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

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**SC Reference No. 1/2018**

In the matter of a reference under and in terms of  
Article 129(1) of the Constitution of the  
Democratic Socialist Republic of Sri Lanka

1. Centre for Policy Alternatives (Guarantee) Limited  
No 6/5, Layards Road, Colombo 00500
2. Dr. Paikiasothy Saravanamuttu  
No. 3, Ascot Avenue, Colombo 00500

**Interventient- Petitioners**

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On this 12<sup>th</sup> day of January 2018

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

**Written Submissions on behalf of Interventient-Petitioners (Centre for Policy  
Alternatives (Guarantee) Limited and Dr. Paikiyasothy Saravanamuttu,  
Executive Director, Centre for Policy Alternatives (Guarantee) Limited)**

1. These submissions are filed further and in addition to the oral submissions made on  
11<sup>th</sup> January 2018 in Your Lordships' Court by Counsel who appeared on behalf of the  
said Interventient-Petitioners, the contents of which are respectfully reiterated.
2. The said submissions were made, pursuant to steps taken by the incumbent President,  
His Excellency Maithripala Sirisena to seek an opinion from the Supreme Court in terms  
of Article 129(1) of the Constitution, on the following question:

*“Whether, in terms of Provisions of the Constitution, I, as the person elected and succeeding to the  
office of President and having assumed such office in terms of Article 32(1) of the Constitution on  
January 9 2015, have any impediment to continue in the office of President for a period of six years*

*from January 9 2015, the date on which the result of my election to the office of President was declared”*

3. In light of the submissions already made before Your Lordships’ Court by several Interventient-Petitioners, these Written Submissions deal with the following issues:
  - a. The legislative intent of the 19<sup>th</sup> Amendment Act was to have ALL the changes made by the said Act to apply to the incumbent President, except in so far as specific provision was made. [Paragraph 4 to 20]
  - b. The time period allowed by the Constitution to the incumbent President to hold office is five (5) years. [Paragraph 21 to 29]
  - c. Parliament has the power to reduce the term of office of the incumbent President and Parliament can do so without the need of a referendum. [Paragraph 30 to 38]
  - d. Court should be cautious to prevent any outcome that would entail effective suspension/exclusion of operation of clear Constitutional provisions. [Paragraph 39 to 40]

#### **Legislative Intent of the 19<sup>th</sup> Amendment**

4. At the outset, it must be stated that holders of an office created under the Constitution, especially those referred to in Article 4 of the Constitution are not “sovereign” or “supreme”. There are merely creatures of the Constitution and temporary repositories of the powers granted to them under the Constitution by the sovereign people.
5. In this regard, Your Lordships’ Court in ***In Re the Nineteenth Amendment to the Constitution (2002)*** expressly recognised that:

*“...power continues to be reposed in the People who are Sovereign (page 319)  
**Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People (page 320)”***
6. As such it is respectfully submitted that in interpreting provisions of the Constitution, Your Lordships’ Court should only consider the clear meaning of the words contained in the provisions of the Constitution which cannot be thwarted or muted by any assertions

of rights vested in individual holders of such offices which are inconsistent with such clear meaning.

7. It is respectfully submitted that the wording of the 19<sup>th</sup> Amendment is unambiguous and clear and that the intent of the framers was to have **ALL** the changes made by the said Act to apply to the incumbent President.

8. Section 49(1)(b) of the 19<sup>th</sup> Amendment to the Constitution states as follows;

***“For the avoidance of doubt it is hereby declared that ...”**“the persons holding office respectively, as the President and Prime Minister on the day preceding April 22, 2015 shall continue to hold such office after such date, **subject to the provisions of the Constitution as amended by this Act.**”* (emphasis added).

9. It is important to note that this section begins with the term “*for the avoidance of doubt*”. Accordingly, no doubt is permitted by the Constitution as amended by the 19<sup>th</sup> Amendment Act, that:

a. The President (and Prime Minister) would continue to hold office after the enactment of the 19<sup>th</sup> Amendment as there was no provision in the 19<sup>th</sup> Amendment which abolished the office of President, prescribed a new oath to be taken or would expressly or impliedly result in the removal of the incumbent.

b. The President (and the Prime Minister) hold office subject to the provisions of the Constitution as amended by the 19<sup>th</sup> Amendment Act.

10. The only doubt that could have arisen in this context was whether the changes made by the 19<sup>th</sup> Amendment would apply to the current President (and Prime Minister) who had both taken their oath of office prior to the enactment of the 19<sup>th</sup> Amendment.

11. In this context, clearly, this section could *only* mean that the person holding the office of President (and the person holding the office of Prime Minister) on the 22<sup>nd</sup> of April 2015 would continue to hold that office, subject to the provisions of the constitution as amended by the 19<sup>th</sup> Amendment.

12. To further clarify the legislative intent, the 19<sup>th</sup> Amendment provides a specific provision identifying which parts of the amendment do not apply to the incumbent President.

13. Section 51 of the 19<sup>th</sup> Amendment Act, which contains the margin note “Special Transitional Provisions relating the person holding office of President on date of commencement of the Act” provides that:

“Notwithstanding anything to the contrary in the Constitution, **the person holding office as President on the date of commencement of this Act**, so long as he holds the Office of President may assign to himself the **subjects and functions of Defence, Mahaweli Development and Environment and determine** the Ministries to be in his charge for that purpose and accordingly, any reference in any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President.”

14. Prior to the 19<sup>th</sup> Amendment the President could assign to himself/herself any subject or function not assigned to any other Cabinet Minister. This provision was repealed by **Section 9 of the 19<sup>th</sup> Amendment, which repealed amongst other provisions, what was previously Article 44(2) of the Constitution.**
15. As such, considering the legislative scheme of the 19<sup>th</sup> Amendment, it is respectfully submitted that:
  - (a) Section 49 of the 19<sup>th</sup> Amendment Act contains a general rule that the person holding the office of President on the 22<sup>nd</sup> of April 2015 would continue to hold that office, subject to the provisions of the constitution as amended by the 19<sup>th</sup> Amendment; and
  - (b) Section 51 of the 19<sup>th</sup> Amendment Act provides the **ONLY** exception to this general rule, stating that contrary to the provisions of the 19<sup>th</sup> Amendment, the person holding office as President on the date of commencement of this Act, so long as he holds the Office of President may assign to himself the subjects and functions of Defence, Mahaweli Development and Environment and determine the Ministries to be in his charge for that purpose *etc.*
16. As **no exception is made** to the said general rule **in relation to the reduction of the term of office of the President by the 19<sup>th</sup> Amendment**, it is respectfully submitted that the said reduction applies to the incumbent President. It is beyond doubt that the incumbent President was himself cognizant of this fact at the time of the promulgation of the 19<sup>th</sup> Amendment Act, as evidenced by his own position reflected on the official state website of the Executive President. (This fact which was highlighted in oral submissions can be found on the following official web link - <http://www.president.gov.lk/presidential-term-limited-to-five-years-president/>). (A printout thereof is attached hereto marked '**Annex 1**' for Your Lordships' convenience)
17. To opine otherwise (that an exception is made) would not only run clearly contrary to the unambiguous Constitutional text, but weaken certainty as to the applicability of important and wide ranging changes made by the 19<sup>th</sup> Amendment pertaining to the powers, duties and functions of the incumbent President.

18. Your Lordships' attention is respectfully drawn to the fact that in addition to reducing the term of office of the President, the 19<sup>th</sup> Amendment *inter alia* effected the following changes in the exercise of the Sovereign Power of the People, which impacts the office of the Executive President:
- a) Re – introduction of the two term limit on the number of terms a person can hold office as President – a person who is twice elected as President is disqualified from contesting for a third time. **[Section 4 of the 19<sup>th</sup> Amendment, Article 31(2) of the Constitution]**
  - b) Disqualifies from being elected to the office of President, a person who is;
    - Below the age of 35 years **[Section 21 of the 19<sup>th</sup> Amendment, Article 92(a) of the Constitution]** or
    - A dual citizen **[Section 20(4) of the 19<sup>th</sup> Amendment, Article 91(1)(d)(xiii) of the Constitution]**
  - c) Imposition of additional duties on the President **[Section 5 of the 19<sup>th</sup> Amendment, Article 33(1) of the Constitution]**
  - d) The President no longer has the power to remove the Prime Minister at his discretion. **[Section 9 of the 19<sup>th</sup> Amendment, Article 46(2) of the Constitution]**
  - e) The President is required to act on the advice of the Prime Minister when appointing or removing from office any Cabinet Minister, Non-Cabinet Minister or Deputy Minister. **[Section 9 of the 19<sup>th</sup> Amendment, Article 43(2), 44(1), 45(1) and 46(3)(a) of the Constitution]**
  - f) Actions of the President in his/her capacity as President are subject to the Fundamental Rights jurisdiction of the Supreme Court. **[Section 7 of the 19<sup>th</sup> Amendment, Article 35 of the Constitution]**
  - g) Removes the power of the President to submit to the People by a referendum any Bill (which is not a constitutional amendment), which has been rejected by Parliament. **[Section 19 of the 19<sup>th</sup> Amendment, by repealing what was previously Article 85(2) of the Constitution].**
19. As stated above, if Your Lordships' Court holds that the reduction of the term of office of the President does not apply to the incumbent President, it would follow that certain other changes made by the 19<sup>th</sup> Amendment may also be considered as not applicable to the incumbent President. It is respectfully urged that it is imperative to ensure that such Constitutional uncertainty is not created by or on the footing of an Opinion of Your Lordships' Court.

20. It is respectfully submitted that thus and otherwise, an interpretation that the term of the incumbent President remains at six (06) years would amount to an absurdity with far reaching consequences and would run counter to the clear intention of the 19<sup>th</sup> Amendment, which can only be changed by due resort to the legislative process (and *not* by any judicial process) under the Second Republican Constitution.

**The time period allowed by the Constitution to the incumbent President to hold office is five (05) years**

21. Section 3 of the 19<sup>th</sup> Amendment states that:

“Article 30 of the Constitution is hereby repealed and the following Article substituted therefore:-

30. (1) There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive and of the Government and the Commander-in-Chief of the Armed Forces.

(2) The President of the Republic shall be elected by the People and **shall hold office** for a term of five years.” (emphasis added)

22. The only change made to Article 30(2) by the 19<sup>th</sup> Amendment was to reduce the term of office of the President, from 6 years to 5 years.

23. It is respectfully submitted that Article 30(2) of the Constitution as amended by the 19<sup>th</sup> Amendment provides *unequivocally* that:

- a. The President of the Republic shall be elected by the People; and
- b. The President of the Republic shall hold office for a term of five years.

24. It was sought to be argued by learned President’s Counsel appearing for the General Secretary of the Sri Lanka Freedom Party, that the provisions of Article 30(2) should be read conjunctively.

25. It is respectfully submitted that this submission is without any merit. If that was the intention of the framers of the Constitution, such would surely have been expressed by simply stating “The President of the Republic shall be elected by the People for a term of five years”. Such an expression (if made) would have supported the position of the Honourable Attorney General that the President is elected for a fixed term.

26. As such it is respectfully submitted that the provisions of Article 30(2) should be read disjunctively. The plain meaning of Article 30(2) is that the people elect the President and the President holds office for a period of five years.

27. The basis of the argument of the Honourable Attorney General and the Intervient Petitioners who supported the proposition that the reduced period of time does not apply to the incumbent President was that, the period of six (6) years attaches to the incumbent President at the time of his election. This interpretation is without any basis as:
- a. As stated above the plain meaning of Article 30(2) does not support this contention;
  - b. As stated above, the Constitution does not create rights for individual holders of a constitutional office but it provides the powers and limitations of such office and prescribes the manner in which the functions of such an office should be discharged; and
  - c. The holding of office by the President is a continuing phenomenon and the Constitution prescribes the temporal limitation, the said limitation can be changed **in accordance with the provisions of the Constitution.**
28. As such there is nothing in the provisions of Article 30(2) which prevents an amendment to the Constitution to reduce the duration of the term of office of the incumbent President.
29. Therefore it is respectfully submitted that the time period allowed by the Constitution to the incumbent President to hold office is five (5) years.

**Parliament has the power to reduce the term of office of the incumbent President and Parliament can do so without the need of a referendum**

30. It was sought to be argued by certain parties at the hearing, that Parliament could not amend the Constitution in a manner that would reduce the term of office of the incumbent President without a referendum, as such a reduction would violate the franchise of the People [Article 4 (e) of the Constitution] in a manner that would imperil Article 3.
31. The Constitution gives to Parliament the power to *inter alia* repeal, amend any provision of the Constitution, to add any provision to the Constitution or to repeal and replace the Constitution [vide Article 75 and Articles 82 – 84 of the Constitution]
32. Article 83 (b) of the Constituting provides that;

*“Notwithstanding anything to the contrary in the provisions of Article 82..... a Bill for the amendment or for the repeal and replacement of or **which is inconsistent with the***

*provisions of paragraph (2) of Article 30 or of, paragraph (2) of Article 62 which would extend the term of office of the President, or the duration of Parliament, as the case may be, to over six years, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.*

33. As such a referendum is **ONLY** required for an amendment to Article 30(2) which would “extend the term of office of the President” to over six years and a referendum would **NOT** be required to pass an amendment which would reduce the term of office of the President.
34. The corollary of this is that the Constitution itself recognizes, that an amendment which would reduce the term of office of the President would not adversely impact the sovereignty of the people.
35. In a recent determination - ***In re the 20<sup>th</sup> Amendment to the Constitution (2017) SC SD 20/2017- SC S.D 32/2017***, after considering several previous cases decided by the Supreme Court, Your Lordships’ Court upheld that:
- “It was held in several determinations that advancing the election date will not violate the Constitution as it will not deprive the voter of his franchise as he will be able to exercise the vote in advance or before the expiry of the term. On the other hand delay in exercising the franchise will affect the fundamental rights of voters.”** (emphasis added)
36. Applying the above to the circumstances of the matter presently before Your Lordships’ Court, it is respectfully submitted that advancing the election date of the subsequent Presidential election by virtue of a reduction of the term of office of an incumbent President will not deprive the voters of their franchise and as such is not in violation of Article 3 of the Constitution.
37. ***In re the 19<sup>th</sup> Amendment to the Constitution (2015) SC SD 4/2015- 19/2015*** Your Lordships’ Court expressly and specifically identified the reduction of the term of President as a “*principal amendment*” contained in the 19<sup>th</sup> Amendment bill. Having done so Your Lordships’ Court went on to hold that it was not one of the matters that required consideration of Court in terms of Article 83 of the Constitution.
38. Therefore the argument that “Parliament could not amend the Constitution in a manner that would reduce the period of office of the incumbent President without a referendum” is devoid of any merit and does not afford a harmonious interpretation of the Constitution as a whole.



**Need to be cautious to prevent any outcome that would entail effective undue suspension/exclusion of operation of clear Constitutional provisions**

39. In fact, adoption of an opinion that the incumbent President may hold office for a term of six (06) years despite the foregoing matters would entail effective exclusion of the operation of clear provision in the post-19<sup>th</sup> Amendment Constitution which would amount to a suspension of part of the enacted Constitution without resort to the mandatory necessary legislative process which is antithetical to the very notion of constitutionalism. Such a precedent would seriously imperil Constitutional integrity.
40. It is respectfully and humbly urged that Your Lordships' Court ought to be cautious not to be enmeshed in such a scenario in the expression of the opinion of Your Lordships' Court.

**Conclusion**

41. In light of the aforementioned submissions, it is respectfully submitted that Your Lordships' Court in answering the reference of the President be pleased to opine that:
- a. The reduction of the term of office of the President by the 19<sup>th</sup> Amendment applies to the incumbent President despite him being declared elected and/or assuming office prior to the commencement of the 19<sup>th</sup> Amendment;
  - b. The term of office of the incumbent President is five (05) years; and
  - c. As such, there exists a Constitutional "*impediment*" for the incumbent President "*to continue in the office of President for a period of six years from January 9 2015*".

*Sgd. Sinnadurai Sundaralingam & Balendra*

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