
**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 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

FURTHER WRITTEN SUBMISSION ON BEHALF OF THE PETITIONERS

1. These Further 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 have already filed Preliminary Written Submissions to Your Lordships' Court on 28th September 2020 and Comprehensive Written Submissions dated 2nd October 2020 in relation to matters arising from the Petition. The Petitioners' reiterate the submissions made in those two Written Submissions in addition to the present Written Submission.
3. These submissions are filed pursuant to the direction of Your Lordships' Court permitting same, in response to the arguments raised by several Counsel for the Intervient Petitioners (one of whom also appeared for a Petitioner) and the Hon.

Attorney General. As such these submissions should be read in addition to and in light of the said Comprehensive Written Submissions dated 2nd October 2020.

4. These Written Submissions, will deal with the following issues:
 - (a) Explain why the Clauses of the Bill which re-introduce provisions of the 1978 Constitution that were repealed by the Nineteenth Amendment to the Constitution require to be reviewed by Your Lordships' Court **[Para 5 to 9]**
 - (b) The Sovereignty of the People and the Fundamental Values of Our Constitution **[Para 10 to 17]**
 - (c) Clause 5 of the Bill "*Immunity of the President from Suit*" Infringes/Derogates from Article 3 of the Constitution. **[Para 18 to 23]**
 - (d) Clause 27 & 28 of the Bill "Urgent Bills" Infringes/Derogates from Articles 3 And 4 of the Constitution. **[Para 24 to 30]**
 - (e) Clause 17 of the Bill Infringes/Derogates from Articles 3 And 4 of the Constitution. **[Para 31 to 35]**

Contains the citizenship Oaths of the United States of America, Australia, Switzerland, Canada, Germany and South Africa.
 - (f) Conclusion. **[Para 36 to 38]**

CLAUSES OF THE BILL WHICH INTRODUCE PROVISIONS OF THE 1978 CONSTITUTION THAT WERE REPEALED BY THE NINETEENTH AMENDMENT TO THE CONSTITUTION.

5. Several Counsel for the Intervenient – Petitioners and the Attorney General sought to argue that the clauses of the Bill which reintroduced provisions of the original 1978 Constitution (2nd Republican Constitution) should be allowed to pass without a referendum.
6. It is respectfully submitted that this position is without merit and undercuts the very jurisdiction exercised by Your Lordships' Court in relation to Bills of this nature.
7. When the 2nd Republican Constitution was promulgated, there was no provision in the 1st Republican Constitution which was analogous to Article 83 and Article 121 of the present Constitution. As such there was no opportunity for the Supreme Court or the Constitutional Court (which existed at that time), to scrutinise the provisions of the 1978 Constitution before they were enacted.

8. This was a question posed by Your Lordships to the Interventient Petitioners on several occasions during oral arguments, but which did not receive a response from Counsel for the Interventient Petitioners.
9. The provisions of the Bill, especially Clause 5 (immunity of President from suit) and Clause 27 and 28 (Urgent Bills) having been repealed and now being reintroduced, these provisions have to conform to the requirements of Article 83 and 121 of the 2nd Republican Constitution.

SOVEREIGNTY OF THE PEOPLE AND THE FUNDAMENTAL VALUES OF OUR CONSTITUTION

10. The Petitioners have exhaustively explained their position in **paragraphs 11 to 24** of their Comprehensive Written Submissions dated 2nd October 2020.
11. The Petitioners in this case are not arguing for Your Lordships' Court to recognize the basic structure doctrine. The Petitioners' position as set out in the Petition and oral submissions is that the Bill as a whole or individual Clauses of the Bill need to be passed by a special majority and be approved by the people at a referendum.
12. It is respectfully submitted that the Petitioners however maintain that the Bill as a whole is flawed beyond repair and cannot be salvaged by any amendments and as such the Bill as a whole requires to be approved by the people at a referendum.
13. The positions taken up in the Comprehensive Written Submissions dated 2nd October 2020 were that;
 - (a) Article 3 (sovereignty of the People) is a unique and fundamental feature in the 2nd Republican Constitution and Your Lordships' Court should closely scrutinize the impact of each provision of the Bill on the sovereignty of the People.
 - (b) Your Lordships' Court should jealously guard the right of the sovereign people to exercise control over the Executive and the Legislature, not merely through free and fair elections, but also in-between elections.
 - (c) The People temporarily give their executive and/or legislative sovereignty to the elected leaders to exercise such power in terms of the Constitution. Therefore, all significant changes to these powers as specified in the Constitution, mandatorily require the approval by the people at a referendum.

- (d) Over a period of time Your Lordships' Court has recognised several important Constitutional values that underpin the Constitution, in addition to the sovereignty of the People.
- (e) These ideas, principles, values are not dispersed ideas. They are interrelated and connected concepts that play out in a Constitutional democracy.
14. These Constitutional values / principles were developed by Your Lordships' as a response to trying to reconcile several countervailing Constitutional provisions. Over time Your Lordships' Court developed these values / principles as guides to interpretation in order to try to temper the undemocratic aspects of the 2nd Republican Constitution.
15. Even some Intervenients and the Hon. Attorney General agreed that Your Lordships' had tempered the harshness of several provisions of the 2nd Republican Constitution, including the immunity of the President.
16. In fact, in *Centre for Policy Alternatives (Guarantee) Ltd and another v Dayananda Dissanayake and others 2003 (1) SLR 277* Your Lordships' Court was faced with the argument that since the some of the constitutional norms, prevalent at the time the Provincial Council's Election Act was enacted, "were undemocratic and unprincipled" Your Lordships' Court should give a similar interpretation to the relevant statutory provision. Your Lordships' Court responded unequivocally by stating
- "When constitutional or statutory provisions have to be interpreted, and it is found that there are two possible interpretations, **a Court is not justified in adopting that interpretation which has undemocratic consequences in preference to an alternative more consistent with democratic principles, simply because there are other provisions, whether in the Constitution or in another statute, which appear to be undemocratic.**..... The Judiciary is part of the "State", and as such is pledged to play its part in establishing a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all people; and it is mandated to strengthen and broaden the democratic structure of government [see Articles 27(2)(a) and 27(4) read with Article 4(d).]
(at pg 292) (emphasis added)
17. As such, the Petitioners' are only urging Your Lordships' Court to look at the impact of the provisions of the Bill in light of the aforementioned Constitutional values / Principles, when examining their impact on the sovereignty of the People.

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

18. The Petitioners reiterate their position as explained in **paragraphs 25 to 42** of their Comprehensive Written Submissions dated 2nd October 2020.
19. In response to the argument by the Intervenients and the Hon. Attorney General that the President's actions qua President remain reviewable by the Supreme Court, it is respectfully submitted that;
 - (a) It is disingenuous for them to downplay the impact / scope of this immunity sought to be imposed by Clause 5.
 - (b) If their position is accurate then what purpose would Clause 5 of the Bill serve? The existing Constitutional provision does not allow the President to be impleaded in proceedings before Your Lordships' Court, even when the acts of the President are being challenged.
 - (c) The Attorney General represents the President and the President does not need to be physically present in Court.
 - (d) The Written Submissions dated 2nd October 2020 has already cited extensive authority, where upon the objections raised on behalf of the Attorney General, Your Lordships' Court has been constrained to conclude that the Court does not have jurisdiction to review such acts even where the President is accused of acting contrary to the Constitution.
 - (e) Furthermore, where there is imminent infringement by an act/omission of a President, it can only be effectively redressed under Article 126. In this situation the "immunity shields the doer not the act" principle lacks efficacy in upholding fundamental rights which is part of the sovereignty of the People recognised in Article 3.
 - (f) As such it is clear that the amendment in Clause 5 is aimed at limiting the sovereignty of the People, by preventing citizens from coming before Your Lordships' Court to challenge the acts of the President.
20. In response to the argument by the Intervenients that the President's immunity is a restriction on Fundamental Rights of the citizens, it is respectfully submitted that;
 - (a) A restriction of a fundamental right pertains to its scope, not in relation to whom it applies to.

- (b) The provisions of Clause 5 of the Bill do not restrict the scope of any fundamental right or its content, it specifically seeks to make the acts of the President qua President immune from the jurisdiction of Your Lordships' Court.
 - (c) This is a violation of the sovereignty of the People, both in terms of fundamental rights and in terms of an unacceptable alienation of the judicial power of the people.
 - (d) It is also a violation of the executive power of the people, as it seeks to make the holder of the office of President immune from any scrutiny during the tenure of his office. This is an unacceptable position and would render the servant (the holder of the office of President) more powerful than the master (the sovereign people).
21. In response to the argument by the Intervenients and the Hon. Attorney General that the President's immunity is not a derogation of the sovereignty of the People because the Constitution provides for an impeachment procedure, it is respectfully submitted that;
- (a) The Comprehensive Written Submissions dated 2nd October 2020 has already exhaustively explained why this position is wrong [See **paragraphs 38 to 41**]
 - (b) Even if it is assumed that the impeachment procedure is a safeguard of the sovereignty of the People, which it is not, exempting all actions of the President qua President from judicial scrutiny would still continue to be a derogation of the sovereignty of the People.
 - (c) It is conceivable that some Presidential acts may warrant judicial review without the more extreme measure of impeachment. To propose impeachment as a remedy for any/every mistake/ violation by the President would itself be unfair on the President (apart from being extreme, harsh and untenable).
22. In response to the argument by the Hon. Attorney General that the President's actions qua President can be reviewed after the President leaves office, it is respectfully submitted that;
- (a) This will not address the consequences faced by the citizens at that time itself and citizens will be forced to delay redress for up to 10 years.
 - (b) Even then a determination from Your Lordships' Court in favour of a citizen will only be enforceable (if at all) against the former President and a sitting President is able to act with impunity whilst in office.

- (c) As such it is respectfully submitted that this is not an effective and expeditious remedy.
 - (d) The Constitutional values that underpin the Fundamental Rights jurisdiction of Your Lordships' Court is that it is citizen centric.
 - (e) Article 126(5) states that Your Lordships' Court should dispose of a Fundamental Rights application within two months. Your Lordships' Court has held that this provision is only directory, in order to protect the rights of citizens from being vitiated. However, this provision does indicate the strong legislative intent that the remedy available to citizens should be effective and expeditious and not merely notational.
23. 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 OF THE CONSTITUTION

24. The submissions on these Clauses, as set out in **paragraphs 43 to 57** of the Comprehensive Written Submissions dated 2nd October 2020 is respectfully reiterated.
25. It is respectfully submitted that the Intervenients and the Hon. Attorney General did not have a response to any of the Petitioners' arguments other than to say that;
- (a) This is a necessary power;
 - (b) It has always been exercised in good faith;
 - (c) Your Lordships' Court is fully capable of examining the provisions of a Bill in 24 hours and provide a detailed opinion. To suggest otherwise would be an affront on Your Lordships' Court.
26. It is respectfully submitted that none of these arguments explain how the said clauses do NOT violate Article 3 of the Constitution. Thus, the Intervenients and the Hon. Attorney General implicitly conceded to the arguments advanced by the Petitioners.

27. In response to the arguments advanced by the Intervenients and the Hon. Attorney General, it is respectfully submitted that;
- (a) There is no necessity for urgent legislation as;
 - i. The Constitution and other laws provide for the exercise of executive power in times of emergencies including *inter alia* in terms of Article 155 of the Constitution; S.2(3), S. 16 and 21 of the Public Security Ordinance; S. 10 & 11 of the Sri Lanka Disaster Management Act.
 - ii. These significant powers that are to be exercised in an emergency are only for a limited time, thus allowing the government to continue until legislation can be passed or the emergency ends.
 - iii. These powers are subject to judicial review when required.
 - iv. Enacting laws in the situation of an actual emergency might not be possible and in any event a law once enacted will be active until it is repealed by Parliament.
 - (b) The urgent Bill provisions have rarely been used in good faith;
 - i. As the Hon. Attorney General conceded there have been over one hundred emergency Bills sent for review by the Supreme Court. This also included several constitutional amendments.
 - ii. As such it is clear this provision has been predominantly used for situations which are not emergencies.
 - (c) Your Lordships' Court has itself stated that urgent Bills, which were cleared by Court in terms of Article 122, violate several provisions of the Constitution [see example already cited in **In re Recovery of Loans by Banks (Special Provisions) Amendment Bill** SC SD 22/2003]
 - (d) Thus, Your Lordships' Court is aware of the inherent dangers of the Urgent Bill procedure.
28. Your Lordships' would also appreciate that the Hon. Attorney General recently argued before Your Lordships' court that the Constitution and other laws had given the executive all the necessary powers to govern the country even without a sitting Parliament for more than 3 months in the midst of a pandemic.
29. It is further respectfully submitted that through this procedure, any government could enact laws which violate provisions of the Constitution, including

entrenched provisions and in a manner that is detrimental to the sovereignty of the People.

30. As described previously, the urgent Bill procedure does not provide for any meaningful access to Your Lordships' Court. Thus, it is respectfully submitted that Clause 27 and 28 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 17 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION

31. The submissions on this Clause, as set out in **paragraphs 85 to 89** of the Comprehensive Written Submissions dated 2nd October 2020 is respectfully reiterated.
32. Additionally, Your Lordships' attention is invited to consider the following oaths an individual would have to take when taking up citizenship in another country
33. It is respectfully submitted that this clearly demonstrates the nature and extent of dual loyalties that would afflict any dual citizen and could result in a situation where conflicts may arise as to whether such person should give priority to the interests of Sri Lanka and Sri Lankans or to the other country of citizenship.

United States of America

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have therefore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform non-combatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God."

Australia

"From this time forward, I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey."

Switzerland

"I swear or I solemnly promise: to be loyal to the Republic and the canton of ____ as to the Swiss Confederation; to scrupulously observe the constitution and the laws; to respect the traditions, to justify my adhesion to the community of Geneva by my actions and behaviour; and to contribute with all my power to keeping it free and prosperous."

Canada

"I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen."

Germany

"I solemnly declare that I will respect and observe the Basic Law and the laws of the Federal Republic of Germany, and that I will refrain from any activity which might cause it harm."

South Africa

"I, do hereby solemnly declare that I will be loyal to the Republic of South Africa, promote all that will advance it and oppose all that may harm it, uphold and respect its Constitution and commit myself to the furtherance of the ideals and principles contained therein."

34. Further, the Attorney General in his submissions stated that the Citizenship Act provides for the Minister to declare on an application on resuming Sri Lankan citizenship in terms of a 'benefit to Sri Lanka'. It is respectfully submitted that the impugned clause could result in a situation where the Minister in question may have dual citizenship and thus the decision whether its of 'benefit to Sri Lanka' may be influenced by his or her own divided loyalties.
35. It is therefore respectfully submitted that Clause 17 of Bill derogates from and infringes the provisions of Article 3 of the Constitution and would also potentially compromises/derogates from Article 1 ('independence of the Republic').

CONCLUSION

36. Your Lordships' attention is respectfully drawn to the fact that no substantive submissions were made by the Intervenients and the Hon. Attorney General challenging the Petitioners' argument that CLAUSE 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.

37. In the context of the aforementioned submissions it is respectfully submitted that 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.
38. For the reasons set out above, it is respectfully submitted that Your Lordships' Court will be pleased to grant the relief prayed for in the Petition of the Petitioners above named.

On this 6th Day of October 2020

Settled by

Luwie Ganeshathasan
Dr. Gehan Gunatilleke
Ermiza Tegal
Bhavani Fonseka
Viran Corea

Attorneys-at-Law

M. A. Sumanthiran

President's Counsel

Registered Attorney-at-Law for the Petitioners