

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

In the matter of an application under
Article 140 of the Constitution for
Mandates in the nature of Writs of
Certiorari, and ***Mandamus***

1. Nagananda Kodituwakku
99, Subadrarama
Nugegoda

Petitioner

Vs

CA (Writ) Application No: 434/2014

1. Commissioner of Elections
Elections Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya, 10107

2. Susil Premajayanth
General Secretary -UPFA
307, T B Jayah Mawatha
Colombo 10

3. Mohan Peiris
The Chief Justice
Supreme Court of Sri Lanka
Hulftsdorp
Colombo 11

4. Dr Shirani Bandaranayake
The former Chief Justice
Park Drive
Rajagiriya

5. The Attorney General
The Attorney General's Department
Hulftsdorp
Colombo 12

To: THE HONOURABLE PRESIDENT JUDGE AND THE OTHER JUDGES OF THE COURT
OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

On this 15th of December 2014

I file herewith the Petition, the Affidavit and documents marked from 'P1' to 'P7' and respectfully move the Court to file same of record.

The copies of this Motion, Petition, Affidavit and the documents marked from 'P1' to 'P7' have been sent to the Respondents by Registered Post and the relevant receipts are annexed hereto in support of the same.

Considering the National interest and urgency of this matter the Petitioner respectfully requests that this matter may be listed for support on one of the following days.

Wednesday, the 17th of December 2014

Thursday, the 18th of December 2014

Friday, the 19th of December 2014

Petitioner further respectfully requests that this matter may not be listed for support before a Bench comprising of Judges appointed to the Court of Appeal from the Attorney General Department for the reasons self-explanatory in the Petition.

N. Kodituwakku


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Attorney-at-Law & Commissioner for Oaths
99, Subadrarama Rd, Nugegoda.

Attorney-at-Law and Petitioner in person

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RESPONDENTS

To: THE HONOURABLE PRESIDENT JUDGE AND THE OTHER JUDGES OF THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

On this 15th day of December 2014

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

PARTIES TO THE APPLICATION

1. The Petitioner is an Attorney-at-Law and Solicitor and a citizen of Sri Lanka and has *locus standi* in the above matter as pleaded.
2. The 1st Respondent is the Commissioner of Elections and the 2nd Respondent is the General Secretary of the United People's Freedom Alliance (UPFA) and the 3rd Respondent is the Chief Justice of the Republic of Sri Lanka, 4th Respondent is the former Chief Justice of the Republic of Sri Lanka, 5th Respondent is the Attorney General of the Republic of Sri Lanka and the 5th Respondent is named as a party to this application for the purpose of serving notice only.

CALLING FOR NOMINATION FOR PRESIDENTIAL ELECTION - 2015

3. The Petitioner states that the 1st Respondent is required to perform the duties of the Office of the Commissioner of Elections as required by the law and further to a proclamation issued by the Executive President of Sri Lanka, Mahinda Rajapakse (hereinafter referred to as Extant President) on **20th November 2014**, declaring his intention to hold a Presidential Election seeking another term, the 1st Respondent called for nominations from the prospective candidates and accepted nominations on **08th December 2014**, including the one from the extant President which was handed over by the 2nd Respondent, despite objections raised about extant President's disqualifications to stand for re-election.

EXTANT PRESIDENT DISQUALIFIED TO STAND FOR RE-ELECTION

4. The Petitioner states that in June 2010, the Extant President stood for re-election to the office of the President, which was permitted by Law as he had held the office only for once. In the run up to the Presidential Election and during his campaign the Extant President sought another mandate from the people for a second term to regulate the government business free from corruption and wrongdoing as stated in his Election Manifesto. And during his election campaign the Extant President did not make any reference whatsoever that in the event his being elected for a 2nd term, he would amend the Constitution to stand for a 3rd term. Instead, in his 2010 Presidential election manifesto the Extant President pledged to the people that 'he would convert the Executive Presidency into a Trusteeship which honours the mandate given to President by being accountable to Parliament and to the Judiciary and enact laws that are accountable to the judiciary, and also not in conflict with the judiciary'. And at the said Presidential Election held on **26th January 2010** the Extant President was re-elected to office for a 2nd term for a period of 6 years.

*True copies of relevant pages of the Extant President's Election Manifesto – 2010 marked **PI(a)** to **PI(g)** are attached hereto.*

EXTANT PRESIDENT VIOLATES ELECTION PLEDGE FOR PRIVATE BENEFIT

5. The Petitioner states that after his re-election for a second term the Extant President deliberately delayed taking oaths and instead a bill, to amend the Constitution was brought to remove the two-term restriction imposed on the office of the President . The said bill was approved by the Cabinet of Ministers, certifying that it was '*urgent in the national interest*'. Suffice to say that it was nothing further from the truth. Accordingly, this urgency could not be substantiated, as the Extant

President had by then not even been installed in the office for the second term. It is therefore averred that the above approval was an inapt, nugatory and somewhat misconceived.

6. The Petitioner states that the Extant President, in terms of Article 122(1) of the Constitution referred the said bill to amend the Constitution to the Supreme Court for a special determination. And by then the spouse of the 4th Respondent, had been appointed as the Chairman of the State owned National Savings Bank of Sri Lanka with effect from **15th May 2010**.

7. The Petitioner states that for the purpose of determining the bill to amend the Constitution, a five-judge bench presided over by the 4th Respondent was appointed on **31st August 2010**, by the then Chief Justice Asoka de Silva, who had earlier been appointed to the office of the Judge in the Supreme Court from the Attorney General's Department and then to the office of the CJ, bypassing the 4th Respondent, (by then the senior most Judge in the Supreme Court) by the Extant President. Asoka de Silva CJ, after his retirement was appointed as a special advisor to the Extant President.

8. The Petitioner states that the 18th Amendment bill was ardently challenged before the Supreme Court by the civil right groups, including the Centre for Policy Alternative, on the basis that the proposed amendment effectively undermined the inalienable sovereignty of the Republic of Sri Lanka held in the people, as recognised in Article 3 of the Constitution and therefore inconsistent with the Article 3 of the Constitution, requiring the bill to be passed by the people at a Referendum in terms of Article 83 of the Constitution. Whereas, it was strongly defended by the 3rd Respondent who had then held the office of the Attorney General. After the said hearing, the Court rejected arguments of the civil rights groups and held with the submissions of the 3rd Respondent and conveyed its special determination to the Extant

President (made known later by the speaker on **07th September 2010** in the Parliament) that;

- a) the Bill entitled "the Eighteenth Amendment to the Constitution" complies with the provisions of Article 82(1) of the Constitution;
- b) requires to be passed by a special majority specified in Article 82(5) of the Constitution;
- c) that there is no provision in the Bill which requires approval of the People at a Referendum in terms of the provision of Article 83 of the Constitution.

NO RESTROSPECTIVE EFFECT IN THE AMENDED ARTICLE 31

9. The Petitioner states that the 18th amendment does not provide an expressed provision to the effect that the amended provision of law made to Article 31 of the Constitution shall also apply to the person elected to the office of the president under the old law that placed a restriction of not more than two terms in office, effectively denying the application of the new law to the incumbent President, who has been already elected to the office of the President twice.
10. The Petitioner states that the Extant President after having amended the Constitution for private benefit for none other than himself, was sworn in as the Executive President for a second term of six years on **19th November 2010** with affirmation to perform the duties and discharge the functions of the office of the President in the Republic of Sri Lanka faithfully and in accordance with the Constitution of the Democratic Socialist Republic of Sri Lanka and the law.
11. The Petitioner states that sometime thereafter on or about **15th May 2011**, the 4th Respondent was made the Chief Justice of the Republic of Sri Lanka by the Extant President.

DECLINING OF RELATIONS BETWEEN THE PRESIDNET & 4th RESPONDENT

12. The Petitioner states that on **03rd December 2011** the constitutionality of the ***Town and Country Planning (Amendment) Bill*** was challenged before the Supreme Court and a bench presided over by the 4th Respondent held that it was inconsistent with the Constitution, forcing the government to abandon the bill.
13. The Petitioner states that with the said development the relations between Extant President and the 4th Respondent were evidently damaged and on or about **20th May 2012**, the spouse of the 4th Respondent was effectively removed from the office of the Chairman of the National Savings Bank and was arrested and charged for bribery.
14. The Petitioner states that thereafter another Supreme Court Bench presided over by the 4th Respondent on **1st November 2012** ruled that the ***Divi Neguma Bill*** too was inconsistent with the Constitution and it would require a special majority of two-third to be enacted law, and Clause 8 of the draft legislation would require a two-third majority and a referendum before it can be deemed Constitutional.
15. The Petitioner states that again another bill to amend the ***Code of Criminal Procedure Act*** (Clause 8 of the bill) was determined unconstitutional by a Bench presided over by the 4th Respondent and deemed it would require a two third majority in Parliament for it to become law.
16. The Petitioner states that in this backdrop the relations between the Extant President and the 4th Respondent were further damaged and an impeachment motion against the 4th Respondent, signed by 117 UPFA MPs was handed to Speaker Chamal Rajapaksa on or about **1st November**

2012, which included charges of failing to disclose financial interests, abuse of power and disregarding the Constitution.

17. The Petitioner states that a eleven-member Parliamentary Select Committee (PSC) consisting of seven government MPs and four opposition MPs was appointed to hear the impeachment charges and the PSC's report was presented to Parliament on **8th December 2012**, finding the 4th Respondent guilty and report was sent to the Extant President.

18. The Petitioner states that nevertheless on **01st January 2013** the Supreme Court ruled that the PSC had no power to investigate allegations against the 4th Respondent and the impeachment was therefore unconstitutional. And further to an appeal made against the findings of the PSC, the Court of Appeal too on **07th January 2013** quashed the findings of the PSC.

CONTEMPT OF JUDICIAL AUTHORITY & CREDIBILITY

19. The Petitioner states that the government ignored the Supreme Court and Court of Appeal rulings and went ahead with the impeachment process, removing the 4th Respondent from the office of the Chief Justice on **13 January 2013** after President Mahinda Rajapaksa ratified the impeachment motion passed by Parliament.

20. The Petitioner states that thereafter, the Extant President appointed the 3rd Respondent who was serving as a legal advisor to the Cabinet of Ministers, to be the Chief Justice on **15th January 2013**, in spite of having a serious charge of gross misconduct and dishonesty levelled against the 3rd Respondent in a Fundamental Rights Application (SCFR/536/2010) filed before the Supreme Court. The hearing of this case had been inordinately delayed for over two years, in which the 3rd Respondent was cited in his personal capacity.

*The true copy of the Petition filed in SCFR/536/2010 marked **P2** is attached hereto*

21. The Petitioner states that in the SCFR case No 536/2010 the conduct of the 3rd Respondent in his former capacity as the Attorney General was challenged with irrefutable evidence of deceiving both the Supreme Court and the Director General of Customs (DGC) in a matter concerning a government revenue fraud of over rupees **619 million** rupees.

*Two documents (a letter dated 03rd August 2010 addressed to the then AG by the DGC and the DGC's observations to the Petition filed in Court), demonstrating the gravity of the fraud and the misconduct of the 3rd Respondent marked **P3** and **P4** are attached hereto.*

22. The Petitioner states that thereafter the 3rd Respondent appointed a bench comprising three judges (all appointed to the Supreme Court from the Attorney General's Department) to hear and determine the case referred to in paragraph 20 above on 04th February 2013. And the said Bench refused the Petitioner in the case (SCFR/536/2010) to support his case on the basis that he had challenged 'a judicial act and not an executive act', referring the deceptive act committed by the 3rd Respondent, costing the government rupees 619 million and dismissed the application. Thereafter one of the Judges in the 2-judge bench, Sathya Hettige, was appointed as the Chairman to the Public Service Commission after his retirement by the Extant President.

*The Order of the Court in the said case (SCRF/536/2010) marked **P5** is attached hereto.*

23. The Petitioner states that thereafter the appointment of 3rd Respondent as the Chief Justice was challenged before the Supreme Court by civil rights groups on the basis that his appointment to the Office of the Chief

Justice was illegal and in violation of the rights of the people of this country. And on **31st October 2013**, it was argued by the Attorney General that no one has the right to question or challenge the Extant President's decision of appointing the 3rd Respondent to the office of the Chief Justice. And on **24th March 2014**, on the preliminary objections raised by the Attorney General, the said application was also dismissed by a bench of 5 Judges appointed to hear the said Petitions by the 3rd Respondent, whose appointment had been made by the Extant President, dishonouring of judicial authority of the Supreme Court and Court of Appeal referred to in paragraph 18 above.

ABANDONING THE ELECTION PLEDGE TO BE ACCCOUNTABLE TO JUDICIARY

24. The Petitioner states that under the notion of Rule of Law the Attorney General of the Republic of Sri Lanka is required at all times to defend and uphold the Rule of Law. However, this tradition has been seriously undermined with undue influence imposed by the Extant President who had brought the Administration of the Attorney General under his purview after he was elected to the office for the 2nd term. And as a result the role of the Attorney General has become subservient to the Extant President and failed to function as required by established traditions and law.

25. The Petitioner states that for instance, since the Extant President's re-election to the office, the Attorney General Department has been forced to withdraw several indictments served on 'politician-suspects' charged before the High Court for commission of serious criminal offences.

26. The Petitioner states further that despite the fact that Attorney General is required to uphold the Rule of Law and to deal with the violators of the fundamental rights of the citizens appropriately, the norm has now become defending the right violators and not the furtherance of the protection of the fundamental rights of the citizens and in cases where compensations orders are made against the violators, to pay such compensation from the state funds.

27. The Petitioner states that it is quite apparent that the Extant President is abusing his office to recognize and duly reward the services of those

subservient officers serving in the Attorney General Department with ‘promotion’ as judges to the superior Courts (such as the Court of Appeal and the Supreme Court) and to offer further gratifications after their retirement. This process has effectively denied the legitimate expectations of the career judges serving in the Court system. This kind of practice is never followed in established democracies such as the United Kingdom, where:

- Not a single officer serving in the Crown Prosecution Service is promoted to the Court System at all.
- Even the Prime minister is liable to be arrested by any citizen under “Citizen Arrest” if a crime is committed.
- Enhanced due diligence is exercised even in the process of Jury Vetting, let alone the judicial appointments.

PUBLIC , PRACTITIONERS LOSING FAITH & TRUST IN THE JUDICIARY

28. The Petitioner states that the extent of the interference with the Judiciary by the Extant President is such that career judges have been denied their legitimate expectation of promotions to superior courts as such vacancies are filled with officers served/serving in the Attorney General’s Department.

29. The Petitioner states that as at present, the two-judge bench of the Writ Court in the Court of Appeal, the court in which people seeking relief against abuse of office by state officers has been filled with State Counsels from the Attorney General’s Department, that defend actions filed against the state officers in the Writ Court.

The Petitioner states that under these circumstances the whole justice system has become preposterous, forcing some practitioners who refuse to compromise their integrity, to stop practicing law in the Writ Court. This includes the Petitioner, who has reported the abuse to the Bar Association and to the Commonwealth Secretariat in London, urging meaningful action be taken to restore peoples trust in the Justice system with the reinstatement of Rule of Law and Good Governance.

Two letters addressed to the Bar Association dated 22nd Oct 2014 and the

Commonwealth Secretariat dated 31st Oct 2014 by the Petitioner marked P6 and P7 are attached hereto.

30. The Petitioner states that according to Article 4 of the Constitution, Judicial power is vested in the people and shall be exercised through the Court system established in accordance with the Supreme law, the Constitution. Judges are required to perform their office as required by the law and have their legitimate expectations to reach the top most office in the Judiciary that is to the office of the Judge in the Supreme Court. However, this tradition has been completely violated by the Extant President with appointment of public officers served/serving in the Attorney General Department to the superior court system.

OPINION EXPRESSED ON EXTANT PRESIDENT'S REFERENCE IS NOT BINDING

31. The Petitioner states that the defining characteristic of the Court's jurisdiction under Article 129 is that the *question that is referred to it by the President must be one of 'public importance'*. The recent reference related to the qualification of the incumbent President in his individual capacity and nobody else. The Constitution does not oblige the Court to give an opinion whenever a question is referred to it. The Court ought to say 'No' if it is asked to give an opinion on a question falling outside its jurisdiction. The President cannot involve the Court on matters affecting his private interests and the Court, being the guardian of the peoples judicial power, cannot and should not allow itself to become entangled in such affairs, compromising its dignity and integrity by responding to such irrelevant references.

32. The Petitioner states that the Court has virtually regarded itself as duty bound to give its opinion on the reference. In its own words, the reference focussed 'on a matter of public importance which concerns the irreducible components of sovereignty' and 'being the Custodian of judicial power of the people cannot flippantly dismiss the questions as a private matter and refuse to exercise our jurisdiction vested in the Court'. Yet, the Court did not consider it is amiss to flippantly dismiss the pleas of

citizens and civil rights movements, including the Bar Association of Sri Lanka, whose opinion the Court itself sought, to make oral submissions.

No rules regarding procedure

33. The Petitioner states that the disconcerting feature of the advisory jurisdiction as exercised by the Supreme Court is that it has not framed any rules specifying how it would exercise its jurisdiction under Article 129. The words 'after such hearing as it thinks fit' in Article 129 (1) of the Sri Lankan Constitution imply the necessity for a hearing. The words 'as it thinks fit' do not give the Court a warrant to dispense with a hearing altogether but that was what the Court did. It is not a matter that concerns only the judges who form the Court. It is apparent from the tone of the Court's opinion that it did not take even the written submissions made to it, with the seriousness they deserved and that the Court followed an *ad hoc* procedure and went through the process of making up its mind, denying the citizens an opportunity to express their views, whose judicial power it exercises on trust.

The opinion *ab initio* void not binding

34. The Petitioner states that the Supreme Court has made a basic error in stating that its opinion given in advisory capacity, acting under Article 129 (1) should be given the same weight as that given to a judgement or determination given by the Court in the exercise of its jurisdiction under other provisions in the Constitution. In the words of the Court, 'it is our solemn duty to emphasize the fact that the effect of our opinion is no different to a judgment that we would pronounce in any one of our jurisdictions'. Not only this stand is flawed but the Court has expressed an opinion on a question on which its opinion was never sought. The Court has gone out of its way to gratuitously express this opinion instead of confining itself to the two questions referred to on which it was asked to express an opinion.

35. Given the virtually surreptitious manner in which the Court gave

its opinion on the reference and the equally surreptitious and hasty manner in which it went about preparing its opinion, denying the citizens whose interests and concerns would directly affected by its opinion to make oral submissions, the Petitioner states that opinion expressed by the court is clearly flawed and lacks any credibility. There must be a reason why the framers had deliberately employed the word 'opinion' instead of 'determination or judgment' used elsewhere in the Chapter conferring the Courts its various jurisdictions. It is to ensure that the same weight attached to a judgement or determination is not attached to an opinion.

36. The Petitioner states that the Court's opinion is not even binding on the Extant President who sought the opinion. For some hitherto unexplained reasons, neither the President nor the Court made it available to the public until an unofficial copy was tabled in the Parliament. The very fact that the President had chosen to conceal the opinion from the public demonstrates that he did not regard it as a matter that should concern the public. If, by definition, the questions that had been referred to the Court were of public importance, then naturally a question arises as to why the answers to those questions were not made public.

37. The Petitioner states that the Supreme Court may be the highest judicial authority in this country but when it gives an opinion it is not acting as such because the jurisdiction that it is called upon to exercise lacks the characteristics of a Court giving a judgement in the exercise of its adjudicatory function.

38. The Petitioner states that an opinion expressed with no hearing afforded is no 'opinion' at all, and it has no constitutional validity as the Court acted in breach of its constitutional duty to have a hearing on the reference before giving its opinion. Therefore, the opinion given by the Court is no different to one that given by the President's personal advisers or even by the Attorney General, who strangely had been silent in this instance even though he is supposed to act as the guardian of public

interest and Rule of Law.

JUDICIARY UNDER DUTY TO UPHOLD THE PEOPLES JUDICIAL POWER

39. In the circumstances the Petitioner states that the act of affording the Extant President an opportunity to contest at the forthcoming Presidential election by the 1st Respondent is unlawful and ultra vires and undermining the intelligence of the citizens of this country who hold the inalienable Sovereignty of the Republic of Sri Lanka, as the Extant President is clearly disqualified and/or ineligible under the existing law to tender nominations and seek a fresh mandate from the people at the forthcoming presidential election scheduled for 08th January 2015.
40. The Petitioner reiterates that the decision of the 1st Respondent to permit the Extant President to stand for the Presidential election is unlawful, inapt, ultra virus and abuse of process/power as much as:
- a. the said decision offends and violates the sovereignty in the peoples;
 - b. the said decision is unsupported by any plausible reasoning;
 - c. the said decision fails to consider relevant matters and/or considered irrelevant matters and apparently made under duress;
41. The Petitioner, reserves the right to furnish any further material as the Petitioner might be able to obtain including the certified copies, which may pertain to the aforesaid matters but not currently available in further proof thereof.
42. The Affidavit by Petitioner is appended hereto in support of the averments contained herein.

43. The Petitioner states that he has not invoked the jurisdiction of the Court of Appeal previously in respect of the matters pleaded herein and pleads that documents **P1** to **P7** be deemed to be part and parcel hereof.

WHEREFORE, the Petitioner pray that the Court of Appeal would;

- a. issue Notices on the Respondents;
- b. issue a mandate in the nature of Writ of *Certiorari* quashing the 1st Respondent's decision permitting the Extant President to stand for the Presidential Election scheduled for 08th January 2015;
- c. issue a Writ in the nature of a Writ of *Mandamus* compelling the 1st Petitioner to reject the nomination tendered for the Extant President to stand for the Presidential election scheduled for 08th January 2015;
- d. Grant **Interim Relief** with issuance of direction to the 1st Respondent to suspend the holding of the Presidential Election scheduled for 08th January 2015 until the final determination of this Application
- e. grant costs; and
- f. grant such other and further relief and/or declaration as to Your Lordships' Court shall seem fit and meet.

N. Kodituwakku


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Attorney-at-Law & Commissioner for Oaths
99, Subadrarama Rd, Nugegoda.

The Petitioner