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

In the matter of an application to determine whether the Bill titled 'Criminal Procedure Code (Amendment) Bill' or any part thereof is inconsistent with the Constitution in terms of Article 121 read with Article 78 of the Constitution.

Arun Arokianathan
64/95, Sangamitta Mawatha,
Colombo 01300

PETITIONER

SC SD Application No: 23/15

Vs

Honourable Attorney General
Attorney General's Department
Colombo 01200

RESPONDENT

On this 15th day of December 2015

TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS THE OTHER HONOURABLE JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

The Petition of the Petitioner above named appearing by NIRMALA MARY VAZ his Attorney-at-Law states as follows:

1. The Petitioner is a citizen of the Democratic Socialist Republic of Sri Lanka and is entitled to prefer this Application to Your Lordships' Court in the interests of the Sri Lankan public. He has been a journalist since 1999 and is the Editor-in-Chief of *Sudar Oli*, a Tamil language newspaper, since May 2014.

2. The Honourable Attorney General is made a Respondent under and in terms of the requirements of Article 134(1) of the Constitution.

3. The Petitioner states that a Bill titled 'Penal Code (Amendment) Bill' to amend the Penal Code (Chapter 19) was placed on the Order Paper of the Parliament on 11th December 2015.

Copies of the said Bill in all three languages are annexed hereto marked **'P1a', 'P1b'** and **'P1c'** respectively and pleaded as part and parcel hereof.

Copies of the said Order Paper of Parliament in all three languages are annexed hereto compendiously marked **'P2**' and pleaded as part and parcel hereof.

4. The Petitioner states that the impugned Bill intends to insert a new section 291C into the Penal Code and that the legal effect of the said section is purportedly 'to make provision to convict and punish persons who cause or instigate acts of violence or hostility which lead to religious, racial or communal disharmony between different racial or religious groups.'

5. Clause 2 of the impugned Bill seeks to insert the said section 291C into the Penal Code. The proposed section 291C provides:

> *Whoever, by the use of words spoken, written or intended to be read, or by signs, or by visible representation, or otherwise, intends to cause or attempts to cause or instigates or attempts to instigate, acts of violence or religious, racial or communal disharmony, or feelings of ill-will or hostility, between communities or different classes of persons or different racial or religious groups, shall be punished with imprisonment of either description for a term which may extend to two years.*

6. The Petitioner states that a separate Bill titled 'Code of Criminal Procedure (Amendment) Bill' was also placed on the Order Paper of Parliament on 11th December 2015. The said Bill seeks to amend section 135 of the Code of Criminal Procedure Act, No. 15 of 1979 by including section 291C of the Penal Code in paragraph (e) of subsection (1) thereof, and the legal effect of the section, as amended, is 'to make the Attorney General's sanction a pre-requisite to take cognizance of an offence punishable under section 291C'.

Copies of the said Bill in all three languages are annexed hereto marked **'P3a', 'P3b'** and **'P3c'** respectively and pleaded as part and parcel hereof.

7. The Petitioner respectfully draws Your Lordships' attention to section 2(1)(h) of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA). Section 2(1)(h) provides:

> *[Any person who] by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups [shall be guilty of an offence under this Act]*.

8. Your Lordships' may be pleased to see that the said section 2(1)(h) of the PTA is nearly identical to the proposed section 291C of the Penal Code.

9. The Petitioner states that the aforesaid section 2(1)(h) of the PTA has been specifically invoked to target members of the Tamil and Muslim communities. Your Lordships' attention is respectfully drawn to two emblematic examples:

   a. Tamil journalist, J.S. Tissainayagam was convicted under section 2(1)(h) of the PTA for accusing a predominantly Sinhalese army of committing atrocities against Tamil civilians, and thereby allegedly intending to incite acts of violence by Sinhalese readers against Tamils (vide *The Democratic Socialist Republic of Sri Lanka v. J.S. Tissainayagam* H.C. 4425/2008).

b. Muslim politician, Azath Salley was arrested and detained in relation to alleged offences under section 2(1)(h) of the PTA following his criticism of the government's inaction on investigating acts of violence against Muslims.

10. The Petitioner states further that incidents of this nature have prompted international condemnation of the government's use of the PTA to suppress media freedom and dissent.

11. The Petitioner respectfully states that section 2(1)(h) of the PTA is regularly used to target those who are critical of the government's policies, particularly on the treatment of minority communities. Hence section 2(1)(h) of the PTA has directly resulted in the infringement of Article 14(1)(a) of the Constitution, which guarantees to every citizen the fundamental right to freedom of speech and expression, including publication.

12. The Petitioner therefore apprehends that the inclusion of a near identical provision (to section 2(1)(h) of the PTA) in the Penal Code will invariably serve to infringe the freedom of speech and expression, including publication, particularly of members of the Tamil and Muslim communities.

13. Clause 2 of the Code of Criminal Procedure (Amendment) Bill seeks to amend section 135(1)(e) of the Code of Criminal Procedure Act to specifically include the proposed section 291C of the Penal Code. The said inclusion ostensibly aims to provide for the Attorney General's sanction prior to any court taking cognizance of an offence punishable under the proposed section 291C of the Penal Code. It therefore seeks to operationalise the proposed section 291C of the Penal Code.

14. The Petitioner further states that Clause 3 of the Code of Criminal Procedure (Amendment) Bill seeks to amend the First Schedule to the Code of Criminal Procedure Act by inserting the offence punishable under the proposed section 291C of the Penal Code and setting out the conditions applicable thereto. Therefore, the said Clause also seeks to operationalise the said section 291C of the Penal Code.

15. The Petitioner states that the impugned Clauses in the Penal Code (Amendment) Bill and the Code of Criminal Procedure (Amendment) Bill do not qualify as grounds for restricting rights under Article 14(1)(a), as permitted by Article 15(7) of the Constitution. Article 15(7) states:

> *The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.*

16. The Petitioner respectfully draws Your Lordships' attention to the words of Amarasinghe J. in *Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority and Others* [2000] 1 Sri.L.R. 314:

> *The burden [of justifying restrictions imposed under Article 15(7)], in my view, continues to be heavy even where freedom of speech is expressed in more or less absolute terms, as it is in Article 14(1)(a), but where specific provision is made elsewhere for exceptions. Exceptions must be narrowly and strictly construed for the reason that freedom of speech constitutes one of the essential foundations of a democratic society which, as we have seen, the Constitution, in no uncertain terms, declares Sri Lanka to be* (vide pp.355-356).

17. Your Lordships' Court accordingly held that a restriction on the freedom guaranteed by Article 14(1)(a) will be 'unconstitutionally overbroad' if there is no 'proximate or rational nexus between the restriction imposed on a citizen's fundamental right…and the object sought to be achieved' (vide p.372).

18. The Petitioner reiterates that the manifest object of the Penal Code (Amendment) Bill is to 'make provision to convict and punish persons who cause or instigate acts of violence or hostility which lead to religious, racial or communal disharmony between different racial or religious groups.' However, as more fully set out hereinafter, the current law of Sri Lanka adequately meets this objective while complying with international standards.

19. Section 3(1) of the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 provides:

> *No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.*

20. Moreover, section 3(5) of the ICCPR Act provides:

> *A trial in the High Court against any person for the commission of an offence under this section shall be taken up before any other business of that Court and shall be held on a day to day basis and shall not be postponed, unless due to any unavoidable circumstances, which shall be recorded.*

21. Therefore, under the ICCPR Act, offences relating to the advocacy of national, racial or religious hatred that constitute incitement to discrimination, hostility or violence is given the highest priority of the relevant High Court having jurisdiction.

22. The Petitioner states that section 3(1) of the ICCPR Act reproduces Article 20 of the ICCPR, and is therefore fully compliant with international standards. The Petitioner respectfully draws Your Lordships' attention to the Advisory Opinion of Your Lordships' Court in *S.C. Reference No. 1 of 2008*. The said Opinion included an Annexure, which analysed 'legislative compliance' with respect to specific provisions of the ICCPR. Your Lordships' were pleased to opine that section 3 of the ICCPR Act ensures 'legislative compliance' with Article 20 of ICCPR.

23. In addition to section 3(1) of the ICCPR Act (which comprehensively deals with the issue of hate speech), several other provisions in the Penal Code set out offences relating to causing or instigating acts of violence or hostility which lead to religious, racial or communal disharmony between different racial or religious groups:

    a. Section 290: Injuring or defiling a place of worship with intent to insult the religion of any class

b. Section 290B: Acts in relation to places of worship with intent to insult the religion of any class
c. Section 291: Disturbing a religious assembly
d. Section 291A: Uttering words with deliberate intent to wound religious feelings
e. Section 291B: Deliberate and malicious acts intended to outrage religious feelings of any class, by insulting its religion or religious beliefs

24. The Penal Code (Amendment) Bill seeks to insert a further offence into the Penal Code, thereby adding to the broad restrictions already imposed on the freedom of speech and expression, including publication as a result of existing provisions in the ICCPR Act and the Penal Code.

25. The Petitioner reiterates that section 2(1)(h) of the PTA contains near identical provisions to the proposed section 291C of the Penal Code. Thus the PTA already imposes undue restrictions on the freedom of speech and expression, including publication, which the Petitioner is unable to challenge owing to the limited scope of Article 121 of the Constitution. However, the Petitioner states that, at the time of the PTA's enactment as an Urgent Bill in 1979, Your Lordships were not called upon to make a determination on the consistency of section 2(1)(h) of the PTA with the Fundamental Rights Chapter of the Constitution, as the Bill was to be passed by a two-thirds majority in Parliament. Therefore, Your Lordships' are not precluded from holding that the proposed section 291C of the Penal Code is inconsistent with Article 14(1)(a) of the Constitution, notwithstanding the fact that near identical provision are already contained in the PTA.

26. The Petitioner respectfully states that the current position under the laws of Sri Lanka more than adequately provides for offences relating to causing or instigating acts of violence or hostility which lead to religious, racial or communal disharmony between different racial or religious groups. Accordingly, there is no 'proximate or rational nexus' between a *further* restriction on the fundamental right guaranteed under Article 14(1)(a) and the stated 'object sought to be achieved' by the Penal Code (Amendment) Bill.

27. The Petitioner reiterates that, by inserting the proposed section 291C into the Penal Code, the Penal Code (Amendment) Bill makes it an offence to *inter alia* cause, attempt to cause, instigate or attempt to instigate 'feelings of ill-will' between communities or

different classes of persons or different racial or religious groups. Without prejudice to the averments made in the preceding paragraphs of this Petition, the Petitioner respectfully states that such inclusion is inconsistent with both Article 14(1)(a) and Article 10 of the Constitution.

28. Imposing a restriction on forms of speech and expression that may cause 'feelings of ill-will' between communities or different classes of persons or different racial or religious groups is *unconstitutionally overbroad*. Inclusion of such a broad restriction in the Penal Code is inconsistent with the narrow scope of restrictions permitted under Article 15(7) of the Constitution. Such inclusion is therefore manifestly inconsistent with Article 14(1)(a) of the Constitution.

29. Article 10 recognises the freedom of religion, including the freedom to 'have or to adopt a religion or belief of [one's] choice'. Your Lordships' Court has held that this freedom is absolute and may not be restricted by any written law (vide *Premalal Perera v. Weerasuriya* [1985] 2 Sri.L.R. 177). Your Lordships' have held that *inter alia* 'conscientious objection' to a compulsory contribution towards a National Security Fund is protected under Article 10 of the Constitution. The Petitioner respectfully states that certain acts and forms of expression similar to 'conscientious objection' may constitute 'words spoken, written or intended to be read, or by signs, or by visible representation' as envisaged by the proposed section 291C of the Penal Code. It is not implausible that such acts and expressions in furtherance of a person's freedom to have or to adopt a religion or belief could cause 'feelings of ill-will' between communities or different classes of persons or different racial or religious groups. For example, a refusal to make a contribution towards a National Security Fund on the grounds of religion or belief may cause such 'feelings of ill-will' between different religious groups.

30. The Petitioner accordingly states that Clause 2 of the Penal Code (Amendment) Bill (L.D.—O.28/2015) placed on the Order Paper of Parliament on 11th December 2015 is inconsistent with Articles 10 and 14(1)(a) of the Constitution. The Petitioner has filed a separate petition before Your Lordships' Court praying that Your Lordships' be pleased to *inter alia*: 'Declare the Bill titled 'Penal Code (Amendment) Bill' and/or any one or more of its provisions as being inconsistent with Articles 10 and 14(1)(a) of the Constitution, and therefore may only be enacted by following the procedure laid down in

Article 83 of the Constitution.'

31. The Petitioner respectfully states that the Code of Criminal Procedure (Amendment) Bill (L.D.—O.40/2015) placed on the Order Paper of Parliament on 11th December 2015 is inconsistent with Articles 10 and 14(1)(a) of the Constitution.

32. The Petitioner states that he has taken steps to furnish a copy of this Petition to the Honourable Speaker in compliance with Article 121(1) of the Constitution.

33. The Petitioner states that in the aforesaid circumstances he is entitled to invoke the jurisdiction of Your Lordships' Court for the reliefs prayed for herein.

34. The Petitioner has not previously invoked the jurisdiction of Your Lordships' Court in respect of this matter except in the aforesaid Petition whereby the Petitioner has sought to challenge the constitutionality of the Penal Code (Amendment) Bill.

35. An affidavit of the Petitioner is appended hereto in support of the averments contained herein.

WHEREFORE the Petitioner prays that Your Lordships' Court be pleased to:

a) Declare the Bill titled 'Code of Criminal Procedure (Amendment) Bill' and/or any one or more of its provisions as being inconsistent with Articles 10 and 14(1)(a) of the Constitution, and therefore may only be enacted by following the procedure laid down in Article 83 of the Constitution;

b) Communicate the declaration(s) made under (a) to the Honourable Speaker of Parliament; and

c) Grant such further and other relief as to Your Lordships' Court shall seem meet.

Attorney-at-Law for the Petitioner