

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

*In the matter of an Application to determine
whether the Bill titled: "Inland Revenue
(Special Provisions)" or any part thereof is
inconsistent with the Constitution in terms of
Article 121, read with Article 78 of the
Constitution.*

Nihal Sri Ameresekere
167/4, Sri Vipulasena Mawatha
Colombo 10.

PETITIONER

SC SD No: 11/2003

Vs.

Hon. Attorney General
Attorneys General's Department,
Colombo 12.

RESPONDENT

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

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER

1. The Petitioner is a citizen of the Democratic Socialist Republic of Sri Lanka and a Fellow Member of the Institute Chartered Accountants of Sri Lanka and the Chartered Institute of Management Accountants of UK, practising as a Consultant, having functioned as a Senior Consultant on World Bank and USAID funded economic infrastructure re-structuring projects of the Government of Sri Lanka, and as an Advisor to the Ministry of Finance.
2. He petitions Your Lordships' Court, both on his own behalf and on behalf of the general public of Sri Lanka, in the national and public interest, in respect of the Bill titled "Inland Revenue (Special Provisions)", which was presented to Parliament on 31st January 2003 and purportedly "passed" by Parliament, as morefully set out herein.

Background to the filing of this Petition

3. In or about mid March 2003, the Petitioner learnt from the media, that a Bill titled "Inland Revenue (Special Provisions)" had been passed in Parliament. Petitioner was unaware of such a Bill ***till the "passing" of the Bill was reported in the media.***
4. On coming to know of the aforesaid, he endeavoured to obtain a copy of the Bill from the Government Publications Bureau, but was informed that it had been sold out. Subsequently, he was able to obtain a photocopy of the library copy of the Bill only on **3rd April 2003** from the Government Publications Bureau. On the face of the Bill it is stated that the same has been presented to Parliament by the Minister of Finance on **31st January 2003**.
5. The Petitioner made enquiry and ascertained that the Government Publications Bureau had received copies of the aforesaid Bill only on **11th February 2003** for sale to the public, and that too, only 10 Sinhala copies, 5 Tamil copies and 15 English copies thereof had been received.
6. In the meantime, he had obtained from a source at the Inland Revenue Department, a copy of a document titled "Inland Revenue (Special Provisions)" published as a "Gazette of the Democratic Socialist Republic of Sri Lanka", with no Gazette Notification number given thereto, *and not in the format of a normal Government Gazette Notification.*
7. To the aforesaid document obtained by the Petitioner, titled as aforesaid containing a Bill, was attached a **2 page fax stating to be from the Legal Draftsman, containing Amendments to be moved at the Committee Stage of the Bill.**
8. Subsequently, on or about **25th March 2003** the Petitioner was able to obtain a printed document stated to be the "Inland Revenue (Special Provisions) Act" ***numbered in hand as 10 of 2003***, but not a published copy of the Act from the Government Publications Bureau.

The basis and the reasons for filing this Petition

9. In terms of Article 77 of the Constitution, the Hon. Attorney General is required to discharge the following duties in respect of proposed legislation:

- i.) to examine every Bill for any contravention of the requirements of paragraphs 1 and 2 of Article 82 of the Constitution **and for any provisions, which cannot validly be passed,** *except by the special majority prescribed by the Constitution.*
- ii) if he is of the opinion, that a Bill contravenes any of the requirements in paragraphs 1 and 2 of Article 82 of the Constitution or *that any provisions in a Bill cannot be validly passed except by a special majority prescribed by the Constitution,* ***to unfailingly communicate such opinion to the President;*** provided that *in the case of an Amendment proposed to a Bill in Parliament he shall communicate his opinion to the Speaker at the stage, when the Bill is ready to be put to Parliament.*
10. Therefore, in view of the foregoing **compulsory** constitutional requirements, every Bill presented to Parliament is certified after examination by the Hon. Attorney General, as not being repugnant with any provisions of the Constitution, *when in his opinion no provisions of a Bill are repugnant.*
11. a) In terms of Article 79 of the Constitution, the Speaker of Parliament is required to give a Certificate that a Bill has been *duly passed by Parliament.*
- b) Inherent in such certification of a Bill being *duly passed* would be that a *Bill has been lawfully and/or legitimately and/or constitutionally passed,* and that it is not repugnant with any provisions of the Constitution, *inasmuch as the Speaker is bound by the oath to uphold the Constitution.*
- c) The two provisos to Article 79 state that –
- “(1) where by virtue of the provisions of Article 82 or Article 83 or Article 84 or Article 123 (2) a special majority is required for the passing of a Bill, the *Speaker shall certify such Bill **only if such Bill has been passed with such special majority***” and furthermore,
- “(2) where by virtue of **Article 83**, the Bill or any provision thereof requires the approval of the People at a Referendum, *such certificate shall further state that the Bill or such provisions **shall not become law until approved by the People at a Referendum.***

12. In terms of Article 75 of the Constitution, Parliament is *debarred* from enacting any law *suspending* the operation of the Constitution or any part of it.

13. Under Article 34 of the Constitution *only the President* of Sri Lanka is conferred with Constitutional power to:

- **grant pardon,**
- **grant any respite,**
- **substitute a less severe form of punishment, or**
- **remit the whole or any part of any punishment imposed or of any penalty or forfeiture due to the State**

and no other person, whomsoever.

14. In terms of Article 28 of the Constitution, as a citizen of Sri Lanka, it is the Petitioner's fundamental duty, *inter-alia*,

- a) **to uphold and defend the Constitution and the law**
- b) **to further the national interest**
- c) **to work conscientiously in his chosen occupation; and**
- d) **to preserve and protect public property, and to combat misuse and waste of public property,**

for which reason he has filed this Application in Your Lordships' Court.

15. Article 4, read with Article 3 of the Constitution, *inter-alia*, mandates that the fundamental rights, which are declared and recognized by the Constitution shall be respected, secured and advanced by all organs of the Government, and shall not be abridged, restricted or denied, and that the ***sovereignty of the people, including the fundamentals rights and powers of Government, is inalienable.***

16. Article 27 of the Constitution defining the Directive Principles of State Policy and Fundamental Duties,

- a) stipulates that Directive Principles of State Policy contained in the Constitution ***shall guide Parliament***, the President and the Cabinet of Ministers ***in the enactment of laws*** and the ***governance*** of Sri Lanka for the establishment of a just and free society.

b) stipulates that the State is pledged to establish in Sri Lanka a Democratic Socialist Society, the *Objectives* of which include -

- i) the *full realization of the fundamental rights and freedoms* of all persons;
- ii) the *promotion of the welfare of the People* by securing and protecting as effectively as it may, *a social order in which justice (social, economic and political) shall guide all the institutions of the national life*;
- iii) *the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities*;
- iv) the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and coordinating such public and private economic activity *towards social objectives and the public weal*;
- v) *the equitable distribution among all citizens of the material resources of the community and the social product, so as best to subserve the common good*;
- vi) the **establishment of a just social order** in which the means of production, distribution and exchange are not concentrated and centralised in the State, state agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka;
- vii) **raising the moral and cultural standards of the People**, and ensuring the full development of human personality;

c) stipulates that the State **shall eliminate economic and social privilege and disparity**, and *the exploitation of man by man* or by the State.

- d) stipulates that the *State shall ensure* that the operation of the *economic system does not result in the concentration of wealth and the means of production to the common detriment*.
- e) stipulates that the *State shall ensure social security and welfare*.
- f) stipulates that **the State shall endeavour to foster respect for international law and treaty obligations in dealings among nations**.
17. In terms of Article 121(1) of the Constitution, any citizen is entitled to invoke the jurisdiction of Your Lordships' Court to seek determinations, as to the constitutionality and/or validity of the provisions of any Bill presented to Parliament, within one week of it being placed on the Order Paper of Parliament.
18. Despite this, ***no copy*** of the aforesaid Bill ("**A3**") was ***made available to any member of the public within one week*** from the same being presented to Parliament, as is borne out from the facts set out above.
19. The Petitioner has set out in his Petition, how the provisions of the aforesaid Bill ("**A3**") *violates the fundamental right to equality* enshrined by Article 12(1) of the Constitution and also *violates the judicial power of the People* enshrined in Article 4(c) of the Constitution, and read with Article 3 of the Constitution, ***it alienates the sovereignty of the people***, and as such, **the same could not have been validly passed by Parliament into law**.
20. Provisions inconsistent with Article 3, read with Article 4, of the Constitution have to be passed by a special majority required under the provisions of Article 84(2) of the Constitution and approved by the people at a Referendum in terms of Chapter XIII of the Constitution.
21. It is respectfully submitted, that the provisions of the aforesaid Bill ("**A3**") directly and/or indirectly endeavour to suspend provisions of the Constitution, particularly those relating to the exclusive and sole right of the President to grant pardon (Vide- Article 34), **and Parliament is debarred from passing such provisions in terms of Article 75 of the Constitution**.
22. It is further submitted, that the provisions of the Bill ("**A3**") endeavour to transfer power that is attributed by the Constitution to one organ of the Government (namely the *Executive President*) to another organ (the *legislative – Parliament*). Such is an alienation of sovereignty of the People in terms of Article 3, read with Article 4 of the Constitution.

23. Your Lordships' determination made on or about 15th October 2002 in respect of the Bill titled "19th Amendment to the Constitution", contained, *inter-alia*, the following conclusion:

"(5) the transfer of a power which attributed by the Constitution to one organ of government to another; or the relinquishment or removal of such power, would be an alienation of sovereignty inconsistent with Article 3 read with Article 4 of the Constitution."

24. The summary of the determination, stated *inter-alia*, that:

"1) the effect of suspending the operation of a part of the Constitution cannot be validly enacted by Parliament in view of the specific bar contained in Article 75 of the Constitution."

"2) provisions inconsistent with Article 3 read together with relevant provisions of Article 4 have to be passed by a special majority required under the provisions of Article 84(2) and approved by the people at a referendum."

25. In the dicta of the said Order Your Lordships stated – **"We have to give effect to this provision according to the solemn declaration made in terms of the Fourth Schedule to the Constitution to "uphold and defend the Constitution" "**

26. It is in this light, that Your Lordships' attention is drawn, to the submissions on behalf of the Petitioner, that:

a) the provisions of the Bill ("**A3**") violates the Directive Principles of State policy and fundamental duties enshrined in Article 27 of the Constitution, as morefully set out hereinbefore;

b) the aforesaid Bill ("**A3**") would result in the concentration of wealth in the hands of a privileged few to the common detriment, and contrary to the Objectives of the State, stated as aforesaid, including the *raising of the moral standards of the people* ; and

c) the aforesaid Bill ("**A3**") purportedly passed as aforesaid, is an *abdication* of "good governance" by the Government, and clearly encourages law breakers and those who perpetrate crimes, ***eroding all norms of "good governance"***, whereas Article 27 of the Constitution provides for the governance of the country for the establishment of a ***just and free society, with a just social order, raising the moral standards of the people.***

27. A Seven-Member Bench of Your Lordships' Court has previously *unanimously determined* in respect of the Bill titled – "19th Amendment to the Constitution", and communicated to the Speaker on 15th October 2002 that *certain provisions* contained in the said Bill ***could not be validly enacted by Parliament***, thus affirming the principle that Parliament's capacity to enact laws are circumscribed by the Constitution, which confers on Parliament the powers to enact laws.

28. The Petitioner complains that the aforesaid Bill ("**A3**") has not been duly and lawfully enacted into law, in compliance with the requirements and procedure laid down by the Constitution, and further states that:

a) the aforesaid Bill ("**A3**") has been hastily and purportedly, unlawfully passed as aforesaid *devoid of warranted discussion and debate in the public domain*, notwithstanding the serious public interest in such regard.

After the Petitioner instituted this Action, a widespread media campaign was carried out by the Ministry of Finance on this purported law encouraging those who have broken the law to seek refuge under this purported law. The Petitioner asks, as to why, such media publicity was not given before the presentation of the Bill ("A3**") to Parliament, so that the people would be made aware that their sovereignty was going to be alienated, as aforesaid ?**

b) as morefully set out hereinbefore, the Petitioner was denied the constitutional right to have invoked the jurisdiction of Your Lordships' Court timeously under and in terms of Article 121 read with Article 78, of the Constitution, since as a member of the general public, he was not aware and did not have sufficient notice to be made aware of the aforesaid Bill ("**A1/A3**"), having been placed on the Order Paper of Parliament; *inasmuch as only a limited number of copies as aforesaid of the said Bill ("**A3**") had been made available to the Government Publications Bureau, and that too, only on **11th February 2003** though stated thereon that it had been presented by the Finance Minister to Parliament on **31st January 2003**, i.e. 10-days after such presentation.*

known to Petitioner, the Petitioner could and would - within the stipulated 7 days of the aforesaid Bill ("**A3**") being placed on the Order Paper of Parliament, have invoked the jurisdiction of Your Lordships' Court, to seek the determination of your Lordships' Court thereon, *in the exercise of the judicial power of the people in terms of the Constitution.*

d) in the given circumstances, it is *unjust and inequitable* for the Petitioner to have been denied the opportunity to have acted in the public interest and public good, which he is bound to uphold as aforesaid, *and to act as aforesaid in terms of Article 28 of the Constitution.*

29. The Petitioner states that, he verily believes that the Hon. Attorney General, had not as mandated by Article 77 of the Constitution examined the aforesaid Bill ("**A1/A3**") for any contraventions of the Constitution and for any provisions which cannot be validly passed, and had not made any communication of his Opinion to the President in the aforesaid circumstances, as mandated by the Constitution.

30. Furthermore, the Petitioner verily believes that the Hon. Attorney General, had not as mandated by Article 77 of the Constitution examined the Amendments ("**A2**") to the aforesaid Bill ("**A1/A3**") and communicated his Opinion to the Speaker, at the stage when the Bill was ready to be put to Parliament for its acceptance.

A copy of Letter dated 13.5.2003 addressed to the Secretary General of Parliament by the Petitioner's Attorneys-at-Law with copy to the Hon. Speaker of Parliament, for which there had been no response, whatsoever, is annexed hereto marked "**X1**".

31. In fact, according to the Petitioner's reliable information, the Speaker (who had been seriously ill) had been abroad for treatment and had returned to the island only on or about Sunday **16th March 2003** and his signature on the certification of the Bill as purportedly "passed", had been obtained on Monday **17th March 2003.**

32. The very Preamble of the aforesaid Bill ("**A3**") professes thus:

"An Act to enable persons who have not furnished a return of income and assets prior to March 31, 2002 to make a declaration in respect thereof; to make provision for the grant of certain concessions to declarants and non-declarants; to indemnify such persons against liability to pay certain taxes and against liability from investigations, prosecutions and penalties under specified statutes, with a view to securing the future compliance of such persons with the prevalent tax laws; to provide for the repeal of the Inland Revenue (Special Provisions) Act, No. 7 of 2002; and to provide for matters connected therewith or incidental thereto."

33. However, under the guise of the misleading and/or misrepresenting and/or camouflaging title "Inland Revenue (Special Provisions) Bill" ("**A3**"), which on the face of it held out that the same was to provide an Income Tax amnesty, ***the said Bill had surreptitiously encompassed several other laws dealing with illegal acts, offences and/or crimes against society.***

34. In fact, the aforesaid Bill ("**A3**") unlawfully purportedly "passed" as aforesaid, under the aforesaid misleading and/or misrepresenting and/or camouflaging title – "Inland Revenue (Special Provisions)", contained serious violations and/or negations of effect of substantial provisions in the following statutes, which had been enacted in the national and public interest:

- i. Customs Ordinance (Chapter 235)
- ii. Excise Ordinance (Chapter 52)
- iii. Excise (Special Provisions) Act No. 13 of 1989
- iv. Import and Export Control Act No. 1 of 1969
- v. Exchange Control Act (Chapter 423)

Also, the Code of Intellectual Property Act No. 52 of 1979 - vide Section 166, it is stipulated that it formed a part of the Custom Ordinance.

35. The aforesaid Statutes provide for the imposition of duties and/or penalties and/or fines ***and also sentences of imprisonment***, and *not only taxes and penalties*, as stated in the Preamble of the aforesaid Bill ("**A3**").

36. Thus, it is respectfully submitted that the aforesaid Preamble is designed to camouflage and mislead the actual effect and scope of its provisions.

37. The offences under the aforesaid Statutes would, *inter-alia*, include the following wrong-doings, which have been provided for to be dealt with in accordance with public policy and international objectives, as recognized by the community of nations:

- i) smuggling, including smuggling of restricted / prohibited items, such as drugs and narcotics, firearms and security sensitive equipments.
- ii) violations of the provisions of the Intellectual Property Act enacted to protect consumer interests, *inter-alia*, preventing unlawful/spurious products and/or imitations in the market
- iii) distilling of illicit brew of liquor such as *Kasippu*, etc and bootlegging,
- iv) dealing in narcotics, cannabis, opium and cultivating of ganja
- v) import and/or export of items prohibited in the national or public interest
- vi) Exchange Control violations detrimental to the national economy
- vii) Money laundering in connection with narcotics, drug peddling, human trafficking and **terrorism** *banned under international conventions / treaties entered into by Sri Lanka.*

Some of the aforesaid offences are Scheduled Offences under the Criminal Procedure Code, for which a Magistrate is not empowered to grant bail and are punishable under the provisions of the Penal Code and therefore cannot be given any ***immunity and/or pardon***, whatsoever, from prosecution, conviction and imprisonment ***under the guise and ruse of an Income Tax amnesty.***

38. Hence, it is submitted that **by the aforesaid Bill ("A3"), endeavour has been made to usurp and/or curb the executive power of the people to be exercised solely and exclusively by the President of Sri Lanka under and in terms of the Constitution, which is in blatant violation of Article 4 of the Constitution, read with Article 3, of the Constitution.**

39. ***Thus, Your Lordships' attention is drawn, to the fact that this is an unconstitutional endeavour to alienate the sovereignty of the people, which is inalienable.***

40. Hence, it is respectfully urged that ***the aforesaid Bill ("A3") is unlawful, unconstitutional and has not been validly enacted by Parliament into law.***

41. The aforesaid attempt to usurp and/or curb the executive power of the people to be exercised solely and exclusively by the President of Sri Lanka under the Constitution in blatant violation of Article 4 of the Constitution, read with Article 3, of the Constitution is borne out and evident from the following:

a) **Section 6(4)** of the aforesaid Bill ("A3") stipulates –

" (4) No court of law shall call upon any person referred to in Sub-section 1 to divulge the identity of the declarant or any information contained in any declaration made under Section 2, other than in the course of any proceedings instituted under the Commission to Investigate Allegations of Bribery and Corruption Act No. 19 of 1994"

b) **Section 4 (1)** the aforesaid Bill stipulates -

"(1) Any investigation or prosecution
..... shall notwithstanding anything to the contrary **in any other law**, be withdrawn." *[Emphasis added]*

c) thus and otherwise Courts of law and law enforcement authorities would be impeded in the pursuit of investigations and prosecutions of offenders involved in criminal acts against society as aforesaid. This would also be in contravention of international conventions and treaties, to which Sri Lanka is a party, which conventions and treaties also enable investigations by international criminal investigation authorities, such as *Interpol* - **Vide Article 27 (15) of the Constitution.**

- d) the aforesaid Bill ("**A3**") would also undermine the arduous efforts of long years of investigations, by public officers of the aforesaid statutory authorities and other law enforcement agencies of the government, carried out into major frauds, knowingly and deliberately perpetrated against the State by unscrupulous persons, denying legitimate revenue to the government and through it to the people of this country.
- e) the provisions of the aforesaid Bill ("**A3**") would only demoralize the public servants serving in the aforesaid statutory authorities and the relevant law enforcement authorities, **discouraging them from taking any future actions to curb crimes against society**, as they are statutorily mandated to do, *contrary to the principles of good governance by any responsible government and in breach of the oaths / affirmations taken by each and everyone of them under the Constitution.*

42. The aforesaid Bill ("**A3**") purportedly passed as aforesaid by Parliament,

- a) provides for the disclosure and/or declaration of monies and/or assets movable and/or immovable to the Commissioner General of Inland Revenue, for the purpose of a Tax amnesty on such monies regardless of its source, and
- b) furthermore stipulates, particularly at *Section 7* thereof, that the declaration of monies could be by the person holding the money or investment in his own name or ***any other name or without any name.***
- c) in terms of Section 3 of the aforesaid Bill, *merely on such disclosure and/or declaration*, the declarant is wrongfully and/or unlawfully sought to be granted, as aforesaid, full immunity from payment of duties and/or fines and/or penalties and/or prosecution, under those other statutes set out in the Schedule to the Bill, coming under the purview and/or direction of the,
 - i) Director General of Customs
 - ii) Director General of Excise
 - iii) Controller of Exchange
 - iv) Controller of Imports & Exports

in addition to the taxes, levies and penalties imposed under the several other Acts specified in the Schedule to the Bill ("A3") to be enforced by the Commissioner General of Inland Revenue, which are not Income Taxes but revenue collections to the State to be made from the public, such as Stamp Duty, Turnover Tax, Goods and Services Tax , etc.

43. In any case, it is submitted that the aforesaid Bill ("A3") has not provided for and cannot annul duties and/or fines imposed under other Statutes and/or by Courts of law thereunder.
44. The aforesaid Bill ("A3") **does not specify the nexus and/or co-relationship** between the value or volume of monies/assets declared by a person to the Commissioner General of Inland Revenue for Tax amnesty and the corresponding transactions and/or crimes perpetrated under the aforesaid other statutes and the values thereof.

(E.g. - the nexus and co-relationship between the declaration of Rs. 1 Million. for Tax amnesty and 10 different Customs violations and/or Exchange Control violations attracting fines of Rs. 400 Million.)

45. Monies collected by persons under the following statutes contained in the Schedule to the aforesaid Bill ("A3"): i.e.,
- i) The Turnover Tax Act No. 69 of 1981
 - ii) The National Security Levy Tax Act No. 52 of 1991
 - iii) The Goods and Services Tax Act No. 34 of 1996

are not taxes on income as it were, but are ***monies collected*** by such persons ***as agents for the State***, from the consumer public, and therefore such monies rightfully and legitimately belong to the state and, ***such persons could not be lawfully permitted to retain such monies, to which they have no entitlement.***

These indirect taxes have been duly paid by the consumer public to be paid to the State. The persons, who are to be granted amnesties in relation thereto do not have the right to retain the same with themselves, ***even if it is now not payable to the State on account of such amnesty and ought refund same, if at all, to the consumer public from whom they have collected such monies on behalf of the State.***

46. It is respectfully urged, that:

- a) if the amnesties as proposed under the aforesaid Bill are granted, the State would be denied of considerable revenues of national economic proportions;
- b) some of the aforesaid revenues, would be on fines to be collected on prosecutions pending before Courts of law and prosecutions successfully concluded. There is no rationale or logic, whatsoever, to defraud the country and the public of such legitimate revenues
- c) the aforesaid monies receivable would become funds of the Consolidated Fund as enshrined in Articles under Chapter XVII of the Constitution, and as such, belong to every citizen of this country, including the Petitioner, ***who has a right and interest thereto.***
- d) not only was the aforesaid Bill ("**A3**") hastily and purportedly "passed" as aforesaid, devoid of public disclosure and debate, but also, the Finance Minister, has failed to provide estimated and/or reckoned figures of revenue losses to the government, consequent to the enactment of aforesaid Bill, as he ought to have, *inasmuch as relevant revenues and expenditure estimates are disclosed in the budgetary provisions.*
- e) the aforesaid revenue streams that are reckoned and anticipated to be collected by the relevant statutory authorities, as aforesaid, would have also taken into reckoning the aforesaid revenues, and reckoned in the budgetary revenues included in the Budget for the year 2003, *which have already been approved by Parliament*
- f) the Finance Minister, has failed to specify, as to how such reckoned revenue stream shortfalls for the year 2003, would be bridged and from what sources
- g) the Petitioner states that he reliably understands that the Government had expected to collect in the year 2002, 84% Tax revenue from indirect taxes. He understands that actual revenue was *Rs. 20,000 million below* anticipated revenue. In such context, it is clearly and obviously not in the public interest to waive such colossal sum of revenue, as aforesaid, that too, *to wrongfully and unlawfully enrich a privileged few law breakers.*

h) in addition to colossal revenue losses to the government, as aforesaid, commission of such acts of smuggling, under-invoicing, illegal disposal of BOI products to the local market, etc., cause undue and unfair competition to local industries, causing losses thereto and closures thereof, resulting in the loss of employment opportunities, in direct violation of the Directive Principles of State Policy and Objectives enshrined in Article 27 of the Constitution.

47. The following matters also warrant Your Lordships' consideration:

- a) the aforesaid colossal bonanza, in blatant violation of the provisions of the Constitution, as aforesaid, is attempted to be given to a privileged few, **who could easily afford to pay.**
- b) **there are scores of poverty stricken persons languishing in jails for non-payment of bail monies and/or minor fines.** These are persons, who have no means to pay such bail monies and minor fines, and they in contrast have thus been **denied equal treatment** under the law as enshrined in the Constitution.
- c) that garment "export quotas" are not granted to garment exporters, where such exporters are in default and/or in arrears of the payment of the statutory dues, such as Employees Provident Fund and Employees Trust Fund payments – they too are thus denied equal treatment under the law as enshrined in the Constitution.
- d) given such criteria enforced for the granting of garment "export quotas" to garment exporters, *earning valuable foreign exchange for the country*, it is shocking that tax evaders, smugglers and exchange control violators, *et al*, who had defrauded and not paid legitimate dues to the State, are permitted to participate in the privatization programmes of the government and buy public property, paying from such monies, *which in the very first instance, rightfully and legitimately belong to the State i.e. the public.*
- e) the Prime Minister addressed the Nation in or about July 2002, and emphatically portrayed the grave and serious economic crisis faced by Sri Lanka and the grave indebtedness of the country, giving facts and data in such regard, *including the staggering level of per capita debt of each and every citizen of this country.*

- f) in the context of the Prime Minister's Address to the Nation marked "B" to the Petition, it is beyond any comprehension, rationality and logic, *as to how such bonanzas of billions of rupees are surreptitiously being attempted to be conferred upon a privileged few law breakers, denying the revenue that rightfully belong to the people of this country, who are said to be gravely indebted as aforesaid with the per capita debt level rising* .

48. In this context, Your Lordships' attention is also drawn, to the fact that:

- a) "Corruption" was defined by the replacement of Section 70 of the Bribery Act, by the following new Section, as per the Bribery Amendment Act No. 20 of 1994.

"70. Any public servant who, with intent, to cause wrongful or unlawful loss to the government, or to confer a wrongful or unlawful benefit, favour or advantage on himself or any person, or with knowledge, that any wrongful or unlawful loss will be caused to any person or to the government, or that any wrongful or unlawful benefit, favour or advantage will be conferred on any person –

- (a) does, or forbears to do, any act, which he is empowered to do by virtue of his office as a public servant;
- (b) induces any other public servant to perform, or refrain from performing, any act, which such other public servant is empowered to do by virtue of his office as a public servant;
- (c) uses any information coming to his knowledge by virtue of his office as a public servant;
- (d) participates in the making of any decision by virtue of his office as a public servant;
- (e) induces any other person, by the use, whether directly or indirectly, of his office as such public servant to perform, or refrain from performing, any act,

shall be guilty of the offence of corruption and shall upon summary trial and conviction by a Magistrate be liable to *imprisonment for a term not exceeding ten years* or to a fine not exceeding one hundred thousand rupees or to both such imprisonment and fine." - [emphasis added]

- b) also as per the Bribery Amendment Act No. 20 of 1994, *the definition of a "Public Servant" was expanded to include, inter-alia, a Cabinet Minister, Non-Cabinet Minister, Speaker, Deputy Minister, Member of Parliament, Servant or Employee of the State, etc.*

- c) both the aforesaid Acts for the establishment of a Permanent Commission to Investigate Bribery or Corruption and to include "Corruption" as an offence punishable under the said law as aforesaid, were passed *unanimously* in Parliament.
- d) accordingly, the very acts perpetrated by those persons, who were instrumental and/or involved in mooted and/or lobbying and/or formulating and/or causing the purported "passing" of the aforesaid Bill ("**A3**"), with the knowing intention of conferring benefit on a privileged few and thereby causing colossal loss to the Government, ***is a contravention of the aforesaid "Corruption" provision unanimously enacted by the Parliament.***

49. Furthermore:

- a) by the provisions of the Bill ("**A3**"), it is abundantly clear, that colossal financial benefit, favour or advantage are wrongfully and/or unlawfully attempted to be conferred upon certain persons, thereby wrongfully and/or unlawfully causing loss to the State. ***This tantamounts to "Corruption" within the meaning of the aforesaid statute.***
- b) should any of **those who mooted and/or lobbied and/or participated and/or acted to cause the unlawful purported "passing" of the aforesaid Bill ("**A3**")** as aforesaid seek refuge under the aforesaid unlawfully aforesaid Bill ("**A3**") to obtain amnesty and/or immunity from suit for themselves, thereby wrongfully and unlawfully causing loss to the State, and gaining wrongful and/or unlawful benefit, favour or advantage unto themselves, ***they too would then be committing the offence of "Corruption" and be liable to be prosecuted.***
- c) inasmuch as Section 6(4) of the aforesaid Bill ("**A3**") under which the Commission to Investigate Allegations of Bribery or Corruption is entitled to call upon the identity of the declarant or any information contained in any declaration made under Section 2 of the aforesaid Bill ("**A3**"), in the interest of public justice,
- i) the **Commissioner General of Inland Revenue, ought to communicate any such declarations made by any persons, coming within the meaning of the definition of "Public Servant" as aforesaid, to the Chairman of the Commission to Investigate Bribery or Corruption,** and

- ii) the **Chairman of the Commission to Investigate Bribery or Corruption** should require the Commissioner General of Inland Revenue to communicate any such declarations made by any persons, coming within the meaning of "public servant" as aforesaid.

50. Your Lordships' attention is **further** drawn, to the fact that:

a) Sub-section 3 of Section 3 *was not contained in the aforesaid Bill ("A3")*, but had been contained in the Statement of Amendments to be moved at the Committee Stage of the Bill, as disclosed in the aforesaid two page fax ("**A2**") containing such Amendments.

b) the aforesaid Sub-section 3 of Section 3, **not contained in the aforesaid Bill ("A3")** reads thus:

"3. Any transaction taking place **on or after March 31, 2002**, in connection with any asset declared for the purposes of the Exchange Control Act (Chapter 423) under Section 2 of this Act, shall be afforded the same immunity referred to in Sub-section 1, as if such transaction has taken place on or before March 31, 2002" **[emphasis added]**.

c) The Petitioner verily believes that, the **Hon. Attorney General**, *had not made communication of his Opinion to the Hon. Speaker* on the aforesaid proposed Amendments, *as mandated under Article 77(2) of the Constitution* and **nor had the Speaker received the same**.

d) the aforesaid **Sub-section 3**, included as aforesaid, shockingly **affords immunity** to any Exchange Control **violation and/or fraud perpetrated** even today and/or **even at a future date**, since such transaction **would be deemed to have taken place before 31st March 2002**.

e) *in other words it gives a carte blanche open ended licence to perpetrate Exchange Control violations and/or frauds, which could and would involve, inter-alia, transactions pertaining to narcotics / drugs peddling, human trafficking, terrorism and/or terrorists and/or terrorist organizations, etc.*

- f) the aforesaid controversial and **perverse Sub-section 3** *is not contained in the aforesaid Bill ("A3") and therefore **would not have been placed on the Order Paper of Parliament in terms of Article 78 of the Constitution.***
- g) the aforesaid **material omission** would render that the **"entirety of the Bill ("A3")" was not placed on the Order Paper of Parliament, as mandated by Article 78 of the Constitution .**
- h) in addition to the grounds stated hereinbefore, in the given facts and circumstances as aforesaid, the Petitioner is entitled to invoke the jurisdiction of Your Lordships' Court to seek a determination on the aforesaid Bill ("**A3**").

51. It is further submitted, that:

- a) the Preamble of the aforesaid Bill ("**A3**") specifically state that provisions of the said Bill are being enacted –

"with a view to securing the future compliance of such persons with the prevalent tax laws" - [Emphasis added]

- b) there is **no provision, whatsoever**, in the aforesaid Bill ("**A3**") *to ensure the **securing of future compliance by such persons***, on whom such bonanzas are to be conferred. Whereas on the contrary, the said Bill ("**A3**") had *provided for Exchange Control **violators and frauds to continue to so violate and defraud the State, deeming their such acts to have been committed prior to 31st March 2002.***
- c) in the case of criminal offences referred to hereinbefore, there is **no provision for the suspension of the fines and/or sentence to be re-imposed, should such defaulters/fraudsters, who are to be pardoned, would perpetrate such similar fraud in the future**
- d) even in the instances of waiving revenue collections, there **is no provision to obtain even an undertaking in law from such persons, that such revenues waived would be re-imposed, should such persons similarly violate the revenue laws in the future, to secure future compliance by such persons as so recited in the said Bill ("A3") as aforesaid.**

- e) on the contrary, ***as it stands now***, the ***clear signal and message would be that such persons could continue to defraud the state, expecting to influence peddle, lobby and cause laws to be enacted, time and again, by their political mentors, to have such revenue defrauded waived and crimes forgiven / pardon.***
- f) **Significantly, the aforesaid Preamble only contemplates securing future compliance with prevalent Tax laws and not compliance with those other Statutes scheduled to the aforesaid Bill ("A3")**

52. This being the case, Your Lordships' attention is respectfully drawn to:

- a) Section 8 of the aforesaid Bill ("**A3**"), which states thus;

"8. (1) The Minister may make regulations in respect of all matters which are required by this Act to be prescribed or in respect of which regulations are required or authorized to be made under this Act to give effect to the principles and provisions of this Act.

(2) Every regulation made by the Minister shall be published in the *Gazette* and shall come into operation on the date of publication, or on such later date as may be specified therein.

(3) Every regulation made by the Minister shall, ***as soon as convenient*** after its publication in the *Gazette*, be placed before Parliament for approval. Every regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval, ***but without prejudice to anything previously done thereunder.*** (*Emphasis added*)

(4) Notification of the date on which any regulation is deemed to be so rescinded shall be published in the *Gazette*."

- b) the aforesaid Section has conferred ***unchecked and unfettered*** power on the Finance Minister, to make Regulations in respect of all matters required, and that such Regulations would come into operation, as published in the *Gazette*.
- c) Sub-section (3) of Section 8 requires the Finance Minister, **as convenient**, **after** the publication of the said Gazetted Regulations, to place such Regulations before Parliament **for approval**.

- d) Questionably, the aforesaid Sub-section (3) also stipulates that the Gazetted Regulations by the Finance Minister, and **not approved** by Parliament **will be deemed to be rescinded from the date of such disapproval by Parliament, without prejudice to anything previously done under such Regulations disapproved by Parliament.**
- e) the above confers on the Finance Minister ***unchecked and unfettered*** power to wrongfully regulate ***to suit and/or oblige and/or favour any particular person/s,*** and **even if Parliament disapproves** such Regulations, **the acts perpetrated under such unlawful Regulations not approved by Parliament stand lawful, in clear violation of legislative power of the Parliament.**
- f) the legislative power of the people is to be exercised by Parliament in terms of Article 4 of the Constitution, ***and the said provisions have thereby alienated the sovereignty of the people, which is inalienable in terms of Article 3 of the Constitution.***
- g) Furthermore, the above is grossly violative of Article 76(1) of the Constitution which stipulates that **“Parliament shall not abdicate or in any manner alienate its legislative power”**
53. It is further respectfully submitted, that merely on a technicality, where there has been no challenge to a Bill presented in Parliament within 7 days of such presentation, due to an impossibility or frustration or otherwise, the mere “passing” of a perverse and/or unlawful and/or unconstitutional Bill by Parliament, ***without adherence to the mandated constitutional provisions in such regard, cannot make such Bill a constitutionally valid and/or a legitimate piece of legislation.***
54. In view of the gravity and seriousness of the matters averred hereinbefore, and to protect public interest and uphold public good as enshrined in the Constitution, ***Your Lordships also being bound by solemn oath of office to defend and uphold the Constitution and to ensure that the judicial power of the people and their sovereignty is not alienated,*** it is respectfully submitted that Your Lordships’ Court possesses inherent judicial powers, which Your Lordships may exercise, in the interest of upholding and defending the Constitution, thereby protecting and safeguarding the inalienable sovereignty of the people.

55. A **SPREAD-SHEET** containing the **serious implications** and **constitutional violations** of the several **Sections** of the Bill "A3" is appended hereto for the convenience of Your Lordships Court, with also summary of excerpts from the unanimous Determinations of 7-Member Benches of Your Lordships Court made in respect of the proposed 18th and 19th Amendments to the Constitution, **and Constitutional Provisions, which grant Your Lordships Court jurisdiction to inquire into and pronounce upon and in any manner call in question the validity of the said Bill ("A3") becoming law.**

Analysis of the Relevant Constitutional Provisions in respect of the Review of Legislation

56. The Constitution of the Democratic Socialist Republic of Sri Lanka promulgated in 1978, confers the power to legislate on the institution of 'Parliament'. Article 4 of the Constitution clearly recognizes that 'the legislative power of the People' is a part of the 'Sovereignty of the People' and sets out the manner in which it shall be exercised, as follows:
57. Article 4(a): the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and the People at a Referendum.
58. The Constitution in several Articles which follow, sets out the manner in which the legislative power of the People is to be exercised, inclusive of specific, express procedure to be followed by the several organs of government, which constitute 'safeguards' to ensure that any legislation may be scrutinized by the Supreme Court in the event of their inconsistency with any provision(s) of the Constitution. It follows, that to circumvent, dismantle or disregard this procedure, would violate the very sovereignty of the People *vis-à-vis* the legislative power.
59. It is respectfully submitted that to properly consider the Constitutionality of the manner of enactment of the said Statute, the following considerations are essential and basic:
1. The Constitution does not recognize the old British notion of 'Supremacy of Parliament' even in the exercise of 'legislative power', which belongs to 'the People'. Instead, in Sri Lanka, one witnesses the concept of the 'Supremacy of the Constitution'. Parliament in the exercise of its powers and functions, must act – and be viewed in this light.

2. The provisions of the Constitution recognize that it is the People who are sovereign, in that it is to them that Sovereignty belongs. (Vide - **Articles 3 & 4** of the Constitution).
3. It is pertinent to note that Parliament is *one* of the institutions exercising the inalienable 'Sovereignty of the People'. The People themselves participate in this process through Referendum in some instances when the proposed legislation is inconsistent with certain entrenched provisions of the Constitution and thus determined by Your Lordships' Court to require one. Therefore, even the notion of the 'Supremacy of Parliament' does not extend with all its fullness to our Parliament.
4. The Constitution (being supreme) has clearly stipulated certain meets and bounds upon Parliament in the exercise of the legislative power of the People, which Parliament must strictly adhere to, in terms of the oaths / affirmations taken under the Constitution. Parliament is also estopped from enacting certain types of legislation as may be seen from the following:

Article 75:

Parliament shall have the power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution.

Provided that Parliament shall not make any law –

(a) **suspending the operation of the Constitution or any part thereof;**

or

(b) repealing the Constitution as a whole unless such law enacts a new Constitution to replace it.

Article 76 also places prohibition on **Parliament from alienating or abdicating its powers**, or setting up any authority with any legislative power whilst providing *inter alia* for Parliament to empower through legislation, any person or body to make subordinate legislation for prescribed purposes.

Article 157 is yet another example of the fetters placed on the Parliament to enact laws.

Put simply, *Parliament is prohibited by the Constitution from enacting certain types of legislation. Thus and otherwise, the concept of 'Supremacy of Parliament' is itself inconsistent with the Constitution of Sri Lanka – which is supreme.*

60. **Procedure required by the Constitution for the enactment of valid legislation (Articles 78 to 80)**

Article 78(1): Every Bill shall be published in the *Gazette* at least seven days before it is placed on the Order Paper of Parliament.

Article 78(2): The passing of a Bill or a resolution by Parliament shall be in accordance with the Constitution and the Standing Orders of Parliament. Any one or more of the Standing Orders may be suspended by Parliament in the circumstance and in the manner prescribed by the Standing Orders.

Article 79: The Speaker shall endorse on every Bill passed by Parliament a certificate in the following form:-

"This Bill (here state the short title of the Bill) **has been duly passed** by Parliament."

Such certificate may also state the majority by which such Bill was passed:

Provided that

- (1) "where by virtue of the provisions of Article 82 or Article 83 or Article 84 or Article 123 (2) a special majority is required for the passing of a Bill, the *Speaker shall certify such Bill **only if such Bill has been passed with such special majority***" and furthermore,
- (2) "where by virtue of **Article 83**, the Bill or any provision thereof requires the approval of the People at a Referendum, *such certificate shall further state that the Bill or such provisions **shall not become law until approved by the People at a Referendum.***

Article 80(1): Subject to the provisions of paragraph (2) of this Article, a Bill passed by Parliament **shall become law**, when the certificate of the Speaker is endorsed thereon, **in strict conformity with the provisions of Article 79 referred to above.**

Article 80(2): Where the Cabinet of Ministers has certified that any Bill or provision thereof is intended to be submitted for the approval of the People at a Referendum or where the Supreme Court has determined that a Bill or any provision thereof required the approval of the People at a Referendum or where any Bill is submitted to the People by Referendum under paragraph (2) of Article 85, such Bill or such provision **shall become law** upon being approved by the People at a Referendum in accordance with paragraph (3) of Article 85 **only when the President certifies that the Bill or provision thereof has been so approved.** The President shall endorse on every Bill so approved a certificate in the following form:

"This Bill/provision has been duly approved by the People at a Referendum."

No such certificate shall be endorsed by the President on a Bill –

(a) in any case where no Petition is filed challenging the validity of the Referendum at which such Bill was approved by the People, until after the expiration of the period within which such a Petition may be filed, under the law applicable in that behalf, challenging the validity of such Referendum;

(b) in any case where a Petition is filed challenging the validity of the Referendum at which such Bill was approved by the People, until the Supreme Court determines that such Referendum was valid.

Every such certificate shall be final and conclusive, and shall not be called in question in any court.

Article 80(3): **Where Bill becomes law** upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.

Your Lordships' attention is respectfully drawn to the fact that Article 80(1) provides that subject to the provisions of Article 80(2), a Bill passed by Parliament shall become law when the certificate of the Speaker is endorsed thereon as aforesaid. Article 80(2) itself sets out several restrictions and prohibitions with regard to the 'ministerial act' of the placing of the endorsement certificate.

Article 80(2) expressly provides at the end, that every **such certificate** shall be final and conclusive, and shall not be called in question in any court.

61. It is noteworthy that Article 80(3) emphasizes that where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.

Therefore, it is respectfully submitted that, **where a Bill "has not become law"** under the Constitution, **that under Article 80 (3) Your Lordships' Court is granted jurisdiction to inquire into and pronounce upon or in any manner call in question the validity of the provisions of a Bill,** in this instance the Bill ("A3"), **inasmuch as the Bill (A3) has not become law as aforesaid.**

62. Furthermore, Articles 154G (2) and (3) written into the Constitution by the 13th Amendment to the Constitution, further clarifies and **endorses without any doubt the foregoing constitutional position** in relation to enactment of laws, in that, by stipulating in the said Articles that – **"no Bill shall become law, unless** "

63. Hence, it is respectfully urged that: for the Rule of Law and in terms of the Constitution, **'for a Bill to become law'**, it has to comply with mandatory Constitutional procedural requirements.

Your Lordships' Court has the inherent duty and jurisdiction to inquire into as to whether, the 'procedure', which culminated in the 'ministerial' endorsement and/or the "passing" of a Bill **was constitutional**, without which the 'legislative power of the People' which is held in their trust, would not be exercised and their sovereignty alienated.

The above pronouncement only Your Lordships' Court can and must make upon inquiry, **in due cognizance of the fact that the Constitution has prescribed clearly, the process that must be adopted to pass Bills into law.**

64. **Role of the Supreme Court in the determination of the constitutionality of passing of Bills into law**

Article 125(1) of the Constitution provides that the "Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, ...". It necessarily follows, that it is the Supreme Court that should interpret the Constitution even in relation to the jurisdiction conferred on it by the Constitution **to determine the constitutionality of passing of Bills into law.**

65. Hence, it is respectfully urged that *the issue of whether or not Parliament must comply with Constitutional procedures for the enactment of legislation, being central to the Rule of Law, the Sovereignty of the People and the Supremacy of the Constitution itself, is an issue of utmost national and public importance, which can validly be determined by no-one other than by Your Lordships' Court under the Constitution.*

66. **Article 120** provides that Your Lordships' Court shall have sole and exclusive jurisdiction to determine any question, as to whether any Bill or provision thereof is inconsistent with the Constitution, with provision to completely preclude and discharge Your Lordships' Court from the exercise of this responsibility and role, only where there is to be reference of such Bill or provision(s) directly to the people through a Referendum.

67. In the exercise of this extremely important jurisdiction conferred, Your Lordships' Court must imperatively determine, the **question as to whether any Bill was validly passed into law** *by complying with the procedural requirements prescribed in the Constitution.*

68. It is noteworthy that the 1978 Constitution has expressly omitted the prohibition contained in Section 39(1) of its predecessor – i.e. the 1972 Constitution, with regard to questioning the legislative process.

69. On the contrary, Article 124 of the Constitution stipulates as follows:

"Save as otherwise provided in Articles 120, 121 and 122, no court or tribunal created and established for the administration of justice, 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).

Furthermore, Article 80(3) of the Constitution stipulates as follows:

"Where Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever"

70. **Thus it is abundantly clear that the framers of the Constitution intended the conferment of jurisdiction on Your Lordships' Court to call into question and pronounce upon the validity of Bills into law *on the grounds inter alia of its due (non) compliance with the prescribed constitutional process.***

71. In the light of several provisions of the Constitution, it is respectfully submitted, that the Constitution, **which is supreme** clearly contemplates that Parliament conforms to the parameters of the Constitutional stipulation for the passage of Bills into law and that otherwise Your Lordships' Court will declare that there has been no valid enactment into law of a Bill.

72. It is respectfully submitted that a meaningful construction of the Constitutional safeguards designed to ensure that all legislation is passed in a manner that does not undermine the 'legislative power of the People held in their trust' as recognized in Article 4(a) of the Constitution, *unequivocally militates against the possibility of asserting that a circumvention of the constitutional procedure in a manner that deprives the citizens of the nation would result in valid laws being enacted.*

73. Any Bill so purportedly passed **would lack the validity of Constitutionalism** and would continuously undermine the very Sovereignty of the People enshrined in Article 3 of the Constitution. Statutes thus promulgated would lack '*ultra-vires*' and would thus be illegal and inimical to the very concept of Representative Democracy.

74. In such circumstances, it is respectfully submitted that *even quite apart from the horrendous impact of the Bill ("A3") currently under consideration of Your Lordships' Court*, Your Lordships may be pleased to take cognizance of the fact that, unless Your Lordships' Court holds that such **purported** legislation can and will and must be reviewed by Your Lordships' Court, laws that ought to have been **constitutionally approved** by a Special Majority and/or a Referendum would be purported to be valid, **unconstitutionally** by the passage by a simple majority in Parliament, and thereby **bind the people and shackle the entire nation for all time** (unless somehow repealed). **Such 'unconstitutional laws' would be unacceptable to the People, who cannot legitimately or reasonably be expected to abide by them.**
75. **Hence, if the safeguard of the procedure mandated by the Constitution has been circumvented and that protection denied to the citizenry, purported laws thus imposed upon the People would not really be laws in as much also, as they are inconsistent with the Social Contract between the 'Sovereign People' and their legislature/government.**
76. **It is respectfully urged that in view of the abovementioned realities and the Constitution, it is the bounden duty of Your Lordships' Court to inquire into and make pronouncement on the legality of Bills passed into law, without adherence to the procedure mandated by the Constitution.**
77. This is particularly so, in view of the fact that, it is only Your Lordships' Court which is competent to inquire into, analyze and decide on the Constitutionality of Bills, without which, Parliament would be unable to exercise the 'legislative power of the People held in their trust' in a manner that upholds and ensures conformity with the Sovereignty of the People through Supremacy of the Constitution.
78. It is respectfully submitted that in other comparable jurisdictions also the non-adherence to mandatory manner and form has been consistently held to invalidate the legislation purportedly 'passed' by the legislature.

"It is possible for the courts to declare a law invalid because the required parliamentary composition or legislative procedure has not been observed"

'South African Constitutional Law'

by Dion Basson and Henning Viljoen

"Parliament is only sovereign on the legislative terrain and even then it has to pass laws in the way prescribed by the law"

Jennings, The Law and the Constitution (1959) p153

79. Wiechers distinguishes flexible and inflexible elements of the constitution. This means that there are elements which the legislature can change at will (flexible elements) and *inflexible elements such as some constitutional requirements, which determine the composition and the manner of conduct of the legislative authority* (Parliament). These requirements result in the legislature not being absolute master in its field, but being bound by the requirements until such time as it decides to change. Accordingly Wiechers is of the opinion that a Court may pass judgement on the validity of a measure if it seems that Parliament has not really acted as Parliament - Verloren van Themaat-Wiechers Staatsreg 1981 p320.
80. Beinart ('Sovereignty and the law' - 1952 THRHR 101 at 124ff) comments on Parliamentary sovereignty in (English) Constitutional Law as follows:
1. Parliaments can pass Acts on any subject and the courts have to observe these Acts.
 2. Legislative power of the parliament is supreme in the sense that no other government body can pass legislation.
 3. Although powers of the parliament are unlimited regarding Acts on any person or subject, **an Act can only be valid when it has been passed according to the 'existing rules of law as to manner and form or procedure'. When an Act has been passed in this way, it can be said that the powers of Parliament are unlimited and courts shall not declare these acts null and void.**
81. In *Hess v The State* 1985 2 Off Rep 112 at 116, Kotze CJ stated that the court could indeed declare an instrument which had not been passed according to the **constitutional law procedures** as not being a Statute.
82. In *R v Ndobe* 1930 AD 484, the Appellate Division declared on the grounds of s. 35 (an entrenched clause) that a law that has been passed in conflict with this section (and had not been accepted with a two thirds majority during a joint session of Parliament) would be invalid. The Courts did indeed have the competence to test whether an Act of Parliament has been passed legally.

83. In **Harris v Minister of Interior** 1952 (2) SA 428 (A), the Court declared the Separate Representation of Voters Act 46 of 1951 as invalid, as it was in conflict with S 35, an entrenched provisions of the Constitution. S 35 could only be amended by a two thirds majority in joint session by both Houses of Parliament, in conflict with these provisions the above Act was passed during a normal bi-cameral session of Parliament.
84. In **S v Tuhadeleni** 1967 (4) SA 511 (T), Court held that it did not have the jurisdiction to investigate into whether a particular Act was valid (The Terrorism Act). However the judgment stated that the Parliament of the republic is supreme and no court has the competence to test any legislation if ***it has been duly passed.***
85. Van der Vyver ('The Section 114 Controversy and Government Anarchy' 1980 SALJ 363 at 371-2) declares unequivocally that the Harris decisions confirmed the courts competence to test all legislation of Parliament. He further states that although the court may not call in question the content of parliamentary enactments, they may do so on the question of whether a specific instrument is ***'an Act of Parliament' or not on the grounds of the fact that the prescribed procedures of legislation have (not) been observed.***
86. Sir Alladi Krishnaswami Ayyar in his speech in the Constituent Assembly Debates said that 'No Government responsible to the people can afford light-heartedly to ignore the provision in Part IV of the Constitution. Chief Justice Kania stated, in ***A.K. Gopalan v Union of India*** ⁴ with reference to the **directive principles**, ***that it represents not the temporary will of a majority in the legislature, but the deliberate wisdom of the nation.***
87. **The Preamble to the Constitution and the Indian model**

A 7-Member Bench of Your Lordships' Court in the unanimous determination made in respect of the proposed 19th Amendment to the Constitution cited the following dicta from an **Indian Judgment** –

“if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective”

Also 7-Member Benches of Your Lordships' Court in unanimous determinations in respect of the proposed 18th and 19th Amendments to the Constitution, *inter-alia*, held:

"The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution"

"The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust."

88. The Preamble to the Constitution of the Republic of Sri Lanka is similar to the Preamble to the Indian Constitution, establishing the "social contract" with the people, whose power is supreme, as guaranteed by the Constitution.
89. Quoted below are extracts from the International and Comparative Law Quarterly – (Volume 42 – October 1993 @ 840) as analyzed by Emeritus Professor of Law, Dr. Lakshman Marasinghe, on the Preamble to the Indian Constitution, and the Preamble to the Constitution of the Republic of Sri Lanka being similar to that of the Indian Constitution, the said analysis is relevant and thus cited;

"The Preamble in the Indian Constitution is not only a part of the Constitution, but it is also an area in which it lays down a whole set of values, principles, and ideas, for the interpretation of the rest of the Constitution.⁸⁸

The preamble of the Indian Constitution reads:

"We, the people of India, having solemnly resolved to constitute India into a sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

*Justice, social, economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity; and to promote among them all
Fraternity assuring the dignity of the individual and the unity and integrity of the nation;*

In our Constituent Assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give ourselves this constitution".

Those who are elected to rule under this Constitution are deemed to have entered into a compact to observe and preserve these tenets upon which their rights and privileges to rule are based.⁸⁹ The Supreme Court of India has declared that the Preamble is supreme. Mr. Justice Subha Rao C.J. wrote in Golak Nath v. State of Punjab⁹⁰

" A correct appreciation of the scope and the place of fundamental rights in our constitution will give us the right perspective for solving the problem presented before us. Its scope cannot be appreciated unless we have a conspectus of the Constitution, its objects and its machinery to achieve its objects. The objective sought to be achieved by the Constitution is declared in sonorous terms in its preamble which reads: (The preamble is quoted in part)It contains in a nutshell its ideals and its aspirations. The preamble is not a platitude, but the mode of its realisation is worked out in detail in the constitution... No authority created under the constitution is supreme. The constitution is Supreme...⁸¹

The Chief Justice of India, after referring to learned treatises on the Indian Constitution⁹², to speeches made to the constituent Assembly by both Pandit Jawaharlal Nehru (the then Prime Minister) and Dr. Ambedkar (then the Union Law Minister and Chief Architect of the Constitution)⁹³ concluded that the Indian Constitution provided these categories of laws⁹⁴. **First, those that require simply majority. Second those that require a two-thirds majority in the Lower House of Parliament – the Lok Sabha. And third, those laws which are so fundamental that they cannot be amended.** To this category are relegated the Preamble and its amplification in Part III of the constitution. Subha Rao C.J. thereafter added:

"In giving to themselves the Constitution, the people have reserved the fundamental freedoms to themselves... the importance attached to the fundamental freedoms to themselves...is so transcended that a bill enacted by a unanimous vote of all the members of both the House is ineffective derogate from its guaranteed exercise. It is not what Parliament regards at a given moment as conducive to the public benefit, but what part III declares protected, which determines the ambit of the freedom. The incapacity of the Parliament therefore in exercise of its amending power to modify, restrict or impair fundamental freedoms in Part III arises from the scheme of constitution and the nature of the freedoms⁸⁵

What the Preamble of the India Constitution has done was to give the rights there declared and their amplification in Part III a **transcendental position. They are placed in a position which goes beyond the reach of Parliaments.** The Preamble, in the nature of its formulation using the language of a social contract, has made them into primordial rights.⁹⁶ They begin from the commencement of Indian Independence, and therefore, the argument was made that so long as the constitution remains the Independence Constitution of India, these rights cannot be changed.⁹⁷

Six years after Golak Nath, the Supreme Court of India re-examined the powers of Parliament to amend the fundamental rights provisions of the constitution. That was in Kesavananda Bharati v. State of Kerala.⁹⁸

In a judgment extending to nearly 600 pages the Supreme Court re-examined the power of Parliament to amend the Indian Constitution. The Supreme Court reduced the contents of the Preamble and its amplification in Part III of the Constitution into what the judges referred to as the "fundamental features" of the Constitution. Having done so, Sikri C.J. expressed the view which remains current to this day in the following passage:

"The expression amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. With these limits Parliament can amend every article".⁹⁹

The Supreme Court gave Parliament the power to amend any article of the Constitution including those contained in Part III. The Part of the Constitution was regarded as the exposition of what was contained in the Preamble. Those articles too could now be amended. But in doing so parliament must not tamper with the "fundamental features" of the Constitution. Since Kesavananda, decided in 1973, there is a long line of cases which has interpreted what constitutes the "fundamental features" of the Indian Constitution, which cannot be altered. These cases¹⁰⁰ establish the position that the "fundamental features" to which the Supreme Court had alluded in Kesavananda were those that arise from the careful articulation of fundamental rights by Subha Rao C.J. in Golak Nath. The Courts, therefore, have come full circle and have re-affirmed that the preamble of the Indian Constitution has provided Indian with a **fundamental rights doctrine which is truly fundamental.**

Supreme Court was unanimous in their view that the nature of the Preamble limited the power of amendment. The power to amend the Constitution at least was limited to the extent that the Constitution as a whole may not be replace and certainly the Preamble couldn't be amended. Sikri C.J. wrote in this aspect:

"...[I]am driven to the conclusion that the expression "amendment of this constitution" in Art 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the constitution to carry out the objectives in the Preamble and the Directive Principles".¹⁰⁵

What the Indian model ultimately does is to make legality so much more difficult to achieve for a political adventurer or a usurper of governmental powers, than under any other model. What it additionally does is to provide a stronger basis for democracy and the protection fundamental rights than do the other models. At the end of the day when the sun begins to set over a nation, nothing but tradition, and good intentions could protect it and preserve its constitution.

90. **Conclusion**

In view of the aforesaid circumstances and the foregoing considerations, it is respectfully submitted that the Petitioner is entitled to invoke the jurisdiction of Your Lordships' Court for the reliefs prayed for in his Petition to Your Lordships' Court.

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On this 28th day of May 2003