To: Hon. Chamal Rajapaksa, M.P.
Speaker of Parliament

AFFIDAVIT

I, **NIHAL SRI AMERESEKERE** of 167/4, Vipulasena Mawatha, Colombo 10 in the Democratic Socialist Republic of Sri Lanka, being a Buddhist, do hereby solemnly, sincerely and truly affirm and declare as follows:

I place before Your Honour the following facts in the context of the Parliamentary Select Committee having been appointed in terms of Standing Orders of Parliament under Article 107(3) of the Constitution, to investigate into a Resolution for the removal of Hon. (Dr) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, entertained on 1st November 2012 by Your Honour, as per Article 107(2) of the Constitution, and placed on the Order Paper of Parliament on 6th November 2012.

The facts contained herein are also tendered to Your Honour in the context of the Application I made on 18th October 2012 to the Supreme Court in SC (SD) No. 2/2011 of which Your Honour was given notice in terms of the Constitution.

I set out below a *chronology* of events on my endeavours to have the Special Determination of 24th October 2011 *reviewed* and *re-examined* to bring out the salient facts of relevance.

14.11.2011 - I filed Fundamental Rights Application SC (FR) No. 534/2011 upon coming to know that the Bill generally referred to, as the 'Expropriation Bill', had been tabled in Parliament on 8th November 2011, *without being aware* that the Bill had already been certified into law by Your Honour on 11th November 2011.

With my aforesaid Application, I also tendered a Motion, seeking to Support my Application in the course of the ensuing week, attaching a Medical Certificate from the Cardiac Specialist, who has been treating me since 1994, recommending two weeks rest, since I was *indisposed*, having just returned from Morocco, after attending the Fourth Session of the Conference of State Parties on the UN Convention Against Corruption.

15.11.2011 Upon seeing in the *media* that other Fundamental Rights Applications on the same Bill had been listed to be Supported on 15th November 2011, I sent a Letter to the Registrar of the Supreme Court, together with an Officer of my Office, *confirming to him my indisposition*, and *intimating* that I had requested my said Officer to be present in Court, to know the date on which my aforesaid Application would be listed for Support.

Notwithstanding the above Motion, Medical Certificate and my said Letter, the Registrar of the Supreme Court *telephoned* and informed me, that Chief Justice, Shirani A. Bandaranayake, had *directed* that my Fundamental Rights Application, also be listed for Support on the very next day i.e. 15th November 2011, and he inquired from me, as to whether I could attend the Supreme Court and Support my said Application also on the said day ?

I intimated to him that I had been medically advised to bed rest, and that I had already sent a Medical Certificate, with my Motion, moving to Support my Application in the course of the next week. I requested the Registrar of the Supreme Court to submit my aforesaid Letter and the Medical Certificate to the presiding Judge of the following 5 Judge Bench of the Supreme Court, who were hearing the other Applications.

Justice N.G. Amaratunga,
Justice I. Imam,
Justice R.K.S. Sureshchandra,
Justice Sathya Hettige
Justice Dep, P.C.

All the other Fundamental Rights Applications had been dismissed *in-limine* on 15th November 2011 by the said 5 Judge Bench of the Supreme Court, *presumably* since the said Bill had been certified into law on 11th November 2011 by Your Honour.

The presiding Justice N.G. Amaratunga had announced in Open Court, that a Fundamental Rights Application had also been filed by me, tendering a Medical Certificate, and had directed the Clerk to the Court, to inform my Officer, that I had been permitted to file a Motion and seek a date to Support my aforesaid Fundamental Rights Application.

17.11.2011 - Accordingly, I filed a Motion seeking to support my Fundamental Rights Application SC (FR) No. 534/2011 on 25th November 2011.

On that day, I also filed a separate Application in SC (SD) No. 2/2011 seeking a *review* and *re-examination* of the Special Determination of 24th October 2011, in respect of which Chief Justice Shirani A. Bandaranayake had *minuted* thus –

> '***Any party that had wanted to intervene should have done so at the time, it was taken before the Supreme Court'***.

The foregoing was an ***impossibility***, since the 'Expropriation Bill' had been submitted, as an Urgent Bill, to Chief Justice Shirani A. Bandaranayake on Friday, 21st October 2011, and she had *minuted* the same to be heard on Monday, 24th October 2011, with the intervening weekend holidays, with no citizen having known the same. The said hearing had not even been listed in the List of Cases for Monday, 24th October 2011.

25.11.2011 - I supported on 25th November 2011 my said Fundamental Rights Application SC (FR) No. 534/2011 before the following 3 Judge of the Supreme Court

Justice N.G. Amaratunga,
Justice R.K.S. Sureshchandra
Justice Sathya Hettige

At the very outset, I, on my own, *expressly* admitted that I was not *impugning* or *putting in issue* the 'Expropriation Bill', or the Act, since I had come to know that Your Honour had announced to Parliament on 22nd November 2011 of the certification of the said Bill into law on 11th November 2012, and that thereby I was *ousted* from doing so under Article 80(3) of the Constitution. *viz:*

> "80(3) 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**" (*Emphasis added*)

However, I *expressly* pointed out that I am *impugning* the Special Determination of 24th October 2011, submitting that I was not *ousted* under Article 80(3) of the Constitution from doing so. In such circumstances, I sought and received approval to amend my Petition, and tendered my Amended Petition on 16th December 2011.

It is very *pertinent to note* that my Fundamental Rights Application No. 534/2011, unlike the other Fundamental Rights Applications *dismissed* previously on 15th November 2011, *was not dismissed* on 25th November 2011, *but was entertained by the said Supreme Court Bench*.

16.12.2011 - Accordingly on 16th December 2011, I tendered my Amended Petition, with Notices to be served by the Registrar of the Supreme Court on the Respondents, as had been directed by the Supreme Court previously on 25th November 2011.

The Registrar of the Supreme Court had accordingly issued Notices on the Respondents returnable on 26th January 2012.

18.1.2012 - In the meanwhile, I, by Motion dated 18th October 2012, made an Application under Article 132 of the Constitution to Chief Justice Shirani A. Bandaranayake, seeking that my aforesaid Amended Petition of 16th December 2011 be heard by a Fuller Bench of the Supreme Court, to *review* and *re-examine* the Special Determination of 24th October 2011 on the 'Expropriation Bill', *which had been made in violation of mandatorily deeming provision in Article 123(3) of the Constitution*.

My such Application had been sent directly by the Registrar of the Supreme Court to Chief Justice Shirani A. Bandaranayake, since such Application made under Article 132 of the Constitution, required the consideration *solely* and *exclusively* by the Chief Justice. *viz:* (*Emphasis added*)

> **132**. (1) The several jurisdictions of the Supreme Court shall be ordinarily exercised at Colombo unless the Chief Justice otherwise directs.
>
> (2) The jurisdiction of the Supreme Court may be exercised in different matters at the same time by the several Judges of that Court sitting apart:
>
> Provided that its jurisdiction shall, subject to the provisions of the Constitution, be ordinarily exercised at all times by not less than three Judges of the Court sitting together as the Supreme Court.
>
> (3) **The Chief Justice may** –
>
> (i) of his own motion ; or
> (ii) at the request of two or more Judges hearing any matter; or
> (iii) on the application of a party to any appeal,
>
> proceeding or matter if the question involved is **in the opinion of the Chief Justice one of general and public importance, direct that such appeal, proceeding or matter be heard by a Bench comprising five or more Judges of the Supreme Court**.
>
> (4) The judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority

However, Chief Justice Shirani A. Bandaranayake, without having constituted a Fuller Bench, directed that my said Amended Petition be supported on 9th February 2012 before the same 3 Judge Bench of the Supreme Court, *who had heard my original Application on 25th November 2011*. *viz*:

Justice N.G. Amaratunga,
Justice R.K.S. Sureshchandra
Justice Sathya Hettige

9.2.2012 - Accordingly, my said Fundamental Rights Application SC (FR) No. 534/2011 was listed for Support on 9th February 2012 '*For Leave to Proceed'*, as per the List of Cases issued by the Supreme Court Registry

I made *extensive* submissions, both orally and in writing, and I further *adduced* grounds of '*perceived judicial bias and disqualification'* on the part of Chief Justice Shirani A. Bandaranayake.

> *I annex marked* ***"X"*** *hereto copy of my further Written Submission dated 9.2.2012 on such aforesaid grounds of 'perceived judicial bias and disqualification' on the part of Chief Justice Shirani A. Bandaranayake.*

I *cited* the House of Lords Judgment *re – Pinochet,* as an authority, where a Judgment by the House of Lords had been *rescinded and vacated* by the another Committee of House of Lords, on such grounds of '*perceived judicial bias and disqualification',* since the wife of one of the Lords, namely, Lord Hoffmann of such Committee had been employed by Amnesty International, who had intervened in such Appeal before the House of Lords.

I was informed by presiding Justice N.G. Amaratunga that for a *review and re-examination,* unlike in the UK, as borne out by the aforesaid House of Lords Judgment, the practice in Sri Lanka was that a *review and re-examination* must be by the same Bench, who had made the initial Determination.

Thereupon, *intimating that I was aware of such practice*, I drew attention to my aforesaid Motion made on 18th January 2012 under Article 132 of the Constitution to Chief Justice Shirani A. Bandaranayake, *vis-à-vis,* my said Amended Petition of 16th December 2011, but that it was she who had *minuited* directing that the matter be heard by the Bench presided by Justice N.G. Amaratunga, *who had heard my Application previously*.

I was taken *aghast* when Justice N.G. Amaratunga, whilst acknowledging the aforesaid Minute of Chief Justice Shirani A. Bandaranayake, intimated to me that '*they had been only asked to hear me and not for the grant of Leave to Proceed'*. This was contrary to the fact that my Application had been listed that day '*For Leave to Proceed*'.

Minuting that '*this Bench cannot entertain and deal with my Application'*, my said Application was dismissed by the said Supreme Court Bench presided by Justice N.G. Amaratunga, citing the *dismissal* previously of the other Fundamental Rights Applications on 15th November 2011, notwithstanding my Fundamental Rights Application having been *subsequently entertained* as aforesaid on 25th November 2011, with permission granted for the amendment of my Petition, and Order made to issue Notices on the Respondents !

The aforesaid further Written Submission on '*perceived judicial bias and disqualification'* on the part to Chief Justice Shirani A. Bandaranayake, annexed marked **"X"** hereto was returned to me further *minuting* as follows:

"All papers submitted by the Petitioner in supporting this application to assist the Bench is returned to the Petitioner and those papers shall not form a part of record in this case.

The record consists only of the Petition and the amended petition filed by the Petitioner and no other material is to be considered as a part of the record."

8.5.2012 - I filed Application to *reconsider* the above Fundamental Rights Application No. 534/2011, *annexing* the aforesaid further Written Submission on 9th February 2012 on '*perceived judicial bias and disqualification*' on the part to Chief Justice Shirani A. Bandaranayake marked **"X",** so that the said document would be a part of the record of the Supreme Court. My said Application was refused in the Chambers by Justice N.G. Amaratuga *minuting* that no Application could be entertained in a dismissed case.

18.10.2012 - In the context of the aforesaid advice given to me that for a *review* or *re-examination* I should go before the same Bench, which made the original Determination, and the aforesaid Minute made in the Order of 9th February 2012 that - '*this Bench cannot entertain and deal with my Application*', I made a fresh Application in SC (SD) No. 2/2011 under Article 132 of the Constitution to Chief Justice Shirani Bandaranayake, for a *review* and *re-examination* of the Special Determination on 24th October 2011.

I *pointed out* that the previous Minute made on my Application on 17th December 2011 that I could have appeared on 24th October 2011 was an ***impossibility***, and that the Supreme Court had *precedence* to *review* and *rectifying* its own decisions, and that in the instance of another Special Determination, ***that Your Honour with the concurrence of all party leaders in Parliament had ruled on 9th October 2011, that a bona-fide error in making a Special Determination could and should be rectified***.

I expressly pointed out that in making the impugned Special Determination of 24th October 2011, that the following Supreme Court Bench

Chief Justice Shirani A. Bandaranayake
Justice P.A. Rathnayake and
Justice Chandra Ekanayake

had acted, *without jurisdiction* in contravention of the *entrenched* deeming provision in Article 123(3) of the Constitution; *and that this was a matter of paramount national and public importance* - viz:

"123.(3) In the case of a Bill endorsed as provided in Article 122, **if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution,** and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article."

I asserted that at the *hearing* into the constitutionality of an Urgent Bill, the citizens of the country have no opportunity, whatsoever, of being heard before the Supreme Court. Hence it is due to such very reason that Article 123(3) of the Constitution has an *inbuilt estoppel* on the Supreme Court's *jurisdiction* to determine, as consistent with the Constitution, an Urgent Bill, on the constitutionality of which, the *Supreme Court entertains any doubts*, whatsoever, *in which event, upon the very entertainment of a doubt, **ipso facto** the Urgent Bill is constitutionally deemed to have been determined to be inconsistent with the Constitution.*

I also *adduced* extensively updated additional facts to establish that there existed the premise of '*perceived judicial bias and disqualification'* on the part, mainly of Chief Justice Shirani A. Bandaranayake, and also on the part of Justices P.A. Rathnayake and Chandra Ekanayake.

A copy of my said Application of 18th October 2012 having been forwarded to Your Honour, attention of Your Honour is very respectfully drawn to the averments contained therein on '*perceived judicial bias and disqualification'* on the part of Chief Justice Shirani A. Bandaranayake .

19.10.2012 - My said Application under Article 132 of the Constitution to Chief Justice Shirani A. Bandaranayake had been forwarded by the Deputy Registrar of the Supreme Court to the Listing Judge, Justice K. Sripavan instead of having been forwarded to Chief Justice Shirani A. Bandaranayake.

22.10.2012 - Listing Judge, Justice K. Sripavan, without forwarding the same for the *sole* and *exclusive* consideration by Chief Justice Shirani A. Bandaranayake in terms of Article 132 of the Constitution, in *contravention* thereof had made his own observation *estopping* my such Application, and gone to the extent of *ridiculing* as '**frivolous',** my factual averments on *'perceived judicial bias and disqualification'*.

In addition, Listing Judge K. Sripavan had *minuted* – '**frivolous** objection taken **after a long period of time without a firm foundation',** whereas as aforesaid, I had adduced good, sufficient and valid grounds of *'perceived judicial bias and disqualification'* in supporting my Fundamental Rights Application No. 534/2011 on 9th February 2012 as set out in annex marked **"X"**

Furthermore, the Listing Judge sitting in Chambers had gone on to interpret Article 80(3) of the Constitution, which I am advised, can be done only in Open Court, after hearing the parties showing interest in the matter, in this instance myself, and the Hon. Attorney General, who had been noticed in terms of the Constitution.

At the same time, Listing Judge K. Sripavan had chosen to '*turn a blind eye'* to the *core issue* of my Application of the *contravention* of the *mandatorily deeming provision* of Article 123(3) of the Constitution, which governs Urgent Bills. *This alone warranted the interpretation of Article 80(3) of the Constitution, which is a matter of far more graver importance, than the Applications presently before the Supreme Court referred to hereinafter*.

23.10.2012 - Thereafter Chief Justice Shirani A. Bandaranayake had *minuted* that she agreed with the observations of Justice K. Sripavan, '*thereby acting as a Judge in her own cause'*, *vis-à-vis*, the '*perceived judicial bias and disqualification'*, on her part, as '**frivolous',** and had forwarded the same for the observations of Justices N.G. Amaratunga, P.A. Rathnayake and Chandra Ekanayake.

24.10.2012 - Justice N.G. Amaratunga had agreed with the above observation of Chief Justice Shirani A. Bandaranayake and Listing Judge Justice K. Sripavan, stating there was no legal basis to entertain my said Application on 18th October 2012.

The foregoing renders, as a *fiction* and *nullity*, the direction made on 9th February 2012 by Justice N.G. Amaratunga, that an Application for a *review* and *re-examination* should be considered by the same Bench, which had made the initial Special Determination.

25.10.2012 - Justice P.A. Rathnayake had also agreed with the foregoing observations of Chief Justice Shirani A. Bandaranayake, Justice N.G. Amaratunga and K. Sripavan, thereby also '*acting as a Judge in his own cause'*, *vis-à-vis*, the '*perceived judicial bias and disqualification'*, on his part averred in my Petition.

07.11.2012 - Justice Chandra Ekanayake too had agreed with the foregoing observations of Chief Justice Shirani A. Bandaranayake and Justices N.G. Amaratunga, P.A. Rathnayake and K. Sripaven, thereby also '*acting as a Judge in her own cause'*, *vis-à-vis*, the '*perceived judicial bias and disqualification'*, on her part averred in my Petition.

I, myself, together with one member of my Office, went to the Supreme Court Registry on 20th November 2012, and personally verified the *correctness* of the following Minutes from the original Case Record.

"Hon. K. Sripavan, J

AAL for the Petitioner files Motion dated 18.10.2012 with :

1. Petition and Schedules "X", "Y" & "Z"
2. Documents
3. Affidavit
4. Special Affidavit in support of the facts contained in "X"

AAL further moves Your Lordship's Court be pleased that this Application be taken for Hearing on 16th, 19th & 20th November 2012, for a review and re-examination of Determination made on 24.10.2011. Submitted for Your Lordship's directions please.

DRSC
19.10.2012

Hon. Chief Justice

The Petitioner by Motion dated 18.10.2012 seeks to review and re-examine the Special Determination dated 24.10.2011. In terms of paragraph 9(h) of the Petition, Hon. Speaker has certified the Bill on 11.11.2011. Upon certification being endorsed, the Bill becomes law and in terms of Article 80(3), the validity of such Act shall not be called in question thereafter upon any ground whatsoever.

This Article (Art 80 (3)) must be interpreted according to its true purpose and intent as disclosed by the phraseology in its natural signification.

If a party perceives "judicial bias & disqualification" against a member of the Bench, such party should have raised objections at the time the Bill was taken up for hearing. If no Objection is taken at the former stage, that party cannot thereafter complain of the matter disclose, as giving rise to a real danger of bias. Any **frivolous** objection taken **after a long period of time without a firm foundation** would not only impede the due administration of justice, but also undermines the work of Court. (*Emphasis added*)

In view of the foregoing, I do not see any legal basis to entertain the Motion dated 18.10.2012. The Motion may be rejected in limine.

Sgd. Sripavan, J
22.10.2012

Hon. Amaratunga, J, Hon. Ratnayake, PC, J, Hon. Ekanayake, J.

I agree with the Observations of Hon. Sripavan, J. The Bill in question was considered by this Court on 24.10.2011 and the certificate by the Hon. Speaker had taken place on 11.11.2011. In terms of Article 80(3) of the Constitution the validly of such an Act shall not be questioned on any ground whatsoever.

No Objection was raised on any one of the three Judges who heard the matter on 24.10.2011. For the aforementioned reasons the Motion dated 18.10.2012 should be rejected in limine.

Pls. consider the said Motion and tender your observations/concurrence.

Sgd. Chief Justice
23.10.2012

Hon. The Chief Justice

I agree with the observation of Your Ladyship and Hon. Sripavan J, set out above. Since there is no legal basis to entertain the Motion dated 18.10.2012, it should be rejected in limine. The Registrar of the Supreme Court should be directed not to entertain any further Motions/ Applications / Petitions in respect of this matter.

Sgd. Amaratunga, J
24.10.2012.

Hon. The Chief Justice

I agree with the observations and recommendations of Your Ladyship, Hon. Amaratunga J, and Hon. Sripavan, J.

Sgd. P.A. Ratnayake, J
25.10.2012

Hon. The Chief Justice

I agree with the observations and directions embodied in Your Ladyship's Order 23/10/2012, Hon. Justice Amaratunga's Order dated 24/10/2012, Hon. Justice Sripavan's Order dated 22/10/2012 and Hon. Justice P.A. Ratnayake's Order dated 25/10/2012.

Sgd. Ekanayake, J
7.11.2012 "

Upon reading the foregoing Minutes, *appallingly baffled*, in that, even in a *glaring* instance of *national significance* and *public importance*, when the Supreme Court had made a Special Determination on an Urgent Bill, *without jurisdiction ultra-vires* the *mandatorily deeming* provision in Article 123(3) of the Constitution, which *reigns supreme*, and as a consequence thereof, a Bill had been passed by Parliament and certified into law, *ironically* no means of *judicial redress or remedy*, whatsoever, was available to a party *affected* by such *patently unconstitutional* Special Determination made by the Supreme Court, that too *without constitutional jurisdiction; thereby reinforcing the necessity for the interpretation of Article 80(3) of the Constitution* being of greater importance than Article 107(3) of the Constitution.

In my said Petition dated 18th October 2012, I had, *inter-alia*, cited the following from the Supreme Court Judgment in SC Application Nos. 66 and 67 of 1995 in Jeyaraj Fernandopulle Vs Premachandra De Silva and Others by a 5 Judge Bench of the Supreme Court – *viz*:

- "The Supreme Court has inherent powers to correct decisions made *per-incuriam*. A decision will be regarded as given *per-incuriam* if it was in ignorance of some inconsistent statute or binding decision – wherefore some part of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong."

- "An order made on wrong facts given to the prejudice of a party will be set aside by way of remedying the injustice caused."

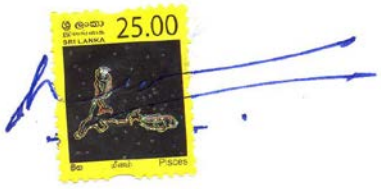
The aforesaid Resolution to impeach Chief Justice Shirani Bandaranayake, on which Your Honour has appointed a Parliamentary Select Committee, contains Charges, including on the very *perceived judicial bias and disqualification'* which I had adduced before the Supreme Court, as aforesaid on 9th February 2012, and later morefully on 18th October 2012.

Consequently, several Writ Applications had been made to the Court of Appeal and several Fundamental Rights Applications had been filed in the Supreme Court on the said matter of Resolution to impeach Chief Justice Shirani Bandaranayake. The Court of Appeal reportedly had referred under Article 125 of the Constitution, the said Applications to the Supreme Court for interpretation of Article 107(3) of the Constitution.

As reported in the media, a 3 Judge Bench of the Supreme Court, including Justices N.G. Amaratunga and K. Sripavan, I verily believe constituted by Chief Justice Shirani Bandaranayake, are reportedly hearing the said Applications. Under Articles 129 and 132 of the Constitution it is imperative that the matters of national and public importance be heard by a Fuller Bench of the Supreme Court. In October 2002 it was a 7 Judge Bench of the Supreme Court which *interpreted* the Constitution.

Justices N.G. Amaratunga and K. Sripavan, had already pre-judged, as **frivolous'**, in Chambers, *without having heard me*, my averments on '*perceived judicial bias and disqualification'* on the part of Chief Justice Shirani Bandaranayake, which is a premise for some of the Charges contained in the aforesaid Resolution to impeach Chief Justice Shirani Bandaranayake. Hence do they not stand *disqualified* from hearing the aforesaid Applications ?

The foregoing Affidavit having been read and understood by the Affirmant within-named, affirmed to and signed at Colombo on this 5th day of December 2012



BEFORE ME

S. NAVARATNAM
Justice of the Peace (All Island)
No. 25/10, Wipulasena Mawatha,
Colombo 10.
Reg. No. CM/JP/AU/168
05/12/2012

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167/4 Vipulasena Mawatha, Colombo 10. Sri Lanka
Tel: 94-11-2696814, 94-11-2686364, 94-11-4715988
Fax: 94-11-2697134 Kandy Tel/Fax: 94-81-4470442
E-mail: consultants21@gmail.com
Website: www.consultants21.com

BY HAND

5th January 2013

Hon. Chamal Rajapaksa
Speaker of Parliament
Parliament of Sri Lanka
Sri Jayewardenepura
Kotte.

Dear Hon. Speaker,

Supreme Court Order of 1st January 2013
interpreting Article 107(3) of the Constitution

I write further to my Letter of 5th December 2012 forwarding my Affidavit of the same date, *inter-alia, vis-à-vis,* the cover-up by some of the Justices of the Supreme Court of the charges I had made against the conduct and actions of the Chief Justice and their disqualification as a consequence thereof to hear matters pertaining to the Chief Justice. My said Letter of 5th December 2012 was before the hearing on 13th and 14th December 2012 on the aforementioned '*interpretation*' by the Supreme Court.

Your Honour, *with the concurrence of the Leaders of all Political Parties in Parliament*, issued a Ruling on 9th October 2012, on the *contravention* of the mandatory provisions of Article 121 of the Constitution in a Special Determination made by the Chief Justice on a Bill. In the said Ruling, Your Honour, *inter-alia*, ruled that the Supreme Court was requested to give earnest consideration to *re-visit* the said Special Determination, and that it was necessary, as well, to rectify a *bona-fide* error made by the Supreme Court.

In such circumstances, with notice to Your Honour, I filed Petition dated 18th October 2012 under and in terms of Article 132(3) of the Constitution for a *review* and *re-examination* of a Special Determination made, *without jurisdiction*, *ultra-vires* the expressly mandated deeming provisions in Article 123(3) of the Constitution. I also adduced facts in *extenso* of improprieties and/or misconduct and/or judicial bias disqualifying the Chief Justice. Some of the matters in my Petition *coincidently* had become grounds for charges in the Impeachment Motion against the Chief Justice, entertained by Your Honour on 1st November 2012.

In addition, by the said Special Determination made by the Chief Justice, Article 157 of the Constitution, which affords protection to foreign investments in terms of *international treaties* passed by the Parliament of Sri Lanka with a 2/3rd majority, and thereby having the force of law in Sri Lanka, was *over-written* by the Chief Justice, in perversely determining, that such foreign investments could be *acquired* by the State in the *public interest*, whereas Article 157 of the Constitution specifically stipulates that it was only possible *in the interest of national security*. **The Supreme Court *had no constitutional right or capacity to have so amended the Constitution of the Republic*.**

I was appalled that, *relying on Your Honour's aforesaid Ruling*, my aforesaid Application made under Article 132(3) of the Constitution, which had to be considered *solely* by the Chief Justice, *and not by any other Justice*, had however in *contravention* of Article 132(3) had been considered by the Listing Judge, Justice K. Sripavan. I myself, together with one member of my Office, went to the Supreme Court Registry on 20th November 2012, and personally verified the *correctness* of the following Minutes from the original Case Record. (*Emphasis added*)

"**Hon. K. Sripavan, J**

AAL for the Petitioner files Motion dated 18.10.2012 with:

1. Petition and Schedules "X", "Y" & "Z"
2. Documents
3. Affidavit
4. Special Affidavit in support of the facts contained in "X"

AAL further moves Your Lordship's Court be pleased that this Application be taken for Hearing on 16th, 19th & 20th November 2012, for a review and re-examination of Determination made on 24.10.2011. Submitted for Your Lordship's directions please.

DRSC
19.10.2012

Hon. Chief Justice

The Petitioner by Motion dated 18.10.2012 seeks to review and re-examine the Special Determination dated 24.10.2011. In terms of paragraph 9(h) of the Petition, Hon. Speaker has certified the Bill on 11.11.2011. Upon certification being endorsed, the Bill becomes law and in terms of Article 80(3), the validity of such Act shall not be called in question thereafter upon any ground whatsoever.

This Article (Art 80 (3)) must be interpreted according to its true purpose and intent as disclosed by the phraseology in its natural signification.

If a party perceives "judicial bias & disqualification" against a member of the Bench, such party should have raised objections at the time the Bill was taken up for hearing. If no Objection is taken at the former stage, that party cannot thereafter complain of the matter disclose, as giving rise to a real danger of bias. Any frivolous objection taken after a long period of time without a firm foundation would not only impede the due administration of justice, but also undermines the work of Court.

In view of the foregoing, **I do not see any legal basis to entertain the Motion dated 18.10.2012. The Motion may be rejected in limine**.

Sgd. Sripavan, J
22.10.2012

Hon. Amaratunga, J, Hon. Ratnayake, PC, J, Hon. Ekanayake, J.

I agree with the Observations of Hon. Sripavan, J. The Bill in question was considered by this Court on 24.10.2011 and the certificate by the Hon. Speaker had taken place on 11.11.2011. In terms of Article 80(3) of the Constitution the validly of such an Act shall not be questioned on any ground whatsoever.

No Objection was raised on any one of the three Judges who heard the matter on 24.10.2011.
For the aforementioned reasons the Motion dated 18.10.2012 should be rejected in limine.

Pls. consider the said Motion and tender your observations/concurrence.

Sgd. Chief Justice
23.10.2012

Hon. The Chief Justice

I agree with the observation of Your Ladyship and Hon. Sripavan J, set out above. Since there is no legal basis to entertain the Motion dated 18.10.2012, it should be rejected in limine. The Registrar of the Supreme Court should be directed not to entertain any further Motions/ Applications / Petitions in respect of this matter.

Sgd. Amaratunga, J
24.10.2012.

Hon. The Chief Justice

I agree with the observations and recommendations of Your Ladyship, Hon. Amaratunga J, and Hon. Sripavan, J.

Sgd. P.A. Ratnayake, J
25.10.2012

Hon. The Chief Justice

I agree with the observations and directions embodied in Your Ladyship's Order 23/10/2012, Hon. Justice Amaratunga's Order dated 24/10/2012, Hon. Justice Sripavan's Order dated 22/10/2012 and Hon. Justice P.A. Ratnayake's Order dated 25/10/2012.

Sgd. Ekanayake, J
7.11.2012 "

My said Petition and the Minutes made thereon had been called for by the Parliamentary Select Committee on 4th December 2012, as recorded in Column 1 on page 1437 of the Report of the said Committee, *prior to the Chief Justice and her Lawyers leaving the proceedings of the Committee in the afternoon of 6th December 2012 – vide* Column 2 on page 1505 of the said Report.

From the aforesaid Supreme Court Minutes it would be noted that Justice K. Sripavan had deemed as **'frivolous'** the charges I had made against the Chief Justice, also stating they were made *belatedly*, whereas I had submitted similar charges, **as far back as 9th February 2012**, before a Supreme Court Bench presided by Justice N.G. Amaratunga, *who refused to accept the same*, minuting as follows:

> "All papers submitted by the Petitioner in supporting this application to assist the Bench is returned to the Petitioner and those papers shall not form a part of record in this case.
>
> The record consists only of the Petition and the amended petition filed by the Petitioner and no other material is to be considered as a part of the record."

As evidenced by the Minutes of Justice K. Sripavan he had ***precluded*** my Application being heard. He had proceeded to interpret Article 80(3) of the Constitution, *regardless* of Your Honour's Ruling made previously on 9th October 2012. He had done so sitting alone in his Chambers, **whereas interpretation of the Constitution, which is a matter of general and public importance, in terms of Articles 129 and 132 have to be by a Bench of 5 or more Judges of the Supreme Court, as had been the practice**.

A 3 Judge Bench presided by Justices N.G. Amaratunga issued Notice on the Respondents on 25th November 2011 in a Fundamental Rights Application I had made *impugning* the Special Determination of 24th October 2011 made by the Chief Justice, *without jurisdiction* and *ultra-vires* Article 123 (3) of the Constitution, and the hearing into which was *manipulatively 'scuttled'* by the Chief Justice, ***in the face of averments made against her,*** and I believe also due to '*extraneous'* reasons.

Whilst having minuted that my aforesaid Application made in the public interest on a matter of general and public importance '*not only impeded the due administration of justice, but also undermines the work of Court'*, the *calamity* created with several litigations concerning the personal interest of the Chief Justice and the *expeditious* hearing thereof *had apparently been of no concern to Justice K. Sripavan.*

The Chief Justice had endorsed the Minutes of Justice K. Sripavan, and so had Justices N.G. Amaratunga, P.A. Rathnayake and Chandra Ekanayake, whereby the said Justices **had prejudicially prejudged** the charges made against the Chief Justice, even without having heard me, and thus they **stood disqualified** from hearing any matter that concerned the Chief Justice.

The matter of interpretation of Article 107(3) of the Constitution had been referred to the Supreme Court by the Court of Appeal in terms of Article 125 of the Constitution, on which the aforementioned Order dated 1st January 2013 of the Supreme Court was delivered through the Court of Appeal on 3rd January 2013. The said reference had been made arising from 7 Writ Applications made against the impeachment of the Chief Justice, making the Members of the Parliamentary Select Committee, appointed by Your Honour, as Respondents.

Since the aforesaid Writ Applications concerned the impeachment of the Chief Justice, the Chief Justice and the other aforementioned Justices were **disqualified** from having dealt with the said matter in the Supreme Court. Nevertheless a Bench comprising Justices N.G. Amaratugna, K. Sripavan and Priyasath Dep, *presumably nominated by the Chief Justice*, had made the aforementioned Order interpreting Article 107(3) of the Constitution.

It is of *significance* that at paragraph 2 of page 5 of the aforementioned Supreme Court Order of 1st January 2013 it recorded thus – '*The Court specifically inquired from all parties including those who sought to intervene whether anyone has any objection to this Bench hearing this references, but there was no objection by any party, including those who sought intervention'*. The parties before Court were **unaware** of the aforesaid **disqualification**, and in any case, such disqualification could not be **so *cured*, but stood**.

Though it was a 27 page Order, the *crux* of the Order are in the last paragraph on page 23 going on to page 24, and paragraph 2 on page 26 *viz*:

> "In a State ruled by a Constitution based on the rule of Law, no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such finding or decision. Such legal power can be conferred on such court, tribunal or body only by an Act of Parliament which is "law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by "law" "
>
> "In view of the reasons we have set out above we answer the question referred to us, as set out at the beginning of this Order, as follows:"
>
> > "It is **mandatory** under Article 107(3) of the Constitution for the Parliament to provide by law the matters relating to the forum before which the allegations are to be proved, the mode of proof. Burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity" *(Emphasis added)*

For easy reference of Your Honour, set out below are Articles 4(c) and 107(3) of the Constitution, and the Interpretation Article 170 of the Constitution defining 'law' to mean any Act of Parliament. (*Emphasis added*)

> "4. The Sovereignty of the People shall be exercised and enjoyed in the following manner :-
>
> (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or **recognized, by the Constitution**, or **created and established by law**, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law; "

"107. (3) Parliament shall by law **or by Standing Orders** provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative."

"170. In the Constitution –

"law" means any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council;

By the foregoing interpretation by the 3 Judge Bench of the Supreme Court, the said Bench had ***expunged*** and/or ***suspended*** from the Constitution the words '**or by Standing Orders',** *which the Supreme Court* ***had no constitutional authority or fiat to do***, nor even the Parliament. This is a prohibition in terms of Article 75 of the Constitution, as per the Special Determination in October 2002 made by a 7 Judge Bench of the Supreme Court on the *aborted* 19th Amendment to the Constitution *viz*: Article 75 *(Emphasis added)*

"75. Parliament shall have 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 also enacts a new Constitution to replace it "

Furthermore, as to how it is '**mandatory'** under Article 107(3) of the Constitution for the Parliament to provide by '**law'** ….., as interpreted by the said 3 Judge Bench of the Supreme Court, defies the independence of the Legislature, which cannot be **mandated** except by the Constitution or by the People at a Referendum, whereas the Constitution has specifically stipulated the words by law **or by Standing Orders**.

Such interpretation had been made stipulating as **'mandatory'** one limb of the Constitution, whilst *ignoring the other* ***optional*** *limb*, on the contrary my aforesaid Application made on 18th October 2012 on the matter of the Supreme Court having acted *without jurisdiction*, *ultra-vires* Article 123(3) of the Constitution *had not even been heard*, but **suppressed** as revealed by the aforesaid Supreme Court Minutes made by the Supreme Court.

Your Honour's attention is specifically drawn to Article 140 of the Constitution, which *empowers* the Court of Appeal to issue Writs. (*Emphasis added*)

"140**.** Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, **according to law**, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person:

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal "

In the context of the aforesaid interpretation by the 3 Judge Bench of the Supreme Court on a reference on a matter, arising out of Writ Applications against Members of the Parliamentary Select Committee appointed by Your Honour, attention is drawn to the words '**according to law'** in Article 140 of the Constitution. **There is no Act of Parliament enacted empowering the Court of Appeal to issue Writs**, which the 3 Judge Bench of the Supreme Court *had curiously failed to take cognisance of.*

In such circumstances, the Court of Appeal over the years had adopted the application of the Common Law in UK for the issuance of Writs in Sri Lanka*. Is such Court of Appeal 'decided practice' thus deemed to be 'superior', than even the Standing Orders made by Parliament as stipulated in the Constitution ?* Under the Common Law of UK, no Writs or Orders, whatsoever are issued against the House of Commons, its Committees or the Speaker. Hence, the same should apply in Sri Lanka in the circumstances of *adopting* the Common Law of UK.

In the Writ Application filed by the Chief Justice, Notices had been issued on Your Honour and the Members of the Parliamentary Select Committee by the Court of Appeal, citing the case of *Mark Antony Lyster Bracegirdle 39 NLR 193 @ 205*, which is on an issuance of a Writ against the then Governor, who was exercising executive power, and not against the Parliament i.e. the House of Commons of UK. The Court of Appeal has failed to recognise the difference between the *executive* and the *legislature*.

Cited below are Articles 129 and 132 of the Constitution. (*Emphasis added)*

"129. (1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.

(2) Where the Speaker refers to the Supreme Court for inquiry and report all or any of the allegation or allegations, as the case may be, contained in any such resolution as is referred to in Article 38 (2) (a), the Supreme Court shall in accordance with Article 38 (2) (d) inquire into such allegation or allegations and shall report its determination to the Speaker within two months of the date of reference.

(3) Such opinion, determination and report shall be expressed **after consideration by at least five Judges of the Supreme Court,** of whom, unless he otherwise directs, the Chief Justice shall be one.

(4) Every proceeding under paragraph (1) of this Article shall be held in private unless the Court for special reasons otherwise directs. "

"132. (1) The several jurisdictions of the Supreme Court shall be ordinarily exercised at Colombo unless the Chief Justice otherwise directs.

(2) The jurisdiction of the Supreme Court may be exercised in different matters at the same time by the several Judges of that Court sitting apart:

Provided that its jurisdiction shall, subject to the provisions of the Constitution, be ordinarily exercised at all times by not less than three Judges of the Court sitting together as the Supreme Court.

(3) The Chief Justice may –

(i) of his own motion ; or
(ii) at the request of two or more Judges hearing any matter; or
(iii) on the application of a party to any appeal,

proceeding or matter if the question involved is in the opinion of the Chief Justice one of general and public importance, direct that such appeal, proceeding or matter be heard by a Bench **comprising five or more Judges of the Supreme Court**.

(4) The judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority. ”

It would be noted that as per Article 129, an Opinion on a Law requested by the President of the Republic has to be after consideration by at least 5 Judges of the Supreme Court. The Constitution is the **supreme law** of the country, and hence a Bench of 5 or more Judges of the Supreme Court should make constitutional interpretations, and not a Bench of 3 Judges, and in any case 2 of whom **stood disqualified** from hearing such matter; and thus and thereby the said interpretation is **questionable,** and its *standing would be in issue*; moreso in the context of being in relation to Writ Applications against the Hon. Speaker and Members of a Parliamentary Select Committee, as dealt with hereinbefore in reference to Article 140 of the Constitution.

Yours respectfully,

Nihal Sri Ameresekere