

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

In the matter of an application under Article 121 and 122 together with inherent powers of the Court read with Supreme Court Rule 63 (2) (iii) in respect of the challenging of the Bill titled '*Nineteenth Amendment to the Constitution*'

1. Nagananda Kodituwakku
99, Subadrarama Road
Nugegoda

Petitioner

Vs

SC (SD) Application No: 18/2015

Attorney General
Attorney General's Department
Colombo 12

Respondent

To: THE HON' CHIEF JUSTICE AND THE OTHER HON' JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

On this 31st March 2015

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

1. The Petitioner is a citizen of Sri Lanka, Attorney-at-Law and a Solicitor in the UK.
2. The Attorney General is made a party to this application in terms of Section 134(1) of the Constitution.
3. The Petitioner in this application challenges the proposed Constitutional Bill referred to as in its Long Title 'AN ACT TO AMEND THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA' (*hereinafter referred to as proposed 19th Amendment Bill*) for the reasons more fully described below on the basis that the act is required to be approved by the people at a Referendum.

The Petitioner respectfully requests the permission of the Court to produce a copy of the 19th Amendment Bill referred to above at the hearing of this application.

The proposed Bill to amend the Constitution is flawed and violates the sovereignty in the people and undermines their Judicial Power

4. *Inter alia*, the Transitional Provisions in the proposed Constitutional Amendment (Article 54) provides that every person holding office on the day preceding the date on which this Act becomes law, as:-

- (a) *the Chief Justice;*
- (b) *Judges of the Supreme Court;*
- (c) *the President of the Court of Appeal;*
- (d) *Judges of the Court of Appeal;*

shall continue to hold such offices and shall, subject to paragraph (3) of Article 41C, continue to exercise, perform and discharge the powers, duties and functions of that office, under the same terms and conditions.

Whilst Every person holding office on the day preceding the date on which this Act becomes law, as the Chairman or a member of the:-

- (a) Parliamentary Council;
- (b) Public Services Commission;
- (c) National Police Commission;
- (d) Human Rights Commission
- (e) Commission to Investigate Allegations of Bribery or Corruption; or
- (f) Finance Commission,

shall cease to hold such office with effect from the date on which this Act becomes law.

5. The Petitioner states that the said Transitional Provision violates, Judicial Power of the People enshrined in Article 4(c), freedom of conscience of the people guaranteed by **Article 10**, Petitioner's fundamental duty of performance of office as an Attorney-at-Law faithfully and conscientiously upholding the Rule of Law as per the oath taken before the Supreme Court and as required by Article 28 (c) and also on the basis it undermines the Article 105 of the Constitution which states *inter alia* that the Administration of Justice '**which protect, vindicate and enforce the rights of the people**' shall primarily be the Supreme Court and the Court of Appeal of the Republic of Sri Lanka, which however has been compromised by certain Judges holding

the office in the Supreme Court and the Court of Appeal, who are allowed to hold office and discharge the powers, duties and functions of such officers by the **Article 54** of the proposed 19th Amendment Bill.

6. The Petitioner states that therefore, unless the Transitional Provision in the Amendment Bill provides that every Judge holding office in the Superior Courts as well on the day preceding the date on which the 19th Amendment becomes law, shall cease to hold office, (however subject to an option to reappointing those who deserve to hold office in the Superior Court System with the recommendation of the Chief Justice) the 19th Amendment Bill would not address the issue of installing a vibrant and independent judiciary.

Discrimination of the Petitioner by certain Judges in the Superior Courts for refusing to compromise integrity

7. Petitioner states that at all times he is committed to uphold the Rule of Law and to discharge the functions of the office he holds as an Attorney-at-Law faithfully and conscientiously as per the Constitutional oath taken before the Supreme Court. The Petitioner states however, that his innate character has cost him profoundly, effectively denying his right to practice law as he is being subjected to sustained pattern of persecution by certain Judges in the Superior Court System, for his uncompromising stand against certain Judges.
8. The Petitioner states that in number of occasions he has been compelled to urge both the Chief Justice and the President of the Court of Appeal that he has no trust and confidence in certain Judges appointed to the Superior Court System by the former President Mahinda Rajapakse, abusing the Executive power vested in him. The Petitioner states that this action of appointing Judges to Superior Courts had been severely criticized by the Bar Association in many occasions in both print and electronic media accusing the Executive for installing a subdued Judiciary that makes orders on the will and desires of the Executive.

(Copies of such criticism published in the print media 'Sunday Times' in the recent past by Bar Association (25th May 2014 and 14th Sep 2014) marked X1 and X2 is attached hereto)

9. The Petitioner states that the Chief Justice and the President of the Court of Appeal have

acceded to his requests not to appoint certain Judges named by him to hear the cases that he appears in the Superior Courts. However, the Petitioner states that it provides no permanent solution to him and also to other lawyers who refuse to compromise their integrity.

(True copies of motions filed by the Petitioner, both in the Supreme Court and in the Court of Appeal, dated 17th March 2015, 19th Dec 2014 and 09th February 2015 in this regard marked X3, X4 and X5 are attached hereto)

10. The Petitioner states that in this dismal background he was compelled to report on the failure of the Rule of Law in Sri Lanka to the Bar Association and also to the Commonwealth Secretariat in London, urging them to initiate a dialogue with the Govt to ensure that it takes meaningful steps to restore the Rule of Law in the country. The Commonwealth Secretariat was further requested to ensure that the Govt of Sri Lanka adhered to the Commonwealth values in governance.

(True copies of the communications sent to the Bar Association on 22nd Oct 2014 and to the Commonwealth Secretariat in this regard dated 31st Oct 2014 marked X6 and X7 is attached hereto)

11. The Petitioner states that the Commonwealth Secretariat has written to him stating that it believes that the new government installed in Office (the President elected to office on 08th Jan 2015) would address the issues raised in the Petitioner's communication (31-10-2014), during its 100-day plan and initiatives. Yet, the Petitioner states that the issues raised by him have not been addressed at all in the proposed 19th Amendment Bill now tabled in the Order paper of the Parliament, as it states that all judges in the Supreme Court and the Court of Appeal shall continue to hold such offices and shall, continue to exercise, perform and discharge the powers, duties and functions of that office, under the same terms and conditions (Article 54 of the Transitional Provision).

(True copies of the reply received from the Commonwealth Secretariat dated 23rd February 2015 marked X8 are attached hereto)

Flawed opinion expressed by the Supreme Court under Mohan Peiris the *de facto* Chief Justice on the President Rajapakse's Reference on a 3rd term

12. The Petitioner states that the defining characteristics of the Supreme Court's

jurisdiction under Article 129 is that the question that is referred to it by the President must be one of 'public importance'. However the reference made to the Court on 05th Nov 2014 in relation to the qualification of the President Rajapakse for a 3rd term was purely in his individual capacity and there was no 'public importance' at all. The Constitution does not oblige the Supreme Court to give an opinion whenever the President refers a question 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 and the trust and confidence placed in it by the people by merely responding to such irrelevant references.

13. However, the Petitioner states, it is obvious that the Supreme Court then controlled by de facto Chief Justice Mohan Peiris, had been made duty bound to give its opinion on the reference made to Court by President Rajapakse on 05th Nov 2014. In his own words the reference was 'a matter of public importance which concerns the irreducible components of sovereignty' and 'being the Custodian of judicial power of the people the Court cannot flippantly dismiss the questions as a private matter and refuse to exercise the jurisdiction vested in the Court'. Yet, he did not consider it was wrong to reject the pleas of citizens and civil rights movements, including the Bar Association of Sri Lanka, to make oral submissions on the matter.
14. 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 *de facto* Chief Justice Mohan Peiris did. It is not a matter that concerns only the Judges that form the Supreme Court. It is apparent from the tone of the Opinion that Mohan Peiris did not consider even the written submissions made to Court, with the seriousness they deserved. He followed an *ad hoc* procedure and went through the process of making up his mind, denying the citizens an opportunity to express their views, whose judicial power the Supreme Court exercises purely on trust.
15. The Petitioner states that the coercive force used by Mohan Peiris on other Judges who may probably have had their own opinion, was such he forced even the other

respectable Judges in the Court to agree to his flawed opinion, stating that the opinion given in advisory capacity by the Court, acting under Article 129 (1), should be given the same weight as that is given to a judgment or determination given by the Court in the exercise of its jurisdiction under other provisions in the Constitution. The said opinion expressed in submissive wording states that, '*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 was flawed but it also made the Court to express an opinion on a question on which its opinion was never sought. *De facto* Chief Justice Mohan Peiris made the Court to go out of its way to express its opinion instead of confining itself to the two questions referred to on which it was asked to express an opinion.

16. The Petitioner states that given the virtually surreptitious manner in which *de facto* Chief Justice gave his opinion on the reference, the hasty manner in which he went about preparing the opinion whilst denying the citizens to make oral submissions, and forcing all the judges to approve it were all clearly flawed and lacked any credibility. The Petitioner states that 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 judgment or determination is not attached to an opinion.
17. The Petitioner states that due to some hitherto unexplained reasons, neither the President nor the Court made the said Opinion expressed by the Supreme Court available to the public until an unofficial copy was tabled in the Parliament by the Leader of Opposition. The Petitioner states that the very fact that the President had chosen to conceal the opinion from the public, demonstrates that he himself 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 said opinion was not made public.
18. The Petitioner states that an *opinion expressed with no hearing afforded is no 'opinion' at all*, and it has no constitutional validity as *de facto* Chief Justice Mohan Peiris acted in breach of Supreme Court's constitutional duty to have a hearing on the reference. Therefore, the Petitioner states that the opinion given on the reference made to Court is no different to one that is given by the President's personal advisers or even by the Attorney General, who had been silent in this instance even though he is supposed to act as the guardian of public interest and the Rule of Law.

19. The Petitioner states that the Judges of the Supreme Court are required to uphold the Rule of Law at all cost. However, it appeared that *de facto* Chief Justice Mohan Peiris had forced all the judges, including the judges who may have wished to express their opinion differently (not to become a party by agreeing to ratify his manifestly flawed opinion).

(True copy of the said Ruling dated 10th Nov 2014 marked X9 is annexed hereto)

Failure of the Supreme Court to abolish the Court Vacation System causing tremendous hardships to the people

20. The Petitioner states that Rule 62 framed under Article 136 of the Constitution by the Supreme Court provides for three Court Vacations a year, during which period the sittings of the Supreme Court and the Court of Appeal will be suspended three times for three weeks, (two weeks and three weeks in the months of April, August and December respectively), as the Chief Justice may determine. The Petitioner states that in a country where there is a severe laws delay, this practice, which is a legacy of the British Colonial System, is clearly unethical as the Court cannot abrogate its Constitutional duty of protecting, vindicating and enforcing the rights of the citizens of this country as enacted in the **Article 105** of the Constitution. The Petitioner states that having realized the hindrances it caused to the speedy disposal of justice, our Colonial master, the Great Britain, did away with this practice long time ago.

Failure of the Supreme Court to respect the Constitution concerning citizen's fundamental rights

21. The Petitioner states that the Article 126 (5) of the Constitution that require to hear and determine Fundamental Rights Petitions filed in Court within 2 months. Yet there are some cases pending before the Supreme Court for several years and in some cases over 4 to 5 years. The Petitioner states that in this backdrop the Chief Justice is under duty to take appropriate measures to defuse the ever-increasing accumulation of pending cases, causing tremendous hardship to the people.
22. The Petitioner further states that the Supreme Court has failed to stop the current practice of paying the compensation awards made against the violators of the fundamental rights from the taxpayers money with no deterrent imposed on the

violators to pay such awards in their personal capacity.

Failure of the Supreme Court to regulate the Legal Profession

23. The Petitioner states that the people expect the Supreme Court to regulate the legal profession in this country appropriately under the powers vested in it in terms of the Article 136 (1) (g) of the Constitution. Nevertheless there are countless number of abuses of litigants by certain corrupt elements in the profession, most of which go unreported for want of effective regulatory authority to control the legal profession effectively. The Petitioner states that the absence of effective regulatory mechanism has a tremendous bearing in the people's trust and confidence in the legal profession and in the Justice System as a whole, whereas in the other leading democracies, like in the UK, there is a system in place, a powerful and effective monitoring body to regulate the legal profession. In this backdrop the Petitioner states that the Chief Justice who is the Guardian of the Rule of Law and the Regulator of the legal profession shall take the necessary corrective measures to address this issue, which has not been dealt with appropriately for decades in this country.

24. The Petitioner states that current set up is such that it permits even most plausible complaints made against corrupt lawyers go missing with no inquiry being conducted. This unhealthy situation has encouraged malpractices permitting the corrupt elements in the profession to thrive, causing tremendous harm to the legal profession. For instance, the fate of the complaint of misconduct against the lawyer Mohan Peiris reported to the Chief Justice in February 2001 by the Director General of Customs (DGC) has been unknown to date.

(Copy of the complaint of the DGC sent to the Chief Justice dated 16th February 2001 marked X10 is attached hereto)

25. The Petitioner states that in this backdrop, citizens of this country should have a right to information with regard to the complaints made against lawyers being published in both electronic and print media, (with the names of the lawyers with the nature of the complaint) with the follow up actions taken which has to be done in regular basis. However, the Supreme Court has hitherto failed to establish such a mechanism, resulting in people being victimized by the errant lawyers.

Failure of the Supreme Court to establish a compulsory Indemnity Insurance scheme for all lawyers to secure the interest from exploitation

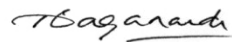
26. The Petitioner states that as the regulatory authority of the legal profession it is the duty of the Supreme Court to take right measures to protect the interests of people who are being frequently exploited by the unscrupulous elements in the Profession. The Petitioner states although Sri Lanka is lagging behind the establishment of a service oriented legal profession like in other parts of the world, where adequate safeguards are in place to arrest all sorts of abuses, which includes a mandatory indemnity insurance requirement for lawyers and an annual practicing certificate scheme that should be earned by the lawyers having demonstrated competency in the field of law they practice, which the Petitioner states is a must to protect the interest of the people.
27. For the reasons given above the Petitioner states that the Transitional Provision in the 19th Amendment Bill to the Constitution, which permits all judges in the Superior Court System to remain in office despite serious allegations were leveled against certain appointments made to the Superior Court System violative of the Constitution that vest the Judicial power of the Republic of Sri Lanka in the people that is exercised by the Court system under Section 4 (c) of the Constitution unless the Transitional Provision in the Amendment Bill provides that every person holding office on the day preceding the date on which the 19th Amendment becomes law, shall cease to hold office in the Superior Courts, however subject to an option to reappoint those who deserved to hold office in the Superior Court System.
28. The Affidavit by the Petitioner is appended hereto in support of the averments contained herein.
29. The Petitioner states that he has not invoked the jurisdiction of the Supreme Court previously in respect of the matters pleaded herein and pleads that documents **X1 to X10** be deemed to be part and parcel hereof.

WHEREFORE, the Petitioner respectfully prays that the Supreme Court would be pleased to;

a) Hear the Petitioner;

b) Determine that the Transitional Provisions (Article 54) in the said Bill titled

'Nineteenth Amendment to the Constitution' is a blatant violation of the provisions of Article 3, 4, 10 and 105 of the Constitution as it condones and permits all Judges in the Supreme Court and the Court of Appeal to continue to hold such offices and continue to exercise, perform and discharge the powers, duties and functions of that office, under the same terms and conditions, forcing the people of Sri Lanka to accept and condone the Judges appointed to the office of the Judges in the Court of Appeal and Supreme Court, some of whom have acted in a manner in which the people lose their trust and confidence placed in the Superior Court System thereby undermining the people's Judicial Power, and therefore the said Bill requires to be passed by not less than two-thirds of the whole number of members of Parliament and also approved by the People, at a Referendum by virtue of provisions of Article 83 of the Constitution.



Nagananda Kodituwakku

Attorney-at-Law & Solicitor (UK), and the Petitioner in Person