

Affidavit

I, **Nagananda Kodituwakku**, a citizen of Sri Lanka and the UK, a public interest litigation activist, an Attorney at Law (Sri Lanka) and a Solicitor (UK), being Buddhist, currently residing at 99, Subadrarama Road, Nugegoda, do hereby solemnly and truly declare and affirm as follows:-

1. I am the affirmant above-named and I affirm to the facts herein contained from my personal knowledge and by reference to records available to me, and I do so with a sincere hope to restore the deteriorating trust and confidence in the judiciary by the people that warrants decisive corrective measures being taken according to law against certain corrupt judges, a fundamental necessity to bring awareness of all the judges serving in the judiciary that they perform their office according to rules of reason and justice, and not according to the private opinion and that the people's judicial power vested in them is exercised within the limits, which a honest person competent to discharge his office ought to confine, having in mind that the judicial power conferred in the judges solely to be used for the public good, and not for the benefit of the person holding the office which is held in trust for the public, to be exercised in good faith according the constitutional oath taken to be faithful to the law and perform the office honestly and faithfully, only upon lawful and relevant grounds of public interest, bearing in mind that the accountability of their actions is certainly an important facet of good governance and is a paramount important factor ensuring that the judges do not abuse, misuse or overstep the powers they have been entrusted only with, in order to serve the people and not for any other purpose.

Developments leading to judicial corruption concerning Eva Wanasundara J

2. Further to the public criticism and condemnation of the appointment of rejected candidates by the people at the Parliamentary Election 2015 to the Parliament through the National List by the Party Secretaries, which directly affected the democratic right of franchise of the people, enshrined in Article 3 of the Constitution, a right of which cannot be denied without a mandate being obtained from the people at a referendum (Article 83), I voluntarily undertook an investigation in the public interest in this regard, to ascertain the credibility of the process adopted by the Executive to enact the relevant law (Article 99A of the 14th Amendment).
3. I state that it was found that it (National list provision in the 14th Amendment) had been enacted without a referendum being held permitting Party Secretaries to appoint rejected

candidates as MPs through the National List. It was also found that the Bill had been signed by the Speaker whereas the relevant provision (reproduced below) in the Constitution [82(6)] provides that no law affecting any of the entrenched provisions (such as Article 3) in the Constitution shall become law unless due process as specified in Article 82 is duly adopted and **upon certification by the Executive President and not by the Speaker.**

'No provision in any law shall be deemed to, amend, repeal, or replace the constitution or any provision thereof, or be so interpreted or construed, unless enacted in accordance with the requirements of the preceding provisions of this Article' [Article 82(6)]

4. I state that further inquiries helped find hard evidence of serious corruption involving all three organs (Legislature, Executive and the Judiciary) of the Government, that had been executed collectively and surreptitiously, permitting smooth passage for the 14th Amendment Bill, which carried an **unlawfully inserted** clause (reproduced below) introduced **within brackets** to Article 99A of the 14th Amendment to the Constitution, allowing **defeated candidates to be elected as MPs by the Party Secretaries through the National List.**

*"...Where a recognized political party or independent group is entitled to a seat under the apportionment referred to above, the Commissioner of Elections shall by a notice, require the secretary of such recognized political party or group leader of such independent group to nominate within one week of such notice, persons qualified to be elected as Members of Parliament (**being persons whose names are included in the list submitted to the Commissioner of Elections under this Article or in any nomination paper submitted in respect of any electoral district by such party or group at that election**) to fill such seats and shall declare elected as Members of Parliament, the persons so nominated..."*

5. I state that the Supreme Court Special Determination Record (SC/SD/02/1988) dated 18th April 1988 (found with great difficulty during the probe) revealed that the five judges in the Supreme Court, had made a **manifestly flawed determination** despite submissions made to the Court that '*... apportionment by the Commissioner and the nomination by the Secretary of the recognized political party or the group leader runs counter to the principal of elections by the electors, enshrined in Article 3, read with Articles 4(a) and 4 (e) of the Constitution, in that it is an erosion of the franchise which is an inalienable aspect of the sovereignty of the people...'*

The Court ruling (reproduced below) was that the said Clause inserted to the 14th Amendment Bill did not violate the people's democratic right of franchise protected in the enshrined provision of Article 3 of the Constitution.

*"... We have considered the respective submissions made in this regard to this matter and our determination is that Clauses 3 and 8 (National List provision Article 99A) of the **Bill are not inconsistent with the provisions of Article 3, read with Article 4 (a) (e) of the Constitution, and therefore do not require the approval of the People at a Referendum ..."***

It is patently clear that the 5 judges in the Supreme Court had abused the office for irrelevant considerations without performing their office according to rules of reason and justice.

(A true copy of the said determination (SC/SD/02/1988) marked **X1** is attached herewith)

6. I state that the probe further revealed that the said 14th Amendment Bill approved by the Parliamentary Select Committee (appointed for the purpose), **did contain no such a clause** (referred below) permitting Party Secretaries to appoint rejected candidates through the National List. It had never been amended either at the Committee Stage in the Parliament.

*"where a recognized political party or independent group is entitled to any seat under such apportionment, the Commissioner shall require the Secretary of such recognized political party or group leader of such independent group to nominate persons, qualified to be elected as Members of Parliament (..... **there is no such close allowing defeated candidate to be nominated**) to fill such seats and shall declared elected as Members of Parliament the persons so nominated"*

(A true copy of the 14th Amendment Bill as approved by the Parliamentary Select Committee marked **X2** is attached hereto).

7. I state that the study further revealed that the said clause (99A) had been interpolated to the 14th Amendment by the then Executive President J R Jayawardene (with no knowledge or concurrence of his own party and the Prime Minister) in a typed-written document, (supposed to be the 14th Amendment Bill) referred to the Supreme Court.

This fact was affirmed by the statement made by Prime Minister R Premadasa, who had introduced the Bill at the Parliamentary debate, held on 04th May 1988, which clearly demonstrates the intention of the legislature. The relevant extracts of the statement of the Prime Minister are reproduced below.

*“... Mr Speaker, what is this Fourteenth Amendment to the Constitution? **I have to raise this question, because there was a discussion of a 14th Amendment, which as I came to understand later, is different from the amendment to the constitution that I speak of** in this instance. The Fourteenth Amendment presented today is the result of deliberations of the Select Committee on Franchise and Elections. This Committee comprised all Political Parties represented in the Parliament ...”*

*“... These 29 seats will be allocated the different parties contesting in election, in proportion to the votes received by each such party at National level. The names of party nominees are known beforehand. In fact their names are published in the Gazette immediately after the closing nominations. **Therefore the voters are aware of the identity of the candidates of the different parties who are to be elected as National Members...**”*

“... Let me make it very clear, that the 14th Amendment presented today, is the result of the decisions taken by the Select Committee on Franchise and Elections, which concluded its sittings on 29th February 1988. It is based on the Report adopted by this...”

A true copy of the relevant part of the Parliamentary proceedings dated 04th May 1988 marked X3 is attached hereto.

8. I state that further evidence recovered from the Supreme Court’s Special Determination Record ref: SC/SD/02/1988, (referred to in paragraph 5 above), which is set out below, demonstrates that the **5 judges of the Supreme Court had acted under moral duress, in determining that the said clause was consistent with the constitution.**
 - a) President J R Jayewardene sends a ‘typed written note’ to the Chief Justice Parinda Ranasinghe, claiming to be the 14th Amendment to the Constitution (which was not a bill published in the gazette as required by Article 78 and

82 of the Constitution) accompanied by a letter dated 08th April 1988, addressing the Chief Justice as '*My dear Chief Justice*', implying that the judiciary was subservient and functions under the mandate of the Executive President.

- b) The Chief Justice entertains the said typed-written note despite President J R Jayewardene not adhering to the due process specified in the Constitution (ensuring that the Constitution enjoys a normative supremacy over other ordinary laws, which could be easily amended) which requires that the Bill to be gazetted at least seven days before being placed it on the Order paper of the Parliament, affording citizens to challenge any such bill within a week therefrom.
- c) The Chief Justice Parinda Ranasinghe appoints a 5-Judge Bench comprising H D Thambiah J , O S M Seneviratne J, H A G De Silva J, G P S De Silva J , M Jameel J to hear and determine the constitutionality of the 14th Amendment Bill (typed-written note) sent by President Jayawardena.
- d) The 5-Judge Bench holds hearing on 18th April 1988 and **despite there was no such bill published in the Gazette**, a normative process required to adopt to amend the Constitution thereby denying the citizens of their legitimate right to challenge it.
- e) A citizen, namely K Leelatunga who may have had information about the Court hearing, presents an affidavit requesting a copy of the note sent to the Court by the President J R Jayewardene and the **Court refuses to issue a copy, on the basis that citizens are not entitled to have access to it.**
- f) **The Court rules on the same day, that the clause permitting Party Secretaries to elect rejected candidates as MPs through the National List does not violate people's sovereign right of franchise, the entrenched Article 3 of the Constitution with no reasons whatsoever given for the said ruling.**
- g) Accordingly the Supreme Court colludes with the Executive in this **Constitutional Fraud**, by giving the tacit approval to the Executive

President J R Jayewardene's unconstitutional move to circumvent the constitutional requirement of obtaining mandate from the people, which is a must as the process adopted by the Executive violated the peoples sovereign right of franchise enshrined in Article 3 of the Constitution.

- h) This Bill was presented in the Parliament by the Prime Minister R Premadasa and was placed on the Order Paper and gazetted on 03rd May 1988 and made law on the following day (04th May 1988) after deliberately avoiding the due process as mentioned in the 8(b) above.
- i) As mentioned in 8 (b) above the due process for the Bill to amend the Constitution was violated by the President J R Jayewardene by forwarding his typed-written Note supposed to be the 14th Amendment Bill to the Supreme Court on 08th April 1988, well before it was duly gazetted for the information of the public. This has been done intentionally to keep the people in the dark about this unconstitutional act.
- j) This Constitutional Fraud involving all three organs of the government never comes to light for the next 28 years until it gets exposed as a result of this probe undertaken in 2015.

(A true copy of the letter sent to the Chief Justice by President J R Jayewardene dated 08th April 1988 marked X4, the typed-written Note sent to the Chief Justice marked X5 and the affidavit furnished to Court by K Leelatunga marked X6 are attached hereto)

9. I state that the President J R Jayewardene's manhandling of the Judiciary has been well documented and in fact, the President Jayewardene had declared that he was seeking to teach the judges a lesson in order to make them more pliable to the wishes of the Executive.

*(A true copy of an extract obtained from the Report published by the International Commission of Justice with a caption **Sri Lanka: A Mounting Tragedy of Errors** by Paul Sieghard marked X7 is attached hereto).*

10. I state that based on these findings, a formal request was made to the Chief Justice K Sripavan, on 26th August 2015 to obtain a certified copy of the entirety of the Court Special Determination Record (SCSD/02/1988) with a view to challenge the flawed Article 99A

enacted without adhering to the due process as set out in Article 82 of the Constitution hence has no legal effect and shall not be interpreted or construed as a lawful amendment to the Constitution [Article 82 (6) of the Constitution]. However this request was not acceded by the Chief Justice and it was referred to Chandra Ekanayake J and then to Priyasath Dep J down the line to make an order on the request.

11. I state that Supreme Court in 2015 would have been fully comprehended that there was a serious error of judgment made by the 5-Judge Bench of the Supreme Court on 18th of April 1988 that determined the constitutionality of the National List provision in the 14th Amendment.

(A true copy of the request made to the Chief Justice dated 26th Aug 2015 marked X8 is attached hereto)

Justice Eva Wanasundara rejects the request for Special Determination Record

12. On 08th September 2015, a second request was made to Registrar for a certified copy of the Special Determination Record, which was referred to Eva Wanasundara J who finally made the following order, refusing to issue a copy of the said Determination Record.

“... Communication between the President and the Chief Justice and the Observations of the Court, which are communicated to the President and to the Speaker, need not be disclosed to Mr Kodituwakku. The request contained in the Motion is therefore refused...”

Judicial corruption involving Supreme Court Judge Eva Wanasundara

13. The ruling of Eva Wanasundara J on the said request clearly displayed an abuse of office of the Supreme Court judge and clear bias towards the Executive, to cover up a grave Constitutional Fraud involving all three organs of the government. Judge Wanasundara should have been well aware that in 1988 the 5-judge bench of the Supreme Court had been involved in this Constitutional Fraud. Her intention was apparently to prevent initiation of any judicial process to expose this Constitutional Fraud.

Executive privilege of secrecy is not absolute as claimed by Justice Wanasundara

14. I state that the paramount duty of the Court at all times is to provide a fair trial with full disclosure of the relevant facts when Constitutional matters are to be determined even in cases where the Head of the State (Executive) is involved. As claimed by Eva Wanasundara J, this cannot be denied relying on the Executive privilege of secrecy, which has been held not absolute by the Supreme Court of United States. In the United States v. Nixon (President Richard Nixon) 418 US 683 (1974) Chief Justice Burger of the Supreme Court of the United States has held as follows.

“... that President do enjoys a Constitutionally protected Executive privilege, but that the privilege was not absolute ... the President’s interest in keeping his communications secret was outweighed by the interests of the Judiciary in providing a fair trial with full factual disclosure ...”

(A true copy of the extract of the ruling in United States v. Nixon - 418 US 683 (1974) is annexed hereto marked X9)

15. I state that followed by this refusal to release the Special Determination Record (SC/SD/02/1988), a further request was made to the Chief Justice K Sripavan on 10th September 2015. In the meantime on 12th September 2015, the media highlighted the refusal of the Supreme Court to release the Special Determination Record. Finally, on the orders of the Chief Justice the Registrar released a certified copy of the Special Determination Record with all the required documents.

*(A true copy of the request made to the Chief Justice dated 10th September 2015 marked X10 and a true copy of the Lead news item of **Sunday Island** Newspaper dated 12th Sep 2015 marked X11 are attached hereto)*

Justice Eva Wanasundara violates UN Convention against Corruption

16. I state that Justice Eva Wanasundara instead of taking measures to combat corruption by releasing the relevant Special Determination Record abused the office of the Supreme Court Judge to suppress the Constitutional Fraud where all three organs of the government were involved. Article 11 of the United Nations Convention against Corruption provides

measures relating to the judiciary and prosecution services as follows.

“... Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, **take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary...**”

Judicial Corruption punishable under the Bribery Act

17. I state that, however, the corruption prevalent in the Judiciary as in the case of the improper conduct Justice Eva Wanasundara amounts to, intentionally ignoring and violating the Constitutional obligations to favour the Executive and also to favour or to the advantage of the members in the judiciary at the expense of people’s sovereign rights. I state further that these actions have effectively destroyed the very foundation of the representative democracy and good governance in the Republic of Sri Lanka, which is tantamount to an offence of ‘corruption’ as defined in the Section 70 of the Bribery Act.

Justice Eva Wanasundara violates Commonwealth Latimer House principles

18. I state that the request for Special Determination Record (SCSD/02/1988) made on behalf of the people was directly connected to the accountability of the Judiciary to their Constitutional obligations, non-adherence of which, undermines the people’s confidence in the Judiciary. Justice Wanasundara’s conduct amounts to compromising of judicial integrity and also violative of the Commonwealth Latimer house principles, which underline the importance of an independent, impartial, honest and competent judiciary, which is integral to upholding the Rule of Law, engendering public confidence and dispensing of justice to the extent permitted by the domestic law of each Commonwealth Nation securing following aims.

- a. Judiciary shall not compromise judicial independence.
- b. Establishment of an independent, effective and competent legal profession, which is fundamental to the upholding of the rule of law and the independence of the judiciary.

- c. Judges to be held accountable to the Constitution and to the law, which the Judges must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin the public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible Government relies.
- d. The Criminal Law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

Justice Wanasundara's action reinforces the adverse stand taken against Sri Lanka's Judiciary by the United Nations Human Rights Council

19. I state that Justice Wanasundara's stand on this Constitutional Fraud and her failure to discharge her duty of protecting, vindicating and enforcing the rights of the people as per the Constitution (Article 105) in this manner has placed the Judiciary in a very vulnerable situation. Sri Lanka's judiciary has already been facing a very embarrassing situation before the international community, particularly before the United Nations Human Rights Council, compelling the Government of Sri Lanka to concede that people of Sri Lanka have no trust and confidence in the justice system and therefore to cosponsor a resolution (A/HRC/RES/30/1) on 01st Oct 2015, to set up a judicial mechanism with international dimension to try serious crimes committed against the humanity. No doubt that Justice Wanasundara's action concerning this matter will reinforce the stand taken by the UNHRC against Sri Lanka's Judiciary.

(A true copy of the Resolution (A/HRC/RES/30/1) adopted by the United Nations Human Rights Council with full agreement of the Government of Sri Lanka on 01st Oct 2015 marked X13 is attached hereto)

Bar Association highlights the erosion of people's confidence in the Judiciary

20. I state further that the Bar Association of Sri Lanka, the professional body of lawyers, in a press statement issued on 28th Nov 2015 too has criticised the existing judicial system in this country. There is no doubt that Justice Eva Wanasundara's action reported here too has contributed heavily towards erosion of people's confidence in the Judiciary as claimed by the Bar Association.

(A true copy of the Press statement dated 28th Nov 2015 issued by the President of the Bar Association referred above marked X14 is attached hereto)

21. I state that therefore, the material facts presented herein to support the complaint establish a *prima facie* case of judicial corruption against the Supreme Court Judge Eva Wanasundara, emanating from the abuse of judicial office for improper purpose of favouring herself, the other judges of the Supreme Court who were involved in this Constitutional Fraud and the Executive, which falls within the offence of corruption as defined in the Section 70 of the Bribery Act, that warrants the Commission to initiate a credible and independent investigation into this complaint in terms of Section 4 of the Act No 19 of 1994

Read over, explained, affirmed
to and signed at Colombo on
this 05th day of Nov 2016

Before me

Justice of Peace