General referred to at 1.7 above and it has not been recovered from the pension. Further, the applicability of the said advice of the Attorney General in respect of the Judges of the Supreme Court or the Court of Appeal who have been appointed after 1996-12-24, is problematic.*

*1.14 Justice A.H.M. Upaly Abeyrathne, former Judge of the Supreme Court, has retired on 2017-08-07 on completion of 65 years of age has filed a Fundamental Rights Application bearing No. SC(FR)282/2018 in the Supreme Court on 2018-09-10 citing the Director General of Pensions, Auditor General and Attorney General as Respondents, challenging the recovery of commuted gratuity that he obtained on his option and payment of the relevant installment deducted pension.*

*1.15 The former President, pursuing action as per the legal advice pertaining to this Petition bearing no. SC(FR)282/2018, submitted the Cabinet Memorandum dated 2019-06-24 and No.19/1782/101/116. Since the recovery of commuted gratuity*



*which is a recoverable advance, obtained on their option and the payment of the relevant installment deducted pension up to 10 years could not be treated as a reduction in pension entitlement as specified in Article 108(2) of the Constitution, the Cabinet at its meeting held on 2019-07-19 has granted approval for the recovery of the commuted gratuity of the Judges of the Superior Courts in 120 months in accordance with existing law.*

*Further, approval has also been granted to move a Resolution in Parliament to that effect. Accordingly, this proposal had been included in the Order Paper of the Parliament dated 2019-11-11. However, the Resolution did not receive Parliamentary approval as it was not debated and due to the prorogation of Parliament.*

*1.16 Since permission has been granted, on the request of the Petitioner, to cite the Cabinet of Ministers too as Respondents and due to the Attorney General inquiring from the Secretary to the Cabinet whether the Petitioner could be granted any administrative relief, the Secretary to the Cabinet drew the attention of the Cabinet to this matter through the Note to the Cabinet dated 2020-11-12 on CP No.20/1822/340/006. The Cabinet having considered this matter at the cabinet meeting held on 2020-11-16 has re-confirmed the decision taken at its meeting held on 2019-07-19 in this regard.*

*1.17 The Petition of the Supreme Court Case No. SC(FR)282/2018 has been further amended on 2023-09-27, wherein the Cabinet of Ministers, the Registrar of the Supreme Court and the Secretary, Ministry of Public Administration, Home Affairs, Provincial Council and Local Government too have been cited as Respondents....*<sup>63</sup>

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<sup>63</sup> Reproduced *verbatim*

124. As can be seen, the said Memorandum sets out the following key observations:

- Opinions received from the Attorney-General intimates that retired judges should be awarded an unreduced pension calculated on the basis of 90% of the salary in terms of the cancelled PA Circular No. 44/90;
- Judges of Superior Courts have accordingly been paid an unreduced pension for a long period of time pursuant to such advice from the Attorney-General;
- An administrative shortcoming has occurred when amending Section 25 of the Minutes on Pension by Gazette Notification No. 1190/18 dated 28<sup>th</sup> June 2001, which had the effect of inadvertently removing the applicability of Sections 2A and 2B of the said Minutes which provided for the 'commuted gratuity' and death gratuity of Superior Court Judges;
- The above removal contravenes Article 108(2) of the Constitution;
- In spite of the abovesaid removal, 'commuted gratuity' had been paid to the Judges of Superior Courts up to 2017, even in the absence of specific provisions in the Minutes on Pensions;
- Steps have been taken to recover the commuted pension from such Judges in 120 months from the year 2017 through the payment of a reduced pension;
- Minutes on Pension ought to be amended to rectify this longstanding administrative shortcoming and regularize the payment of death gratuity and 'commuted gratuity';
- It would be appropriate to pursue action according to the policy at the time to recover the 'commuted gratuity' granted as an advance recoverable from all public officers, including Superior Court Judges;

125. Somewhat significantly, the Memorandum further observes that "[n]on-recovery of the

*commuted gratuity from the Judges of the Superior Courts would tantamount to granting a new pension entitlement to such retired Judges...*" and forewarns that such non-recovery could potentially lead to issues regarding the recovery of property loans, vehicle loans, etc., while also giving reasons for other public officers to demand similar benefit.

126. The above concern is reflected in the Cabinet Memorandum dated 24<sup>th</sup> June 2019 as well, which I have adverted to under the immediate subheading hereinabove. I have discussed why other public officers would not be entitled to a similar benefit, and do not wish to repeat the same reasoning once again.
127. As to the other concerns, the non-recovery of commuted pension does indeed tantamount to granting a new pension entitlement. This is precisely why Article 108(2) of the Constitution prevents the same from being removed. In actual fact, the Judges were paid the full pension without any deductions even when they have opted to receive a commuted pension, according to the Public Administration Circular No. 44/90. Even after the cancellation of the said Circular, the fully payment had continued in practice. It is entirely erroneous to claim that this continuation lacks a legal basis, when the Attorney-General has repeatedly explained the legal basis with reference to Article 108 of the Constitution in several advisory opinions.
128. It is also entirely incorrect to suggest that non recovery of the commuted pension could potentially cause trouble with respect to the recovery of personal loan, etc. The effect of Article 108(2) of the Constitution is such that, once a salary or pension benefit is granted to a Judge referred therein, after such person's appointment as a Judge, the salary of pension benefits so granted cannot be taken away. Salary and pension benefits of Superior Court Judges can only be increased, and never reduced. This provision by no means places such Judges beyond the reach of their creditors, nor does it absolve their debts or other such obligations. To even suggest so would be manifestly absurd.

### **Failure to Place All Material Documents Before the Cabinet**

129. As the Respondents submitted, it is consequent to a clarification sought by the Attorney-General that the Ministry had, by letters dated 17<sup>th</sup> March 2023 and 21<sup>st</sup> December 2023, brought to the notice of Hon. Attorney-General the material documents, that disclosed the reasons as to why the full pension was paid to Judges of the Superior Courts without any deductions.
130. Thereafter, the Respondents, by motion dated 24<sup>th</sup> March 2023, disclosed said documents to this Court as well as to the Petitioner. Thereafter, the same documents have been placed before the Cabinet of Ministers by the former President by the aforementioned Cabinet Memorandum dated 14<sup>th</sup> December 2023. Thereafter, the Cabinet had decided on 18<sup>th</sup> December 2023 to appoint a Cabinet Sub-Committee and an Official's Committee to provide recommendations to the Cabinet.
131. Accordingly, it is amply clear that all cabinet decisions taken in this regard prior to this Memorandum dated 14<sup>th</sup> December 2023 have been made without considering vital material relating to the pension entitlements of Superior Court Judges.

### **Advice Sought from the Attorney-General in 2023 [Attorney-General's Third Opinion, dated 11<sup>th</sup> January 2024]**

132. The Secretary to the Cabinet of Ministers, by letter dated 29<sup>th</sup> November 2023, had sought advice from the Attorney-General on the same matter with specific reference to the instant fundamental rights application. The Attorney-General, by a response letter dated 11<sup>th</sup> January 2024, had sent his opinion to the said Secretary.<sup>64</sup>

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<sup>64</sup> Marked "T", appended to the Motion dated 19<sup>th</sup> June 2025

133. In this response, at the very outset, then Attorney-General, Sanjay Rajaratnam, PC has emphasised the fact that this matter related to the independence of the judiciary. Having so emphasised, the Hon. Attorney-General has reiterated the advice given by the abovementioned First and Second Opinions in 1997 and 2017.
134. The Attorney-General has specifically stated in his opinion that recovering commuted pensions from judges under Gazette No. 981 of 19<sup>th</sup> June 1997 would be inconsistent with Article 108(2) of the Constitution. He has further noted that such inconsistencies had previously been avoided through the application of Circular No. 44/90 of 18<sup>th</sup> October 1990 with respect to the pensions of Superior Court Judges.
135. The Attorney-General has also made observations therein with regard to the Audit Query dated 16<sup>th</sup> February 2015, by which the Auditor-General's Department sought clarifications from the Department of Pensions as to why commuted pension paid to the pensions of Superior Court Judges were not deducted from their pensions.
136. However, the Department of Pensions had failed to set out the reasons with reference to the foregoing series of events in its reply to the Auditor-General. As I previously noted, the Director-General of Pensions admitted this fact in his Statement of Objections, which was tendered by way of an affidavit.
137. The Attorney-General also observes that the Director General of Pensions had also failed to furnish a full and complete statement of facts—including aforementioned circulars, advice given by the Attorney-General, and letters from the said Director-General and Secretary to the Ministry of Public Administration—to the *Audit and Management Committee Meeting* of the said Ministry as well as to the *Parliaments Committee on Public Accounts (COPA)*.

138. Moreover, and very crucially, the Attorney-General further observe that aforementioned facts had not been fully disclosed to the Cabinet of Ministers at the time of making decisions dated 19<sup>th</sup> July 2019 and 16<sup>th</sup> November 2020, despite such matters being within the knowledge of the Secretary to the Ministry of Public Administration.
139. Having made the abovementioned observations, the Attorney-General concludes his opinion dated 11<sup>th</sup> January 2024 as follows:

*"In the light of the aforementioned facts, and those that were disclosed to my Department by the Secretary to the said Ministry, I am of the opinion that the decision and steps taken at the said Management Audit Committee Meeting on 28.06.2016 and the steps taken by the Director General of Pensions thereon viz. commencing with the former Chief Justice Hon. K. Sripavan upon his retirement on 01.03.2017 and the other Judges of the Superior Courts thereafter, amounts to a reduction of their pension benefits that such Judges were eligible to at the time of their appointment. Such decision and the reductions [are] prohibited by Article 108(2) of the Constitution in as much as such the decision's failure to consider the relevant material facts, makes the decision and steps arbitrary and irrational thus violating Article 12(1) of the Constitution."*<sup>65</sup>

140. Attorney-General has once again sent a letter containing his opinion and recommendations to the Secretary to the Cabinet of Ministers, following a letter dated 11<sup>th</sup> January 2024 from the said Secretary. This letter, too, *inter alia*, reiterates the above position, and I have adverted to the said letter [Attorney-General's Fourth Opinion] morefully hereinbelow.

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<sup>65</sup> *ibid* at para 5 (Emphasis added)

**Attorney-General's Observations and Recommendations to the Cabinet Memorandum dated 14<sup>th</sup> December 2023 [Attorney-General's Fourth Opinion, dated 01<sup>st</sup> March 2024]**

141. In this letter dated 01<sup>st</sup> March 2024, countersigned by then Attorney-General, Sanjay Rajaratnam, PC, the Attorney-General's Department has provided an opinion and made recommendations to the Secretary to the Cabinet of Ministers regarding Proposals No. 3.1, 3.2 and 3.3 in the Cabinet Memorandum dated 14<sup>th</sup> December 2023.

142. Aforementioned proposals are as follows:

*"3.1 To amend section 25 of the Minutes on Pensions regularizing the granting of commuted gratuity and the death gratuity for the Judges of the Superior Courts in keeping with the current circulars on salaries and allowances.*

*3.2 To recover the commuted gratuity obtained by Judges of the Superior Courts at their option as resumed since the year 2017, without prejudice to the pension benefits paid with effect from 1990-10-18, in 120 months as per the provisions of the Minutes on Pensions and to pay the reduced monthly pension during the said period.*

*3.3 To explore the possibility of making provisions through a separate law pertaining to the pension entitlements and benefits and matters connected thereto of the Judges of the Superior Courts."*

143. By this advice, the Attorney-General, reiterates the opinions given in the previous three occasions. It states, *inter alia*, that:

- The decision taken in 1997 was to continue the application of PA Circular No. 44/90 of 18<sup>th</sup> October 1990 to the Judges of Superior Courts;
- The above decision was given effect to, starting from Hon. Ramanathan, J. and

continued even after the Gazette No. 1190/18 of 28<sup>th</sup> June 2001 was promulgated;

- There was no legal basis to resume the recovery of commuted pension in 2017 in the first place;
- The decision to effect such recovery was made by persons who are not empowered by law to make such decisions (as the decisions were not made by Parliament), thus violating Article 108(1) of the Constitution;
- As such recoveries were effected in respect of Judges of Superior Courts after their appointment, such recoveries violate Article 108(2) of the Constitution;
- The decisions to recover and the recovery of commuted pension from Judges of Superior Courts from 2017 are *ultra vires*, illegal, irrational, void in law, and are violative of Article 108(1), 108(2) and 12(1) of the Constitution.

144. The Attorney-General also highlights that the said material facts have not been disclosed to the Cabinet of Ministers by the two Cabinet Memoranda in 2019, thus compromising the validity of the two Cabinet Decisions taken pursuant to such Memoranda.
145. It is further noted therein that, if Gazette No. 1190/18 dated 28<sup>th</sup> June 2001 has not been accurately drafted, the Secretary to the Ministry of Public Administration or the Director General of Pensions ought to have taken immediate steps to rectify the same. Having said so, the Attorney-General advises against any future amendment to further perpetuate such inaccuracies, and recommends that Section 25 to the Minutes on Pension be amended to regularise the same in accordance with Public Administration Circular No. 44/90 dated 18<sup>th</sup> October 1990.
146. Following such observations, the Attorney-General had advised against the proposals set out in the aforementioned Cabinet Memorandum.



**Attorney-General's Observations dated 06th September 2024 – Addendum to the Report of the Officials' Committee [Attorney-General's Fifth Opinion]**

147. As I previously noted, following the Cabinet Memorandum dated 14<sup>th</sup> December 2023 by the President, by Cabinet Decision dated 18<sup>th</sup> December 2023, the Cabinet of Ministers have formed a Cabinet Sub-Committee, chaired by the Minister of Justice, to consider and make recommendations regarding the matters relating to the instant case.
148. Additionally, by the same Cabinet Decision, an Officials' Committee was appointed to assist the Cabinet Sub-Committee. However, the members of the Officials' Committee had failed to reach a unanimous decision. Accordingly, the Officials' Committee had submitted two separate set of observations and recommendations to the Sub-Committee, reflecting the differences of opinion.
149. While the Attorney-General has given one opinion as an Addendum to the Officials' Committee Report, all other members of the Officials' Committee have given a different opinion, with their own set of recommendations. The Attorney-General has recommended against the implementation of proposals No. 3.1, 3.2 and 3.3 in the Cabinet Memorandum dated 14<sup>th</sup> December 2023, highlighting that such implementation would, *inter alia*, contravene Articles 108(1), 108(2) and 12(1) of the Constitution.
150. I do not see it necessary to set out the reasonings of the two factions in detail. The said opinion of the Attorney-General [in the Addendum to the Report] is entirely consistent with all four opinions I have already adverted to. The opinion of the other members run completely contrary to that of the Attorney-General, recommending the implementation of all proposals.

**Conclusion of the Cabinet Appointed Sub-Committee in Its 2025 Report and Associated Concerns**

151. The Report of this Sub-Committee was made available before this Court by the learned Deputy Solicitor General, maintaining the highest traditions of the Attorney-General's Department. The contents of this Sub-Committee's Report, for it was prepared with special reference to the matters before us, warrant special consideration.
152. The Cabinet Sub-Committee has come to make the following observations, having referred to the cobweb of circulars, memoranda, and cabinet decisions, which I do not wish to repeat, for that would make this judgment awfully repetitive—if it is not so already.
153. The Report clearly reveals that this Cabinet Appointed Sub-Committee was of the view that the aforementioned Public Administration Circular No. 44/90 dated 18<sup>th</sup> October 1990 was implemented with the aim of encouraging public officials to retire at the age of 55 without seeking an extension of service. They opine in this Report that this benefit should not have been extended to the judges of the Superior Courts.
154. Be that as it may, the reality is that the said benefit was in fact given to Judges of the Superior Courts for many years. Had there been an error in this regard, as has been repeatedly emphasised in several of the opinions given by the Attorney-General, the relevant authorities ought to have taken immediate steps to rectify the same, instead of attempting to act after nearly 27 years with retrospective effect.
155. The Committee has also formed an opinion to the effect that there is no legality in granting such a commuted pension to Judges of the Superior Courts and that relevant provisions need to be *"amended to obtain legality in giving a recoverable commuted pension to Judicial officers of the Superior courts as the entitlement given in Section 25 has been repealed by the Gazette Notification No. 1190/18 dated 28.06.2001."* The Committee

has also taken notice of the fact that a commuted pension has nonetheless been given to judicial officers.

156. Moreover, the Committee has made the following observations regarding the applicability of Article 108 of the Constitution:

*"This does not appear to be a violation of Art. 108(2) as this is given as a Commuted Pension upon the agreement and the discretion of the pensioner. Therefore, this is similar to obtain of a loan. Once a loan has been applied it will get deducted from the applicant's salary as agreed by the applicant at the time of application. The only difference we see is that the commuted pension is not getting fully recovered and there is no interest payment as well. Therefore, it appears that the commuted pension has been given as a recoverable benefit.*

*Moreover, to become a violation of Art. 108(2) of the Constitution, the reduction should have to be necessarily, which should be in existence at the time of the appointment. In the given case, there was not such an entitlement provided by law at the time of the appointment of the Petitioner. Hence, there cannot be any legitimate expectation of getting and unrecoverable commuted pension while there is no legality in giving such a commuted pension to superior court Judges due to the amendment of Section 25 of the pension minutes."*<sup>66</sup>

157. Although the Attorney-General has repeatedly advice that such action would violate Article 108(2) of the Constitution, the Sub-Committee has simply disregarded this opinion, stating that said opinion of the Attorney-General was specific to the situation of Justice Ramanathan. This, I must point out, is clearly erroneous. Only the very first advice given by the Attorney-General in 1997 relate to the pension benefits of Justice Ramanathan.

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<sup>66</sup> Reproduced *verbatim*

158. The Attorney-General has given further advice regarding this matter in four other separate instances—three of which are in fact attached to the Report of the Cabinet Sub-Committee. Attorney-General's Third Opinion dated 11<sup>th</sup> January 2024, which is directly addressed to the Secretary of the Cabinet, explicitly states as follows: "*the advice sought by the Director General of Pension's said letter dated 14.07.2017, is the same in respect of which my Department had previously provided advice by letter dated 15.09.1997...*"<sup>67</sup> From this statement, the Attorney-General has made it amply clear that the advice given with respect to the pension entitlements of late Justice Ramanathan is applicable to all Judges of the Superior Courts.
159. In addition to this, the Sub-Committee has also ventured to interpret the Constitution in contravention of Article 125 of the Constitution. Quite apart from forming an opinion and giving advice as to how a constitutional provision apply, to organise and set up day-to-day administrative affairs and for such other purposes, the Sub-Committee has gone on to interpret provisions in the Constitution, in complete disregard of the opinions given by the chief legal advisor to the State as to how the relevant Articles of the Constitution ought to be interpreted.
160. It is important to note that, where there is a question relating to the interpretation of a Constitutional provision, it is only the Supreme Court that is empowered by the Constitution to resolve such questions.<sup>68</sup> No other authority, howsoever highly placed on the political ladder, has jurisdiction under the Constitution to answer any question of Constitutional interpretation.

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<sup>67</sup> Attorney-General's letter addressed to the Secretary to the Cabinet of Ministers dated 11<sup>th</sup> January 2024, para (q)

<sup>68</sup> *vide* Article 125(1) of the Constitution

161. What is more disturbing is that this constitutional interpretation was given by the Sub-Committee in relation to a matter that is currently sub judice, in addition to the interpretation itself being manifestly ill-conceived.
162. The view taken by the Sub-Committee to the effect that *"to become a violation of Art. 108(2) of the Constitution, the reduction should have to be necessarily, which should be in existence at the time of the appointment [sic]"* is completely antithetical to Article 108(2) of the Constitution, and manifestly so.
163. Article 108(2) does *not* state that salary payable to and pension benefits in existence at the time of appointment of a judge shall not be reduced. What it states is that the *"salary payable to, and the pension entitlement of"* a Superior Court Judge *"shall not be reduced after appointment"*. This simply means that, subsequent to one's appointment as a Superior Court Judge, his or her salary and pension entitlement should never decrease.
164. I wish to also observe at this stage that, in my view, there is no illegality, unlawfulness and/or impropriety in granting the commuted pension to Judges of Superior Courts even after aforementioned Gazette No. 1190/18 dated 28<sup>th</sup> June 2001. When PA Circular No. 44/90 dated 18<sup>th</sup> October 1990 was implemented, all public officers were given the benefit of receiving a commuted pension and it was not deducted from the monthly pension thereafter. This was also extended to judicial officers—whatever the policy consideration may have been at the time, that is how this Circular was implemented. Thereafter, when said Circular No. 44/90 was cancelled, Article 108 of the Constitution operated so as to preserve the application of the said Circular with respect to Superior Court Judges, for a mere Gazette cannot suppress or negate the effect of a provision of the Constitution. Accordingly, for all intents and purposes, the pension benefits given in the said Circular No. 44/90 are still in force with respect to Superior Court Judges.

**Cabinet Decision Dated 17<sup>th</sup> June 2025 Pursuant to the Cabinet Sub-Committee Report**

165. The aforementioned Report of the Cabinet Appointed Sub-Committee, with its recommendations, had then been placed before the Cabinet of Ministers along with the **Note to the Cabinet dated 23<sup>rd</sup> May 2025** by the Minister of Justice and National Integration.
166. The Sub-Committee has made six recommendations to the Cabinet, including, to recover the commuted pension within the existing framework, to make a separate law regarding the pension entitlements of Judges and amending Section 25 of the Minutes on Pension to provide for the granting of commuted pension to judicial officers and to recover the same from the monthly pension.
167. The Cabinet of Ministers has accordingly decided to approve all six of the said recommendations, and to inform the Attorney-General regarding this policy decision so that this Court may be kept informed in the course of instant fundamental rights application. The Cabinet has further decided to implement such recommendations adhering to the judgment of this Court in the instant application.

**Legitimate Expectation of the Judges**

168. It was also contended that decisions and steps taken to recover the commuted pension violated the Petitioner's legitimate expectation to continue receiving the pension benefit granted by Public Administration Circular 44/90 and that such benefit, which was available to Judges of Superior Courts until 2017, would not be taken away after his appointment to the Court of Appeal in 2008.

169. As Dr. Bandaranayake, CJ observed in **Siriwardana v. Seneviratne and 4 Others**,<sup>69</sup>

*"The term, now known as legitimate expectation, was first used by Lord Denning, in Schmidt v. Secretary of State for Home Affairs [(1969) 1 All ER 904]. The Court, referring to a decision of the government to reduce the period already allowed to an alien to enter and stay in England, had held that the person had a legitimate expectation to stay in England that cannot be violated without following a reasonable procedure. This was immediately followed in Breen v. Amalgamated Engineering Union [(1971) 1 All ER 1 148] ...*

*...The meaning and scope of the doctrine of legitimate expectation was considered at length in Union of India v Hindustan Development Corporation [(1933) 3 SCC 499] where it was clearly stated that:*

*"Time is a three-fold present: the present as we experience it, the past as present memory and future as a present expectation. For legal purpose, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. however earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope cannot amount to a legitimate expectation. the legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in a natural and regular sequence. Again, it is distinguishable from a mere expectation. Such expectation should be justifiable legitimate and protectable. Every such legitimate expectation does not by itself fructify into a*

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<sup>69</sup> [2011] 2 Sri L.R. 1

*right and, therefore, it does not amount to a right in a conventional sense."*

*A careful consideration of the doctrine of legitimate expectation, clearly shows that, whether an expectation is legitimate or not is a question of fact..."<sup>70</sup>*

170. **Dr. Sunil Coorey**, in ***Principles of Administrative Law in Sri Lanka***,<sup>71</sup> with reference to numerous judgments of this Court and the Court of Appeal observes as follows:

*"The unreasonable disregard of a "legitimate expectation" of "reasonable expectation of a party has recently been identified as a particular instance of the exercise of power being invalid for adopting a policy which no reasonable man would adopt. The unreasonable disregard of the Petitioner's "legitimate expectation" in the exercise of discretionary power has been held to be one of the reasons why such exercise of power must be held to be invalid.*

*"The doctrine of legitimate expectation is not limited to cases involving a legitimate expectation of a hearing before some right or expectation was affected, but is also extended to situations even where no right to be heard was available or existed but fairness required a public body or official to act in compliance with its public undertaking or assurance." "The doctrine of inconsistency or of legitimate expectation prohibits decisions being taken which confounds or disappoints an expectation which an official or other authority or person has engendered in some individual except, perhaps, where some countervailing facet of the public interest so requires—this being judged in the light of the harm being done to the applicant."*

171. As morefully described earlier in the judgment, Public Administration Circular 44/90 dated 18<sup>th</sup> October 1990 introduced a new pension benefit to public officers, whereby there

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<sup>70</sup> *ibid* at p. 6-8

<sup>71</sup> Sunil F.A. Coorey, *Principles of Administrative Law in Sri Lanka* (4 edn, 2020) Vol. I, at p. 457-458



were able to obtain a commuted pension upon retirement and still receive their full monthly pension, without such commuted pension being deducted from their monthly pensions. Minutes on Pension was amended to reflect this by Gazette No. 709 dated 03<sup>rd</sup> April 1992. The said Gazette amended the Minutes on Pension with retrospective effect, i.e., with effect from 18<sup>th</sup> October 1990, which is the date on which Circular 44/90 was issued. Judges of Superior Courts also received this benefit in terms of Section 25 read with Section 2, 2A and 2B of the Minutes on Pension.<sup>72</sup>

172. According to the 1<sup>st</sup> and 27<sup>th</sup> Respondents, Superior Court Judges received this benefit until 01<sup>st</sup> March 2017.<sup>73</sup> The Petitioner was elevated to the Court of Appeal on 27<sup>th</sup> March 2008 and, then, to the Supreme Court on 17<sup>th</sup> December 2014. It is amply clear that, at the time of Petitioner's appointment as a Superior Court Judge, the pension benefit in terms of aforementioned Circular 44/90 was being paid to the retired Justices of Superior Courts. In fact, letter dated 10<sup>th</sup> February 2012 by then Director-General of Pensions, addressed to the Registrar of the Supreme Court,<sup>74</sup> clearly states the following: “ශ්‍රේෂ්ඨාධිකරණ/අභියාචනාධිකරණ විනිසුරුවරුන්ට, මනාපය ප්‍රකාශකළ කල්හි පාරිතෝෂිකයක් හිමිවන අතර, අනෙකුත් රාජ්‍ය නිලධාරීන්ට මෙන් එකී පාරිතෝෂිකය ආපසු අය කරනු නොලැබේ...[Supreme Court and Court of Appeal Judges are entitled to a gratuity upon expressing their preference/upon election, and the said gratuity is not recovered unlike with other public officers]”.<sup>75</sup>

173. There is an express constitutional guarantee to the effect that any person appointed as a Judge of the Superior Courts would continue to receive any and all salary and pension

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<sup>72</sup> 1<sup>st</sup> Respondent's Statement of Objections, paras 10(g) and 10(h)

<sup>73</sup> 1<sup>st</sup> Respondent's Statement of Objections, para 10(p); 27<sup>th</sup> Respondent's Statement of Objections, para 9(v)

<sup>74</sup> Marked “G”, appended to the Petition of the Petitioner

<sup>75</sup> An approximate translation added

benefits which are being paid to such Judges at the time of his or her appointment to the Superior Court. It is subject to this guarantee that a person accepts the lifelong restrictions attached to such office.

174. If a constitutional guarantee—being the highest form of legal authority—cannot give rise to a legitimate expectation, then it follows that no lesser law or provision could do so; and if that were the case, no legal provision could ever be said to create a legitimate expectation.
175. As such, I am of the view that the practice of the Department of Pensions, aforementioned correspondence from then Director-General of Pensions along with the constitutional guarantee set out in Article 108(2) of the Constitution in particular, taken as a whole, is most certainly capable of giving rise to a legitimate expectation. The impugned acts of the Respondents have clearly violated this legitimate expectation, rendering such actions *per se* unreasonable.
176. While submissions were also made as to whether a legitimate expectation has been created with respect to other Judges of the Superior Courts, considering the foregoing discussion with respect to the interpretation of Article 108(2) of the Constitution and the conclusion that follows, I see no necessity to consider this aspect in detail, for that would have no bearing on the outcome of this application.

### CONCLUDING REMARKS

177. If I may once again quote Alexander Hamilton from the **Federalist No. 79**,

“In the general course of human nature, a power over a man’s subsistence amounts to a power over his will”<sup>76</sup>

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<sup>76</sup> Alexander Hamilton, ‘Federalist No. 79: The Judiciary Continued’ (McLEAN’s Edition, New York)

178. The dangers of allowing any direct or circuitous methods to influence the salaries and pension entitlement of judges cannot be gainsaid. If the executive and legislative branches are left entirely to their own devices to increase or decrease the remuneration and other entitlements of judges, by such overt or covert means, it leaves these two branches of power with the means and opportunity to exert economic pressure on the individual members of a 'disobedient' third branch. Even if this risk never comes to realise, the mere impression arising out of the existence of such highly coercive authority is sufficient to compel at least some judicial office bearers to choose compliance over confrontation, and to make those cautious and popular decisions over the sincere, daring, and judicious.
179. I take the view that Article 108 of the Constitution is one provision from which no derogation can be allowed, for that may have lasting effects on the independence and the quality of judicial office bearers.
180. Some may, at first glance, fail to see why such independence and the quality is so paramount; But those who understand the science of law and governance, I trust, would come to see the values that are truly at stake.
181. The deliberate or negligent erosion of the judicial institution provides the most direct path for those in authority to advance toward corruption and authoritarianism. When holders of executive and legislative power betray the confidence reposed in them by the people, it is ultimately the judiciary—as the custodians of judicial power—that must serve as the safeguard. Judicial officers must therefore owe allegiance solely to the public trust and, by extension, to the Rule of Law. In fulfilling this duty, they are required to remain steadfast and resolute. For a judge must do what the law compels him to do, he ought to be free from any fear of repercussions. While judicial office may not be for the faint

hearted, it must also not become an endeavour only the bravest, the wealthiest and the most daring can stomach.

182. As Chief Justice Rehnquist observed “[t]he Constitution protects judicial independence not to benefit judges, but to promote the rule of law.”<sup>77</sup> And as Justice Kennedy aptly put it, “Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must.”<sup>78</sup>
183. This is precisely why strict constitutional safeguards such as Article 108 of our Constitution are put in place to prevent coercive control and potential manipulations of those entrusted with the judicial power of the people. It is amply clear that the purpose of this Article is to prevent the use salary and pension benefits as a bargaining chip, as it were, to potentially influence the judicial will.
184. As to the acts impugned by the instant application, needless to say, it is very much open for the executive or legislative powers to influence the judicial will through the threat of implementation, or the promise of non-implementation, of the recovery of commuted pension. It is my considered view that the impugned acts clearly fall within the kind of mischief this Article intends to address and prevent.
185. I wish to further emphasise that even the covert reductions of salaries and pensions would amount to a violation of Article 108(2) of the Constitution. Actions such as replacing one type of allowance with another, which, while being of equivalent value today, would naturally deflate and diminish as time passes; or substituting a percentage-based allowance, designed to rise proportionally with a certain variable such as basic pay, with

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<sup>77</sup> Chief Justice Rehnquist ‘2004 Year-End Report on the Federal Judiciary’ (January 1, 2005), at p. 4

<sup>78</sup> Chief Justice John G. Roberts, Jr, ‘2024 Year-End Report on the Federal Judiciary’ (December 31, 2024), at p. 3-4, citing A. M. Kennedy, Testimony in Senate Judiciary Committee Hearing on Judicial Independence, 2007.

a fixed sum, would, in effect, constitute such a covert reductions violative of Article 108(2) of the Constitution. Although fixed-rate compensation and benefits may create an ostensible impression of certainty, such measures, in substance, amount to a prospective diminution, for they effectively preclude the benefit from being increased in tandem with the salary.

## **FINDINGS**

186. I am mindful of the fact that this judgment may have been plenty repetitive. It was by no means an easy opinion to author, for there were nearly 35 years of circulars, decisions, memoranda and other bureaucratic rigmarole placed before this bench to be reviewed. In all such detail, I fear, the exact effect of Article 108(2) of the Constitution, which I endeavoured to uncover hereabove, may just be lost.
187. If I were to frame my findings in the simplest of terms, Article 108(2) of the Constitution prohibits the reduction of salaries and pension entitlements of the Judges of Superior Courts, by overt or covert methods. While such salaries and pension entitlements may be increased as and when appropriate, any reduction or amendment to such entitlements that could potentially cause benefits to be deflated at a future time, can only be done by law approved by a two thirds majority in Parliament as well by the People at a referendum, as the reduction of salary and pension benefits will violate Article 108 read with Articles 3 and 4, as well as Article 12(1) of the Constitution.
188. A series of administrative oversights and errors have triggered the sequence of events precipitating the Petitioner's grievance as well as the Cabinet decisions to recover the commuted pension granted to Superior Court Judges, and I am convinced by the learned Deputy Solicitor General's submissions that there had been no *mala fides* on the part of the Respondents.
189. Considering all the material discussed hereinabove, I find that all decisions, and steps

taken pursuant to such decisions, to recover the commuted pension payable to the Superior Court Judges, including any Resolutions passed in Parliament to that effect, are *ultra vires*, illegal, irrational and are violative of Articles 108(1), 108(2) read with Article 3 and 4 as well as 12(1) of the Constitution. Accordingly, all such steps, decisions, including the decisions of the Cabinet of Minister and Parliamentary Resolutions, to recover 'commuted pension' from the Retired Judges of Superior Courts are void and of no force or avail in law.

190. As such, I hold that the recovery of the 'commuted pension' paid to Superior Court Judges by the 1<sup>st</sup> Respondent, the Director General of Pensions, is violative of the fundamental rights of the Petitioner, as well of other Retired Judges of Superior Courts, guaranteed under Article 12(1) of the Constitution. All such steps and decisions taken to that end, including the decisions of the Cabinet of Ministers and Parliamentary Resolutions, are hereby declared null and void.
191. As pension benefits given to Judges of Superior Court by Circular No. 44/90 dated 18<sup>th</sup> October 1990 cannot be withdrawn without following the aforementioned procedure set out in the Constitution, the 1<sup>st</sup> Respondent is accordingly directed to continue the payment of unreduced monthly pension to Judges of Superior Courts without deducting the 'commuted pension/gratuity'.
192. Application is hereby allowed. I make no order as to costs. The Registrar of the Supreme Court is directed to forward this judgment to the Director General of Pensions and other relevant parties for necessary action.

***Application Allowed.***

**JUDGE OF THE SUPREME COURT**

**MAHINDA SAMAYAWARDHENA, J.**

193. I have had the advantage of reading the draft judgment prepared by my learned brother, Justice Thurairaja. However, I regret that I am unable to agree with it.
194. Prior to 1990, the pension benefits of a Judge of the Supreme Court were governed primarily by section 25 of the Minutes of Pensions. Under section 51 thereof, such Minutes could be amended by the subject Minister. Pursuant to this framework, if a Judge of the Supreme Court or Court of Appeal elected to receive a commuted pension, that option was available to him, with the commuted sum being recoverable from his pension in instalments.
195. When this system was in place, as evidenced by the Cabinet Memoranda placed before this Court, the then Government adopted a policy to encourage “public officers” to opt for voluntary retirement. Pursuant to that policy decision, Public Administration Circular No. 44/90 dated 18.10.1990 was issued. According to this Circular, *inter alia*, a public officer who had completed 30 years of service became eligible to receive an unrecoverable commuted pension together with an unreduced monthly pension equivalent to 90 percent of his salary at the time of retirement.
196. After six years, Circular No. 44/90 was cancelled by Public Administration Circular No. 32/96 dated 12.11.1996, and stated that all retirements after 23.12.1996 will be in accordance with the Minutes of Pensions as was the case prior to Circular No. 44/90.
197. By Gazette No. 1190/18 dated 28.06.2001, the subject Minister repealed section 25 of the Minutes of Pensions applicable to the Judges of the Supreme Court and, *inter alia*, introduced a scheme whereby a Judge of the Supreme Court or the Court of Appeal who had served for thirty-six months (whether as a Judge of the Supreme Court, the Court of Appeal, or both) would, upon retirement, be entitled to a pension calculated at 90 percent

of the last drawn salary. However, the Gazette made no provision for the grant of a commuted pension.

198. Nonetheless, upon “an opinion expressed by the Attorney General” in 1997 that Circular No. 32/96 has no application to Judges referred to in Article 108(2) of the Constitution, as it would have the effect of reducing their pension entitlement, the Department of Pensions has continued to pay the unrecovered commuted pension together with the unreduced pension to Judges, thereby extending the benefit that had been introduced under the repealed Circular No. 44/90.
199. The Auditor General questioned this practice in 2015, and several Cabinet decisions have thereafter been taken, including one in 2025, affirming that the commuted pension, once paid, shall be deducted from the monthly pension.
200. It is clear that there is no dispute regarding the entitlement of a retired Judge of the Supreme Court to receive 90 percent of his last drawn salary as the monthly pension. There is likewise no live issue concerning the grant of a commuted pension where the Judge elects to receive it, although 2001 Gazette does not provide for it. The only outstanding issue is whether such commuted pension shall be unrecoverable.
201. The petitioner’s contention is that his monthly pension cannot be reduced in order to effect the recovery of the commuted pension on instalment basis. He argues that, in terms of Article 108(2) of the Constitution, the pension entitlement of a Judge of a Superior Court shall not be reduced after his appointment, and that, accordingly, the respondents cannot deny him an unrecoverable commuted pension together with an unreduced monthly pension equivalent to 90 percent of his salary at retirement, a benefit introduced by Circular No. 44/90, notwithstanding its subsequent cancellation prior to his appointment as a Judge of the Court of Appeal. This is the crux of the matter. All other ancillary issues are beside the point.



202. I find myself unable to accept the above argument. Article 108(2) provides that *“The salary payable to, and the pension entitlement of, a Judge of the Supreme Court and a Judge of the Court of Appeal shall not be reduced after his appointment.”* The petitioner, retired as a Judge of the Supreme Court, was appointed a Judge of the Court of Appeal in 2008. By that time Circular No. 44/90 was not in operation, as it was withdrawn in 1996. The recovery of the commuted pension in instalments without interest, which is an advance lump-sum payment, does not amount to a reduction of the pension. It in no way impinges upon the independence of the judiciary or the sovereignty of the people. Circular No. 44/90 was issued for a specific and temporary purpose. Once that purpose was achieved, the Government withdrew it and reverted to the Minutes of Pensions. This is perfectly in order. If the petitioner’s argument is correct, any enhanced payment made even through mistake by a subject clerk would necessarily have to be continued, thereby perpetuating the error. The petitioner’s contention that, by virtue of Article 108(2), the Government must continue paying Judges an unrecoverable commuted pension, or that, having paid the commuted pension, the Government is precluded from recovering it from the monthly pension, cannot be sustained.
203. The petitioner finally submits that he must at least succeed on the doctrine of legitimate expectation. For a claim based on legitimate expectation to succeed, the expectation must be founded on a legal and legitimate basis, not on an illegal or improper basis. On the facts and circumstances of this case, I find no such basis.
204. There is no violation of either Article 12(1) or Article 108(2) of the Constitution. I accordingly dismiss the application, but without costs.

**JUDGE OF THE SUPREME COURT**

**A.L. SHIRAN GOONERATNE, J.**

205. I have had the benefit of reading the Judgments of my learned brother Thuraiaraja, PC, J., and Samayawardhena, J., and I wish to record the following observations.
206. By Public Administration Circular No. 44/90 dated 18/10/1990, a public officer who had completed thirty years of service or more became eligible, upon retirement, to receive an unrecoverable commuted pension equivalent to ninety per cent (90%) of the salary. This Circular was subsequently cancelled by Public Administration Circular No. 32/96 dated 12/11/1996, read with Circular No. 32/96(1) dated 16/12/1996. The cancellation was given effect to by Gazette No. 981 dated 19/06/1997.
207. Upon the coming into force of Gazette No. 981, advice was sought by the Registrar of the Supreme Court from the Secretary to the Ministry of Public Administration regarding the applicability of the said Gazette to Judges of the Superior Courts, having regard to Article 108(2) of the Constitution. The Attorney General, by opinion dated 15/09/1997, advised that the pension payable to Judges of the Superior Courts must continue to be computed based on Circular No. 44/90, and that Gazette No. 981 of 19/06/1997 had no application to Judges falling within Article 108(2), since its application would have the effect of reducing their pension entitlements.
208. The Attorney General further opined that, upon appointment, even though a Judge's pension entitlement may be increased at any stage, once increased, such entitlement cannot thereafter be varied or altered if the variation results in a reduction of the pension payable.
209. It is of significance to note that, acting upon this advice, the pension of Judges of the Superior Courts was paid without deduction for nearly fifteen years. It was only following an Audit Query dated 16/02/2015, and a subsequent decision of the Audit and Management Committee of the Ministry of Public Administration, that steps were taken

to recover the commuted pension amounts from the monthly pensions of Judges of the Superior Courts.

210. In January 2018, the Attorney General once again reiterated that Judges of the Superior Courts constitute a distinct constitutional class under Article 108, and that neither their salaries nor their pension benefits can be reduced after appointment. It was further emphasized that the Constitution vests authority over judicial remuneration exclusively in Parliament, and that any executive or administrative interference in derogation of this mandate would undermine the independence of the judiciary.
211. The question that arises for consideration is whether Circular No. 44/90, which has been expressly or by necessary implication superseded by subsequent circulars, Cabinet decisions, and order papers, can nevertheless continue to regulate the pension entitlements of Judges of the Superior Courts, or whether such subsequent executive or quasi-administrative instruments are legally competent to curtail, abridge, or otherwise varied from constitutional guarantees to his disadvantage after his appointment.
212. I concur with my brother, Justice Thurairaja, on the factual findings based on the documents presented by the Petitioner, and therefore, shall refrain from an analysis of the documents referred to therein.
213. Before proceeding further, it is necessary to emphasize that the Petitioner has filed this action not solely to vindicate his individual pension benefits but also to assert the broader constitutional principle that *"the pension entitlement payable to a Judge of the Supreme Court and a Judge of the Court of Appeal shall not be reduced after his appointment in terms of Article 108(2) of the Constitution."*
214. The precise purpose and intent of Circular No. 44/90 are not explicitly stated within the document. What is, however, clear is that the Government of the time had resolved to

grant concessions to public officers retiring under the provisions of the said Circular. These provisions were intended to apply to all categories of public officers without exception, including members of the Provincial Public Service and Local Government Service.

215. Article 108(2) provides that *"The salary payable to, and the pension entitlement of, a judge of the Supreme Court and a Judge of the Court of Appeal shall not be reduced after his appointment."*
216. Under Circular No. 44/90, the commuted pension payable to public officers, including Judges of the Superior Courts, was not treated as an advance or loan but as a part of the terminal benefit. Obtaining this benefit did not result in any reduction of the monthly pension paid.
217. The subsequent cancellation of that Circular altered the character of the commuted benefit itself by transforming it into a recoverable liability. The legal effect of this diminished the net pension payable to a retired Judge.
218. Article 108(2) as mentioned above expressly mandates that the salary payable to, and the pension entitlement of, a Judge shall not be reduced after appointment. This provision is absolute in form and allows for no exception except through a constitutional limitation. Consequently, any executive or administrative quasi-legislation must necessarily give way to this constitutional guarantee.
219. While Circular No. 32/96 and the subsequent Gazette may be valid as rules made for the regulation of the orderly conduct and affairs of public administration, they cannot operate retrospectively or prospectively to diminish a pension entitlement already constitutionally protected. To the extent that the cancellation of Circular No. 44/90 has the effect of reducing pension benefits, altering the method of commutation to the detriment of a

Judge, or authorizing recovery or adjustment of sums already paid, such enforcement would amount in substance to a reduction of a beneficial entitlement prohibited by Article 108(2) of the Constitution.

220. As held in **Evans v. Gore**, 253 U.S. 245 (1920)

*"The primary purpose of the Constitution in providing (Art. I, § 1, cl. 6) that the compensation of the judges "shall not be diminished during their continuance in office" was not to benefit the judges, but to attract fit men to the bench and insure that independence of action and judgment which is essential to the maintenance of the Constitution and the impartial administration of justice. Pp. 253 U. S. 248, 253 U. S. 253.*

*Such being its purpose, the limitation is to be construed not as a private grant, but as a limitation imposed in the public interest -- not restrictively, but in accord with its spirit and the principle on which it proceeds. P. 253 U. S. 253.*

*Any diminution which by necessary operation and effect withholds or takes from the judge a part of that which has been promised by law for his services must be regarded as within the limitation."*

221. What is constitutionally material is not the form of the mechanism adopted, but its effect upon the remuneration secured to the Judge.

222. Hence, any attempt to recover the commuted amount by monthly deductions from the pension payable to a Judge necessarily results in a diminution of the pension received and therefore constitutes a reduction in the sum that was originally guaranteed, which the Constitution expressly prohibits. In the absence of exceptional circumstances such as recovery of sums obtained by fraud or established clerical error through due process of

law, any monthly recovery of a commuted pension from a Judge is unconstitutional and void.

223. Accordingly, Public Administration Circular Nos. 32/96 and 32/96(1), notwithstanding their publication in Gazette No. 981 of 19/06/1997, cannot be enforced against Judges of the Supreme Court or the Court of Appeal in any manner that results in a reduction of salary or pension entitlement protected by Article 108(2). Such circulars may, at best, operate only in respect of persons who do not enjoy constitutional protection, and cannot be invoked to defeat or curtail an absolute judicial right guaranteed by an express and unequivocal provision of the Constitution.
224. Therefore, Gazette No. 981 of 19/06/1997 and subsequent administrative decisions cannot reduce judicial pension entitlements, which have been guaranteed under Article 108(2) of the Constitution.
225. In the above circumstances, I agree with the findings of the Judgment of Justice Thurairaja.

**JUDGE OF THE SUPREME COURT**