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**EXPLANATORY STATEMENT**  
**“URGENT BILL” TITLED “THE 18<sup>TH</sup> AMENDMENT**  
**TO THE CONSTITUTION”**

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**Introduction:**

This is to accompany the motion of several members of the BASL annexed thereto, in explanation of the legal basis upon which it is being forwarded, to be tabled at an emergency meeting of the BASL in terms of its Constitution, for immediate ratification and formal resolution; in order to give effect to the concerns as formulated morefully in the proceeding paragraphs and the “motion” and “draft resolution” annexed hereto, as a matter of urgency.

The preamble to the Constitution of the Republic sets out the “**Intangible heritage of the people of Sri Lanka-**

*“... assuring to all peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA”*

A few identified inconsistencies will be highlighted herein in order to establish that the urgent Bill titled 18<sup>th</sup> Amendment to the Constitution [*hereinafter referred to as the Bill*] *in toto* would require a special majority of Parliament together with the approval of the people at a referendum if it is to preserve this intangible heritage.

**The Proposed Amendments (in brief):**

The Bill titled 18<sup>th</sup> Amendment to the Constitution (the “Bill”) envisages, *inter alia*,

- a) the removal of the two-term limit imposed on a person who has held the office of President, by *Article 31(2)*,
- b) to abolish the Constitutional Council and set up a Parliamentary Council whose observations would be sought in making appointments to the offices and Commissioners mentioned in the 17<sup>th</sup> Amendment;
- c) to take away certain powers of the Elections Commission;
- d) the inclusion of several provisions of a transitional character;
- e) to repeal *Chapter VIIA* and amendment to *Article 107* of the Constitution through the provisions in *Clause 4*, which would greatly damage the independence of the Judiciary;
- f) to amend *Article 155G*, which is in conflict with Article 55. This will have an impact of diminishing the independence of the Police

**1. The Bill in toto undemocratic & thus inconsistent with Article 1:**

- (a) Having regard to the effect of the proposed Amendment, the norms governing democracy encapsulated in *Article 1* of the Constitution are infringed and therefore the Amendment requires approval by the People at a Referendum for amongst others, the following reasons;
- i.* By virtue of *Clause 2(2)* of the Bill, the Incumbent President, at the expiry of 4 years of commencement of every term, would come forward as a candidate whilst holding the Presidency and whilst discharging executive powers;
  - ii.* By virtue of *Clause 3(1)* if the Bill, the Executive President can also attend Parliament and enjoy all Parliamentary privileges, but is **not liable for any breach** of the said privileges;
  - iii.* The Civil Service and the Police, which were protected under the 17<sup>th</sup> Amendment from political interference, have been completely removed, making the entire Civil Service vulnerable to interferences by the Executive **at will** and **without safe guards**;
  - iv.* The safeguards that were provided to ensure integrity of the electoral process have been removed under *Clause 14* of the Amendment exposing the Public Service and public resources for inexplicable abuses

**2. Tinkering with 17<sup>th</sup> Amendment Infringes on Article 3 of the Constitution- Clause 5**

- (a) The Hon. Attorney General was heard to say (during the hearing) that the rationale of the present Amendment is to ensure that the Constitutional Council (Now, Parliamentary Council) would consist of only Parliamentarians and not outsiders. However, *Clause 5* therein, inserting the new *Article 41(A)* makes it possible for the President to make all appointments specified in Schedule I and II of *Article 41(A)*, without any scrutiny whatsoever. This means that the President would make these appointments at his pleasure and none of these appointments can be challenged in a Court of Law by virtue of *Article 35* of the Constitution;
- (b) It is not impractical to assume that the observations of the Parliamentary Council be totally ignored by the President and his powers will also extend to the appointments to Commissions including the Public Service Commission

### 3. Making Electoral Process Unequal – Clause 14 Inconsistent with Article 3

- (a) The proposed Amendment to *Article 104* has a chilling effect on the integrity of the election process and franchise. The powers of the Election Commissioner to ensure a suitable environment for a clean election and equal suffrage had been guaranteed under *Article 104B*, whereby the Election Commissioner had authority to give appropriate directions to prevent abuse of State resources, State employees and the abuse of powers by the authorities that has direct and/or indirect effect on the elections;
- (b) Conduct of elections is not only a matter of constitutional importance but also a matter of International Human Rights framework, *Article 25* of the International Covenant on Civil and Political Rights, [hereinafter referred to as ICCPR] requires that every citizen of a State Party should ensure, “genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”.
- (c) In order to conduct free and fair elections, the independence of the Commissioner of Elections and the ability of the Elections Commissioner to control the electoral process is of fundamental importance. [*Thavaneethan Vs Dayananda Dissanayake Commissioner of Elections and Others 2001 1 SLR 177*]
- (d) As decided by Their Lordships’ of the Supreme Court, in *Karunathilaka and Another V. Dayananda Dissanayake, Commissioner of Elections And Others 1999 1 SLR 157 at 188* his Lordship Justice Mark Fernando stated “that the Commissioner of Elections has such implied powers and duties as are necessary to ensure that voting is free, equal and secret.”
- (e) The suggested Amendment has the effect of curtailing the total powers of the Commissioner, resulting in exposing the Public Service and public assets for abuse during elections. This will not only affect the Public Finance but also makes an election unequal, unfair and partial;
- (f) Further, right to vote is recognised as part of the Freedom of Expression as recognised in *Karunathilaka and Another V. Dayananda Dissanayake, Commissioner of Elections And Others 1999 1 SLR 157* and therefore the proposed Amendment has a chilling effect no the total electoral process including the Freedom of Expression as guaranteed by *Article 14(a)* of the Constitution;
- (g) Therefore the proposed Amendment in *Clause 14* is inconsistent with *Article 3* of the Constitution requiring the Amendment to be passed by the People at a referendum.

#### 4. Proposed bill abdicates judicial powers

- (a) Removal of two terms of the President needs to be understood in the backdrop of the Presidential powers and immunity given to the President under *Article 35*.
- (b) Immunity has been given to the President from suit, because there is a limitation of Presidential term. Removal of such limitation also extends the effect of *Article 35*, which deprives the court of its judicial power over the Presidential action.
- (c) Thus, we submit that such extension takes away the judicial power of the people enshrined in *Article 3* read with *Article 4 (c)*, and substituting judicial power with legislative judgement on litigation. Thus, the bill is inconsistent with *Article 3* of the Constitution.

#### 5. An unfettered Presidency - Clause 2 & 5

- (a) As per *Article 4(b)* of the Constitution the President exercises the executive power of the people but like every organ of the government exercises power as given by the Constitution. Intrinsic in that exercise of power are the checks which have been built into such exercise by the Constitution itself;
- (b) Such limitations are those which are necessary to ensure that the executive acts within boundaries and to ensure that the powers of the executive Presidency do not go unchecked. **In such circumstances the term limit on the Presidency is itself a check imposed on the exercise of executive power; What the Bill seeks to do is to keep the President's powers intact while at the same time removing all perceived obstacles to the exercise of executive power**
- (c) *Clause 2 & 5* of the Bill have the effect of removing the limit on the President's term of office as well as removing the restrictions on the exercise of his power would affect the manner in which the executive power of the people is exercised and would therefore impinge on *Article 3* of the Constitution.

#### 6. Amendment of Chapter XVIIA of the Constitution - Clause 21

- a) According to *Article 154G (2)* every Bill for the amendment of Chapter XVII must be referred to each of the Provincial Councils;
  - b) *Clause 21* of the 18<sup>th</sup> Amendment Bill seeks to amend *Article 154R*, which is part of Chapter XVIIA. The Bill has not been referred to the Provincial Councils.
7. For the above reasons amongst others, the 18<sup>th</sup> Amendment to the Constitution Bill requires approval by the People at a referendum.