

Petition

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

In the matter of an application to determine whether the Bill titled: "Twentieth Amendment to the Constitution" or any part thereof is inconsistent with the Constitution in terms of Article 121 of the Constitution.

Rajith Keerthi Tennakoon,
No. 482/4, Rajagiriya Road,
Rajagiriya.

PETITIONER

SC (SD) No:

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 12

RESPONDENT

On this 23rd day of September 2020

**TO HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS THE OTHER HONOURABLE
JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

The Petitioner above named appearing by Ms. Manoja Gunawardana, his Attorney-at-Law states as follows;

1. The Petitioner states that he is a citizen of Sri Lanka.
2. The Petitioner states that he served as the Governor of the Central Province and the Southern Province from January 2019 to November 2019 and was functioned as the Executive Director of the Campaign for Free and Fair Elections (CaFFE) which is an organization actively involved in the democratic process to endure the free and fair elections within the political sphere of the country.

3. The Petitioner states that he is making this application to Your Lordships Court as a citizen having sufficient and reasonable public interest with regard to the grievances pertaining to and inconsistencies stated in this application.
4. The Petitioner states that the Honorable Attorney General is the Respondent and named as a Respondent to this application in terms of Article 134(1) of the Constitution.
5. The Petitioner states, the Bill titled 'Twentieth Amendment to the Constitution' which was published in Part II of the Gazette dated 28th August, 2020 (**marked as 'A' with the Petition and pleaded as part and parcel hereof**) contains proposed amendments to the Constitution of Sri Lanka which would,
 - (a) Reverse/ repeal/ amend provisions which places checks on the powers of the President which was brought about by the 19th Amendment to the Constitution;
 - (b) Grants vast powers to the President which was not envisaged even under the 1978 Constitution when it was originally enacted;
 - (c) Directly impacts upon the Petitioner's sovereignty in terms of Article 3 read together with Article 4 (a) 4(c) and 4(d) in terms of weakening/ making defunct the legislative powers of the Parliament, subordinating the judiciary to the will of the executive and granting executive immunity on any fundamental rights violations he may commit in the course of his tenure;
 - (d) Weakens the sovereignty of the Petitioner in terms of Article 3 read together with Article 4(e) in terms of their franchise which is the only power directly exercisable by the Petitioner to exercise their sovereignty;
 - (e) Violates and is in contravention of Article 1 of the Constitution and paves way for bartering Sri Lankan sovereignty with elected Representatives who have dual nationality and therefore dual state loyalties.

EXECUTIVE USURPING POWERS OF THE LEGISLATURE / WEAKENS THE LEGISLATURE AND MAKES IT SUBSERVIENT TO THE WILL OF THE EXECUTIVE

6. The Petitioner states,
 - (a) The Clause 14 of the proposed Bill repeals Article 70(1) of the Constitution which only allows the President to dissolve Parliament before the expiration of four and a half years if two thirds of the Members of Parliament pass a resolution requesting him to dissolve Parliament;

- (b) The proposed Amendment in Clause 14 allows the President to dissolve Parliament at any time he wishes after one year from the General election curtailing the legislative powers of the people;
- (c) Therefore the proposed Clause 14 violates the Petitioner's rights entrenched under Article 3 (read together with Article 4(a)) whereby the stability of the Legislature is left to the will of the President;
- (d) Further the proposed Clause 14 violates the Petitioner's rights entrenched under Article 3 (read together with Article 4(e)) whereby the franchise exercised by the people in electing a new Parliament if not to the want of the Executive can be tampered with by dissolving it almost immediately.

MAKING THE LEGISLATURE DEFUNCT

7. The Petitioner states,

- (a) Clause 16 of the proposed Amendment introduces Article 85(2) to the Constitution whereby the President is empowered to submit to the people by way of a referendum a Bill which has been rejected by Parliament;
- (b) This clause introduces extraordinary powers to the Executive whereby even after the Parliament rejects a Bill, it can be sent for approval to the people by way of referendum;
- (c) Despite this amendment *prima facie* appearing democratic, as the people have direct influence in law making, a referendum is not a space where a Bill can be debated in detail before the people can make an informed choice on the entirety or selected clauses of a Bill;
- (d) A 'yes' or 'no' limitation in the referendum process makes it grossly unsuitable for law making by popular people's vote;
- (e) Therefore submitting a Bill rejected by the Parliament where it goes through several stages of discussions, debates and amendments before passed in to law, to the people for approval infringes upon Article 3 (read together with Article 4(a)) whereby the Executive oversteps the legislature and its law making power;
- (f) The proposed power of the Executive under Clause 16 also makes the Parliament a defunct body cut off its powers to reject a Bill and therefore infringes on Article 3 ((read together with Article 4(a)) of the Constitution.

REPEALING / AMENDING EXISTING PROVISIONS ENABLING THE PARTICIPATION OF PEOPLE IN LAW MAKING

8. The Petitioner further states,
- (a) Despite the Bill purporting to increase participation of people in law making by enabling the Executive to override the Parliament and submitting rejected Bills to the people at a referendum, in the same breath reduces the time frame within which a Bill is published and is made available to the public;
 - (b) In this regard, Clause 15 (1) of the proposed Bill whereby the existing Article 78(1) which enables a Bill to be published in the Gazette at least fourteen days before it is placed on the Order paper to 'at least seven days before it is placed on the Order paper of Parliament';
 - (c) The reduction of time proposed by Clause 15 (1) in fact reduces the time period within which a Citizen is made aware of any proposed Bill which may be made law by the Legislature and given substantial time to study and engage with the law making process;
 - (d) The reduction of time frame in which a citizen is made aware of a Bill which is to be debated and passed as law in parliament,
9. The Petitioner states,
- (a) Clause 27 of the proposed Amendment introduces Article 122 whereby Cabinet of Ministers can introduce to Parliament Bills 'urgent in the national interest'.
 - (b) However between the periods of 1978 to 2015 Article 122 of the Constitution as it existed then provided for 'Bills urgent in the national interest.
 - (c) The nature of 'Urgent Bills' passed in to laws thus far amply demonstrate that this provision has only been used to surpass citizen's rights to challenge legislation in the Supreme Court before it is enacted.
 - (d) As Citizens do not have the right to challenge laws after it has come in to operation shutting the only window available for citizens to challenge proposed laws is curtailing the direct exercise of sovereignty of the people in law making.

- (e) Further despite the proposed Article 122 not enabling the Cabinet to introduce an Urgent Bill which will amend, repeal or replace the Constitution, there is no restriction on introducing Bills which will override provisions of the Constitution.
- (f) The Proposed Article 122 also sets a time period of 24 hours (and only if the President specifies more period) to read an entire Bill and give its determination by the Supreme Court and this is not an adequate time period for the Judiciary to make an informed decision on the nature of a Bill particularly in the context of the people excluded from making representations to Court on the Constitutionality of the Bill;
- (g) In the context of adequate provisions in the Constitution and the general law of the Country already in existent empowering the President at his unfettered discretion to call for a state of emergency there is no necessity for introducing Articles empowering the Executive to introduce 'Urgent Bills'.
- (h) Therefore the proposed Article 122 violates Articles 3 read together with Article 4 (c), 4(d), 4(e) of the Constitution.

A JUDICIARY APPOINTED AND CONSTITUTED BY THE EXECUTIVE

10. The Petitioner states,

- (a) Clause 6 of the proposed Bill the proposed amendment to Article 41(A) empowers the President to at his discretion appoint all Judges of the Supreme Court and Court of Appeal including the Chief Justice.
- (b) Clause 25 of the proposed Bill repeals Article 111D of the Constitution and proposes a new Article 111D whereby the Judicial Service Commission will be appointed by the President.
- (c) Clause 26 proposes Article 111(E) (6) which grants absolute discretion to the President to remove any member of the Judicial Service Commission.
- (d) The existing Constitutional Provisions under Article 111 (1) and (2) empowers the President to appoint and remove High Court Judges at the recommendation of the Judicial Service Commission.
- (e) The Judicial Service Commission is entrusted with appointing all other Judges.

- (f) With the members of the Judicial Service Commission appointed exclusively by the President and the composition of the two other Supreme Court judges forming the Judicial Service Commission left to the absolute and unchecked discretion of the President, and the appointment, transfer and disciplinary controls of the minor judicial totally depended upon the judicial service commission directly or its recommendations, the Executive effectively controls the judiciary.
- (g) A clear conflict of interest arises where if according to the principals of checks and balances the judiciary is mandated under the Constitution to on the one end check the executive and on the other end appointed by the very Executive it is tasked to check and hence is made a subservient arm of the Executive.
- (h) Independence of the judiciary is one of the founding principles of our democracy as set out in the preamble to the Constitution.
- (i) Hence no Constitutional provision should allow the judiciary to become subservient to the Executive.
- (j) Therefore Clause 6 and the proposed Article 41(A), Clause 25 and the proposed new Article 111D and Clause 26 and the proposed new Article 111(E) (6) read individually and together violates Article 3 read together with Article 4(c), (d), (e) of the Constitution.

EXECUTIVE PRESIDENT'S IMMUNITY AGAINST FUNDAMENTAL RIGHTS APPLICATION

11. The Petitioner states,

- (a) Clause 5 of the proposed Amendment repeals Article 35 which held the President accountable for Fundamental Rights Violation in a Court of Law whereby Petitioner could make the Attorney General a party to such Action.
- (b) The proposed Amendment in repealing Article 35 grants immunity to the President to commit Fundamental Rights violation without being held accountable.
- (c) The Fundamental Rights which is vested in the people only has meaning if it is enforceable against the Executive including the primary repository of executive power the President.

- (d) Clause 5 takes away what was already granted to the citizens under Article 35 and shrinks the ability of the people to hold the Executive President accountable to his Official actions.
- (e) Therefore Clause 5 violates the Petitioner's sovereignty and fundamental rights guaranteed under Article 3 with Article 4 (d) of the Constitution.

RULED BY EXECUTIVE AND LEGISLATURE WITH DUAL NATIONALITIES AND DUAL LOYALTIES

12. The Petitioner states,

- (a) The drafters of the 1972 and 1978 Republican Constitutions specifically declared Sri Lanka to be a 'Free Sovereign and Independent Republic'.
- (b) The 19th Amendment to the Constitution particularly barred dual Citizens from holding higher elected Offices including holding the Office of President and becoming a Member of the Legislature in Article 91(1)(d)(xiii).
- (c) This Amendment strengthened Article 1 of the Constitution which declared Sri Lanka to be a 'Free Sovereign and Independent Republic'.
- (d) Dual Citizenship in the highest elected Offices of the Country results in conflict of interest of national interests which includes the defense and protection of the territorial integrity of Sri Lanka.
- (e) Enabling the President of Sri Lanka to be a dual citizen will also effect diplomatic relations with other states depending on the geo-political interests of the other Nation to which the Sri Lankan President has 'sworn' loyalty to.
- (f) Therefore repealing Article 91(1)(d)(xiii) will open the flood gates for dual citizens to acquire the seats in the highest elected offices in Sri Lanka;
- (g) The proposed amendment therefore violates Article 1 of the Constitution

FUNCTIONS OF THE PARLIAMENTARY COUNCIL DOES NOT CHECK THE POWERS OF THE PRESIDENT

13. The Petitioner states,

- (a) The existing Constitutional Council constituted in the provisions of Chapter V11A of the Constitution replaces it with a Parliamentary Council.
- (b) One of the primary functions of the Constitutional Council was to check the President on the appointments he made to Commissions such as the Judicial Service Commission, the Election Commission and the Human Rights Commission amongst others the bodies of which should be independent of any influence by the Executive.
- (c) Therefore the Constitutional Council was granted powers to 'recommend' persons to such commissions (Article 41B(3)) and the President is bound by those recommendations when he makes his final appointments.
- (d) Under the proposed Clause 6, the Parliamentary Council has no powers to check the Executive in making the appointments. The Parliamentary Council is given powers only to send 'observations' to the President on his choice of appointment to Commissions such as the Election Commission, the Public Service Commission, the Human Rights Commission and the Judicial Service Commission amongst many such other Commissions set out in Part I and Part II of Schedule II to the proposed Article 41(A) and persons set out under Schedule 1 to the said proposed Article which includes the Chief Justice and the Auditor General amongst others.
- (e) Further Clause 6 also empowers the President to 'remove' appointed persons from their offices when there are no enacted legislations prescribing the method of their removal.
- (f) The President is not required to obtain 'prior approval' from the Parliamentary Council as was required of him under the existing Article 41B(5) where the President was bound by the 'prior approval' of the Constitutional Council before he could remove such a Chairman or a Member of a Commission or any person appointed under the existing Article 41B(1) and Article 41(C)(1).
- (g) On the face of Clause 6 there is a conflict of interest which amounts to the violation of Petitioner's rights under Article 3 read together with Article 4 (c),(d) and (e) of the Constitution;

THE ABOLITION OF AUDIT SERVICE COMMISSION AND LIMITING THE POWERS OF THE AUDITOR GENERAL

14. The Petitioner states that;

- (a) Clause 32, 33, 34, 35, 36, 37 and 38 of the proposed amendment repeals Article 153(A), (B), (C), (D), (E), (F), (G) and (H) which established the Audit Service Commission,
- (b) The Audit Service Commission was established by the 19th Amendment to the Constitution in order to have a transparent and accountable management of Public Finance,
- (c) The Audit Service Commission is answerable to Parliament in terms of Article 153(H),
- (d) The full control over public finance was vested with the Parliament in terms of Article 148 of the Constitution, and the accountability and transparency of public finance was enhanced by the introduction of Article 153 (A) to (H) by the 19th Amendment,
- (e) Repealing the provisions relating to Audit Service Commission, will directly affect the role of the Parliament in controlling the public finance,
- (f) The Parliament exercising the legislative power of the people of the Republic in terms of Article 4(a) which is an arm of sovereignty recognized by Article 3 of the Constitution.
- (g) The proposed clause 32, 33, 34, 35, 36, 37 and 38 violates Article 3 and Article 4(a) of the Constitution,
- (h) Clause 40 of the proposed amendment curtail the powers of the Auditor General by not authorizing to audit the secretary of the President and the Secretary of the Prime Minister, which limits the powers of the Auditor General guaranteed by the 19th Amendment of the Constitution,
- (i) The Auditor General functions as the state officer accountable to the Parliament regarding the utilization of the public finance,
- (j) The proposed Amendment limit the scope and power of the Parliament to have a check and/or overlook over the funds allocated to the Presidential Secretariat

and the Secretariat of the Prime Minister, under the constitutional authority vested on the Parliament by Article 148,

(k) The proposed clause 40 violates Article 3 and 4(a) of the Constitution by curtailing the powers of the Parliament vested by the people of the Republic in terms of the said Articles,

15. Thus and otherwise, the Petitioner respectfully reiterates that,

(a) The provisions of the said Bill are inconsistent with the aforesaid provisions of the Constitution;

(b) and read as a whole places the fundamental democratic, sovereign, independent nature of the Sri Lankan state which respects the principles of 'representative democracy and assuring to all people freedom, equality, justice , fundamental human rights and the independence of the judiciary in peril.

16. The Petitioner respectfully reserves the right through his Counsel to refer to any other clauses of the said Bill that may become relevant in the course of the hearing of this application.

17. The Petitioner has not previously invoked the jurisdiction of Your Lordships' Court in respect of the said Bill.

18. Affidavit of the Petitioner is appended hereto in support of the averments contained herein.

WHEREFORE the Petitioner respectfully prays that Your Lordships' Court be pleased to:

a) Determine that one or more of the provisions of the said Bill ("**A**") is/are inconsistent with the provisions of the Constitution and require to be passed by the special majority and approved by the people at a Referendum required under the provisions of Article 83 of the Constitution,

b) Determine that the provisions of the said Bill ("**A**") are inconsistent with the fundamental democratic, sovereign, independent nature of the Sri Lankan state which respects the principles of 'representative democracy and assuring to all people freedom, equality, justice , fundamental human rights and the independence of the judiciary;

- c) Make Order granting costs, and
- d) Make such other Orders that Your Lordships' Court seem meet.

Attorney at Law for the Petitioner