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

In the matter of an application in terms of Article 121 read with Article 120, Article 78 and Article 154(G)(2) of the Constitution to determine whether the Bill titled "The Twenty First Amendment to the Constitution (Private Member's Bill)" or any part thereof is inconsistent with the Constitution.

Centre for Policy Alternatives (Guarantee) Limited,
24/2, 28th Lane, Off Flower Road,
Colombo 07.

Petitioner

SC (SD) No: 17/2013 **- vs -**

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

Respondent

TO: <u>THE CHIEF JUSTICE AND THEIR LORDSHIPS THE OTHER JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

<u>FURTHER WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER</u>

1. These further Written Submissions are made with respect to the Petitioner's application for a Special Determination with regard to the Bill titled "The Twenty First Amendment to the Constitution (Private Member's Bill)", (herein after referred to as the "Bill") which is impugned in SC SD 17/2013.

2. The Petitioner has already made "preliminary written submissions" to Your Lordships' Court on 28th June 2013, in relation to matters arising out from the Petition. These submissions are filed further and in addition to the said preliminary written submissions, the contents of which are respectfully reiterated.

3. When the said Bill was taken up for consideration in Your Lordships' Court on 1st July 2013, three Intervenient-Petitioners sought the leave of Court to intervene in proceedings. As has been the practice of the Petitioner in the past, and towards ensuring to all citizens who so desire, the opportunity to reasonably participate and involve themselves in the law making process and avail themselves of their Constitutional right, the Petitioner did not object to any of the persons who sought to intervene before Your Lordships' Court.

4. The Petitioner's position is a very fundamental issue of constitutional non-compliance, namely that the Bill cannot be considered one that may be duly or properly placed on the Order Paper of Parliament, as it has not secured the mandatory requirements of Article 154G (2) of the Constitution.

The Objection that the Supreme Court's Jurisdiction is limited to Article 120 proviso (a) in the case of a Bill described in its long title as being for the amendment for any provision of the Constitution.

5. When this matter was taken up for hearing of submissions before Your Lordships' Court, the learned Deputy Solicitor General (DSG) appearing for the Attorney General submitted that when a Bill is described in its long title as being for the amendment of any provision of the Constitution the Supreme Court may only determine whether such Bill requires approval by the People at a Referendum or whether such Bill can be passed by a Special Majority as specified in Article 82(5) of the Constitution.

6. Learned Counsel who appeared for the Intervenient-Petitioners also associated themselves with the said submission.

7. **<u>Article 120</u> of the Constitution and proviso (a) thereof** reads as follows;

"*120. The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution : Provided that-*

(a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;"

8. During the course of the proceedings It was further submitted that Article 124 of the Constitution operated as an "ouster clause" and that accordingly the Supreme Court does not have the power or jurisdiction to inquire into or pronounce upon the Constitutionality of a Bill or its due compliance with the legislative process except in terms of Article 120, 121 and 122 of the Constitution.

9. We respectfully submit that the above position is erroneous, misconceived in law and militates against a harmonious interpretation of the Constitution, for several reasons, morefully setout below.

10. At the outset it is submitted that the position submitted by the learned DSG is untenable, since Article 154(G)(2) is a ***specific*** provision brought about by the Thirteenth Amendment, as opposed to the ***general*** provision contained in Article 120.

11. Thus, since Article 154(G)(2) was not in existence at the time of the enactment of Article 120 **AND** since Article 154(G)(2) creates a requirement in limited cases, it is clear that the ***specific*** provision of Article 154(G)(2) must be given effect to. This must be considered in giving a purposive (as opposed to literal) construction to Article 120.

12. In other words, the said submission of the learned DSG ignores the evolution of the provisions of the Constitution to what it is today. It is respectfully submitted that pursuant to the amendments enacted by the Thirteenth (13th) Amendment to the Constitution, such an interpretation is no longer reasonably possible.

13. The learned DSG adverted to several early determinations of the Supreme Court in support of the said proposition put forward by her. However, the determinations submitted by the DSG ***In re the First Amendment to the Constitution***, ***In re the Second Amendment to the Constitution***, ***In re the Fourth Amendment to the Constitution***, ***In re the Ninth Amendment to the Constitution***, and ***In re the Thirteenth Amendment to the Constitution*** were all determined prior to the enactment of Article 154(G)2 of the Constitution, and hence are distinguishable and/or inapplicable to the circumstances of the Bill presently under consideration in these proceedings.

14. It is further submitted, that one Learned Counsel who appeared on behalf of two Intervenient Petitioners submitted that the decision of Your Lordships' Court in ***Bandaranaike v. Attorney General 1982 2 S.L.R 786***, discusses the types of determinations that can be made by the Supreme Court in respect of Bills. It is submitted that this particular submission is also untenable due to the aforesaid distinction. Their Lordships, when deciding that case were dealing with an entirely different 'Constitutional scheme' to what Your Lordships are required to consider, act in terms of, and uphold, today.

15. Thus, it is submitted that in the post Thirteenth Amendment Constitutional order, the dicta of Your Lordships' Court in the above mentioned case is also distinguishable and/or not relevant.

16. It is submitted that this is also borne out by the fact that Your Lordships' Court, (by benches comprising of many different judges of the Supreme Court), has not failed to make determinations recognizing the requirement that mandatory Constitutional requirements must be complied with in order to render a Bill capable of being constitutionally, legally and properly placed on the Order Paper of Parliament.

17. It is respectfully submitted that several other determinations cited by the learned DSG including ***In re the Fifteenth Amendment to the Constitution*** which were decided after the enactment of Article 153(G)2 also do not apply, in as much as the **provisions of Chapter XVIIA and/or the Ninth Schedule to the Constitution were never sought to be amended and/or repealed in the Bills under consideration in those determinations**.

18. However, several provisions of the Seventeenth Amendment to the Constitution and the Eighteenth Amendment to the Constitution impacted several provisions contained in Chapter XVIIA and/or the Ninth Schedule to the Constitution.

19. Specifically, the said amendments amended provisions relating to the finance of Provincial Councils and their powers relating to law and order.

20. ***In re Seventeenth Amendment to the Constitution SC SD No 06/2001***, it appears that none of the Counsel nor the Attorney General took up the position nor brought to the attention of Court that certain provisions of Chapter XVIIA and/or the Ninth Schedule of the Constitution would be amended by the said Bill to amend the Constitution. Since the said issue was not raised, their Lordships of the Supreme Court could not address their judicial minds to the issue and make pronouncement thereon, as clearly evidenced by the text of the said determination. (See Annexure 1)

21. However, ***In re the Eighteenth Amendment to the Constitution SC SD 01/2010*** one Learned Counsel submitted that Clause 21 of the Bill has the effect of amending Chapter XVIIA of the Constitution and accordingly that it was necessary to give effect to Article 154(G) 2 of the Constitution. Based on the clarification given by the Attorney General, the Supreme Court determined that the said clause:

"…. *Is an amendment to amend the provisions, which were originally contained in the 17th Amendment to the Constitution. In the Bill pertaining to the 17th Amendment to the Constitution, the specific provision had been introduced as Clause 19.* ***The said Clause was considered by this Court in that Determination as a consequential amendment, which did not require any other procedure to follow such as being Gazetted and referred to Provincial Councils. Accordingly it is pertinent that the said amendment does not attract the provisions of Article 154(G)2 of the Constitution***" (emphasis added) (See Annexure 2 at pp. 184-185)

22. It appears that the above determination by five judges of the Supreme Court was the only instance in which the Court gave its mind to the implications of Article 154(G)2. It is pertinent to note that in deciding on the objection raised by Learned Counsel in that case, the Supreme Court if it so wished, could have easily disposed of the same by determining that it did not have jurisdiction to determine whether a Bill has complied with the requirements of Article 154(G)2.

23. Furthermore, it is even more pertinent that a fuller bench (Five Judges) of the Supreme Court sought the opinion of the Attorney General on the purpose of the said clause and in fact ventured to examine whether in fact it had the effect of amending provisions of Chapter XVIIA and/or the Ninth Schedule of the Constitution. ***The objection of the Counsel in that case was only dismissed on the basis that it did not attract the provisions of Article 154(G)2 of the Constitution*.**

24. It is thus respectfully submitted that the above constitutes acceptance by the Supreme Court by the said determination of a fuller (five judge) bench that Article 154(G)2 has to be considered when exercising the Constitutional Jurisdiction of the Supreme Court. It is respectfully urged that accordingly, the bench of Your Lordships' Court considering this important Constitutional issue ought to take due cognizance of the said determination of the fuller bench of the Supreme Court.

25. Secondly, the position put forth by the Learned DSG is erroneous and flawed, as it fails to give effect to a purposive and harmonious interpretation of the entire Constitution. It is submitted that such an interpretation (purposive and harmonious interpretation) would give a workable meaning to the said provisions of the Constitution and not disable upholding through determination, the need to comply with Article 154(G)2, which provisions are clearly mandatory.

26. Referring to the statement made by Krishna Iyer, J in ***Fatehchand Himatlal v. State of Maharashtra*** ***(1977 Mah LJ 205)*** (Bindra's Interpretation of Statutes – Eighth Edited – p. 858) states that:

"*A Constitution is a document of the founding fathers of a nation and the fundamental directions of their fulfillment. So much so an organic, not pedantic approach to interpretation, must guide the judicial process****. The healing art of harmonious construction not the tempting game of hair splitting promotes the rhythm of the law***" (emphasis added). (See Annexure 3)

27. In the Indian case of ***Chief Justice of Andhra Pradesh v. L.V.A. Dixitulu***, cited in Bindra's Interpretation of Statutes (Eighth Edited – p. 860), it is stated that:

"***Where two alternative constructions are possible, the Court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion or friction, contradiction and conflict between its various provisions or undermines or tends to defeat or destroy the basic scheme and purpose of the enactment***...." (emphasis added) (See Annexure 4)

28. The determination of the Supreme Court in **Divineguma Bill – SC (SD) No. 4/2012 to No.14/2012** states that:

"*Constitutional Provisions are required to be understood and interpreted with an object- oriented approach. The words used has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. The successful working of the Constitution depends upon the democratic spirit underlying it being respected in letter and in spirit*" (See Annexure 5 at p.1058).

29. In ***Somawathi De Zoysa alias Kumarasinghe v. Jayasena Fernando 2005 1 SLR 10***, the Supreme Court gave effect to the above principle albeit in a slightly modified manner. The Court opined that;

"*The provisions of a statute must be construed with reference to the context and with due regard to the object to be achieved and the mischief to be prevented. Where two views are possible an interpretation which would advance the remedy and suppress the mischief it contemplates is to be preferred*."(at p. 10).

The Purpose Of The Thirteenth (13th) Amendment To The Constitution

30. In ***Town and Country Planning (Amendment) S.C. (SD) No.03/2011*** the Court explained the objective of introducing the Provincial Council System in Sri Lanka as follows:

"*Provincial Councils came into being in the Sri Lankan Island Republic as a result of the introduction of the 13th Amendment to the Constitution in 1987. Article 154(A)(1) of the Constitution accordingly made provision for a Provincial Council to be established for every Province. The purpose for such introduction was chiefly to devolve power which was vested hitherto in the Central Government to Provincial Councils.*

In the Supreme Court Determination in Re Thirteenth Amendment to the Constitution Bill and the Provincial Councils Bill (SC SD Nos.7-48/87) it was clearly stated that the introduction of the Provincial Councils was for the purpose of devolution of authority, which included, inter alia, legislative devolution. This position was emphasised by the Supreme Court in ***Madduma Bandara v Assistant Commissioner of Agrarian Services ([2003] 2 SLR 80)*** *where it was stated as follows:*

"The 13th Amendment to the Constitution, which came into effect in November 1987, was chiefly introduced for the purpose of devolving power from the Central Government to the Provincial Councils." For the said devolution, it was stated that the Provincial Councils would have legislative power in respect of matters enumerated in the Provincial Councils List (List I)

and the Concurrent List (List III) of the Ninth Schedule to the Constitution." (See Annexure 6 at p.426)

31. In fact the majority decision of Your Lordships Court ***In re the Thirteenth Amendment to the Constitution 1987 2 SLR 312***, opined that through the creation of Provincial Councils, the legislature was attempting to give effect to Article 27(4) of the Constitution which provides that:

"*The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.*"

32. Their Lordships, in the majority decision of the Court nonetheless stated unequivocally, that;

"*True the Principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government The Directive Principles require to be implemented by legislation. In our view, the two Bills represent steps in the direction of implementing the programme envisaged by the Constitution makers to build a social and democratic society.*

Healthy democracy must, develop and adopt itself to changing circumstances. The activities of central government now include substantial powers and functions that should be exercised at a level closer to the People. Article 27 (4) has in mind the aspirations of local people to participate in the governance of their regions. The Bills envisage a handing over of responsibility for the domestic affairs of each province, within the framework of a united Sri Lanka. They give new scope for meeting the particular needs and desires of the people for each province. Decentralisation is a useful means of ensuring that administration in the provinces is founded on an understanding of the needs and wishes of the respective provinces. The creation of elected and administrative institutions with respect to each

province that is what devolution means gives shape to the devolutionary principle." (at pp. 326-327).

33. In the case of ***Maithripala Senanayake, Governor Of The North Central Province v. Gamage Don Mahindasoma* [1998] 2 SLR 333**, the Supreme Court held that:

"*In exercising his power to dissolve a Provincial Council under Article 154B(8)(c), the Governor is required by Article 154B(8)(d) to act in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Council.* ***This is a safeguard imposed by Parliament to promote the purpose of the Thirteenth Amendment namely, devolution, for the benefit of voters and elected representatives at Provincial level***." (emphasis added)

34. Considering the purpose of the Thirteenth Amendment as propounded above by several consistent Judgments and Determinations of the Supreme Court, it is most undeniably evident that Article 154(G)2 was introduced in order to establish a consultation mechanism by which the representatives of the people in the Provincial Councils, who are elected to formulate policy for the purpose of *meeting the particular needs and desires of the people for each province* get involved in and share in the decision making process of the representatives of the people in the Central Parliament.

35. This mechanism ensures that regional needs and aspirations are also considered for reflection in the decision making process of the Central Government.

36. Adopting the interpretation placed before Court by the learned DSG and other Counsel for the Intervenient-Petitioners would lead to an absurd situation where the Constitution creates a "RIGHT" for people to convey the needs peculiar to their Province to the Central government through Provincial

Councils, but would not provide for a mechanism by which the said right can be effectuated.

37. It is respectfully urged that Your Lordships' Court ought not to adopt or give credence to such flawed reasoning, which would only serve to regressively render Your Lordships' Court impotent to uphold Constitutional principles in the face of flagrant non-compliance with mandatory Constitutional prerequisites for the placing of a Bill on the Order Paper of Parliament, by a serious departure from now well-established judicial precedent of Your Lordships' Court which has recognized and upheld the need for Constitutional compliance.

38. In the case of ***Sriyani Silva v. Iddamalgoda [2003] 1 SLR 14***, the Court was faced with a similar preposterous situation in which if the Court adopted a very narrow interpretation, a person who is tortured and survives could vindicate his rights in proceedings before Court, but if the torture is so intensive that it results in death, the right cannot be so vindicated. In that instance the Court citing authority, held that:

"***If a statute which creates a right does not prescribe a remedy for the party aggrieved by the violation of such a right, a remedy will be implied and the party aggrieved may have relief, in an appropriate action founded upon the statute****. The creation of a new duty or obligation or the prohibition of an act formerly lawful carries with it by implication a corresponding remedy to assure its observance."(Interpretation of Statutes, 7th edition, pp. 729-730)……..*

*"**In my view a strict literal construction should not be resorted to where it produces such an absurd result**. Law, in my view, should be interpreted to give effect to the right and to suppress the mischief. Hence, when there is a causal link between the death of a person and the process, which constitutes the infringement of such person's fundamental rights, anyone having a*

legitimate interest could prosecute that right in a proceeding instituted in terms of Article 126(2) of the Constitution." (emphasis added)

39. **<u>It is submitted therefore that the Court should read Article 154(G)2 of the Constitution as forming part of the Jurisdiction set out in Article 118 to 125 of the Constitution.</u>**

40. It is further submitted that Article 124 of the Constitution does not oust/limit the jurisdiction of the Supreme Court. **<u>Article 124</u>** states that:

"*Save as otherwise provided in Articles 120,121and 122, **<u>no court or tribunal created and established for the administration of justice</u>**, or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process, on any ground whatsoever*." (emphasis added)

41. It is submitted that Article 124 has to be read in relation to and in connection with other provisions of the Constitution. Article 118 sets out the General Jurisdiction of the Supreme Court in broad terms. Article 125 further expands this Jurisdiction by stating that

"*(1) The Supreme Court shall have **<u>sole and exclusive jurisdiction</u>** to hear and determine any question relating to the interpretation of the Constitution*…"

42. It is worthy of note that ***no other organ of government is empowered by the Constitution to interpret and give meaning to the Constitution other than the Supreme Court***. This is because the other two arms of government are predominated and driven by politicians who on the one hand would not have the necessary technical expertise to engage in legal interpretation and on the other hand (and more importantly) are motivated by political interests,

which taint the prospect of impartial consideration required for proper Constitutional interpretation.

43. It is submitted that the mere fact that Parliament is constituted by persons who are directly elected by the people does not give Parliament the right to engage in deciding which provisions of the Constitution should be followed and which should not be.

44. The Sovereign People through the Constitution have expressed their will that the Supreme Court (which ought to comprise "apolitical" Judges; with advanced legal training; and who are not motivated by their own political or personal gain) is the best repository for the power to interpret the Constitution.

The Objection That The Petition Is Not In Compliance With Article 120 Of The Constitution

45. It has also been contended that the Petitioner has not invoked the Jurisdiction of the Supreme Court as per Article 120 *to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.* Prayer "b" of the Petition of the Petitioner states as follows:

"*Determine that the Bill titled "The Twenty First Amendment to the Constitution (Private Member's Bill)" can only be placed on the Order Paper of Parliament AFTER such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference, and* ***shall not become law*** *unless there is due compliance with Article 154G(2) of the Constitution, including the requirement that such Bill is duly referred to every Provincial Council in terms of Article 154G(2) of the Constitution*"

46. It is submitted that the crux of the question raised by the Petitioner is whether the said Bill is in conformity with the mandatory provisions of Article 154(G)2.

47. The only way the above objection can be sustained is if one were to interpret Article 154(G)2 as not being part of the Constitution and hence the above objection has no merit and cannot be sustained.

48. The Petitioner respectfully submits that Article 154G(10) is further instructive in this regard. The said Article states that:

"*Nothing in this Article shall be read or construed as derogating from the powers conferred on Parliament by the Constitution to make laws, in* ***accordance with the Provisions of the Constitution (inclusive of this Chapter)****. with respect to any matter, for the whole of Sri Lanka or any part thereof*." (emphasis added)

49. The drafters of the Thirteenth Amendment have included the highlighted part in order to remove/dismiss all speculation as to whether Chapter XVIIA is part of the Constitution.

50. The Petitioner submits that the plain/simple and common sense meaning of the said Article is that "*Parliament can make laws in accordance with the provisions of the Constitution*. *The provisions of Chapter XVIIA – being part of the Constitution - must also be complied with in making such laws*."

51. Where there is no such compliance the "Bill" as a whole would be rendered unconstitutional. In fact Article 154(G)(2) specifically recognizes that where the said Article is not complied with, the Bill ***shall not become law***.

The Objection That S.3 Of The Parliamentary Powers And Privileges Act Read Together With Article 67 Of The Constitution Preclude The Supreme Court From Inquiring As To Whether A Bill Has Been Properly Placed On The Order Paper Of Parliament

52. **Section 3 of the Parliamentary Powers and Privileges Act**, states that:

"*There shall be freedom of speech, debate and proceeding in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament*."

53. Article 67 of the Constitution states that:

"*The privileges, immunities and powers of Parliament and of its Members may be determined and regulated by Parliament by law, and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act,* shall, mutatis mutandis, apply*."

54. It is respectfully emphasized that the Supreme Court taking into consideration whether certain mandatory provisions have been followed prior to placing the Bill on the Order Paper of Parliament does not impinge on the scope of S.3 of the Parliamentary Powers and Privileges Act.

55. The very same argument was raised by learned President's Counsel appearing for the Intervenient-Petitioner in the determination of the Supreme Court in ***Divineguma Bill – SC (SD) No. 4/2012 to No.14/2012***

56. After hearing lengthy submissions from all parties on this issue and after having examined the relevant Constitutional Provisions, the Court held that;

"Article 154(G)(3) is couched in such a manner that ***no bill shall become law****, unless such Bill is referred by His Excellency the President to every Provincial Council for the expression of its views thereon.*

The obligatory nature of the requirement that a particular step shall be taken by His Excellency the President before the Bill is placed on the Order Paper is a procedural step prescribed by law.

It has to be borne in mind that this Court does not inquire into the due compliance of the legislative process of the Bill in Parliament. The Court is only concerned with the due process that has to be observed by His Excellency the President before the Bill is placed on the Order Paper. *Constitutional provisions are required to be understood and interpreted with an object oriented approach. The words used have to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. The successful working of the Constitution depends upon the democratic spirit underlying it being respected in letter and in spirit.*

This position is consistent with the previous Determinations of this Court, which had to inquire into and pronounce upon, not only the Constitutionality of the Bill in question, but also its due compliance with the legislative process (SC SD Nos.24-25/2003, SC SD Nos.26-36/2003, SC SD No.3/2011, SC SD Nos.01-03/2012)." (See Annexure 5 at p.1058)

57. In answering the submission that Court cannot inquire into the Acts by the President by virtue of Article 35, Court stated that;

"*Considering the submissions of the learned Solicitor General in terms of Article 35 of the Constitution, it is to be borne in mind that the matter that has to be determined arises out of legislative process based on constitutional jurisdiction and not of an executive act, which would come within the purview of the said Article. More importantly Article 35 deals with immunity of His Excellency the President from instituting proceedings in any court or tribunal in respect of anything done or omitted to be done either in his official or private capacity.*

Mark Fernando, J., referring to the applicability of Article 35 of the Constitution in ***Karunathilaka and Another v Dayananda Dissanayake [1999] 1 SLR page 157*** *had stated that,*

> *"…. immunity is a shield for the doer, not for the act."*

(See Annexure 5 at p.1058)

58. Moreover, on several occasions Your Lordships' Court held that in the event the mandatory procedure set out in Article 154G(3) (which is similar to that in Article 154G(3)) has not been followed, the Bill is not properly placed on the order paper of Parliament. (Water Services Reform Bill – SC (SD) No. 24/2003 and No. 25/2003, Local Authorities (Special Provisions) Bill - SC (SD) No. 6/2008 and No. 7/2008, Town and Country Planning (Amendment) Bill – SC (SD) No.3/2011), Divineguma Bill – SC (SD) No. 1/2012 and No. 2/2012 and No.3/2012.

59. In light of the uninterrupted and unequivocal Determinations of Your Lordships Court as to whether Bills have been properly placed on the order paper of Parliament and the cogent reasons in the ***Divineguma Bill – SC (SD) No. 4/2012 to No.14/2012*** it is submitted that an inquiry in terms of Article 154G(3) and 154G(2) does not attract the provisions of S.3 of the Parliamentary Powers and Privileges Act.

60. It is further respectfully submitted that the very existence of the Constitutional jurisdiction to inquire into the constitutionality of bills places certain Constitutional restrictions on the exercise of the freedom of speech, debate and proceedings in Parliament. This is a Constitutionally mandated restriction, and the Constitutional jurisdiction cannot possibly be said to violate the Parliament Powers and Privileges Act.

61. It is respectfully urged that leaving the matter of examination of whether there has been mandatory constitutional compliance to the legislature would thwart due consideration thereof on party and/or political and/or partisan considerations, rather than in the objective manner that an independent Supreme Court may be expected to determine same.

62. It submitted with utmost respect, that the submissions and objections raised as on behalf of the Attorney General and the Intervenient-Petitioners serve only to weaken and disembowel the established jurisdiction of Your Lordships' Court and strip Your Lordships' Court of efficacy in the wake of steps to pass legislation disregarding and violating mandatory Constitutional provisions, including the provisions brought about by the Thirteenth (13th) Amendment.

63. This amounts to flagrant violation of equal protection of the law through compliance with the unambiguously mandatory Constitutional provisions Article 154G(2) and Article 154G(3), which is required in terms of Article 4(d) read with Article 12(1) of the Constitution.

64. Article 4(d) of the Constitution provides that "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 to the extent hereinafter provided".

65. It is respectfully urged that Your Lordships' Court is both empowered and required to consider (and not decline to) make determination as to the issue of non-compliance with mandatory constitutional provisions, in order:

(a) *To enable the Parliament and the citizenry to have the benefit of the relevant Constitutional interpretation that it involves; and*

(b) *For Your Lordships' Court as the judicial organ of government to be duly compliant with Article 4(d) of the Constitution.*

66. In the given circumstances, it is respectfully urged that it is imperative for Your Lordships' Court to continue to uphold the integrity of Constitutional process by not departing from the established jurisprudence of Your Lordships' Court, which has given harmonious construction to the Constitutional provisions, so as to enable mandatory requirement of compliance with the mandatory requirements of Article 154G(2) and Article 154G(3) of the Constitution.

SUBMISSIONS ON THE MERITS OF THE PETITIONER'S APPLICATION

67. Clause 2 of the Bill states that:

The Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the "Constitution") is hereby amended by the repeal of:-

(a) Article 154A to 154T which constitute Chapter XVIIA

(b) Article 155(3A)

(c) Ninth Schedule

68. It is submitted that the cumulative effect of the above provisions is to repeal *in toto* the provisions of chapter XVIIA introduced by the Thirteenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka.

NON-COMPLIANCE WITH THE MANDATORY PROCEDURE SET OUT IN ARTICLE 154G(2) OF THE CONSTITUTION

69. **Article 154G(2) of the Constitution** states that:

"*no Bill for the amendment or repeal of the provisions of this Chapter or the Ninth Schedule shall become law unless such Bill has been referred by the President after its publication in the Gazette and before it is placed to the Order paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference…*"

70. It is submitted that the Bill seeks to amend the Constitution by *inter alia* repealing all provisions of chapter XVIIA of the Constitution, and also specifically by repealing the Ninth Schedule of the Constitution.

71. As such in terms of Article 154G(2) of the Constitution the Bill must be referred to every Provincial Council for the expressions of its view in terms of Article 154G(2) PRIOR to the Bill being capable of being lawfully placed on the Order Paper of Parliament.

72. This is the 1st time a Bill has been tabled in Parliament to directly amend the provisions of chapter XVIIA or the Ninth Schedule of the Constitution. As such the provisions of Article 154G (2) have not been invoked before your Lordships Court on a previous occasion.

73. However on several previous occasions, through jurisprudence developed through a line of Special Determinations, Your Lordships' Court has determined that Bills which had not been placed on the Order Paper of Parliament in compliance with the Provisions of Article 154G(3) "shall not become law" until they comply with the requirements contained in the said Article.

74. **<u>Article 154G (3) of the Constitution</u>** states that:

"*No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon within such period as may be specified in the reference*"

75. Both Article 154G(2) and Article 154G(3) are couched in the same mandatory and prohibitive language, and as such, the principles recognised in the previously mentioned Special Determinations of Your Lordship's Court are applicable *mutatis mutandis* to the circumstances of the impugned Bill.

76. In **Water Services Reform Bill S.C (SD) No. 24/2003- S.C (SD) 25/2003** Your Lordship's Court stated that;

"*For the reasons set out above we make a determination in terms of Article 120 read with Articles 123 and 154G of the Constitution that the Bill is in respect of a matter set out in the Provincial Council List and shall not become law unless it has been referred by the President to every Provincial Council as required by Article 154G (3) of the Constitution. Since the Bill has been placed on the Order Paper of Parliament without compliance with provisions of Article 154G (3) we would not at this stage make a determination as to the other two grounds of challenge referred to above*"

77. The Court made the exact same determination as above in **<u>Local Authorities (Special Provisions) Bill S.C (SD) No.6/2008- S.C (SD) 7/2008</u>**

78. In **Town and Country Planning (Amendment) S.C. (SD) No.03/2011** the Court stated that:

"Since such procedure has not been complied with, we make a Determination in terms of Article 120 read with Article 123 of the Constitution that the Bill in question is in respect of a matter set out in the Provincial Council List and shall not become law unless it has been referred by His Excellency the president to every Provincial Council as required by Article 154 (G) (3) of the Constitution."

79. The determination of the Supreme Court in **Divineguma Bill – SC (SD) No. 1/2012 and No. 2/2012 and No.3/2012** further augmented the clear, unequivocal and unbroken line of jurisprudence the Court had developed over a decade when it stated that:

"*It is therefore evident that in terms of Article 154G(3) of the Constitution, with regard to the subject matters referred to in the Provincial Council List, it is mandatory for the Central Government to Consult the Provincial Councils before placing such type of a Bill on the Order Paper of Parliament. When such authority has been attributed to the Provincial Councils, by way of Provisions contained in the Constitution, that cannot be taken away unless by way of following the procedure laid down in order to amend such Constitutional provisions. Where the intention and the language of a piece of legislation are clear and when there are no ambiguities, there should not be any necessity for any type of construction or interpretation of such provision*."

80. Article 154G (3) deals with situations where Parliament attempts to alter powers vested in the Provincial Councils by the Constitution, by enacting ordinary legislation.

81. Article 154G(2) is far more serious in nature as it deals with situations where Parliament seeks to alter the constitutional provisions which grant certain powers to Provincial Councils, and also includes a situation such as the present one, where Provincial Councils are sought to be abolished in their entirety.

82. In **Town and Country Planning (Amendment) S.C. (SD) No.03/2011** the Court explained the objective of introducing the Provincial Council system in Sri Lanka as thus:

"*Provincial Councils came into being in the Sri Lankan Island Republic as a result of the introduction of the 13th Amendment to the Constitution in 1987. Article 154(A)(1) of the Constitution accordingly made provision for a Provincial Council to be established for every Province. The purpose for such introduction was chiefly to devolve power which was vested hitherto in the Central Government to Provincial Councils.*

In the Supreme Court Determination in Re Thirteenth Amendment to the Constitution Bill and the Provincial Councils Bill (SC SD Nos.7-48/87) it was clearly stated that the introduction of the Provincial Councils was for the purpose of devolution of authority, which included, inter alia, legislative devolution. This position was emphasised by the Supreme Court in ***Madduma Bandara v Assistant Commissioner of Agrarian Services ([2003] 2 Sri LR 80)*** *where it was stated thus:*

"The 13th Amendment to the Constitution, which came into effect in November 1987, was chiefly introduced for the purpose of devolving power from the Central Government to the Provincial Councils." For the said devolution, it was stated that the Provincial Councils would have legislative power in respect of matters enumerated in the Provincial Councils List (List I) and the Concurrent List (List III) of the Ninth Schedule to the Constitution."

83. In fact the majority decision of Your Lordships Court **in re the Thirteenth Amendment to the Constitution 1987 2 Sri. LR 312** opined that through the creation of Provincial Councils the legislature was attempting to give effect to Article 27 (4) of the Constitution which provides that;

"*The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.*"

84. Their Lordships in the majority decision of the court stated that;

"*True the Principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government The Directive Principles require to be implemented by legislation. in our view, the two Bills represent steps in the direction of implementing the programme envisaged by the Constitution makers to build a social and democratic society.*

Healthy democracy must, develop and adopt itself to changing circumstances. The activities of central government now include substantial powers and functions that should be exercised at a level closer to the People. Article 27 (4) has in mind the aspirations of local people to participate in the governance of their regions. The Bills envisage a handing over of responsibility for the domestic affairs of each province, within the framework of a united Sri Lanka. They give new scope for meeting the particular needs and desires of the people for each province. Decentralisation is a useful means of ensuring that administration in the provinces is founded on an understanding of the needs and wishes of the respective provinces. The creation of elected and administrative institutions with respect to each province that is what devolution means gives shape to the devolutionary principle." (at pp. 326-327)

85. It is therefore submitted that in light of the above rationalization for the need of a system of devolution (as expressed by Your Lordships Court), where a Bill seeks to abolish Provincial Councils *in toto*, the **unambiguous and clear requirements of Article 154G(2)** should be given effect and / or enforced more strictly and in a more exacting manner than the manner in which the requirements of Article 154G(3) have been given effect and / or enforced by Your Lordship's Court.

86. The Petitioner in its Petition and the Affidavit submitted on its behalf stated that there is no evidence before Parliament that the Bill has in fact been referred to any Provincial Councils "*for the expression of their views*" before it was placed on the Order Paper of Parliament.

87. The Petitioner has further stated that its officers are reliably informed that:

(i) the impugned Bill has not been duly referred to the Provincial Councils for the obtaining of their views, and / or

(ii) the views of the Provincial Councils in respect of the relevant Bill have not been obtained and / or tabled in Parliament

as envisaged and required by the Constitution.

88. Where the Bill, which is clearly governed by Article 154(G)(2), has not been referred to the Provincial Councils, as Constitutionally required, it is respectfully submitted that Your Lordships' Court would determine that same could not have been placed on the Order Paper of Parliament until the provisions of the said Article are complied with.

89. Thus, as was the case with the ***Divineguma Bill*****,** once the Bill is **duly** placed on the Order Paper, the Petitioner and other citizens would be able to challenge the Bill on the merits, if so required.

90. In ***Divineguma Bill – SC (SD) No. 4/2012 to No.14/2012*** Court held that:

"It was submitted by learned counsel for the intervenient Respondents that in terms of Article 124 of the Constitution the Constitutionality of a Bill or its due compliance with the legislative process, cannot be considered on any ground whatsoever by any Court or tribunal save as otherwise provided in Articles 120, 121 and 122 of the Constitution. However, a simple reading of the said provision shows that the Constitutionality of a Bill, including whether there had been due compliance with the legislative process could be inquired into and pronounced upon by the Supreme Court, subject to the provisions laid down in Articles 120, 121 and 122 of the Constitution" (See Annexure 5 at p.1057)

"Article 154(G)(3) is couched in such a manner that ***no bill shall become law****, unless such Bill is referred by His Excellency the President to every Provincial Council for the expression of its views thereon.*

The obligatory nature of the requirement that a particular step shall be taken by His Excellency the President before the Bill is placed on the Order Paper is a procedural step prescribed by law.

It has to be borne in mind that this Court does not inquire into the due compliance of the legislative process of the Bill in Parliament. The Court is only concerned with the due process that has to be observed by His Excellency the President before the Bill is placed on the Order Paper. *Constitutional provisions are required to be understood and interpreted with an object oriented approach. The words used have to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. The successful working of the Constitution depends upon the democratic spirit underlying it being respected in letter and in spirit.*

This position is consistent with the previous Determinations of this Court, which had to inquire into and pronounce upon, not only the Constitutionality of the Bill in question, but also its due compliance with the legislative process *(SC SD Nos.24-25/2003, SC SD Nos.26-36/2003, SC SD No.3/2011, SC SD Nos.01-03/2012).*" (pages 23-24)

"***In such circumstances, we determine that <u>the Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon, the Constitutionality of a Bill and its procedural compliance, before such Bill is placed on the Order Paper of Parliament</u>***". (page 24)

91. The instant Special Determination deals with a more serious situation, where the Articles introduced by the Thirteenth Amendment, and the Ninth Schedule itself, are sought to be abolished in one sweeping stroke, sans any reference to the Provincial Councils, as Constitutionally required.

92. It is respectfully submitted that Your Lordships' Court has ***<u>sole and exclusive jurisdiction to inquire into or pronounce upon, the Constitutionality of a Bill and its procedural compliance, before such Bill is placed on the Order Paper of Parliament</u>***. The submissions to the contrary, of learned DSG and Counsel for the intervenients, cannot be sustained inasmuch as such interpretation does not give effect to the Constitutional safeguards mandated by Article 154(G)(2) and are not based on a purposive interpretation, or harmonious construction of the Constitution.

93. As the sole and exclusive interpreter of the Constitution, and the custodian of the judicial power of the People, it is submitted, that this Court will ensure that the Sovereignty of the People is upheld, by ensuring compliance with the safeguards mandated by Article 154(G)(2) of the Constitution.

94. As such it is respectfully submitted that Your Lordships' will be pleased to determine that:

(a) Determine that the Bill titled "*The Twenty First Amendment to the Constitution (Private Member's Bill)*" has not been validly placed on the Order Paper of Parliament and cannot be enacted into law;

(b) Determine that the Bill titled "*The Twenty First Amendment to the Constitution (Private Member's Bill)*" can only be placed on the Order Paper of Parliament AFTER *such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference*, and shall not become law unless there is due compliance with Article 154G(2) of the Constitution, including the requirement that such Bill is duly referred to every Provincial Council in terms of Article 154G(2) of the Constitution.

On this 04th day of July 2013

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