

IN THE SUPREME COURT OF
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Article **125, 140** read with Article **104H(1)** of the Constitution of Republic of Sri Lanka for **Mandates** in the nature of Writ of ***Certiorari*** and ***Mandamus***

Nagananda Kodituwakku
99, Subadrarama Road
Nugegoda

Petitioner

Vs

SC/WRITS/05/2015

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

2. General Secretary – UPFA
307, T B Jayah Mawatha
Colombo 10

3. General Secretary
United National Party
400, Sirikotha
Pitakotte, Kotte

4. General Secretary
People's Liberation Front
464/20, Pannipitiya Road,
Pelawatta,
Battaramulla

5. General Secretary,
Ilankai Tamil Arasu Kadchi
30, Martin Road
Jaffna

6. U J Tilanga Sumathipala
Member of Parliament (UPFA)
Parliament Approach Road
Sri Jayawardenepura Kotte

7. B Mahinda Samarasinghe

Member of Parliament (UPFA)
Parliament Approach Road
Sri Jayawardenepura Kotte

8. S B Dissanayake
Member of Parliament (UPFA)
Parliament Approach Road
Sri Jayawardenepura Kotte

9. Lakshman Yapa Abeywardena
Member of Parliament (UPFA)
Parliament Approach Road
Sri Jayawardenepura Kotte

10. Angajan Ramanathan
Member of Parliament (UPFA)
Parliament Approach Road
Sri Jayawardenepura Kotte

11. A M H M Lebbe
Member of Parliament (UPFA)
Parliament Approach Road
Sri Jayawardenepura Kotte

12. G Vijith Wijayamuni Zoysa
Member of Parliament (UPFA)
Parliament Approach Road
Sri Jayawardenepura Kotte

13. M H M Navavi
Member of Parliament (UNP)
Parliament Approach Road
Sri Jayawardenepura Kotte

14. Sunil Handunnethi
Member of Parliament (JVP)
Parliament Approach Road
Sri Jayawardenepura Kotte

15. B N R Weerakoon
Member of Parliament (JVP)
Parliament Approach Road
Sri Jayawardenepura Kotte

16. Attorney General
Attorney General's Department
Colombo 11

Respondents

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

On this **26rd Nov 2015**

Constitution requires the Petition to be disposed of within two months

Whereas the Petitioner in this case on **13th Oct 2015** invoked the jurisdiction of the Court in terms of Article **104H** of the Constitution, which requires that the Court shall hear and finally dispose of this application within two months of the filing of the same [**104H (2)**]

And whereas on 30th Oct 2015, when this matter was taken up for support, the Respondents were absent and unrepresented, in spite of Notices having served on them through the Registry of the Court however, the Court made an Order to support the Petition on **08th Dec 2015** with Notices re-served on the Respondents through the Registry

Unlawful clause fraudulently inserted in the National List provision (Article 99A)

And whereas the application filed by the Petitioner, purely in the Public interest, supported by overwhelming evidence of abuse of the people's Legislative, Executive, and Judicial powers by all three organs of the government (Executive President, Parliament and Judiciary) to insert the clause "... *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 the that election...*" (hereinafter referred to as the 'flawed clause') to the **Article 99A** of the Constitution by deceitful means, as morefully set out below, thereby violating the sovereign rights of the People of Sri Lanka, which includes the power of Franchise enshrined in **Article 3** of the Constitution, which cannot be taken away or denied without a mandate obtained from the people at a referendum and upon a certificate by the Executive President being endorsed on the Bill (**Article 83**) and therefore the aforesaid 'flawed clause' inserted in the Article 99A of the Constitution is *ab initio void* in terms of Article **82 (6)** of the Constitution

Flawed opinion expressed on the refusal of the request for a Full Bench hearing

And whereas a request was made by the Petitioner by Motion filed in Court on 13th Oct 2015 in terms of Article 132 (3) (iii) of the Constitution, for the hearing of this matter before a Full Bench of the Supreme Court, considering the fraudulent manner, the said 'flawed clause' had been inserted to the Article 99A of the Constitution, which is of a matter

of National importance, Your Lordship has **ruled that it was not a matter of Public and General Importance** as follows

“I am of the view that the matters involved in this case are not of general and public importance. Hence the request made in terms of Article 132 (3) (iii) of the Constitution is refused”

And whereas, all Judges are required to stand by their decisions which shall be, directed to the parties to the litigation and to the general public with reasons for their rulings given, which however has not been adhered to in Your Lordship’s ruling, reducing it to mere nullity (ref **P30**)

And whereas, by the above ruling, Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship’s bias towards the Executive, despite credible evidence produced in the case that the impugned ‘flawed clause’ referred to above (the focal point in the matter) has been fraudulently inserted to the Article 99A of the Constitution by the then Executive President J R Jayewardene in 1988, by circumventing the procedure established by law and hence *ab initio void*

The determination by 5-Judge Bench in 1988 ab initio void

And whereas in 1988, 5-judges of the Supreme Court, despite the patent violation of the Article 3 (powers of government, fundamental rights and franchise) of the Constitution by the said ‘flawed clause’, had made an patently flawed determination on 18th April 1988 (ref **P39**) that the said ‘flawed clause’ was NOT inconsistent with the provision of Article 3 and therefore did not require the approval of the People at a referendum, which is mandated by Article 83 of the Constitution, a decision, which had apparently been made under moral duress (ref **P31**)

And whereas it is observed that the said 5-Judge Bench had denied the opportunity (Ref **P38**) for the citizens to make objections against the said ‘flawed clause’ and made the Court’s determination as follows (ref **P39**)

“We have considered the respective submissions made in regard to this matter, and our determination is that the Clause 3 and Clause 8 (Clause that permitted party Secretaries to appoint rejected candidates as MPs through the National List) of the Bill are not inconsistent with the Provisions of Article 3, read with Article 4(a) and 4(e) of the Constitution, and therefore do not require the approval of the People at a Referendum”

Determination given with no reasons adduced, is a nullity

And whereas the failure of the 5-Judge Bench to adduce reasons for their determination (in clear violation of the Article 123 of the Constitution) reduced the said determination (Ref P30) a merely nullity and *ab initio void*

Refusal to issue the Determination Record (SC/SD/02/1988) to the Petitioner

And whereas the Supreme Court's Special Determination Record (SC/SD/02/1988) demonstrates that the process followed by the aforesaid 5-Judge bench had been absolutely flawed and in clear violation of the mandatory procedure provided in Chapter XII of the Constitution

And whereas on 26th Aug 2015 the request made by the Petitioner (P32) to obtain a certified copy of the said Determination Record (SC/SD/02/1988) was denied by following ruling made by the Justice Eva Wanasundara

“...Communications 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...”

And whereas, as a result of a further request made on 10th Sep 2015 by the Petitioner to Your Lordship (Ref P33), a certified copy of the said Determination Record was made available to the Petitioner

Due process not followed in adopting the 14th Amendment to the Constitution

And whereas this matter directly affects the sovereign rights of the people (which includes franchise) guaranteed by the Article 3 of the Constitution, a right of which cannot be denied except with people's approval obtained at a referendum (Article 83), which provides abrogating of People's democratic right of appointing Members to the Legislature to the Party Secretaries, shall require endorsement by the Executive President (Article 82) after such referendum, and not by the Speaker

And whereas the said clause had not been referred to the people at a referendum as required by Article 83 of the Constitution and had not been endorsed by the Executive President as mandated by Article 80 of the Constitution but instead ratified by the Speaker

And whereas any amendment to the Constitution, shall not be deemed to amend any provision of the Constitution, unless duly enacted in accordance with the mandatory requirements as set out in Article **82** of the Constitution [(Article **82(6)**)] the said ‘flawed clause’ enacted by circumventing the due process established by law is *ab initio void* and is of no force or avail in law

And whereas the said ‘flawed clause’ enacted unlawfully has been enforced, despite the fact that it shall not be construed as part of the Constitution in terms of Article **82 (6)**

Hansard affirms that there was no such clause in the Bill, approved by APSC

And whereas the Hansard dated 04th May 1988 (ref **P22**) confirms that there was no such clause (‘flawed clause’), permitting Party Secretaries to nominate rejected candidates through the National List, in the draft bill presented by the Government and approved by the Parliament

And whereas in the 14th amendment bill, which had been duly approved (ref **P18**) by the All Party Select Committee (APSC) appointed (ref **P17**) to recommend changes to the franchise and elections, did contain no such clause in the proposed Article 99A

And whereas the, then Prime Minister R Premadasa and the then Minister of National Security, Lalith Athulathmudali took part in the debate on 04th May 1988 and confirmed that there was no such clause (‘flawed clause’), permitting Party Secretaries to nominate rejected candidates through the National List, in the draft bill approved by the Parliament.

‘Flawed clause’ inserted by President J R Jayewardene

And whereas the investigations conducted by the Petitioner confirm that the then Executive President, J R Jayewardene, had on 08th April 1988 fraudulently caused the insertion of the ‘flawed clause’ to the Article 99A of the approved amendment by the All Party Select Committee and referred to the Supreme Court (ref **P36, P37**), bypassing the mandatory provisions (Article 82, 83 and 84) concerning any amendment to the Constitution.

‘Flawed clause’ demeans the Constitutional norm of ‘Representative Democracy’

And whereas the said ‘flawed clause’, effectively nullifies the principle of ‘Representative Democracy’ duly recognised in the Preamble to the Constitution of the Republic of Sri Lanka

Judiciary duty bound to uphold the people's judicial power

And whereas the Republic of Sri Lanka is a representative democracy (ref preamble to Constitution) and the citizen's judicial power is exercised by the Judiciary, wholly on trust, demand not only that judicial power be exercised independently and according to law, but also that judicial decision-making be demonstrably rational and fair and must also be seen to be rational and fair and the Court should be able to justify its actions as an exercise of public power which are always likely to be called in question

And whereas the Judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect judges to attend to the task of administering justice and to leave politics to politicians

And whereas the Judges have a different responsibility, and are subject to a different form of accountability and the public expectation of judges is that they will not respond to political pressure

And whereas the judges are not permitted to be seen to have private agendas such as expectation of special treatment or perks after retirement

Court is under duty to take due cognizance of this matter of National Importance

And whereas the Court is expected to resolve the matter presented in this case, strictly according to law, adhering to legal methodology, acting as the final interpreter of the Constitution, protector of fundamental rights of the citizens, their sovereign rights and as a guardian to keep necessary checks upon constitutional transgressions by itself or other organs of the State (**Union of India v Raghubir Singh (1989) 2 SCC 754**)

And whereas, as per **Lord Denning**, '**judges cannot afford to be timorous souls and they cannot remain impotent, incapable and sterile in the face of injustice**'

And whereas the Judiciary, as the watchdog of the people, shall not permit itself or the other organs of the government, the Executive and the Legislature, to act arbitrarily but to act reasonably, in the public interest and strictly according to law

And whereas when the Legislature and Executive have effectively failed to discharge their respective constitutional functions as required by law, giving rise to a near collapse of responsible representative governance, the Judiciary is required to speedily and effectively

protect, vindicate and enforce the rights of the people (Article 105) which is the hallmark of the concept of democracy and constitutionalism

And whereas the collapse of fundamental norms warrants many a drastic and unconventional step being taken by the judiciary to restore public confidence in the Judiciary as a symbol of hope for the people of Sri Lanka, augmenting its moral authority and reinforcing its credibility

Duty to restore public confidence in the Judiciary

And whereas the people's trust and confidence in the Judiciary had been seriously undermined by *de facto* Chief Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgment against the Government, and also appointing of judges according to wishes of the Executive, which the Prime Minister with contempt revealed in the Parliament

The relevant part of the Hansard dated 30th Jan 2015 is attached hereto marked P40

Restoring of Integrity of the Judiciary

And whereas, *de facto* Chief Justice, Mohan Peiris completely destroyed the trust and confidence in the Judiciary with improper appointments made to the Judiciary on his recommendations

And whereas, in this backdrop the Petitioner, having lost his trust and confidence in the Judiciary reported the state of Judiciary of Sri Lanka to the Commonwealth of Nations of which Sri Lanka is a member, to ensure that Latimer House principles which state that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice' were implemented and judicial appointments were made on the basis of clearly defined criteria and by a publicly declared process

(A true copy of the communication sent to Commonwealth Secretariat marked P41 is attached hereto)

And whereas the Commonwealth Secretariat in London had informed the Petitioner that Commonwealth Secretariat had sent an observer group to Sri Lanka and believed that the newly elected government would address the issues raised by the Petitioner

And whereas the said desired intentions of the Commonwealth of Nations has regrettably been ignored and yet to be fulfilled by the Judiciary under the new regime

(True copy of the reply received from Commonwealth Secretariat marked P42 is attached hereto)

Judiciary determined private issue as a matter of National Importance

And whereas on 03rd Nov 2014 the then Executive President Mahinda Rajapakse made a reference (SC/Reference 01/2014) to the Court of two questions:

- a. whether there was any impediment after four years in office to declare his intention of appealing to the people for a further term, and
- b. whether there was any impediment for him to be elected for a further term

this was a matter, which had indisputably affected only individual, the then President Mahinda Rajapakse in his personal capacity, and there was no National or General Importance in the two questions referred to the Court in terms of Article 129 (1) of the Constitution.

Yet, on 10th Nov 2014, having ruled that it was matter of National and General Importance the Full Bench of all Judges of the Supreme Court, unanimously ruled in favour of the former President Mahinda Rajapakse with a determination that there was no impediment whatsoever to his being elected for a further term

(Relevant page of the Determination (SC Ref 01/2014) ratified by all Judges marked P44 is attached hereto)

Actions should speak louder than words

And whereas in the ceremonial address made, by Your Lordship, 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 duty and obligation of Court to see that fundamental rights of every citizen is protected and safeguarded..."*
- 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 for the Judiciary to **uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the Rule of Law...**" and*
- 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..."*

*(Copy of Your Lordship's ceremonial address marked **P43** enclosed herewith)*

And whereas now it is Your Lordship's turn to put what Your Lordship expounded to the people at Your Lordship's ceremonial address, into practice

Need for a Full Bench considering the National Importance of the case

And whereas Your Lordship's impugned decision on the request made for a full Bench has effectively disqualified Your Lordship from hearing this case, it is respectfully requested that this matter be fixed for support before the Full Bench of the Supreme Court **sans Your Lordship the Chief Justice**, Justice **Eva Wanasundara** who had clearly shown bias towards the Executive and Justice **Sarath De Arbrew** presently indicted in the High Court.

Wherefore, the Petitioner with due respect to Your Lordship, requests that the obviously impugned *per incuriam* ruling given by Your Lordship that the '*matters involved in this case are NOT of general and public importance*' be reviewed considering the general and public importance of this case, initiated purely in the public interest by the Petitioner, which goes to the very root of the representative democracy of the Republic of Sri Lanka, and to

appoint a Bench of 7 Judges of the Supreme Court in terms of Article 132 (3) (iii), to hear and determine this case on any one of the following days.

1. Wednesday the 02nd of Dec 2015

2. Thursday the 03rd of Dec 2015

3. Friday the 04th Dec 2015

However, in the event the request made herein, purely in the public interest, in terms of Article 133 (3) (iii), cannot be acceded to, the Petitioner, in view of Your Lordship's refusal to direct the hearing before a full Bench of the Supreme Court, respectfully submits that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka's Judiciary, whose actions have attracted severe international criticism and compelled the UN System to intervene and call for an independent tribunals, with foreign judges, to hear cases, and respectfully request the Court to deem that the Petitioner withdraws the Petition.

I tender herewith an affidavit by the Petitioner and the document marked **P40, P41, P42, P43** and **P44** respectfully move the Court to be pleased to accept the same to be filed of Record.

Notices addressed to all Respondents along with the Motion, the Affidavit and the document marked **P40, P41, P42, P43** and **P44** also produced herewith with duly addressed stamped envelopes to be served on the Respondents through the Registry.

N. Kodituwakku


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

N Kodituwakku, The Petitioner in Person

[Attorney-at-Law (Sri Lanka) Solicitor (UK) and Public Interest Litigation Activist]