

**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

Written Submission of the Petitioner

Determination sought

1. The Petitioner seeks a determination that the Transitional Provision setout in Section 54 of the Bill titled '*Nineteenth Amendment to the Constitution*' violates the provisions of Articles **3**, **4**, **10**, and **105** of the Constitution and approval of the People at a Referendum in terms of Article **83** of the Constitution is required in respect of the Amendment to Article **3** in respect of the inalienable sovereignty of the people, including the powers of government, and Article **10** in respect of the fundamental right of freedom of thought and conscience.
2. In the ceremonial address made, by Your Lordship the Hon' Chief Justice K

Sripavan, on being appointed to the office of the Chief Justice on 09th Jan 2015, Your Lordship declared *inter alia* that;

- a) *"...The administration of Justice draws its legal sanction from the Constitution, its credibility rests in the faith of the people. Indispensable to that faith is the Independence of the Judiciary. Public confidence in the administration of Justice is imperative to its effectiveness, because ultimately the ready acceptance of a judicial verdict gives relevance to the justice system. We should always try to see that our Courts of law should be the Temple of Justice and it is our proud privilege to work together in order to make democracy of our country to be the best symbol and emblem for the whole region..."*
- b) *'It is the sacred duty of Courts to see that fundamental rights of every citizen are protected and safeguarded'*. Also quoting Justice **Sen** in **Bandhua Mukti Morcha Vs Union of India** (AIR 1984 SC 802) Your Lordship the Chief Justice asserted that *'It becomes the special responsibility of this Court to see that justice is not denied to them (a class of people referred to in the said case) and the disadvantageous position in which they are placed, do not stand in the way of their getting justice from this Court'*.
- c) *'Credibility of the Judiciary rests in the faith of the people. Indispensable to that faith is the independence of the Judiciary'*
- d) *'The power of the Judiciary depends largely on its reputation for independence, integrity and wisdom'*
- e) *'It is the sacred duty of the Court to see that fundamental rights of every citizen are protected and safeguarded' and uphold the constitutional values and to enforce the constitutional limitations is the essence of the Rule of Law'*
- f) *'The members of the legal profession should strive to occupy a prominent place in the heart of the people and the public life in the country. Thus, the*

strength and stability of a democratic state rests upon the vision and wisdom of its legislature, the efficiency of the Executive and the integrity, impartiality and independence of its Judiciary' and

g) *'It is for the Judiciary to uphold the constitutional values and to enforce the constitutional limitations that is the essence of the Rule of Law. The fundamental right to move this Court can, therefore, be appropriately described as the corner stone of the democratic edifice raised by the Constitution' (ref: X11)*

(Copy of Your Lordship's ceremonial address marked X11 enclosed herewith)

3. The Petitioner respectfully submits that making inappropriate appointments to the Superior Courts and undue interference with the Judiciary on an unprecedented scale by the former President Mahinda Rajapakse had a very adverse effect on the Judiciary losing the people's trust and confidence placed in it. These have been severely criticized by the professional body of lawyers, the Bar Association of Sri Lanka, on many occasions in both print and electronic media (ref: X1 and X2). The Executive has been accused of installing a subservient Judiciary that makes orders on the will and desires of the Executive.
4. The Petitioner respectfully submits that his commitment to perform his duty conscientiously in the performance of his office as an Attorney-at-Law, has been seriously impaired in view of the number of occasions on which he has already been compelled to urge both the Hon' Chief Justice and the Hon' President of the Court of Appeal not to appoint certain Judges named by him as he had no trust and confidence in them to hear the cases for which he appeared in the Superior Courts (Ref X3, X4 and X5). This process would have a tremendous adverse effect on the dispensation of Justice by the Judiciary.
5. The Petitioner respectfully submits further that he was compelled to report

the failure of the Rule of Law in Sri Lanka, to the Bar Association (ref X6 dated 22-10-2014) and also to the Commonwealth Secretariat in London (Ref X7 dated 31-10-2014), urging them to initiate a dialogue with the Government of Sri Lanka to ensure that it takes meaningful steps to restore the Rule of Law in Sri Lanka. The Commonwealth Secretariat was further requested to intervene to ensure that the Government of Sri Lanka adhered to the Commonwealth values in governance as a Member of the Commonwealth of Nations.

6. The Petitioner respectfully submits that the Commonwealth Secretariat has responded to his request (refer X8) informing him that the new government in Sri Lanka installed in Office on 08th Jan 2015, would address the issues raised in the Petitioner's communication of 31st Oct 2014, during the Government's 100-day plan and initiatives. However, the Petitioner respectfully submits that the issues raised by him have not been addressed at all in the Nineteenth Amendment Bill, which states that 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 (Section 54)

Flawed opinion expressed on two questions referred to it by the Executive President

7. The Petitioner with highest respect and honour to the Supreme Court respectfully submits that the Opinion expressed by Mr Mohan Peiris P.C., usurping the powers of the Office of the Hon' Chief Justice, with all the other Judges in the Supreme Court agreeing, on the two questions referred to the Supreme Court by the former President Mahinda Rajapakse on 03rd November 2014, in respect of a private matter affecting him only, in his personal capacity (not a matter of national importance as specified by Article 129 of the Constitution), caused tremendous damage to the trust and confidence placed in the Supreme Court by the people whose inalienable judicial power is exercised by the Judiciary in this country purely on trust [(Article 4 (c))].

8. The Petitioner respectfully submits that in response to the aforesaid reference of the former President, Mr Mohan Peiris P.C. as *de facto* Chief Justice, having denied the citizens any opportunity to express their views in abuse of the power which the Supreme Court exercise purely on trust - Article **4 (c)** with all other Justices agreeing, expressed in very submissive, if not servile words, the opinion dated 10th November 2014 (ref **X9**) of the Supreme Court which included advice or direction, that the President should seek election for re-election for a further term, in the following words.

*“Thus Your Excellency **shall exercise** your right and power vested in you by virtue of Article 31 (3A) (a) (i) of the Constitution **and seek re-election for a further term** and there exists no impediment for Your Excellency to exercise the right and powers accorded to you under the Constitution to offer yourself for a further term’* (ref: **X9**).

Violation of Article 105 of the Constitution by the Judiciary

9. *‘Sovereignty in the People, being nothing less than the exercise of the general will, can never be alienated; the power indeed may be transmitted, but not the will of the people’ - Jean Jacques Rousseau.*

The Petitioner respectfully submits that as the Transitional Provision (Section **54**) of the Nineteenth Amendment to the Constitution effectively permits continuance of the Judges in the Superior Courts, and for the reasons mentioned above, the said provision violates the inalienable Sovereignty of the people (Article **3**).

10. The Petitioner respectfully submits however, that some Judges in the Superior Courts have violated their social contract and dishonored their constitutional duty to the people whose Judicial power they exercise purely on trust as set out in the Article **105** of the Constitution, which provides 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.

11. The Petitioner submits that many of the appointments to the Superior Courts made by the former President Mahinda Rajapakse, in patent disregard of the people's sovereign power (Article 3), undermining the trust placed in the Executive President [(Article 4**(b)**] and therefore the said Transitional Provision in the said bill which permits these Justices to remain in office, effectively undermining the integrity of the Judiciary and the people's trust and confidence placed in it [(Article 4**(c)**] violates the fundamental right of the people guaranteed by the said Article 10.

12. The Petitioner submits that it will further deny Petitioner of his freedom of conscience and also his ability to perform his duties of office as an Attorney-at-Law conscientiously Article 28**(c)**, honoring his constitutional obligation, unless the said Transitional Provision is amended to include the cessation of the tenure of all judges in the Superior Courts, with an option to reappoint those considered suitable by the Constitutional Council under the provisions of Article 41C (1) of the Nineteenth Amendment to the Constitution. As mentioned above this requires the approval by the People at a referendum as provided under the Article 83 of the Constitution.

Offensive Court Vacation system

13. The Petitioner respectfully submits further that the Supreme Court **Rule 62** framed under Article 136 of the Constitution 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 Hon' Chief Justice may determine. The Petitioner respectfully submits that in a country where laws delay is severe, this practice, which is a legacy of the British Colonial System has been adopted for decades. The Petitioner submits that continuance of this detrimental and unethical practice is contrary to the Supreme Court's Constitutional duty of **protecting, vindicating** and **enforcing the rights of the citizens** of this country as enacted by Article 105 of the Constitution. The Petitioner respectfully submits further after having

realized the hindrances caused to the people by this vacation system and for the speedy disposal of justice even the Colonial Master, the Great Britain, did away with this practice a long time ago.

Neglect of Constitutional duty of upholding the people's fundamental rights

14. The Petitioner respectfully submits, with due respect to this Court, that the history of the administration of justice in this country suggests that the Supreme Court has failed to uphold its Constitutional Duty to hear and determine Fundamental Rights petitions filed in the Supreme Court by the Citizens of this country, within the specified period prescribed by law, i.e. within 2 months of the filing of such petitions in Court [(Article **126 (5)**) of the Constitution] and in some cases, the Rights Applications are pending before the Court for well over 5 years. The Petitioner, with due respect to the Court, submits that this delay in dispensing of justice, is tantamount to a clear violation of the people's judicial power that the Judiciary exercises, purely on trust [(Article **4 (c)**)], causing tremendous hardship to the people. In this backdrop, the Petitioner respectfully submits that the legislature of this country that exercises the people's legislative power on trust [(Article **4 (a)**)] cannot compel the people in whom are vested all powers associated with their inalienable sovereignty (Article **3**), including the Judicial power (Article **4 (c)**) to accept the judges already serving in the Superior Courts, as specified in **Section 54** of the Nineteenth Amendment Bill, unless it is appropriately amended to reestablish the Superior Court system with Judges who would respect and honour the trust and confidence placed in the Judiciary by the people, (as desired by Your Lordship in Your Lordship's speech referred to above), which may also include the upright and respectable judges now serving in the superior Courts, and thereby **protecting, vindicating and enforcing the rights of the citizens (Article 105)**.
15. The Petitioner, with due respect to the Court, further submits that the Supreme Court has failed to terminate the practice of payment of compensation awards made against the fundamental right violators, from the

taxpayers' money with no deterrent punishment imposed on the violators to pay such awards in their personal capacity. The Petitioner reiterates, with highest respect to the Court, that this practice clearly contradicts the Court's Constitutional duty of **protecting, vindicating and enforcing the rights of the people** (Article 105), who hold the sovereign powers that include Legislative, Executive and Judicial powers [(Article 4 (a), (b), (c))].

Unregulated Legal Profession

16. In this regard the Petitioner respectfully invites Your Lordship's attention to Article **(4c)** and Article **105** of the Constitution that vest the responsibility of **protecting, vindicating and enforcing the rights of the citizens in this country**, which, the Petitioner submits, have been compromised by the Judiciary.

17. The Petitioner respectfully submits that Article **136 (1) (g)** of the Constitution has vested power in the Supreme Court to regulate the legal profession in this country appropriately and effectively. Nevertheless, the Petitioner respectfully submits that there are countless instances of exploitations 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 submits that the absence of an effective regulatory mechanism has had a tremendous bearing in the breakdown of the people's trust and confidence in the legal profession and in the Justice System as a whole, whereas in the other leading democracies, such as the UK, there is a system in place, with a powerful and effective monitoring body to regulate the legal profession. In this backdrop the Petitioner submits that Your Lordship the Hon Chief Justice, the Guardian of the Rule of Law and the Regulator of the legal profession, is under a clear duty to effect necessary corrective measures to address this issue, in keeping with Article **105** of the Constitution that vests the responsibility of **protecting, vindicating and enforcing the rights of the people in the Judiciary**. However, the Petitioner respectfully submits that this has been neglected for decades in this country.

18. The Petitioner respectfully submits that the prevailing system of regulating the legal profession is such that it permits even the most plausible complaints made against corrupt lawyers to 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 Mr Mohan Peiris reported to the Chief Justice in February 2001 by the Director General of Customs (DGC) is unknown to date (X10).

19. The Petitioner, with due respect and honour to this Court, respectfully submits that in this backdrop, citizens of this country should have a 'right to information' with regard to the complaints made against lawyers, by such information being published in both electronic and print media (with the names of the lawyers and the nature of the complaint) with the follow up actions taken, which has to be done on a regular basis. However, the Petitioner, with due respect to the Court, submits that hitherto the Supreme Court, being the Regulatory Authority, has failed to establish such a mechanism, resulting in the sovereign people being victimized by the errant lawyers. This clearly contradicts the Court's duty to the people as set out in Article 105 of the Constitution read with Article 136 (1) (g) of the Constitution.

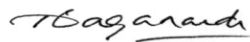
Establishment of a compulsory Indemnity Insurance scheme for all lawyers to protect the interests of the litigants from exploitation

20. The Petitioner respectfully submits that as the regulatory authority of the legal profession, the Supreme Court is vested with the bounden duty under Article 105 and Article 136 (1) (g) of the Constitution to take appropriate measures to protect the interests of citizens who are being frequently exploited in this country by the unscrupulous elements in the Profession. The Petitioner respectfully submits that although Sri Lanka is lagging behind in the establishment of a service oriented legal profession, in other leading democracies there are adequate safeguards in place to arrest all sorts of abuses. A mandatory indemnity insurance, requiring all lawyers practicing

law to obtain and produce annually to the Regulatory Authority to renew their license (Practicing Certificate) and further that every lawyer should be required to demonstrate his/her competency in the field of law he/she intends to practice in. The Petitioner respectfully submits that introduction of this practice to protect the interests of the people from being exploited which is a clear duty cast on the Supreme Court by Article **105** read with Article **136 (1) (g)** of the Constitution.

WHEREFORE, the Petitioner respectfully prays that the Supreme Court would be pleased to Determine that the Transitional Provisions (Article **54**) in the said Bill titled '*Nineteenth Amendment to the Constitution*' violates the provisions of Article **3**, **4**, **10** and **105** of the Constitution as it condones and permits the 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 them, some of whom have performed their office in a manner adversely affecting the people's trust and confidence placed in the Superior Courts [(Article **4 (c)**], undermining the sovereignty vested in the people (Article **3**).

Therefore the Petitioner respectfully submits that the relevant provisions in the said Bill titled '*Nineteenth Amendment to the Constitution*' are required 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

02nd April 2015

