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

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*In the matter of an application in terms of Article 121 read with Article 120, Article 78 and Article 83 of the Constitution to determine whether the Bill titled "The Twentieth Amendment to the Constitution" or any part thereof is inconsistent with the Constitution.*

1. Centre for Policy Alternatives (Guarantee) Limited,  
No. 6/5, Layards Road, Colombo 5.
2. Dr. Paikiasothy Saravanamuttu  
No. 03, Ascot Avenue,  
Colombo 5.

***Petitioners***

**S.C. (S.D.) No: 03/2020**

**- v -**

The Attorney General,  
Attorney General's Department,  
Colombo 12.

***Respondent***

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

**COMPREHENSIVE WRITTEN SUBMISSION ON BEHALF OF THE PETITIONERS**

1. These Written submissions are made with regard to the Petitioners' Application for a Special Determination with regard to the Bill titled "*The Twentieth Amendment to the Constitution*" (hereinafter referred to as "the Bill").
2. The Petitioners in this application have already made "preliminary written submissions" to Your Lordships' Court on 28<sup>th</sup> September 2020, in relation to matters arising from the Petition. These submissions are filed pursuant to the direction of Your Lordships' Court permitting same.

3. As directed by Your Lordships' Court the Petitioners' have included all relevant authorities in these written submissions.
4. These Written Submissions, will deal with the following issues:
  - (a) The Sovereignty of the People and the Fundamental Values of Our Constitution **[Para 11 to 24]**
  - (b) Clause 5 Of the Bill "*Immunity of the President from Suit*" Infringes/Derogates from Article 3 Of The Constitution. **[Para 25 to 42]**
  - (c) Clause 27 & 28 Of the Bill Infringes/Derogates from Articles 3 And 4 Of the Constitution. **[Para 43 to 57]**
  - (d) Clause 6 Of the Bill Infringes/Derogates from Articles 3 And 4 Of the Constitution. **[Para 58 to 65]**
  - (e) Clause 19, 20, 21 And 22 Of the Bill Infringes/Derogates from Articles 3 And 4 Of the Constitution. **[Para 66 to 70]**
  - (f) Clause 7 And 14 Of the Bill Infringes/Derogates from Articles 3 And 4 Of the Constitution. **[Para 71 to 77]**
  - (g) Clause 16 Of the Bill Infringes/Derogates from Article 3 Of the Constitution. **[Para 78 to 84]**
  - (h) Clause 17 Of the Bill Infringes/Derogates from Articles 3 And 4 Of the Constitution. **[Para 85 to 89]**
  - (i) Conclusion. **[Para 90 to 92]**
5. The long title of the said Bill describes it as "*An Act to Amend the Constitution of the Democratic Socialist Republic of Sri Lanka*". The Bill was published as a Supplement to Part II of the Gazette of 28<sup>th</sup> August 2020. The said Gazette was only issued on 2<sup>nd</sup> September 2020 and the Bill was placed on the Order Paper of Parliament on 22<sup>nd</sup> September 2020.
6. As Your Lordships will no doubt appreciate, when engaging in pre-enactment review of legislation, Your Lordships' Court will consider whether the impugned provisions or the Bill as a whole would have the "**propensity or likelihood to encourage or permit the violation**" of Constitutional provisions complained of

by the Petitioners (See **In Re the Sri Lanka Broadcasting Authority Bill** SC SD 1-14 / 1997).

7. As such the Petitioners' do not have to prove that these violations would in fact happen, but only have to demonstrate to Your Lordships' Court that the impugned provisions create a **propensity or likelihood to encourage or permit the violation** of Constitutional provisions.
8. Furthermore, it has to be kept in mind that, just because the provisions of the Bill will "reintroduce" provisions of the original text of the 2<sup>nd</sup> Republican Constitution, that in itself does not guarantee that the provisions of Article 83 are not violated.
9. When the 2<sup>nd</sup> Republican Constitution was promulgated, there was nothing in the previous Constitution which is analogous to Article 83 and Article 121 of this Constitution. As such Your Lordships' Court would not have had occasion to examine the provisions of the original text of the 2<sup>nd</sup> Republican Constitution.
10. However, having been repealed and now being reintroduced, these provisions have to conform to the requirements of the 2<sup>nd</sup> Republican Constitution.

### **SOVEREIGNTY OF THE PEOPLE AND THE FUNDAMENTAL VALUES OF OUR CONSTITUTION**

11. It is respectfully submitted that Your Lordships' Court should consider the implications of the proposed Bill on the sovereignty of the People as recognized in Article 3 of the Constitution and the fundamental values of our Constitutional order which are enshrined in our Constitution and have been recognized by Your Lordships' Court.
12. A core element of the 2<sup>nd</sup> Republican Constitution is that Sovereignty is vested in the People of the Republic. Article 3 of the Constitution provides that:  
  
"In the Republic of Sri Lanka sovereignty **is in the People** and is inalienable. **Sovereignty includes the powers of government, fundamental rights and the franchise**". (emphasis added)

13. As such Article 3 recognizes *inter alia* that:
- (a) The Sovereignty is in the People of the Republic (and not in the Republic itself or any instrument of the Republic); and
  - (b) Powers of Government, Fundamental Rights and Franchise are part of the sovereignty of the People.
  - (c) The Sovereignty of the People is inalienable.
14. In a representative democracy the People have a limited scope to directly exercise the powers of government. As such the Constitution provides for a conduit and a mechanism of how the power of the People must be exercised by the different arms of government.
15. However, for the purposes of the Constitution, the power exercised by the different arms of Government are done so on behalf of and for the benefit of the People. Therefore, the People never cease to be the sovereign and do not abdicate their control over the arms of government. In this regard the pronouncement of Your Lordships' *In Re The Nineteenth Amendment to The Constitution 2002 (3) SLR 85* is most instructive;
- “The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. **This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.**” (at pg. 97) (emphasis added)
16. The Constitution is important because it is the fundamental legal instrument by which the sovereign people temporarily entrust their power to the different arms of government, and all elected and unelected members of the different

arms of government are required to take an oath to uphold the Constitution before taking office.

[See *Singarasa Vs. Attorney General 2013 (1) SLR 245 at pg 255* “Organs of Government do not have a plenary power that transcends the Constitution and the exercise of power is circumscribed by the Constitution and written law that derive its authority therefrom.]

17. Thus, the Constitution as a whole is the basis on which the people delegate the powers of government to the different organs of government. Whilst the provisions of the Constitution can be changed by a two thirds majority of the Parliament, if such a change is done in a manner that prejudices the sovereignty of the people, such would require the approval by the people at a referendum.

18. The link between Article 3 and other provisions of the Constitution in the context of Article 4 was discussed in the majority judgment of a full bench of Your Lordships’ Court in *In Re The Thirteenth Amendment To The Constitution And The Provincial Councils Bill 1987 (2) SLR 312;*

“In our view, Article 4 sets out the agencies or instruments for the exercise of the sovereignty of the People, referred to in the entrenched Article 3. It is always open to change the agency or instrument by amending Article 4, provided such amendment has no prejudicial impact on the sovereignty of the People..... However, to the extent that a principle contained in Article 4 is contained or is a necessary corollary or concomitant of Article 3, a constitutional amendment inconsistent with such principle will require a Referendum in terms of Article 83, not because Article 4 is entrenched, but because it may impinge on Article 3. In our view, Article 4 is not independently entrenched but can be amended by a two third majority, since it is only, complementary to Article 3, provided such amendment does not impinge on Article 3.” (at pg.324) (emphasis added)

19. In addition to the sovereignty of the People, the Constitution is also underpinned by several important Constitutional values, explicitly recognized in its preamble;

“..... whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY and assuring to all Peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and

well-being of succeeding generations of the People of SRI LANKA..." (emphasis added)

20. As observed by Sharvananda J (as he was then) in his separate but concurring opinion in *Visuvalingam and others v Liyanage and others* 1983 (1) SLR 203:

**"The main aspirations of the Constitution are set down in its luminous preamble. Rule of law is the foundation of the Constitution and independence of the judiciary and fundamental human rights are basic and essential features of the Constitution.** It is a lesson of history that the most valued constitutional rights pre-suppose an independent judiciary, through which alone they can be vindicated. (at pg 236) (emphasis added)

21. Furthermore, Your Lordships' Court has in numerous judgements identified the Rule of law as the foundation / basis of our Constitution. [See *Premachandra v. Jayewickrema* 1994 (2) SLR 90; *Senarath and others v Chandrika Bandaranaike* 2007 (1) SLR 59; *Karunathilaka and Another Dayananda Dissanayake, Commissioner of Elections and Others* 1999 (1) SLR. 157]

22. The idea that the powers of Government are derived from the sovereign people and should be exercised on their behalf and the immutable republican principles identified in the preamble of our Constitution and the importance of rule of law, are not disperse ideas. They are interrelated and connected concepts that play out in a Constitutional democracy.

23. This interrelationship is briefly explained by Joseph Raz as follows;

**"What is it to act as a government? Governments are there not to promote their own interest, but that of..... the governed. Understood broadly, eg to include their moral interests, this seems plausible. The justification of rules of law and of governmental actions should be that they are, as we say, 'in the interests of the governed'.**

Several ideas coalesce around this core:

- (a) The interests of all the governed should be given their proper significance and importance.
- (b) Custodianship: the governed, broadly understood, include anyone directly impacted by government action. ....
- (c) Manifest intention: governments conform to the rule of law when they act and exercise their power according to law. Governments claim to be morally legitimate in part because they are constituted by a legitimate system of law, and

that law provides reasons that bind the government that it constitutes. The government acts arbitrarily when not trying to follow the law. **The test of conformity to the rule of law is acting with manifest intention to serve the interests of the governed, as expressed by the law and its morally proper interpretation and implementation...**

[Oxford Journal of Legal Studies, Vol. 39, No. 1 (2019), pp. 1-15]

24. As such, it is respectfully submitted that the provisions of the proposed Bill, which seek to amend the provisions of the Constitution and enhance the powers of the office of the President, have to be examined in light of its impact on the inalienable sovereignty of the People and its impact on the aforementioned Constitutional values, which underpin our Constitution.

**CLAUSE 5 of the BILL “IMMUNITY OF PRESIDENT FROM SUIT”  
INFRINGES/DEROGATES FROM ARTICLE 3 OF THE CONSTITUTION**

25. Clause 5 of the Bill seeks to amend Article 35 of the Constitution by granting the President immunity from all legal proceedings, except in a very few specifically identified instances.
26. The scope of the changes proposed to the Article 35 is evident when comparing the following excerpts of the existing Constitution with the relevant part of the twentieth amendment Bill;

Proposed Twentieth Amendment Bill	The Constitution as it is
<p>Article 35(1)</p> <p>While any person holds office as President, <b><u>no proceedings</u></b> shall be instituted or continued against him <b><u>in any court or tribunal</u></b> in respect of <b><u>anything done</u></b> or omitted to be done by him either in his official or private capacity. (emphasis added)</p>	<p>Article 35 (1)</p> <p>While any person holds office as President of the Republic of Sri Lanka, <b><u>no civil or criminal proceedings</u></b> shall be instituted or <b><u>continued against the President</u></b> in respect of anything done or omitted to be done by the President, either in his official or private capacity (emphasis added)</p>

27. This wide and overarching immunity is sought to be granted to the President in a context where;

- (a) The Constitution even as it exists, only recognizes limited controls / checks and balances over the President.
  - (b) Twentieth Amendment Bill seeks to grant the President enhanced power over Parliament and the judiciary and concentrate substantial power within the office of the President.
  - (c) Twentieth Amendment Bill seeks to make Parliament subject to the full control of the President (See below) thereby completely negating even the limited ability of Parliament to act as a check on the President.
28. As such it is respectfully submitted that Clause 5 of the impugned Bill both on its own and read in the context of the entire Bill negatively impacts the sovereignty of the People as it:
- (a) Alienates the judicial power of the people vis-à-vis the President's acts qua President as it removes the direct control the People have over the individual they have elected to hold the office of President by conferring on that individual immunity from suit for any Application in terms of Article 17 and 126 of the Constitution in relation to powers exercised qua President.
  - (b) Removes judicial scrutiny on the holder of the office of President during his tenure of office and with it negates an effective check and balance.
  - (c) Abridges, restricts and denies fundamental rights of the People in relation to acts of the President.
  - (d) Seeks to place the holder of the office of President above and beyond the law when exercising substantial powers of his/ her office and thereby allow him/her to exercise unfettered discretion.
29. The immunity sought to be conferred on the President is absolute and will lead to a situation where the President's acts qua President, even when they clearly and blatantly are unconstitutional, would not be able to be challenged in your Lordships' Court by any citizen. This is not mere conjecture, as was seen in the case **Sumanasiri G. Liyanage & Hettiarachchige Subash Ravi Jayawardana Vs. H.E. Mahinda Rajapakse & others SC FR 297/2008 and 578/ 2008** decided on 18.03.2011



30. These cases, were filed challenging; the
- (a) The deliberate refusal of the President to appoint the Constitutional Council in terms of the former Article 41A of the Constitution and
  - (b) The appointment of an individual as the Attorney General of Sri Lanka by the President without following the procedure laid down and without obtaining the approval of the Constitutional Council in terms of the former Article 41C of the Constitution.
31. In its judgment, the Court upheld the preliminary objection raised by the Hon. Attorney General, that the immunity of the President precluded the Court from considering the merits of the application. The Court, discussing other cases on Presidential immunity, held that;

"Article 35 of the Constitution confers immunity on the President from having proceedings instituted or continued against him in any Court in respect of anything done or omitted to be done in his official or private capacity except in respect of matters specified in Article 35 (3) of the Constitution. The language used in the Article is plain and unambiguous. In **Kumarathunga vs. Jayakody 1985 2 SLR 124** at page 135 Sharvananda CJ. interpreting a Constitutional provision states as follows:-

"Where the language of the Constitution is plain and unambiguous, effect has to be given to it and a Court cannot cut down the scope or amplitude of such provision for the reason that notionally it cannot harmonise with the ideal of the Constitution. "

.....

In fact **in Victor Ivan vs. Hon. Sarath N Silva 2001 1 SLR 309 at 327**, where an effort was made to challenge the absolute nature of the immunity granted by Article 35, this Court in a five [judge] bench decision where it was refused to even grant Leave to Proceed. S.W.B. Wadugodapitiya, J stated as follows:-

"I am constrained to say that in fact what the Petitioners are asking this Court to do, is in effect to amend, by judicial action, Article 35 of the Constitution, by ruling that the immunity enjoyed by the President is not immunity at all. This of course, is not within the power of this Court to do. In the guise of judicial decisions and rulings, Judges cannot and will not seek to usurp the functions of the legislature especially where the Constitution itself is concerned. "

This Court in the case of **Mallikarachchi vs. Siva Pasupathi, Attotrney General 1985 1 SLR 74 at 77** makes the following observations in respect of the immunity granted to the President under Article 35(1) of the Constitution;

"Article 35(1) confers on the President during his tenure of Office an absolute immunity in legal proceedings in regard to his official acts or omissions and also in respect of acts or omissions in his private capacity. The object of this article is to protect from harassment the person holding the high Office of the executive head of State in regard to acts or omissions either in his official or private capacity during his tenure of the office of President."

In the circumstances mentioned above, Article 35 of the Constitution do not permit the President to be cited as a Respondent in SC. (FR) Application 297/08 or in SC. (FR) application 578/08. **Since the impugned acts or omissions in the applications do not fall within Article 35(3) it is not possible to cite the Attorney General as a Respondent under the proviso to Article 35(3).** Based on the above facts both applications have been wrongly constituted and therefore fails in limine. Since the two objections considered and taken by the Hon. Attorney General and Counsel appearing for the 4th Respondent in SC. (FR) application 578/08 are fatal to the maintainability of both applications, **it is not necessary to decide on the other questions raised on behalf of the Petitioners.**"

32. As such, it is clear that the immunity proposed by the Twentieth Amendment Bill would preclude citizens going before the Supreme Court to canvass serious violations of their rights by the President, including the intentional violation of the Constitution by the President.
33. After the enactment of the Nineteenth Amendment to the Constitution in 2015, the Constitution allowed for a review of the President's acts qua President through the Fundamental Rights Jurisdiction in Article 17 and 126 of the Constitution.
34. Seven judges of Your Lordships' Court, in **Rajavarothiam Sampanthan and Others Vs. The Hon. Attorney General and Others**, SC FR 351-356/ 2018, SC FR 358- 361/ 2018] expressly held that;

**"... the inalienable right of every citizen of our country to invoke the fundamental rights jurisdiction of the Supreme Court is a cornerstone of**

**the sovereignty of the people which is the Grundnorm of our Constitution.**

Thus, Article 4 (d) declares “the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and extent hereinafter provided.” (At pg 30/ 31) (emphasis added)

35. Seven judges of Your Lordships’ Court, **In Re The Eighteenth Amendment To The Constitution** 2002 (3) SLR 71 unequivocally stated that an attempt to oust the jurisdiction of the Supreme Court from reviewing the decisions of the Constitutional Council in applications made in terms of Article 17 and 126 is a violation of Article 3 of the Constitution;

“By the envisaged 18th amendment, the Constitutional Council is clothed with unlimited and unfettered immunity on their decisions, recommendations and approvals. If such immunity is given to the Constitutional Council, it would in effect be elevated to a body that is not subject to law, which is inconsistent with the Rule of Law. The Rule of Law, means briefly the exclusion of the existence of arbitrariness and maintaining equality before the Law (A. V. Dicey - Law of the Constitution, pg. 120).

..... The total immunity expected in terms of the proposed amendment to the Constitution would effectively shut out the justiciability of actions of the Constitutional Council in the exercise of the fundamental rights jurisdiction by the Supreme Court. The Constitutional Council established under the 17th Amendment, is part of the Executive and is attributed executive power.... **It is, therefore, the duty of the Constitutional Council to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution.** The functions of the Constitutional Council would come within the framework of executive action as provided for in terms of Article 17 of the Constitution. Article 17 enables every person to apply to the Supreme Court in respect of the infringement or imminent infringement of a fundamental right.

The effect of the amendment in Clause 4 is to introduce a different class of people whose actions are not subject to judicial review. **There is no justification for such immunity to be granted, which is contrary to Article 12 (1) of the Constitution and the basic principles of Rule of Law.**

The concept of judicial review of administrative action, being a predominant feature of Constitutional jurisprudence, prevents total immunity being given to anybody, created under the Constitution as such restriction of judicial scrutiny,

would impair the very foundation of the Constitution and the Rule of Law. **The total immunity contemplated by the amendment, taking away the judicial review of the actions of the Constitutional Council out of the fundamental rights jurisdiction, in effect would alienate the judicial power from the people in contravention of Articles 3 and 4 of the Constitution.** It is to be noted that Article 3 of the Constitution specifically refers to the following : (A) the sovereignty is in the people and that it is inalienable, and (B) the sovereignty includes the powers of Government, fundamental rights and the franchise.

**For the aforementioned reasons we determine that Clause 4 of the Bill is inconsistent with Articles 3 and 4 of the Constitution. We also state that the Bill in its present form is therefore required to be passed by the special majority in terms of the provision of paragraph (2) of Article 84 and approved by the people at a Referendum by virtue of the provisions of Article 83.**

36. It is respectfully submitted that the above dicta are applicable to Clause 5 of the Twentieth Amendment Bill with greater vigour for the following reasons:
- (a) The President is not only a part of the executive, he is the head of the executive.
  - (b) Compared to the limited powers envisaged to be exercised by the “ten members” of the Constitutional Council, the individual who holds the office of President holds extensive power.
  - (c) If the Twentieth Amendment Bill is passed in its present form, the President will hold power over all other arms of government.
  - (d) The office of the President will in effect be beyond the scrutiny of the judiciary with no check to prevent the violation of the constitution.

As such it is absolutely crucial for the sovereignty of the People that the holder of such office is not completely immune from judicial proceedings and accountability.

37. Your Lordships’ Court has held very clearly that the mere existence of the impeachment procedure, would NOT be a sufficient and/or adequate check on the power of the President.

38. In ***Rajavarothiam Sampanthan and Others Vs. The Hon. Attorney General and Others***, the argument was made by the Respondents that based on the judgment of the Supreme Court in ***Mallikarachchi vs. Siva Pasupathi, Attorney General*** the impeachment procedure was an “effective check” on the power of the President.
39. The Supreme Court in ***Sampanthan's*** case completely rejected this argument and stated that;
- “a perusal of the judgment [in ***Mallikarachchi***] shows that Sharvananda CJ only referred to the provisions of Article 38 and commented [at p.78] “It will thus be seen that the President is not above the law.” **That obiter comment cannot be taken as authority for the submission Article 38 strips this Court of its jurisdiction for the protection of the Petitioners’ fundamental rights.**”
40. As stated previously, the Twentieth Amendment Bill, seeks to entrench the President’s power over Parliament and further undermines the already limited check and balance the impeachment procedure would allow. The President is able to appoint any number of Members of Parliament as Ministers and the President is able to prorogue and dissolve Parliament at his will, before any such impeachment proceedings can be tabled in Parliament.
41. Whether impeachment proceedings can only be instituted by Members of Parliament (and NOT citizens) in certain specific situations and requires the vote of two thirds of Members of Parliament twice to succeed. Such an onerous procedure cannot be considered an “effective check on the President” in a manner consistent with protecting the sovereignty of the People.
42. As such, it is respectfully submitted that Clause 5 of the Bill derogates from and infringes the provisions of Article 3 of the Constitution and is required to be passed at a referendum in addition to being approved by 2/3rds of the Members of Parliament.

**CLAUSE 27 & 28 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION**

43. Clause 27 and 28 of the Bill, deals with Bills which are “in the view of the Cabinet of Ministers, urgent in the national interest, and bears an endorsement to that effect under the hand of the Secretary to the Cabinet”. These clauses would;
- (a) Prevent the publication of such Bills in the gazette prior to such being tabled in Parliament;
  - (b) Preclude the citizens from being able to Petition the Supreme Court in terms of Article 121 of the Constitution and negates it;
  - (c) Allow the President to directly refer the Bill to the Supreme Court for a “special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitution”.
  - (d) Mandatorily require that Your Lordships of the Supreme Court make a determination within 24 hours of assembling the Court or such further time, not exceeding three days, as may be granted by the President.
44. In terms of Article 80(3) of the Constitution once a Bill becomes law upon the certification of the Speaker or the President as the case may be “no Court or tribunal shall inquire into, pronounce upon or in any manner call into question, the validity of such Act on any ground whatsoever”.
45. As such the limited pre-enactment review contained in Article 121 of the Constitution, is the only opportunity citizens will have to canvass the constitutional validity of a Bill / Act enacted by Parliament.
46. Clause 27 and 28 of the Bill seeks to remove this limited opportunity provided to the citizens and thus derogates from and infringes the provisions of Article 3 of the Constitution.
47. These provisions would impact on the legislative power of the People and the judicial power of the People. The Constitution as it exists only provides a for a limited role for Citizens in the legislative process. These Clauses would remove even this limited opportunity citizens had to engage with the legislative process as;

- (a) The Bills not being gazetted would preclude the People from even knowing the contents of the Bill before it is referred by the President to the Supreme Court.
  - (b) The provision does NOT require that the Supreme Court have a public hearing on the Bill.
  - (c) Even if the Supreme Court allows for a public hearing on the Bill, the clause does not provide for sufficient time for citizens, especially those who are not residing in Colombo, to make submissions to the Court regarding such a Bill.
48. Thus, these provisions would effectively take away from citizens any ability to engage the jurisdiction of the Supreme Court in terms of Article 121 of the Constitution.
49. The Constitution already provides the government a means by which to pass emergency regulations, which could even suspend the operation of any law, to deal with emergencies. These regulations are subject to judicial review and laps when the state of emergency is no more.
50. However, a law passed by Parliament continues to be valid long after any urgency which would necessitate its passage and despite it being contrary to the provisions of the Constitution.
51. As such it is respectfully submitted that the right of citizens;
- (a) To have access to the gazetted Bill for an adequate time period,
  - (b) To properly invoke the jurisdiction of Your Lordships' Court in a manner where Your Lordships' have the benefit of submission from a wide variety of viewpoints,
  - (c) Where Your Lordships' can adequately address Your Lordships' judicial minds to the consequences of proposed legislation without intrusion
- Are intrinsic aspects of the legislative power of the people and the judicial power of the people. As such any attempt to denude these rights of the people is a violation of Article 3 of the Constitution in as much as it infringes the sovereignty of the People.
52. Furthermore, during the course of Oral Arguments before Your Lordships' Court, Counsel for the Petitioners brought to the attention of Your Lordships' Court several instances where the urgent Bill procedure was used to enact legislation

which was unconstitutional but which were undetected by Your Lordships' Court at the time, possibly because of the lack of time to carefully consider the impact of the laws.

53. **In re Recovery of Loans by Banks (Special Provisions) Amendment Bill** SC SD 22/2003 five judges of Your Lordships' Court made the following pronouncements;

“The Bill seeks to amend the Recovery of Loans by Banks (Special Provisions) Amendment Act, No 4 of 1990. This Act is based on a Bill which was considered by the Cabinet of Ministers as being urgent in the national interest and referred by the President for a special determination..... At that stage, the Court made a determination that the provisions of the Bill were not inconsistent with the Constitution, resulting in the Bill being enacted as Act, No 4 of 1990...”

The Court went on to analyse some Constitutional provisions relating to judicial power and concluded that, the “parate execution” introduced to our law by Act, No 4 of 1990 was contrary to the Constitution. The Court held that;

“The enforcement of a right as against another person by seizure and sale of property without the intervention of a Court, is described as "parate execution". The Roman Dutch Law being our common law, has looked upon this process described as "parate execution" with extreme disfavour. **The preceding analysis of judicial power, its scope and exercise demonstrates that our constitution framework is set against any recourse to "parate execution", in our law. The constitution positively assures to every person the protection, vindication and enforcement of his rights by an institution established by law or for the administration of Justice.** Since any transaction which may result in a dispute, involves rights and duties of parties inter se, the constitutional guarantee is a two-way process which would ensure equally to the benefit of both parties...”

54. The aforementioned case is important because it is an instance where Your Lordships' Court itself has recognized that the law which the Court cleared through the Urgent Bill procedure, in fact had several provisions which violated the Constitution.



55. As such, through this procedure, any government could enact provisions of the law which violate provisions of the Constitution, including entrenched provisions and in a manner that is detrimental to the sovereignty of the People.
56. Additionally, it is submitted that the decision by the Cabinet of Ministers that the Bill is urgent in the National interest, is what prevents citizens from being able to access the Supreme Court in terms of Article 121 of the Constitution.
57. As described previously, the urgent Bill procedure does not provide for any meaningful access to Your Lordships' Court. Thus, the decision of the Cabinet of Ministers has the effect of ousting the jurisdiction of Your Lordships' Court in terms of Article 121 of the Constitution.

**CLAUSE 6 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF  
THE CONSTITUTION**

58. Clause 6 of the Bill repeals the entire Chapter VIIA of the Constitution and replaces it with a new Chapter VIIA.
59. The main impact of the proposed Clause 6 would be to *inter alia* abolish the "Constitutional Council" and replace it with a "Parliamentary Council". The Parliamentary Council;
- (a) Will only be made up of Members of Parliament, most likely only representing the Political party / coalition in government and main opposition party / coalition in Parliament.
  - (b) Can only make "observations" and cannot make binding recommendations or approve the nominations made by the President. The President can disregard or completely ignore the "observations" of the Parliamentary Council.
  - (c) Will be under the full control of the President as the President has the power, to at any time remove three (the Prime Minister, the nominee of the Prime Minister and the nominee of the Leader of Opposition) out of the five Members of the Parliamentary Council for any reason [*proposed Article 47(a) of Clause 6 of the Bill and proposed Article 41(A)(7) of Clause 6 of the Bill*]

60. Your Lordships' Court in ***In Re the Nineteenth Amendment to the Constitution Bill (2015) [SC SD 4 to 19 of 2015]*** held that;

“The purpose and object of the Constitutional Council is to impose safeguards in respect of the exercising of the President’s discretion, and to ensure the propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions....

..Seeking the views of different stakeholders can in no way be offensive to the exercise of the powers of appointment. **In fact a consulting process will only enhance the quality of the appointments concerned.**” (emphasis added)

61. As observed by Your Lordships' Court, the purpose of the Constitutional Council was to enhance the sovereignty of the People. The Constitutional Council, which was constitutionally mandated to endeavour to make its decisions “unanimously”, provided a pluralistic and consultative approach to appoint individuals to key institutions which are required to function independent of the Executive.

62. The structure and powers of the Parliamentary Council allows the individual holding the office of President unfettered discretion to make appointments as she/he wishes, to these positions.

63. As recognized in a continuous line of judicial authorities of Your Lordships' Court, our Law does not recognise that any public authority, or an officer of the State or an organ of the State, has unfettered or absolute discretion or power. Such would be inimical to the idea of a constitutional democracy and the rule of law.

64. This was specifically emphasized by Seven Judges of Your Lordships' Court in ***Rajavarothiam Sampanthan and Others Vs. The Hon. Attorney General and Others***, SC FR 351-356/ 2018, SC FR 358- 361/ 2018]

At Pg 67

**“A related principle is that our Law does not recognise that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power.”**

And at pg 74

“It must also be stressed that, as set out earlier **when identifying the relevant principles of the law and statutory interpretation, this Court has, time and again, stressed that our law does not permit vesting unfettered discretion**

upon any public authority whether it be the President or any officer of the State." (emphasis added).

65. Thus, it is respectfully submitted that the provisions in Clause 6 of the Bill derogates from and infringes the provisions of Article 3 of the Constitution.

**CLAUSE 19, 20, 21 AND 22 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION**

66. Clause 19, 20, 21 and 22 all pertain to a reduction of the powers of the independent Election Commission.
67. Clause 6 of the Bill grants the President absolute authority to appoint at his discretion the Members of the Elections Commission;
68. The cumulative effect of these provisions would *inter alia* include;
- (a) Removal of the power of the Election Commission to issue guidelines pertaining to any matter relating to the Public Service during the period of election to ensure a free and fair election.
  - (b) Repeal of **Article 104GG** of the Constitution which makes it **an offence** for any public officer or any employee of a public corporation, business or undertaking vested in the Government to not fail to comply with the Election Commission to secure the enforcement of any law relating to the holding of an election or the conduct of a Referendum, or a failure to comply with any directions or guidelines issued by the Commission.
  - (c) The amendment as a whole denudes the ability of the Elections Commission to conduct a "free and fair election"
69. As Your Lordships' Court has continuously held, the franchise of the People as recognized in Article 3, includes the right to a "free and fair election".
70. Thus, the provisions in Clause 6, 19, 20, 21 and 22 of the Bill as they pertain to the ability of the Elections Commission to function effectively and independently, derogates from and infringes the provisions of Article 3 of the Constitution.

CLAUSE 7 AND 14 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3  
AND 4 OF THE CONSTITUTION

71. Clause 7 of the Bill repeals the entire Chapter VIII of the Constitution and replaces it with a new Chapter VIII.
72. The proposed Clause 7 would *inter alia*;
- (a) Removes the security of tenure of the Prime Minister, as long as she/he holds the confidence of Parliament and makes the position of Prime Minister one of that which serves at the pleasure of the President.
  - (b) Removes the constitutional requirement that the President has to act on the advice of the Prime Minister when appointing from among Members of Parliament, Ministers, to be in charge of the Ministries determined by him.
  - (c) Removes the constitutional requirement that the President has to act on the advice of the Prime Minister when appointing from among Members of Parliament, Ministers who shall not be members of the Cabinet of Ministers.
  - (d) Removes the constitutional requirement that the President has to act on the advice of the Prime Minister when appointing from among Members of Parliament, Deputy Ministers to assist Ministers of the Cabinet of Ministers in the performance of their duties.
  - (e) Removes the constitutional requirement that the President has to act on the advice of the Prime Minister when removing a Minister of the Cabinet of Ministers, a Minister who is not a member of the Cabinet of Ministers or a Deputy Minister.
  - (f) Removes the constitutional limitations on the total number of Ministers of the Cabinet of Ministers, the number of Ministers who are not members of the Cabinet of Ministers and Deputy Ministers.
73. Clause 14 of the Bill would enable the President to;
- (a) If a General Election was held consequent to a dissolution of Parliament by the President, to dissolve Parliament at any time **after the lapse of one year** from the date of the last General Election, except in certain limited situations.

- (b) Dissolve Parliament at any time if the previous General Election was held after the conclusion of Parliament's term of five years, except in certain limited situations.
74. The cumulative impact of Clause 14 and Clause 7 of the Bill is that the President will have full control over Parliament, given the full power to co-opt any of its Members to the executive and to determine when Parliament should be dissolved.
75. If these provisions are enacted, Parliament would not be in a position to act as an effective check and balance over the President. Thus, the proposed amendments **violate the separation of powers**, which underpins the Constitution, and which is essential to protecting the sovereignty of the People in between two elections.
76. As determined by Your Lordships' Court in *In Re The Nineteenth Amendment to The Constitution [2002]*;
- “Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution in one organ of government shall not be transferred to another organ of government or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution.” (at pp. 97 – 98)
77. The subjugation of Parliament to executive fiat, is inimical to the legislative sovereignty of the People. Therefore, it is respectfully submitted that the provisions in Clause 7 and 14 of the Bill derogate from and infringe the provisions of Article 3 of the Constitution.

**CLAUSE 16 OF THE BILL INFRINGES/DEROGATES FROM ARTICLE 3 AND/ OR  
ARTICLE 83 OF THE CONSTITUTION**

78. Clause 16 of the Bill gives the President the power to submit to the People by way of a referendum any Bill (which is not a constitutional amendment), which has been rejected by Parliament.
79. Clause 16 provides that;
- “Article 85 of the Constitution is hereby amended by the insertion, immediately after paragraph (1) of that Article, of the following paragraph:-
- “(2) The President may in his discretion submit to the People by Referendum any Bill (not being a Bill for the repeal or amendment of any provision of the Constitution, or for the addition of any provision to the Constitution, or for the repeal and replacement of the Constitution, or which is inconsistent with any provision of the Constitution), which has been rejected by Parliament.”
80. The said Clause;
- (a) Amends the provisions of Article 83 of the Constitution;
- (b) Is contrary to, and inconsistent with, Article 3 of the Constitution as it removes a facet of the legislative power of the people from the Members of Parliament elected by the People and places it with the President.
81. It has to be noted that in this situation, it is the President who decides on which Bills which have been rejected by Parliament and should be placed before the People at a referendum.
82. This is NOT an example of direct democracy, where the citizens themselves can decide (through an appropriate procedure) which laws/ proposals should be placed before the public in a referendum (as happens in Switzerland and in certain States in the United States of America).
83. This is a situation where the law-making power of the people, is being transferred from Parliament to the President. As stated in **In Re The Nineteenth Amendment to The Constitution** “any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of

sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution.”

84. It is therefore respectfully submitted that the provision in Clause 16 of the Bill derogates from and infringes the provisions of Article 3 and/or 83 of the Constitution.

**CLAUSE 17 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION**

85. Clause 17 repeals Article 91(1)(d)(xiii) of the Constitution which provides that “a citizen of Sri Lanka who is also a citizen of any other country” is disqualified from being elected as Members of Parliament. By virtue of Article 92(b) this provision also disqualifies such a person from being elected as President of the Republic.
86. The proposed clause will remove the constitutional restriction of dual citizens from contesting elections for the post of President and to be elected a Member of Parliament. Thus, it will allow for citizens of another country who may have assets in and loyalties to another country holding elected office in Sri Lanka.
87. Moreover, according to Article 43(2) of the Constitution, Members of Parliament may be appointed to the Cabinet of Ministers to hold ministerial portfolios. Such Members by virtue of their functioning as Ministers would become privy to matters that are of a highly sensitive and confidential nature, which pertain to *inter alia* the security, economy, and foreign affairs of the Republic. For instance, Cabinet decision-making with respect to multilateral and bilateral agreements, defence, and procurement will be made privy to such Members
88. Clause 17 will accordingly allow individuals with divided loyalties and interests to be elected to key offices in Sri Lanka, including the office of President, and the post of Cabinet Minister. It could result in situations where conflict may arise and questions as to whether priority will be given to the interest of Sri Lanka and Sri Lankans or to the other country of citizenship.
89. It is therefore respectfully submitted that Clause 17 of Bill derogates from and infringes the provisions of Article 3 of the Constitution.

**CONCLUSION**

90. In the context of the aforementioned submissions and in light of such further submissions the Petitioners' Counsel will be taking up during the course of proceedings before Your Lordships' Court, it is respectfully submitted that;
- (a) The provisions of the impugned Clauses 5, 6, 7, 14, 16, 17, 19, 20, 21, 22, 27 and 28 of the Bill are thus and otherwise contrary to, and inconsistent with, Article 3 of the Constitution and /or
  - (b) The provisions of the impugned Clause 16 of the Bill are thus and otherwise contrary to, and inconsistent with, Article 83 of the Constitution.
91. For the reasons set out above, it is respectfully submitted that Your Lordships' Court will be pleased to determine that;
- (a) The provisions of the impugned Clause 5, Clause 6, Clause 7, Clause 14, Clause 16, Clause 17, Clause 19, Clause 20, Clause 21, Clause 22, Clause 27 and Clause 28 of the Bill titled "*The Twentieth Amendment to the Constitution*" and/or the said Bill as a whole are contrary to, inconsistent with and derogate from Article 3 of the Constitution.
  - (b) The provisions of the impugned Clause 16 of the Bill titled "*The Twentieth Amendment to the Constitution*" and/or the said Bill as a whole is contrary to, inconsistent with and derogate from Article 83 of the Constitution.
  - (c) The provisions of the impugned Clause 5, Clause 6, Clause 7, Clause 14, Clause 16, Clause 17, Clause 19, Clause 20, Clause 21, Clause 22, Clause 27 and Clause 28 of the Bill titled "*The Twentieth Amendment to the Constitution*" and/or the said Bill as a whole are required to be enacted in terms of Article 83 of the Constitution.
92. The Petitioners respectfully reserve their right to respond to arguments adduced by the Hon. Attorney General and Interventient Petitioners and submit additional written submissions as appropriate.

On this 2<sup>nd</sup>Day of October 2020

*Settled by*



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