

**The Rule issued against Mr Nagananda Kodituwakku
Attorney-at-Law by the Supreme Court on 29th
February 2024 under Section 42(2) of the Judicature
Act.**

Title of the case

In the matter of a Rule in terms of Section 42(2) of the
Judicature Act No. 2 of 1978, against Mr. Nagananda
Kodituwakku, Attorney-at- Law.

Nagananda Kodituwakku Attorney-at-Law 99,
Subadrarama Road, Nugegoda
Respondent

SC Rule 03/2017

A note of explanation about the on the judgment issued by the Supreme Court on the rule (SC/Rule/3/2017) issued on Mr Nagananda Kodituwakku Attorney-at-Law, on 29th February 2024

1. As there was a wide publicity given by all electronic media, print media, and social media platforms, it is appropriate to publish a document based on the factual information concerning this case for the purpose of the public information. Therefore, we are providing the following document relating to this judgment so that public should gauge an insight into the judgment.
2. The documents referred to are as follows.
 - a. Section 42(2) of the Judicature Act, which is the basis on which this Show Cause Notice was issued on Mr Nagananda Kodituwakku
 - b. A copy of the show cause notice issue on 27th February 20217
 - c. the Judgment of the Supreme Court dated 29th February 2024
 - d. Objections taken up to the alleged charges by the Respondent Nagananda Kodituwakku by way of Written submission in reply to the Representiave of the Bar Association of Sri Lanka and also Hon. Attorney General.....

A shout Comment on some legal issues of concern

At this state we do not wish to comment on the particular judgement, which would be done in due course.

For the purpose of public consideration, we wish only to point to following matters which are of vital importance to this case.

3. There is no statutory basis for this judgement as the matters dealt with in the judgment are not within scope of the Section 42 (2) of the Judicature Act.

The relevant provision of the Judicature Act reads as follows.

*'... Every person admitted and enrolled as an attorney-at-law who shall be guilty of any **deceit, malpractice, crime or offence** may be suspended from practice or removed from office by any three Judges of the Supreme Court sitting together...'*

The matters dealt with in the judgement have no reference to any of the matters that are relevant to the issuance of the rule under the provisions of the 42 (2) of the Judicature Act.

4. *Objection on this basis has been taken by Attorney at Law, Mr Nagananda Kodituwakku by way of written submissions where the issues relating to the Section 42 (2) has been clearly raised that there is no allegation has been made against him under Section 42 (2) of the Judicature Act, However, the Court has failed to recognise the basis of the objections made against the issuance of the Rule.*
5. Although the judgement does not directly make determination, it quotes the Attorney General as saying that Section 42 (2) of the Judicature Act is not exhaustive. Whether the said Section 42 (2) is exhaustive or not or whether it needs to be expanded is not a matter for the Attorney General or the Judiciary, but it is a matter for the Legislature and the Judiciary has no power to expand the scope of the 42 (2). Yet, by implication of this judgment the scope of the Section 42 (2) of the Judicature Act has been expanded by the Judiciary with no power or authority given by law to do so.
6. The Court has made various observations, including the references to contempt of court and the like. However, Mr Nagananda Kodituwakku has not been charged for Contempt of Court or any other offence as set out in Section 42 (2) of the Judicature Act of which the scope is very limited and not exhaustive. Therefore, whatever the observations made in this judgment are absolutely irrelevant to the case heard by the Court.
7. The Court fails to come into any finding on any matter relating to in what way the 42(2) could be applied to this case. No determination against the AAL has been arrived at in this judgment and only issue before Court was whether the alleged conduct of the AAL falls within 42 (2) of the Judicature Act. The failure to make this judgement within the scope of the 42(2) has made it ab initio void but a statement of punishment has been arrived at without jurisdiction on the material placed before the Court.
8. Before, the Court arrive at a to punishment it should have first arrived at whether the allegations of misconduct made against the Attorney at Law has been proved by the Attorney General. if it has not been proved then there is no basis to proceed to impose a punishment. But arriving at punishment without first arriving at judgment of the allege wrongdoing is completely violative of the legal process and illegal.
9. Imposing a punishment without determining whether charge has been proved is completely disproportionate. The particularity where the court cannot come to a finding whether an offence has been committed under Section 42 (2) has been established by the Attorney General the court had violated the principles of Natural justice in meeting out dipropionate punishment which is universally condemned by the International Covenant on Civil and Political rights and also principle of fair hearing
10. In any case the Supreme Court had no jurisdiction whatsoever to remove the Constitutional mandate available to any citizen to enforce their Constitutional duty to defend the Constitution, the Rule of Law and protect the rights of others and to combat corruption through public interest litigation.

11. The reason for the issuance of the rule was relating to the engagement in the legal profession by Mr Nagananda Kodituwakku, as a Public Interest Litigation Activist and a Lawyer. Such a rule in no way can apply to engagement in the constitutional rights by a citizen derived from the Constitution. This part of the judgement is completely outside the jurisdiction vested in the Supreme Court and amounts to abuse of abuse and/or misuse of judicial authority and tantamount to enter into an area of citizenship rights.

12. This judgment will have a crippling effect on entire legal fraternity in the Republic of Sri Lanka. If an undefined category of 'unbecoming conduct' could be brought to regulate the legal profession which is an independent of profession that authorize exercising of powers of reasoning cannot be curtailed by this undefined arbitrary norm of unbecoming conduct. If not duly addressed the introduction and abuse of this term to remove lawyers from the profession could have disastrous effect in the legal profession in Sri Lanka.

Article 42 of the Judicature Act

Refusal to admit, suspension and removal of attorney-at-law. 42.

(1) The Supreme Court shall have the power to refuse to admit and enroll any person applying to be so admitted and enrolled as an attorney-at-law and shall if required to do so by the applicant, assign and declare in open court the reasons for such refusal.

(2) Every person admitted and enrolled as an attorney-at-law who shall be guilty of any deceit, malpractice, crime or offence may be suspended from practice or removed from office by any three Judges of the Supreme Court sitting together.

(3) Before any such attorney-at-law shall be suspended or removed as hereinbefore provided a notice containing a copy of the charge or charges against him and calling upon him to show cause within a reasonable time why he should not be suspended or removed, as the case may be, shall be personally served on him. If, however, personal service cannot be effected, the Supreme Court shall order such substituted service as it may deem fit: Provided however that every such attorney-at-law may be suspended by any Judge of the Supreme Court on such cause as aforesaid pending the final decision of the Supreme Court.

(4) It shall be the duty of the presiding officer of any court or other tribunal administering justice before which any attorney-at-law is found guilty of any crime or offence which may be prescribed to forthwith report such fact to the Supreme Court which may if it thinks fit suspend such attorney-at-law from practice pending the final determination of any appeal from such finding of guilty or a proceeding under subsection (3) whichever is later.

Show Cause Notice Served on Nagananda

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Mr. Nagananda Kodituwakku, Attorney-at-Law.

Nagananda Kodituwakku,
99, Subadrarama Road,
Nugegoda.

SC/Rule No. 03/2017
SC/REG/CHA/MISC/08/2016
SC/WRIT/05/2015

RESPONDENT

TO THE RESPONDENT ABOVENAMED

WHEREAS on 13th October 2015, you invoked the jurisdiction of this Court by filing SC.WRIT No. 05/2015 (hereinafter referred to as the 'said Application') wherein you appeared in person as the Petitioner and *inter alia*, sought the matter be heard before a full bench of this Court by way of a motion filed on the same day.

Whereas upon a consideration of the matter, the motion for a fuller bench of this Court was refused on the basis that the said Application did not disclose any matters of general and public importance.

Whereas consequent to the foregoing order of refusal, a further Petition and an affidavit dated 26th November 2015 was filed by you in the said Application.

Whereas having considered the contents of the further affidavit dated 26th November 2015, especially the averments which appeared ex facie an affront to the dignity of this Court and the entire judiciary of this country, Their Lordships Court made order on 14.03.2016 to the effect whether you exceeded your privileges as an Attorney at Law by making unbecoming, deliberate aspersions on the judges of the Supreme Court that calls for suspension of practice.

--214

AND WHEREAS Their Lordships of the Supreme Court, having examined the contents of the said Application, more particularly the Petition and the affidavit dated 26th November 2015, have formed the view that the contents said Application, discloses, *inter alia*, that;

- (a) In paragraph 8 of the said affidavit and the corresponding averments in the said Petition, you have averred *inter alia* that; ".....by the above ruling, Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship's bias towards the Executive, despite credible evidence produced in the case that the impugned 'flawed clause' referred to above"
- (b) In paragraph 25 of the said Affidavit and the corresponding averments of the said Petition, you have averred *inter alia* that "the Judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect Judges to attend to the task of administering justice and to leave politics to politicians".
- (c) In paragraph 27 of the said Affidavit and the corresponding averments of the said Petition, you have averred *inter alia* that "..... the Judges are not permitted to be seen to have private agendas such as expectation of special treatment or perks after retirement".
- (d) In paragraph 33 of the said Affidavit and the corresponding averments of the said Petition, you have averred *inter alia* that, "..... the people's trust and confidence in the Judiciary had been seriously undermined by *de facto* Chief Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgment against the Government, and also appointing of judges according to wishes of the Executive,"
- (e) In paragraph 34 of the said Affidavit and the corresponding averments of the said Petition, you have averred *inter alia* that, "..... the *de facto* Chief Justice, Mohan Peiris completely destroyed the trust and confidence in the Judiciary with improper appointments made to the Judiciary on his recommendations".
- (f) In paragraph 35 of the said Affidavit and the corresponding averments of the said Petition, you have averred *inter alia* that, "I state that in this backdrop

—gc

having lost my trust and confidence in the Judiciary I reported the state of Judiciary of Sri Lanka to the Commonwealth Nations of which Sri Lanka is a member, to ensure that Latimer House Principles which state that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice' were implemented and judicial appointments were made on the basis of clearly defined criteria and by a public declared process".

- (g) In paragraph 36 of the said Affidavit and the corresponding averments of the said Petition, you have averred *inter alia* that, "..... I state that however, the said desired intention of the Commonwealth of Nations had been ignored and yet to be fulfilled by the Judiciary under the new regime".
- (h) In paragraph 39 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that on 10th Nov 2014, having ruled that it was a matter of National and General Importance the Full Bench of all Judges of the Supreme Court, unanimously ruled in favour of the former president, Mahinda Rajapakshe with a determination that there was no impediment whatsoever to his being elected for a further term".
- (i) In paragraph 42 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that Your Lordship's impugned decision on my request made for a full Bench has effectively disqualified Your Lordship from hearing this case, and therefore I respectfully request that this matter be fixed for support before the Full Bench of the Supreme Court sans Your Lordship the Chief Justice, Justice Eva Wanasundara who had clearly shown bias towards the Executive and Justice Sarath De Arbrew presently indicted in the High Court".
- (j) In paragraph 44 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that in the event the request made herein, purely in the public interest, in terms of Article 133(3)(iii), cannot be acceded to, in view of Your Lordship's refusal to direct the hearing before a full Bench of the Supreme Court, I respectfully submit that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka's Judiciary, whose actions have attracted severe international criticism and compelled the UN System to intervene and call for an independent tribunals, with foreign judges, to hear cases, and respectfully request the Court to deem that I have withdrawn the case".
- 94

- (k) The overall tenor and the effect of the matters so averred in the said papers are contemptuous, malicious, derogatory and is a willful, deliberate, calculated and an intentional attempt to ridicule, embarrass, demean and defame this Court, question its integrity and lower its standing and estimation in the eyes of the public.

AND WHEREAS the aforesaid examination by Their Lordships of the papers filed by you discloses that you have;

- (a) By reason of filing the aforesaid papers replete with derogatory and defamatory statements and other insinuations and innuendos, you have conducted yourself;
- (i) in a manner which would reasonably be regarded as disgraceful or dishonourable of Attorneys-at-Law of good repute and competency, or
 - (ii) which would render you unfit to remain an Attorney-at-Law,
 - (iii) in a manner which is inexcusable and such as to be regarded as deplorable by your fellows in the profession,

and thereby you have committed a breach of Rule 60 of the Supreme Court Rules 1988 (Conduct of and Etiquette of Attorneys-at-Law) made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the said rules), and,

- (b) by reason of the aforesaid acts and conduct, you have conducted yourself in a manner unworthy of an Attorney-At-Law and have thus committed a breach of Rule 61 of the said rules.


AND WHEREAS this Court is of the view that proceedings against you for suspension or removal from the office of Attorney-at-Law should be taken under Section 42(2) of the Judicature Act No 2 of 1978 read with the Supreme Court Rules (Part VII) of 1978 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

THESE ARE THEREFORE to command you in terms of Section 42(3) of the Judicature Act No. 2 of 1978 to appear in person before this Court at Hulftsdorp, Colombo 12, Sri

-- 21

Lanka on the 14th day of May 2018 at 10.00 O'clock in the forenoon and show cause as to why you should not be suspended from practice or be removed from the office of Attorney-at-Law of the Supreme Court of the Democratic Socialist Republic of Sri Lanka in terms of Section 42(2) of the Judicature Act.

Given on this 27th day of February 2018.



Registrar of the Supreme Court

MRS.M.M.JAYASEKERA
REGISTRAR
SUPREME COURT
COLOMBO 12.
SRI LANKA.

SC/18/10/2018
MRS. M.M. JAYASEKERA
REGISTRAR
SUPREME COURT
COLOMBO 12.
SRI LANKA.

Mrs. M.M. Jayasekera
REGISTRAR OF THE SUPREME COURT
SUPREME COURT
COLOMBO 12.
SRI LANKA.
On this 27th day of February 2018.

The Rule issued by the Supreme Court on 29th February 2024

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

In the matter of a Rule in
terms of Section 42(2) of the
Judicature Act No. 2 of 1978,
against Mr. Nagananda
Kodituwakku, Attorney-at-
Law.

SC Rule 03/2017

SC/REG/CHA/MISC/08/2016

SC/WRIT/05/2015

Nagananda Kodituwakku
Attorney-at-Law
99, Subadrarama Road,
Nugegoda

Respondent

Before : Priyantha Jayawardena PC, J
P. Padman Surasena, J
S. Thurairaja PC, J

Counsel : The Respondent appeared in Person
Rajiv Goonetilleke, DSG with Hashini Opatha, SC for the Hon. Attorney General
Rohan Sahabandu, PC with Ms. Sachini Senanayake for the Bar Association of
Sri Lanka

Decided on : 29th of February, 2024

The respondent was admitted and enrolled by the Supreme Court as an Attorney-at-Law in terms of section 40 of the Judicature Act No. 2 of 1978, as amended. He was issued with the Rule dated 27th February, 2018 in terms of section 42(2) of the Judicature Act No. 2 of 1978 to show cause why he should not be suspended from practice or removed from the office of Attorney-at-Law.

The impugned conduct of the respondent was set out in the Rule as follows;

*“**WHEREAS** on 14th October 2015, you invoked the jurisdiction of this Court by filing SC. WRIT No. 05/2015 (hereinafter referred to as the 'said Application') wherein you appeared in person as the Petitioner and inter alia, sought the matter be heard before a full bench of this Court by way of a motion filed on the same day.*

***Whereas** upon a consideration of the matter, the motion for a fuller bench of this Court was refused on the basis that the said Application did not disclose any matters of general and public importance.*

***Whereas** consequent to the foregoing order of refusal, a further Petition and an affidavit dated 26th November 2015 was filed by you in the said Application.*

***Whereas** having considered the contents of the further affidavit dated 26th November 2015, especially the averments which appeared ex facie an affront to the dignity of this Court and the entire judiciary of this country. Their Lordships Court made order on 14.03.2016 to the effect whether you exceeded your privileges as an Attorney at Law by making unbecoming, deliberate aspersions on the judges of the Supreme Court that calls for suspension of practice.*

***AND WHEREAS** Their Lordships of the Supreme Court, having examined the contents of the said Application, more particularly the Petition and the affidavit dated 26th November 2015, have formed the view that the contents said Application, discloses, inter alia, that;*

- (a) *In paragraph 8 of the said affidavit and the corresponding averments in the said Petition, you have averred inter alia that; ".....by the above ruling. Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship's bias towards the Executive, despite credible evidence produced in the case that the impugned 'flawed clause' referred to above"*
- (b) *In paragraph 25 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that "the Judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect Judges to attend to the task of administering justice and to leave politics to politicians".*
- (c) *In paragraph 27 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that "..... the Judges are not permitted to be seen to have private agendas such as expectation of special treatment or perks after retirement".*
- (d) *In paragraph 33 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "..... the people's trust and confidence in the Judiciary had been seriously undermined by de facto Chief Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgment against the Government, and also appointing of judges according to wishes of the Executive,"*
- (e) *In paragraph 34 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "..... the de facto Chief Justice, Mohan Peiris completely destroyed the trust and confidence in the Judiciary with improper appointments made to the Judiciary on his recommendations".*

- (f) *In paragraph 35 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "I state that in this backdrop having lost my trust and confidence in the Judiciary I reported the state of Judiciary of Sri Lanka to the Commonwealth Nations of which Sri Lanka is a member, to ensure that Latimer House Principles which state that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice' were implemented and judicial appointments were made on the basis of clearly defined criteria and by a public declared process".*
- (g) *In paragraph 36 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "..... I state that however, the said desired intention of the Commonwealth of Nations had been ignored and yet to be fulfilled by the Judiciary under the new regime".*
- (h) *In paragraph 39 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that on 10th Nov 2014, having ruled that it was a matter of National and General Importance the Full Bench of all Judges of the Supreme Court, unanimously ruled in favour of the former president, Mahinda Rajapakshe with a determination that there was no impediment whatsoever to his being elected for a further term".*
- (i) *In paragraph 42 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that Your Lordship's impugned decision on my request made for a full Bench has effectively disqualified Your Lordship from hearing this case, and therefore I respectfully request that this matter be fixed for support before the Full Bench of the Supreme Court sans Your Lordship the Chief Justice, Justice Eva Wanasundara who had clearly shown bias towards the Executive and Justice Sarath De Arbrew presently indicted in the High Court".*

(j) In paragraph 44 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that in the event the request made herein, purely in the public interest, in terms of Article 133(3)(iii), cannot be acceded to, in view of Your Lordship's refusal to direct the hearing before a full Bench of the Supreme Court, I respectfully submit that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka's Judiciary, whose actions have attracted severe international criticism and compelled the UN System to intervene and call for an independent tribunals, with foreign judges, to hear cases, and respectfully request the Court to deem that I have withdrawn the case".

(k) The overall tenor and the effect of the matters so averred in the said papers are contemptuous, malicious, and derogatory and is a willful, deliberate, calculated and an intentional attempt to ridicule, embarrass, demean and defame this Court, question its integrity and lower its standing and estimation in the eyes of the public.

AND WHEREAS *the aforesaid examination by Their Lordships of the papers filed by you discloses that you have;*

(a) By reason of filing the aforesaid papers replete with derogatory and defamatory statements and other insinuations and innuendos, you have conducted yourself;

(i) in a manner which would reasonably be regarded as disgraceful or dishonourable of Attorneys-at-Law of good repute and competency, or

(ii) which would render you unfit to remain an Attorney-at-Law,

(iii) in a manner which is inexcusable and such as to be regarded as deplorable by your fellows in the profession,

and thereby you have committed a breach of Rule 60 of the Supreme Court Rules 1988 (Conduct of and Etiquette of Attorneys-at-Law) made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the said ales), and,

(b) by reason of the aforesaid acts and conduct, you have conducted yourself in a manner unworthy of an Attorney-At-Law and have thus committed a breach of Rule 61 of the said rules.

AND WHEREAS *this Court is of the view that proceedings against you for suspension or removal from the office of Attorney-at-Law should be taken under Section 42(2) of the Judicature Act No. 2 of 1978 read with the Supreme Court Rules (Part VII) of 1978 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.”*

Thereafter, the respondent sent his response dated 27th February, 2018 to the Registrar of the Supreme Court denying the allegations and charges in the said Rule.

As the respondent denied the charges leveled against him, it was decided to hold an inquiry in respect of the said charge sheet. At the inception of the inquiry, the charges were read out to the respondent, and he pleaded not guilty to the charges. The learned Deputy Solicitor General commenced the inquiry by leading the evidence of the Deputy Registrar of the Supreme Court.

In her evidence, she stated that the file relating to SC.Writ 5/15 was opened on the 14th of October, 2015 consequent to an application filed by the respondent. She produced the Petition and the affidavit dated 13th October, 2015 filed in the said application. She further stated that there was a motion had been filed by the respondent, seeking to constitute a full bench in terms of Article 132 (iii) of the Constitution to hear the application, stating that the matter involved in the said application contains matters of public and general importance.

She further stated that hence, the docket was forwarded to then Chief Justice for a ruling on the said application. Having considered the said motion, then Chief Justice had refused to constitute a full bench under Article 132(iii) of the Constitution and the application was taken up for support in court. On that day, the respondent had appeared in person, and the other respondents were represented by counsel. Having observed the contents of the affidavit filed by the respondent in the said application, court directed the Registrar of the Supreme Court to serve a certified copy of the motion dated 26th of November, 2015 together with the affidavit dated 26th of November, 2015 filed by the petitioner on the President of the Bar Association directing him to appear as amicus to assist court to decide whether the contents under the heading “Need for a full bench considering the national importance of the case” and the averments contained in paragraph 42 of the affidavit obstructs the cause of justice and amounts to an interference in the due administration of justice.

The original petition dated 14th October, 2015 filed by the respondent, the affidavit dated 13th October, 2015, the motion dated 13th October, 2015 were produced by the witness and marked as P1(A), P1(B) and P1(C) respectively. Further, the journal entries dated 15th October, 2015, and 8th December, 2015, the motion dated 26th November, 2015 and the affidavit attached to the said motion were produced and marked as P1(D), P1(E), P1(F) and P1(G) respectively.

It is pertinent to note that, at the inquiry, the respondent admitted filing the aforementioned documents in SC/WRIT No. 05/2015.

The affidavit dated 26th November, 2015 referred to the aforementioned Rule, *inter alia*, stated as follows;

“

1. *I, NAGANANDA KODITUWAKKU of 99, Subadrarama Road, Nugegoda do hereby solemnly and truly declare and affirm as follows:-*

2. *I am the affirmant above-named, Attorney-at-Law (Sri Lanka) & Solicitor in the UK and a citizen of both countries and being a Buddhist and Public Interest Litigation Activist and I state that I*

furnish this Affidavit to support the content of the Motion filed in Court today. (26 Nov 2015)...

....

5. *I state that the Writ Application filed by me (SC/Writ/05/2015) on 13th Oct 2015, purely in the Public interest, supported by overwhelming evidence of abuse of the people's Legislative, Executive, and Judicial powers by all three organs of the government (Executive President, Parliament and Judiciary) to insert the clause "... being persons whose names are included in the list submitted to the Commissioner of Elections under this Article or in any nomination paper submitted in respect of any electoral district by such party or group at that election..." (hereinafter referred to as the 'flawed clause") to the **Article 99A** of the Constitution by deceitful means, as morefully set out below, thereby violating the sovereign rights of the People of Sri Lanka, which includes the power of Franchise enshrined in **Article 3** of the Constitution, which cannot be taken away or denied without a mandate obtained from the people at a referendum and upon a certificate by the Executive President being endorsed on the Bill (**Article 83**) and therefore the aforesaid 'flawed clause' inserted in the Article 99A of the Constitution is ab initio void in terms of Article **82(6)** of the Constitution.*

6. *I state that the request made by me by Motion filed in Court on 13th Oct 2015 in terms of Article 132(3)(iii) of the Constitution, for the hearing of this matter before a Full Bench of the Supreme Court, considering the fraudulent manner, the said 'flawed clause' had been inserted to the Article 99A of the Constitution, which is of a matter of National importance. Your Lordship has **ruled that it was not a matter of Public and General Importance** as follows.*

“ I am of the view that the matters involved in this case are not of general and public importance. Hence the request made in terms of Article 132(3)(iii) of the Constitution is refused.”

7. *I state that all judges are required to stand by their decisions which shall be, directed to the parties to the litigation and to the general public with reasons for their rulings given, which however has not been adhered to in Your Lordship's ruling, reducing it to mere nullity (ref P30).*

8. *I state that by the above ruling, Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship's bias towards the Executive, despite credible evidence produced in the case that the impugned 'flawed clause' referred to above has been fraudulently inserted to the Article 99A of the Constitution by then Executive President J R Jayawardene in 1988, by circumventing the procedure established by law and hence ab initio void.*

9. *I state that in 1988, 5 judges of the Supreme Court, despite the patent violation of the Article 3 (powers of government, fundamental rights and franchise) of the Constitution by the said 'flawed clause', had made a patently flawed determination on 18th April 1988 (ref P39) that the said 'flawed clause' was NOT inconsistent with the provision of Article 3 and therefore did not require the approval of the People at a referendum, which is mandated by Article 83 of the Constitution, a decision, which had apparently been made under moral duress (P31).*

10. I state that I observed that the said 5 - Judge Bench had denied the opportunity (**Ref P38**) for the citizens to make objections against the said "flawed clause and made the Court's determination as follows (**ref P39**)

*"We have considered the respective submissions made in regard to this matter, and **our determination is that Clause 3 and Clause 8** (Clause that permitted party Secretaries to appoint rejected candidates as MPs through the National List) of the Bill **are not inconsistent with the Provisions of Article 3**, read with Article 4(a) and 4(e) of the Constitution, and **therefore do not require the approval of the People at a Referendum**".*

11. I state that the failure of the 5-Judge Bench to adduce reasons for their determination (in clear violation of Article 123 of the Constitution) reduced the said determination (**Ref P30**) a merely nullity and ab initio void.

12. I state that the Supreme Court's special determination Record (SC/SD/02/1988) clearly demonstrates that the process followed by the aforesaid 5-Judge bench had been absolutely flawed and in clear violation of the mandatory procedure provided in Chapter **XII** of the Constitution ...

...

23. I state that the said 'flawed clause', effectively nullifies the principle of 'Representative Democracy' duly recognized in the Preamble to the Constitution of the Republic of Sri Lanka.

24. I state that the Republic of Sri Lanka is a representative democracy (ref preamble to Constitution) and the citizens judicial power is exercised by the judiciary, wholly on trust, demand not only that judicial power be

- exercised independently and according to law, but also that judicial decision-making be demonstrably rational and fair and must also be seen to be rational and fair and the Court should be able to justify its actions as an exercise of public power which are always likely to be called in question.*
25. *I state that the judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect judges to attend to the task of administering justice and to leave politics to politicians.*
26. *I state that the judges have a different responsibility and are subject to a different form of accountability and the public expectation of judges is that they will not respond to political pressure.*
27. *I state that the judges are not permitted to be seen to have private agendas such as expectation of special treatment of perks after retirement.*
28. *I state that the Court is expected to resolve the matter presented in this case, strictly according to law, adhering to legal methodology, acting as the final interpreter of the Constitution, protector of fundamental rights of the citizens, their sovereign rights and as a guardian to keep necessary checks upon constitutional transgressions by itself or other organs of the State (**Union of India V Raghbir Singh (1989) 2 SCC 754**)....*
- ...
33. *I state that the people's trust and confidence in the judiciary had been seriously undermined by de facto Chief Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgment*

against the Government, and also appointing judges according to wishes of the Executive, which the Prime Minister with contempt revealed in the Parliament.

*The relevant part of the Hansard dated 30th Jan 2015 is attached hereto marked **P40***

34. I state that the de facto Chief Justice, Mohan Peiris completely destroyed the trust and confidence in the judiciary with improper appointments made to the judiciary on his recommendations.

35. I state that in this backdrop having lost my trust and confidence in the judiciary, reported the state of Judiciary of Sri Lanka to the Commonwealth of Nations of which Sri Lanka is a member, to ensure the Latimer House principles which state that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice' were implemented and judicial appointments were made on the basis of clearly Define criteria and by a publicly declared process.

*(A true copy of the communication sent to Commonwealth Secretariat marked **P41** is attached here too)*

36. I state that the Commonwealth secretary in London had informed me that Commonwealth Secretariat had sent an observer group to Sri Lanka and believed that the newly elected government would address the issues raised by me in my communication sent to the office of the Commonwealth of Nations. I state that however, the said desired intentions of the Commonwealth of Nations had been ignored and yet to be fulfilled by the judiciary under the new regime.

(True copy of the reply received from Commonwealth Secretariat marked P42 is attached here too)...

...

39. *I state that on the 10th November 2014, having ruled that it was matter of National and General Importance the Full Bench of all judges of the Supreme Court, unanimously ruled in favor of the former President Mahinda Rajapakse with a determination that there was no impediment whatsoever to him being elected for a further term.*

(Relevant page of the Determination (SC Ref 01/2014) ratified by all judges marked P44 is attached hereto)...

...

42. *I state that Your Lordship's impugned decision on my request made for a full bench has effectively disqualified Your Lordship from hearing this case, and therefore I respectfully requested that this matter be fixed for support before the Full bench of the Supreme Court sans Your Lordship the Chief Justice, Justice Eva Wanasundara who had clearly shown bias towards the Executive and Justice Sarath De Arbrew presently indicted in the High Court.*

43. *I state that I with due respect to Your Lordship, request that the obviously impugned per incuriam ruling given by Your Lordship that the 'matters involved in this case are NOT of general and public importance' be reviewed considering the general and public importance of this case, initiated purely in the public interest by me, which goes to the very root of the representative democracy of the Republic of Sri Lanka, and to a point a Bench of 7 judges of the Supreme Court in terms of Article 132 (3)(III) to hear and determine this case.*

44. I state that in the event the request made herein, purely in the public interest, in terms of Article 133(3)(III), cannot be acceded to, in view of Your Lordship's refusal to direct the hearing before a full bench of the Supreme Court, I respectfully submit that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka's judiciary, whose actions have attracted severe International criticism and compelled the UN system to intervene and call for independent tribunals, with foreign judges to hear cases and respectfully request the Court to deem that I have withdrawn the case.”

The witness stated that according to the journal entry dated 16th of February, 2016 the respondent had submitted to court that he would tender an unqualified apology. Further, he had moved to file an appropriate affidavit withdrawing the motion dated 26th of November, 2015 and the affidavit dated 26th November, 2015. Hence, the respondent was given two weeks to file an apology or withdraw the motion.

Thereafter, the witness stated that, as per minute dated 23rd of February, 2016, the respondent had filed the motion dated 23rd February, 2016, together with the affidavit dated 23rd February, 2016. The said motion dated 23rd of February, 2016 and the affidavit annexed to that motion dated 23rd of February, 2016 were produced and marked as P1(J) and P1(K) respectively.

Moreover, the witness stated that the respondent had agreed unconditionally to withdraw certain averments in the said affidavit and the motion, on the advice of the President of the Bar Association and to tender a fresh affidavit to the court. However, according to the affidavit dated 23rd February, 2016 respondent had only withdrawn the averment 42 of the affidavit dated 26th November, 2015. The witness further stated that, according to the journal entry dated 14th March, 2016, then Chief Justice, had directed Registrar of the Supreme Court to submit the documents filed in the said application to the judges of the Supreme Court together with the proceedings to consider whether the petitioner as an Attorney-at-Law had exceeded his privilege and had made unbecoming and deliberate aspersions on the judges of the Supreme Court. Consequently, the Registrar of the Supreme Court had submitted the said documents to the learned judges of the Supreme Court.

Thereafter, based on the observations made by the learned judges of the Supreme Court, the Rule dated 23rd November, 2016 was issued on the respondent.

After the evidence in chief of the witness was concluded, the respondent was given an opportunity to cross examine the witness, and the respondent cross examined the witness. After the cross examination was concluded by the respondent, court informed the respondent that he is entitled to give evidence and the respondent was requested to commence his case. Thereafter, the respondent started giving evidence. Before his evidence was concluded the respondent informed court that his family, who were residing in the United Kingdom were leaving that night, and moved to adjourn court for the day. Hence, the proceedings were adjourned on sympathetic grounds. Further, the respondent was informed that the inquiry is specially fixed for the 18th of January, 2023 at 10.00 a.m. and also for the 24th and 25th of January, 2023.

When this matter was taken up for inquiry on the 18th of January, 2023 the respondent was absent and unrepresented. The learned President's Counsel appearing for the Bar Association of Sri Lanka, informed court that he met the respondent that morning in the premises of the Supreme Court. Hence, the inquiry was concluded and a date was fixed for correction of proceeding. When the matter was taken up in court for correction of proceedings, the respondent appeared in court and made an application to re-open the inquiry. However, the said application was refused by court and the respondent was allowed to file written submissions.

In his written submissions, the learned Deputy Solicitor General submitted that the respondent deliberately and intentionally prepared the affidavit dated 26th November, 2015 following the refusal to appoint a full bench, is a calculated effort to make derogatory statements and unfounded allegations in respect of the judiciary as a whole and specific judges mentioned by name.

Moreover, it was submitted that this is not the first time that the respondent has been engaging in such behavior unbecoming of an Attorney-at-Law but he had been doing so for a considerable period of time. It was submitted that the respondent had already been found guilty in Rule bearing No. 1/2016 served on the respondent due to having made spurious allegations against a sitting

Judge of the Court of Appeal which culminated in the respondent being suspended from practice as an Attorney-at-Law for a period of 3 years.

The learned President's Counsel appearing for the Bar Association of Sri Lanka submitted that the Rules framed under the Constitution are not exhaustive, specifically Rule 62. Further it was submitted that the Rules presupposes a lawyer's context, shaping the lawyer's role. It includes the provisions of the Constitution, provisions of law, Judicature Act No. 2 of 1978, decisions of the Supreme Court.

He further submitted that mere allegation without any proof, mere statements made in most reckless manner, statements been made that judges are charged with judicial corruption where no semblance of proof is tendered is not the conduct of a lawyer, and he cannot be a lawyer of good repute referred to in section 41 of the Judicature Act. Moreover, a lawyer who has been enrolled as a man of good repute has to maintain that 'good repute' throughout his professional life. He drew the attention of the court to Rule 61 which states that "an Attorney-at-law shall not conduct himself in any manner unworthy of an Attorney-at-law."

It is pertinent to note that, the respondent did not justify his conduct, or the statements made by him in his affidavit dated 26th November, 2015, either by giving evidence or in the written submissions filed by him. The allegations made against the independence and impartiality of judges sitting in the apex court of this country were not supported by any material.

A careful consideration of the allegations referred to in the Rule and the affidavit dated 23rd February, 2016 when taken as a whole, constitute an affront to the judiciary and the judicial system and that the respondent has not withdrawn the same nor made an unqualified apology. Further, the respondent at no stage expressed any remorse or apology for a making such statements in his affidavit of 26th November, 2015; namely paragraphs 8, 25, 27, 33, 34, 35, 36, 39, 42 and 44 referring to abuse of discretion, insinuating that judges engage in politics, that judges have private agendas, that the trust and confidence in the judiciary has been undermined.

Moreover, the evidence and the material produced at the inquiry shows that the conduct of the respondent is not only bad conduct but also amounts to contemptuous behaviour with total disregard of the authority and respect of the Supreme Court. Hence the evidence led at the inquiry proved that the actions taken by the respondent amounts to conduct which is dishonorable and unworthy of an Attorney-at-law.

Taking into consideration that this is the second instance that the respondent was found guilty of professional misconduct, and the nature of the grave misconduct of the respondent referred to in the Rule, the aforementioned Rule is affirmed. We hold that the respondent is guilty of malpractice. Hence the respondent is removed from the office of Attorney-at-Law. Further, the respondent is restrained from filing public interest litigation in his personal capacity as such conduct would nullify the said decision to remove the respondent from the office of Attorney-at-Law.

The Registrar of the Supreme Court is directed to take all necessary steps to implement this Order and to communicate this Order to the relevant institutions.

Priyantha Jayawardena PC, J

Judge of the Supreme Court

P. Padman Surasena, J

Judge of the Supreme Court

S. Thurairaja PC, J

Judge of the Supreme Court

Objections against the issue of Rule file by Nagananda by way of a reply to the submissions made by the representative of the Bar Association

In the Supreme Court of Republic of Sri Lanka

In the matter of Rule in terms of Section 42(2) of the
Judicature Act No 2 of 1978 against Attorney at Law
Nagananda Kodituwakku

Sc/Rule/3/2017

K Sripawan

Chief Justice

Supreme Court of Sri Lanka

Complainant

Nagananda Kodituwakku

Attorney-at-Law

99, Subadrarama Road

Nugegoda

Respondent

To: The Hon' Chief Justice and other judges of the Supreme Court of Sri Lanka

The Defendant submits his written submission against the issuance of Notice of a Rule dated 27th Feb 2018 against him, in reply to the Written submission made by the Bar Association

1. The defendant states that the Attorney General's power related to formulating charges against an Attorney-at-Law is limited to Section 42 (2) of the Judicature Act No 2 of 1978. However, the Attorney General has exceeded his power and violated the law by acting outside the scope of the said provision of law by bringing up averments which are outside the scope of the said law. In **Re Arthenayake**, Attorney at Law [1987] 1 SLR 314
2. Therefore, the Respondent respectfully requests the Court to dismiss the charge sheet wholly, as it itself is bad in law in terms of the said Section 42 (2) of the Judicature Act. The Respondent

therefore submits that there are no valid charges to inquire into and hence the proceedings against him should be brought to an end.

3. The Respondent refers to the averments in the said Charge Sheet filed by the Attorney General beginning with the paragraph “and whereas their Lordships of the Supreme Court, having examined the content of the said Application, more particularly the Petition and the Affidavit dated 26th Nov 2015, have formed the view that the contents said application, discloses, inter alia, that:
 - a. In paragraph 8 of the said affidavit and the corresponding averments in the said petition, you have averred inter alia that “...by the above ruling, Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship’s bias towards the Executive, despite credible evidence produced in the case that the impugned ‘flawed clause’ referred to above.....”
 - b. In paragraph 25 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “the judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect judges to attend to the task of administering justice and to leave politics to politicians”
 - c. In paragraph 27 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “...the judges are not permitted to be seen to have private agendas such as expectation of special treatment or perks after retirement”
 - d. In paragraph 33 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “.....the people’s trust and confidence in the judiciary had been seriously undermined by de facto Chief of Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgement against the Government, and also appointing of judges according to wishes of the Executive.....”
 - e. In paragraph 34 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “....the de facto Chief Justice, Mohan Peiris completely

destroyed the trust and confidence in the judiciary with improper appointments made to the judiciary on his recommendations”

- f. In paragraph 35 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “I state that in this backdrop having lost my trust and confidence in the judiciary I reported the state of judiciary of Sri Lanka to the Commonwealth Nations of which Sri Lanka is a member, to ensure that Latimer House principles which state that ‘An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice’ were implemented and judicial appointments were made on the basis of clearly defined criteria and by a public declared process”
- g. In paragraph 36 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “I state that however, the said desired intention of the Commonwealth of Nations had been ignored and yet to be fulfilled by the judiciary under the new regime”
- h. In paragraph 39 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “ I state that on 10th Nov 2014, having ruled that it was a matter of National and General Importance the Full Bench of all judges of the Supreme Court, unanimously ruled in favour of the former president, Mahinda Rajapaksa with a determination that there was no impediment whatsoever to his being elected for a further term”.
- i. In paragraph 42 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “I state that Your Lordship’s impugned decision on my request made for a full Bench has effectively disqualified Your Lordship from hearing this case, and therefore I respectfully request that this matter be fixed for support before the Full Bench of the Supreme Court sans Youth Lordship the Chief Justice, Justice Eva Wanasundara who had clearly shown bias towards the Executive and Justice Sarath De Arbrew presently indicted in the High Court”

- j. In paragraph 44 of the said affidavit and the corresponding averments of the said petition, you have averred inter alia that “I state that in the event the request made herein, purely in the public interest, in terms of Article 133(3) (iii), cannot be acceded to, in view of Your Lordship’s refusal to direct the hearing before a full Bench of the Supreme Court, I respectfully submit that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka and compelled the UN system to intervene and call for an independent tribunals, with foreign judges, to hear cases, and respectfully request the court to deem that I have withdrawn the case”
- k. The overall tenor and the effect of the matters so averred in the said papers are contemptuous, malicious, derogatory and is a willful, deliberate, calculated and an attempt to ridicule, embarrass, demean and defame this Court, question its integrity and lower its standing and estimation in the eyes of the public.

By including above paragraphs in the said Charge Sheet the Attorney General has made an attempt to include them within the scope of the Section 42 (2) of Judicature Act. However, the Judicature Act is very clear in its wording and is very unambiguous. It is not within the power of the Attorney General to enlarge the scope of statutes passed by the legislature. Therefore, the Respondent states that **the content of the Charge Sheet amounts to exercise of legislative function by the Attorney General.**

- 4. Neither the Judiciary nor the Attorney General has the power to Legislate. Legislative power solely vested in the Legislature in terms of Article 4 (1) of the Constitution of Sri Lanka. Expanding the Article 42 (2) of the Judicature Act could be done only by the Legislature by following the due process as set out in the Constitution. Therefore, the Respondent submits that the attempts made by the Attorney General to expand the article 42 (2) of the Judicature Act amounts to an exercise of Legislative power and hence unconstitutional and unlawful.
- 5. By making the above-mentioned averments referred to in the paragraph 2 above, the Attorney General has moved away from his functions as the prosecutor on behalf of the Government which is rooted on the foundation of rule of law, ensuring the good governance, democracy, sovereignty in the people and their fundamental rights. **By incorporating these averments, the Attorney General is attempting to exercise a function of a ‘thought controller’ which is condemned by all the civilized societies as being opposed to freedom loving nations in which freedom of thought, conscience, and expression are regarded as having the highest**

value. The prosecutor's function within such a system of civilized government does not allow 'function of thought control' to anyone.

However, in dictatorships the prosecutor's function is often transformed into a political function. In worst situations, the prosecutor plays the role of **'thought controller'**. In the world-famous novel '1984' by George Orwell demonstrates the manner in which such a **'thought control process'** has taken place. A historical example of the way this role has been played is demonstrated in the case of Russia under dictatorship of Joseph Stalin by his famous prosecutor, Andrey Vishinski. The Defendant fervently hopes that the present case would not be an indication of an attempt to thought control of the legal profession.

6. On the issue of sovereignty in the people the Defendant submits as follows.

The Defendant in this case files the relevant petition as a citizen of Sri Lanka exercising the right afforded to a citizen by the Constitution. The fact that he happens to be an Attorney at Law is beside the point. This petition (SC/Writs/5/2105) is a petition by a citizen and as a citizen the Respondent has expressed certain views, some of which, have been mentioned in the averments of the Charge Sheet mentioned in paragraph 2 of this reply.

As a citizen he is entitled to express his views. Any citizen of Sri Lanka has the right to express his views independently. If the views expressed is a violation of limits to freedom of expression that should be adjudicated within the relevant constitutional provisions of the Sri Lankan Constitution. The Sri Lankan Constitution does not forbid expression of any of the views expressed in the averments of the Charge Sheet mentioned above. In fact, even those citizens who holds the position of head of the state have on occasions expressed views similar to those expressed in the above averments in the Charge Sheet. For an example, in the averment mentioned as "d" and "e" which are relating to the conduct of Mohan Peiris the former Chief Justice, it was the former Executive Presidents Ranil Wickramasinghe and Maithripala Sirisena had criticized the conduct of Mohan Peiris through a televised broadcast to the nation and also in the Parliament, which is recorded in the Parliamentary Hansard. There has been criticism levelled at judicial officers like Sarath Nanda Silva, the former Chief Justice by the concerned citizens. The most recent statement of Eran Wicarakaratne MP profoundly reflects an enormous concern of this deterioration.

"We are losing the young people of this country. Because the rule of law is not working in this country. SLMC Ethics Committee on Decisions of professional conduct committee inquired in to the conduct of Dr. M.A. Rahul Haq, Reg. No 15168, the JMO who gave that report. The SLMC Ethic committee decided that Dr. Rahul Haq be imposed a suspension for a period of eight months from exercising his rights on 20th December 2022. This person suspended by the SLMC has given the 2nd report on the death of Dinesh Schaffter. How can a JMO who is under interdiction give a second report contradicting his first report. The death of businessmen Dinesh Schaffter needs answers from relevant authorities if the country is to be seen and known as a country which respect the rule of law." (http://www.colombopage.com/archive_23A/Feb23_1677091890CH.php).

Many similar statements have been made by citizens of this country all the time.

7. The Defendant submits that none of the statements attributed to him in the averments mentioned in the Charge Sheet are of any exceptional nature and all these averments are a reflection of the views maintained by many concerned citizens in the country irrespective of what positions they hold. These statements do not in any sense create any scandal or shock. They are occupying a common place in conversations of Sri Lankans here and abroad. Thus, other than merely stating commonly held views of the country about the judiciary the defendant has had no intention or a wish to create any impression against the judiciary as an institution except for public good.
8. The Defendant himself is saddened by the state of affairs prevailed in all three organs of the government that threatens the sovereignty in the people. The sovereignty and the observance of rule of law which are bound together. When the rule of law degenerates, there is no avenues available to the people to exercise their sovereign rights enshrined in the Constitution. The Defendant firmly submits that he is firmly committed to promote and defend the independence of the judiciary including the independence of the lawyers as these are essential to guarantee the constitutional protection of the sovereignty in the people.
9. An independent and fearless Bar is the most important defendant of independence of judiciary. The defense of independence of judiciary means to defend the rule of law. It is the function of the lawyers to be in the frontline in the defense of the law. The lawyers are no servants of anyone else including those who hold political powers. The great tradition of law is to defend the law and to ensure that the law is just and serves the interests of the people. **Without the defense of this**

great tradition, neither the law nor independence of judiciary can survive. It is to achieve this purposes that the defendant, as a citizen of Sri Lanka who is committed to uphold the rule of law, has taken various efforts including the filing of such a petition challenging the appointment of defeated candidates through Article 99A of the Constitution which was a matter of national importance as the said provision of law had been fraudulently interpolated to the Constitution that empowered the judiciary to make that blatantly unlawful provision of law unconstitutional under the power vested in it by Article 82 (6) of the Constitution.

10. The statements attributed to the Defendant in the said Charge Sheet by the Attorney General is a part of the Petition he filed as a citizen and not specifically as an Attorney at Law. He is an active member of the civil society and known for his public interest litigations initiated for public good particularly in an environment where the people are defenseless. As a citizen the Defendant has a right to form and express his opinion on matters of general interest. This is the duty of any citizen and it is pity that many leaned people do not engage in defending their own rights. However, those who do engage in such as exercise should not be punished but in fact be encouraged without which no good governance and rule of law can prevail.

11. Who should judge the correctness, validity and justifiability of the averments mentioned in the Charge Sheet filed by the Attorney General?

It is the tradition established by the civilized world that professional conduct of any profession should be judged only by the peers of this profession. The law in Sri Lanka has recognized this principle and has laid down in the Judicature Act and in the Supreme Court rules. And this great legal tradition has been created for the defense of the legal profession. Therefore, this tradition must be upheld at all circumstances and particularly on matters which affect opinions and expressions of ideas. And imposing sanctions against those who hold different views and opinions for public goods is only degenerate the already corrupt system of governance that do not respect the rule of law, the sovereignty in the people and their fundamental rights.

12. In Sri Lanka everyone who is called upon to face any inquiry is provided the opportunity of a hearing. That tradition is based on the tradition of natural law. However, the Defendant in this case has been completely denied a fair hearing, thus he has been treated as a person of a unworthy character. That is an affront to the human dignity, justice and fair play.

13. That the notice of rule issue him as mentioned above is directly contrary to the Constitution and the Judicator Act the section 42 (2) of which states as follows:

“every person admitted and enrolled as an Attorney at Law who shall be guilty of any ... malpractice, crime, or offence, may be suspended from practice or removed from office by any of the judges of the supreme court sitting together”.

The Defendant respectfully submits that he has not found guilty of any deceit, malpractice, crime or offence. Therefore, the defendant states under the Judicator Act there is no ground to proceed at all in pursuing the notice issued against him.

Therefore, the Defendant submits that the Supreme Court lacks jurisdiction to go into this notice of the rule and it is urged that the notice be refused *in limine* as there is no legal basis at all to proceed in this case.

- A. The defendant particularly states that he has not been found guilty of any offence related to obstructing justice. Therefore, the insinuation made in notice of the rule as well as submission by lawyer Bandula Sahabandu purporting to be the Counsel for the Bar Association is not founded on to the effect that the Defendant has committed a crime against administration of justice or against the Supreme Court of Sri Lanka is completely unfounded and false.
- B. The Defendant states that he has never been found guilty of any charge – if such a charge exists at all – of committing any affront to the Supreme Court of Sri Lanka. Further, the defendant states that he is not aware of any ‘offence’ called affront to the Supreme Court.

Therefore, it is submitted that the Bar Association has failed to provide reasons as to why there is any legally justifiable course to proceed with this case. And for that reason, as there is no *prima facie* case established against the Defendant to call on the jurisdictions of this court to proceed with this case.

- C. Under the constitution of Sri Lanka right to practice a profession is recognized as a human right. Removal or suspension of a person from any profession denoting the legal profession or even judicial profession is a violation of human rights. Any limitation on this right needs to be in terms of universally practiced rules regarding professions and methodologies that have been developed over centuries for removal or suspension of persons from their

professions. The criteria used in such an occasion is highly restricted and protection accorded to the affected person to defend himself/ herself against any allegations is also very high.

Under these circumstances submission purporting to be on behalf of the Bar Association attempts to trivialize or belittle the serious nature of the jurisdiction exercised by the Court in decision to remove or to suspend an Attorney at Law from the legal profession. Counsel attempts to make it appear as if such a suspension or removal to be purely administrative matter that can be done by the supreme court as and when it pleases. Therefore, the position taken by the Bar Association in this manner is completely unprecedented and highly threatening to the legal profession as well as the professions and also severely undermines the rule of law.

Particularly under the circumstances of Sri Lanka where critical victimization is constantly alleged the position taken by the Bar Association creates justification for political victimization also in the field of suspension and removal of professionals including those of legal profession and related professions. The Counsel's dismissal of Latimer House Principles on the basis that it applies only to the judges dealt to appreciate the independence of judges as well as lawyers are a fundamental aspect of defense of freedom, the independence of judiciary and rule of law and democracy. In the past the Bar Association has jealously guarded the independence of legal profession, independence of judiciary, and rule of law. However, submission tendered by the Counsel for the Bar Association undermines all these vital attempts and more importantly the principles.

The fact of recognition of the right to practice of profession of one's choice implies protection that right. As the article 02 of the International Covenant on Civil and Political Rights has laid down it's a duty of a state that is signing the ICCPR to provide for legislative, judicial, and administrative measures to protect such as a right. The Sri Lankan state is a party of the ICCPR and also to the optional protocol 2 of the ICCPR.

Therefore, it is the duty of the Legislature and Judiciary of Sri Lanka to protect the right to practice profession of person's choice as vital human rights. Perhaps judiciary on this occasion may contribute to the development of the jurisprudence on the human rights of the practice of a profession articulating the necessary principles that protects also the legal profession, and even judicial profession, which not long ago came to be threatened by the arbitrary removal of a Chief Justice.

14. The law relating to procedure for suspension or removal of an Attorney at Law

Law in Sri Lanka has clearly laid down, law and the rules when issue of considering the removal or suspension of an Attorney at Law by the Supreme Court:

The Judicator Act under the section 42 (3) deals with the procedure before any Attorney at Law suspended or removed as a member of the legal profession.

It mentions about the copy of the notice of charge or charges is served on him, that is a given time to cause as why he is to be suspended, and requiring by disciplinary committee into allege misconduct of Attorney at Law it is inquired into an act upon under section 43 of the Judicator Act.

What is enshrined in these provisions is further amplified in the Supreme Court Rules under part VII titled "the admission, enrollment, suspension, and removal of attorney at law". These rules have set out in details the manner in which the Committee of the Bar Association will inquire into and finally report back to the Supreme Court on the inquiry that they have conducted. It is only after then that the actual inquiry into the allegations take place before the Supreme Court.

The Counsel purporting to acting for the Bar Association speaks of inquiry into allegations of misconduct to be not adversarial but inquisitorial in nature. However, the legislation on the matter of inquiry has been very clear in the legislation itself. As cited above the Judicator Act as well as the rule mentioned above has laid down the procedures and has led rules so as not to deviate from such a procedure. It should have been the duty of the Counsel of the Bar Association to advice its own members as defendants as well as the Supreme Court and Attorney General about legal process that is involved. There is no indication that the Counsel for the Bar Association has discharged his duties his own member, Defendant or to the Supreme Court. In fact, his submissions and dissuading observations can have a discouraged impact not only for this case but also for the dure case relating to rights of Attorneys at Law.

The reference by the Counsel of the Bar Association about unproven allegations of judicial misconduct:

For reasons which have not been explained the Counsel for the Bar Association has bragged the issue of allegations of judicial misconduct into this case by way of submissions. This was completely unwarranted and give rise to the suspicion that there are more Counsels' submissions than the actual matters of this case and about the law.

As explained above, the removal of an Attorney at Law must be on proven allegations for having found been guilty of any offence. However, making of complaints who legitimate authority in Sri Lanka like for the example, the commission against bribery and corruption is legitimate exercise and honorable exercise of civic duties of citizens. The Counsel of the Bar Association has made it out that making of such complaints is a crime warranting removal of person registered in profession including a registered Attorney at Law, then there is something alarming and disturbing in the in position taken up by the counsel before the Bar Association. Is the Counsel pursuing a matter of law in terms of Judicator Act and the rules and also the Constitution of Sri Lanka or is he pursuing some other agenda? If so that would amount to abuse of the position of an *amicus curie*, where his role should be impartial and fair observer of proceedings and where he should take a role of guiding the Court on matters of law and practice. An *amicus curie* should enjoy high respect of adherence to principles and finer qualities of fairness.

The Defendant submits that the counsel has not acted in fairness towards the defendant both as an Attorney at Law and as a member of the Bar Association itself.

15. Conflict of interest

The Defendant is a member of the Bar Association of Sri Lanka. Law in Sri Lanka has entrenched universally accepted principles granting the Bar Association, the powers to protect the members of its profession, the very idea of the legal provisions made in the Judicator Act and rules and the Constitution itself recognizing the right to practicing a profession as a human right provides an ample opportunity for the Bar Association to do all in its power to protect its members. However, there is conflict of interest when the Counsel for the Bar Association ignores the legal provisions, Constitutional provisions, and attempts to create an impression that all that is involved in removing a professional is a mere an administrative matter of least importance. This kind of trivialization of grave responsibility that rests on the Bar Association clearly is a conflict of interest. The primary responsibility of the Bar Association is to protect its members with the framework of law. It is the duty of the of the Bar Association and legal profession itself to act without fear or favor. It should not only be done but also it must also to appear to be done. The Defended states that the positions taken by the Counsel of the Bar Association is in fact give rise to the suspicion of a less honorable pursuit.

The Defendant is also surprised that the Counsel of the Bar Association has failed to refer to objections the Defendant has taken earlier that;

- a. under the law and procedure practices of Sri Lanka, no special witnesses are recognized and all are treated equally,
- b. the defendant has the right to counter any evidence given against him during the proceedings envisaged under the rules including right to ask questions for clarification.
- c. The law does not allow the Defendant excluded from the proceedings including defending himself by adducing his own evidence and witnesses of his choice which however did happened unfortunately in this case, as the Respondent was denied to give evidence or to call witnesses to give evidence for defense.
- d. It was the duty of the Counsel of the Bar Association to express his opinions on these matters, which he has failed to do.

16. The defendant states that the legitimate role he has been playing publicly as a human rights defender and advocate of civic responsibilities, in particular, the prevention of corruption, will not be treated as a crime mentioned in section 42 of the Judicator Act. The United Nations has worked throughout the world intensely to defend the rights of critics of governments and other powerful bodies as they have come under severe attacks throughout the world. The rule of law cannot be protected unless judicial processes sensitively protect the crimes of those who engage in the function of the crucially participating improving all their institutions, including institutions of administration of justice.

Nagananda Kodituwakku

The Defendant and Public Interest Litigation Activist

09th March 2023

