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

*In the matter of an application under
Article 121 of the Constitution against a
Bill titled "Twentieth Amendment to the
Constitution"*

Udaya Prabath Gammanpila
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Petitioner-Respondent

S.C. (SD) No: 29/2018

- VS -

Centre for Policy Alternatives
(Guarantee) Ltd.

Intervient – Petitioner

Paikiasothy Saravanamuttu

Intervient – Petitioner

Gamini Viyangoda

Intervient – Petitioner

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

Respondent-Respondent

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

WRITTEN SUBMISSIONS

ON BEHALF OF THE ABOVE NAMED INTERVENIENT-PETITIONERS

BACKGROUND

1. The jurisdiction of Your Lordships' Court has been invoked to determine whether the Private Member's Bill titled 'the Twentieth Amendment to the Constitution' requires to be placed before the People at a Referendum, prior to being enacted.

2. As the Bill is described in the long title as being for the amendment of the Constitution, the ONLY question before Your Lordships' Court is whether it requires a Referendum **in view of the provisions of Article 83** (vide **Article 120(a)**).

3. For the reasons set out in these submissions, it will be *inter alia* contended that:
 - The only question to be decided in these proceedings is whether a referendum is required or not;
 - The basic structure doctrine does not apply in Sri Lanka;
 - The transference of Executive Power **within** the Executive organ / branch will not prejudicially affect the executive power of the People and / or the sovereignty of the People;
 - There is no violation of the franchise of the People and / or Article 4(e) of the Constitution;
 - In any event the proposed amendments will not violate the franchise of the People as contained in Article 3;
 - The Bill as a whole and in its individual clauses, has no prejudicial impact on the sovereignty of the People, and in fact has a net positive effect on the sovereignty of the People;
 - The Bill as a whole, and in its individual clauses, is not inconsistent with any Article of the Constitution set out in Article 83;
 - A referendum is not required in respect of the Twentieth Amendment Bill.

4. These submissions will deal with the following issues which arose during the course of submissions:
- (1) The Jurisdiction of Your Lordships' Court in this matter (**pages 3-5**);
 - (2) Basic Structure Doctrine (**pages 5-8**);
 - (3) The Relationship between Articles 3 and 4 of the Constitution (**pages 8-16**);
 - (4) Transfer of Executive Power (**pages 17-24**);
 - (5) Election of the President by Parliament (**pages 24-28**);
 - (6) Envisaged Election Process (**pages 29-34**);
 - (7) Provisions Pertaining to Disciplinary Action against Members of Parliament (**pages 34-37**);
 - (8) Unitary State (**page 38**).

(1) THE JURISDICTION OF YOUR LORDSHIPS' COURT

5. **Article 120 of the Constitution** *inter alia* provides that:

The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution

Provided that –

(a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;

6. Therefore in the instant proceedings the ONLY question whether Your Lordships' Court can determine is whether the Bill, or any provision thereof, requires the approval of the People at a Referendum **by virtue of the provisions of Article 83.**
7. **Article 83** provides:
- Notwithstanding anything to the contrary in the provisions of Article 82-*
- (a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or of this Article, and*
- (b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over six years. Bills inconsistent with the Constitution.*
- shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80*
8. Your Lordships' Court would appreciate that the ONLY Articles entrenched are Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or 83 and to a limited extent Articles 30(2) and 62(2).
9. In other words, the People have chosen to permit, and have mandated, the legislature to make constitutional amendments, save and except those affecting the aforesaid Articles, and as such the issue of referring the instant Bill for a Referendum will not arise.

10. It is further submitted that the list of Articles contained in Article 83 should be interpreted narrowly, as the present Constitution itself has not been passed by way of a referendum. Except for the limited Articles given special protection through Article 83, logical interpretation would suggest that it should be possible to amend the Constitution in the same manner that it is adopted.
11. As held by Your Lordships' Court in **In Re The Seventeenth Amendment To The Constitution, S.C Special Determination No. 8/2000 at page 218:**
- It would indeed be illogical to contend that the Amendment which was introduced only with a special majority without submission to a Referendum could be repealed only if it is submitted to a Referendum.*

(2) **BASIC STRUCTURE DOCTRINE**

12. Some of the Petitioners sought to argue that provisions not included in Article 83, should be read into Article 83 since they form part of the Basic Structure of the Constitution.
13. The Petitioners relied on the Indian case of **Kesavanda Bharathi v State of Kerala (1973) 4 SCC 225** which was cited in the dissenting opinion of Justice Wanasundara in the determination on the 13th Amendment to the Constitution.
14. It is however submitted that the Sri Lankan Constitution is materially different to that of India. The Constitution of India has no entrenched provisions, and the provisions judicially pronounced upon to be the basic structure can never be amended, even with the mandate of the People.

15. On the other hand, in Sri Lanka, the Articles that fall within Article 83 can only be amended through a special procedure. Further, the Constitution itself recognizes that the entirety of the Constitution can be repealed and replaced (Article 82(2), Article 75(b)), thus demonstrating that there is no basic structure as exists in Indian Constitutional Law.
16. It is further submitted that the sovereign People have enacted the Constitution, and therein provided that ***in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83***
17. Further, since the Constitution itself recognizes the manner in which the Constitution can be amended, AND, prevents the amending of Article 83 save and except by a Referendum, it is submitted that Your Lordships' Court will not read-in additional Articles into Article 83, and thereby judicially amend Article 83. Even the Legislature which is supreme in the Legislative sphere, is barred from doing so, save and except by a Referendum.
18. While His Lordship Justice Ranasinghe agreed with Sharvananda CJ, Colin-Thome J, Atukorale J and Tambiah J on all other aspects, on the question of Article 83, he held that ***(In Re the Thirteenth Amendment to the Constitution, [1987] 2 Sri L.R. 312, 385 – 386):***
- In the Constitution all the articles which should be amended only by a 2/3 majority and by a Referendum, have been grouped together in Article 83. In Article 83 are included all the Articles of the Constitution which are entrenched in that special way; and, in order to prevent an amendment of Article 83 itself in the ordinary way, and thereby taking the Articles so grouped together in Article 83 out of the category of Articles which require such special manner and form for amending them, Article 83 itself has been made alterable only by*

the selfsame process of a 2/3 majority-and a Referendum. That is the effect of the provisions of Article 83 The resulting position then was that once the Constitution came into operation, any amendment of the provision of Article 83, could be effected not in the ordinary manner by a simple majority, but only in that special manner and form of a 2/3 majority and a Referendum so expressly and clearly set out in Article 83. This then is the scheme of the Constitution. Thenceforth any amendment of the Constitution, which constitutes an amendment, either expressly or by necessary implication, of an already entrenched provision such as Article 83, could be validly effected only by compliance with the procedure so laid down in Article 83. That being so, any steps taken thereafter to entrench any other Article, included or to be included in the Constitution by laying down the selfsame special process for amendment would in truth and in fact, amount to an 'addition' to the existing provisions enumerated in the said Article 83. Sub-Article (7) of Article 82, which is in the same chapter as Article 83, provides that in this Chapter 'amendment' includes repeat, alteration and addition'. The, introduction therefore, of any such new Article to the Constitution without having recourse to Article 83 and expressly including such new Article too in the list of Articles already included in, and entrenched by the said Article 83, would have the effect of adding a new provision to the Articles already set out in Article 83: and would, in law, amount to an 'implied amendment' of Article 83. It would amount to an amendment by implication. The term 'implied amendment' has been used by Courts in determining whether the Constitutional requirement as to the form of an amendatory Act has been violated (Bindra: Interpretation of Statutes (7 ed.) p. 915). It is not in my opinion, open to state that, because the new provision carves with it an ultimate appeal to the People; the legal Sovereign under the Constitution; such provision could be entrenched in the Constitution separately and independently of Article 83. Such an approach would not be in keeping with the spirit of the Constitution either. The intention of the makers of the Constitution seems also to have been that, after the date on which the Constitution comes into operation, no provision was also to be entrenched in the Constitution without it being expressly approved by the People. That the provisions of only a Sub-Article of an Article in a Constitution could be entrenched without the rest of the Article being entrenched is clear

*law A .G. of Trinidad v. McLeod, [1984] (1) AER 697. **Any attempt to have a new Article entrenched in the Constitution without reference to Article 83 and without having recourse to the special manner and form required by Article 83 would be tantamount to doing indirectly what cannot be done directly. Such a procedure is not permissible.***

(3) WHAT IS THE RELATIONSHIP BETWEEN ARTICLES 3 AND 4?

19. Article 3 provides that:

“In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise”

20. Article 4 *inter alia* provides that:

The Sovereignty of the People shall be exercised and enjoyed in the following manner:

...

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

...

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.

21. Article 3 recognises the pre-existing fact that sovereignty is vested in the People. Sovereignty includes the powers of government, fundamental rights and the franchise. This sovereignty is inalienable.
22. Article 4 provides for that sovereignty to be temporarily delegated and exercised in trust.
23. As Your Lordships' Court held **In Re the Nineteenth Amendment to the Constitution, SC SD 4 – 19 / 2015, at page 31:**
It has to be borne in mind that the Sovereign People have CHOSEN NOT TO entrench Article 4. Therefore, it is clear that not all violations of Article 4 will necessarily result in a violation of Article 3.
24. For the reasons morefully explained in these submissions, it will be submitted that it is ONLY if an amendment is made which is inconsistent with Article 4 (or any the provision of the Constitution), and ALSO ADVERSELY / PREJUDICIALLY AFFECTS the sovereignty of the People OR seeks to alienate the sovereignty of the People as a whole that the inconsistency could be said to violate Article 3.
25. In this regard it will also be submitted that the determinations which have suggested that a substantial / significant connection to Article 3 is sufficient to hold that Article 3 is affected, do not reflect the Constitutional position. Under such a test EVEN an amendment which undoubtedly and significantly enhances the sovereignty of the People will require a referendum. Such was not the intention of the framers of the Constitution.
26. **Therefore, the real question to be asked is not whether the amendment violates Article 4, but rather, whether the amendment PREJUDICIALLY AFFECTS the Sovereignty of the People and therefore violates Article 3!**

27. It is in this light that the question of the link between Article 3 and 4 must be examined.

28. In **Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1987) 2 Sri L.R. 312, 324 - 325** the majority determination (of a Full Bench of Your Lordships' Court) stated that:

*"It was submitted that Article 4 which sets out how the sovereignty of the People is to be exercised, has to be read with Article 3 as an integral part of Article 3, and as such is entrenched along with Article 3 by Article 83. The Constitution expressly specifies the Articles which are entrenched, Article 4 is not one of those Articles. The legislative history of the 1978 Constitution shows that Article 4 was deliberately omitted from the list of entrenched articles. The report of the Parliamentary Select Committee on the Revision of the Constitution published on 22.6.1978 discloses that **the Committee recommended the entrenchment of Articles 1-4, 9, 10, 11, 30(2), 62(2) and 83** (para.9 of the Report). The Bill for the repeal and replacement of the 1972 Constitution (published in the Gazette of 14.7.78) included Article 4 in the category of entrenched Articles. However, when the Bill was passed, Parliament omitted Article 4 from the list of entrenched provisions. That omission must be presumed to have been deliberate, especially as Article 6, 7 and 8 were added to the list.*

*In our view, Article 4 sets out the agencies or instruments for the exercise of the sovereignty of the People, referred to in the entrenched Article 3. **It is always open to change the agency or instrument by amending Article 4, provided such amendment has no PREJUDICIAL IMPACT on the sovereignty of the People.** Article 4(a) prescribes that the legislative power of the People shall be exercised by Parliament, consisting of the elected representatives of the People and by the People at a Referendum". Article 4(a) can be amended to provide for another legislative body consisting of elected representatives, so long as such amendment does not affect Articles 2 and 3.*

Similarly, an amendment to Article 4(b) can be enacted by providing for the exercise of the executive power of the People by a President and a Vice President elected by the People. However, to the extent that a principle contained in Article 4 is contained or is a necessary corollary or concomitant of Article 3, a constitutional amendment inconsistent with such principle will require a Referendum in terms of Article 83, not because Article 4 is entrenched, but because it may impinge on Article 3. In our view, Article 4 is not independently entrenched but can be amended by a two third majority, since it is only, complementary to Article 3, provided such amendment does not impinge on Article 3. So long as the sovereignty of the People is preserved as required by article 3, the precise manner of the exercise of the sovereignty and the institutions for such exercise are not fundamental.

29. Counsel for some of the Petitioners sought to rely on several determinations of Your Lordships' Court, for the proposition that Article 4 and 3 are intrinsically linked and that ANY violation of Article 4 results in a violation of Article 3.

30. In considering the determination ***In Re the Nineteenth Amendment to the Constitution (SC SD 11-40/2002)*** which was made by a divisional bench of seven (7) judges of Your Lordships' Court, it is respectfully submitted that to the extent that the said determination appears to determine that any transfer of powers between the organs specified in Article 4 would be a violation of Article 3, the said Determination would NOT be relied on by and / or followed Your Lordships' Court.

31. In this regard it is respectfully submitted that **In Re the Nineteenth Amendment to the Constitution (SC SD 11-40/2002)** is *per incuriam* inasmuch as it:
- (a) fails to analyse the legislative history of Article 83, and the intentional exclusion of Article 4 from the list of entrenched clauses ;
 - (b) fails to properly analyse the relationship between Articles 3 and 4 especially in the light of the determination **In Re the Thirteenth Amendment to the Constitution;**
 - (c) fails to consider the determination of a full bench of Your Lordships' Court **In Re the Thirteenth Amendment to the Constitution;**
 - (d) fails to analyse the balance of power in the Constitution as a whole.
32. It is respectfully submitted that the Full Bench determination **In Re the Thirteenth Amendment**, accurately reflects the position of Article 4 vis-à-vis Article 3, which is that an amendment inconsistent with Article 4 will not require a referendum UNLESS it also violates Article 3.
33. **Therefore, as submitted at the outset, the question to be asked is NOT whether there is a violation of Article 4 (and to presume that there is thus a violation of Article 3), but to ascertain whether or not Article 3 is violated.**
34. In this regard Your Lordships' attention is respectfully drawn to the (now repealed) Article 122 of the Constitution. In the case of urgent bills if the Supreme Court entertained a doubt as to Constitutionality, it was deemed to have been determined that such provision is inconsistent with the Constitution (Article 123(3) of the Constitution).

35. However, in all other cases such a deeming provision does not apply, and the burden would lie on the Petitioners to conclusively establish that the Bill or any provision thereof is inconsistent with the Constitution.
36. Without prejudice to the above, we further respectfully submit that in any event ***In Re the Nineteenth Amendment to the Constitution (SC SD 11-40/2002)*** is distinguishable because:
- The said determination dealt with the transfer of power **between** organs of government (namely transfer of power from the executive to the legislature) (page 319 of the Determination, last paragraph);
 - The said determination clearly refers to the balance struck between the three organs of government (page 320 of the Determination, first paragraph);
 - This is also borne out by the ‘conclusions’ reached at page 321 of the Determination, which refer to transfer of power **between** organs of government;
 - In the instant case the powers to be transferred are mostly **within** the executive organ of government, albeit to a different institution (i.e. from the President to the Cabinet / Prime Minister – and NOT to a different organ).
37. The absurdity of the argument that Articles 3 and 4 are inextricably linked so as to require a referendum whenever Article 4 is violated (and thereby concluding that Article 3 is also violated) can be demonstrated as follows:
- Article 3 speaks of Fundamental Rights as an element of Sovereignty;
 - However, out of the Fundamental Rights chapter, only Articles 10 and 11 are referred to in Article 83;
 - Hence only a Bill which affects Articles 10 or 11 of the Fundamental Rights chapter will *ipso facto* require a referendum;

- However, one who argues that Article 3 and 4 are inextricably linked would then urge that even a violation of Article 12 *ipso facto* requires a referendum because Fundamental Rights are mentioned in Article 3;
- This is clearly not tenable as evidenced by the jurisprudence of Your Lordships' Court.

38. In Re the Seventeenth Amendment to the Constitution (SC SD 6/2001)

which established the Constitutional Council, Your Lordships' Court held that:

*“The Bill taken in its entirety has the objective of altering the legal regime for the appointment, regulation of service and disciplinary control of public officers... ..it **places restrictions on the discretion** now vested in the President and the Cabinet of Ministers...”*

(page 250)

“Therefore although there is a restriction in the exercise of the discretion hitherto vested in the President, this restriction per se would not be an erosion of the executive power by the President, so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution.”

(page 253)

- 39.** Thus although the executive power of the President was reduced (by vesting powers of appointment in the Constitutional Council, and restricting the President's power), this was held not to require a referendum. It did not have a prejudicial impact on the sovereignty of the People.

- 40.** Similarly the **Nineteenth Amendment to the Constitution (SC SD 4-19/2015)** while holding certain clauses to be unconstitutional, Your Lordships' Court recognised that:

- the clauses requiring the President to act on the advice of the Prime Minister in appointing and removing Cabinet Ministers, Deputy Ministers, and Non- Cabinet Ministers, did not require a referendum;

- the clauses preventing the President from holding any Ministerial portfolio did not require a referendum;
- the clauses effectively removing the President’s discretion in making appointments to high judicial and public office, did not require a referendum. (*vide*, pages 36-37).

THE SOVEREIGNTY OF THE PEOPLE

41. **Article 3** provides that:

“In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise”

42. Therefore it is clear that:

- Sovereignty is IN the PEOPLE;
- The Sovereignty of THE PEOPLE is inalienable.

43. **What is entrenched is thus the Sovereignty of the People, which cannot be alienated from the PEOPLE.**

44. **The temporary exercise of such Sovereignty by organs of Government, in TRUST for the People, is not entrenched.**

45. The attempt **In Re the Nineteenth Amendment to the Constitution (SC SD 11-40/2002)** to suggest that alienation or transfer of powers between organs was prohibited, clearly does not accord with the letter or spirit of the Constitution, and the legislative history, and the clear legislative intent that Article 4 should not be entrenched.

46. As Your Lordships' Court held **In Re the Nineteenth Amendment to the Constitution, SC SD 4 – 19 / 2015, at page 31:**

It has to be borne in mind that the Sovereign People have CHOSEN NOT TO entrench Article 4. Therefore, it is clear that not all violations of Article 4 will necessarily result in a violation of Article 3.

47. The correct and binding position is contained in the majority determination **In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1987) 2 Sri L.R. 312, 324 - 325** (of a Full Bench of Your Lordships' Court) which that:

*In our view, Article 4 sets out the agencies or instruments for the exercise of the sovereignty of the People, referred to in the entrenched Article 3. **It is always open to change the agency or instrument by amending Article 4, provided such amendment has no PREJUDICIAL IMPACT on the sovereignty of the People.***

48. It is thus clear that the 'agency or instrument' exercising such power need not be those as set out in Article 4, and a change of such 'agency or instrument' does NOT *ipso facto* impinge on the sovereignty of the people.

49. Article 3 of the Constitution seeks to vest sovereignty in the people which includes the powers of government. The provisions of the proposed amendments contained in the Bill do not, in any manner, seek to limit or impair **the sovereignty enjoyed by the people with respect to the powers of Government.**

(4) TRANSFER OF EXECUTIVE POWER

50. The Petitioners contend that the Bill seeks to transfer executive power from the President to the Cabinet of Ministers and the Constitutional Council, and that such violates Article 4(b) read with Article 3 of the Constitution.

51. It should be noted that the Petitioners were unable to demonstrate any prejudicial impact on the sovereignty of the people, which would be caused by such transference of the institution which exercised the executive power.

52. It is further submitted that the transference of power, is to another institution within the executive organ of government, and does not amount to a transfer of power to another organ of government (the organs of government being the legislature, executive and judiciary).

53. **Article 4(b) of the Constitution** presently reads as follows:

The Sovereignty of the People shall be exercised and enjoyed in the following manner:

...

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

54. Your Lordships' Court will appreciate that, Article 4(b) is not an Article referred to in Article 83. Additionally, Your Lordships' Court will appreciate that the amendments sought to be made will not affect any other Article referred to in Article 83.

55. Your Lordships' Court will also appreciate that, notwithstanding the provisions of Article 4(b), the Constitution as it presently stands clearly demonstrates that all executive power is NOT exercised by the President alone. Thus:

- The Appointment of the Constitutional Council takes place notwithstanding the fact that the President may not be in agreement with most of the persons to be appointed (*Article 41A*);
- The recommendations made by the Constitutional Council with regard to the appointments specified in Article 41B will take effect by operation of law in the event the President does not make the appointments within the period of 14 days (*Article 41B*), and thus the President has no discretion with regard to same;
- The President cannot make appointments to the high judicial and public offices specified in Article 41C, unless the Constitutional Council approves such appointments (*Article 41C*), thus curtailing the President's discretion with regard to same;
- Provincial Councils / Boards of Ministers exercise significant executive powers with regard to the matters specified in the Provincial List. Thus, except where the Governor is required by the Constitution to act on his own discretion (in which event he must act on the President's directions), he must act on the advice of the Board of Ministers (*Article 154F(1)*);
- The Cabinet of Ministers is charged with the direction and control of Government (*Article 42(1)*). Apart from being the Head of the Cabinet, the President does not have any additional right or responsibility with regard to such direction and control, which responsibility is shared by the Cabinet collectively;
- **The incumbent President, by virtue of the transitional provisions contained in section 51 of the Nineteenth Amendment, is permitted to be the Minister of Defence, Mahaweli Development and Environment;**

- **However, any future President will not be permitted to hold any Ministerial portfolio, as Ministerial portfolios can only be held by Members of Parliament (Article 43(2));**
- Your Lordships will appreciate that the former Article 44(2) (which permitted the President to hold Ministries / subjects and functions) was repealed by the Nineteenth Amendment to the Constitution.

56. Therefore, in terms of the Constitution, it is a complete fallacy to suggest that the President alone exercises executive power. It is clear that **several institutions within the executive organ of the Government exercised concurrent executive power.**

57. Your Lordships' Court will also appreciate that the Sri Lankan Constitution does not contain a strict separation of powers.

- MOST of the Cabinet (excluding the President) are drawn from the legislature. In a Westminster System such as the 1972 Constitution, the entire Cabinet would be drawn from Parliament.
- EVEN with regard to judicial power, Article 4(c) speaks of such being exercised BY PARLIAMENT through Courts...

58. Your Lordships' Court, **In Re the Nineteenth Amendment to the Constitution Bill (2015)** recognized that *"...Cabinet is collectively charged with the exercise of executive power, which is expressed as the direction and control of the Government of the Republic and the collective responsibility of Cabinet, of which the President is the Head. It establishes conclusively that the President is not the sole repository of executive power under the Constitution. It is the Cabinet of Ministers collectively, and not the President alone, which is charged with the direction and control of Government. Further, the Cabinet is answerable to Parliament."* (page 31).

“Additionally, certain powers with regard to the Public Service are vested in the Public Service Commission and some in the Cabinet of Ministers (Articles 54 and 55), again showing that executive power is not concentrated in the President. Chapter VII, VIII and IX of the Constitution are titled “The Executive – The President of the Republic”, “The Executive – The Cabinet of Ministers” and “The Executive – The Public Service” respectively.” (page 32)

59. Your Lordships’ Court will also appreciate that, EVEN the dissenting opinion of Wanasundera J, **In Re the Thirteenth Amendment to the Constitution (1987) 2 Sri L.R. 312, 341** recognised that:

*“It is quite clear from the above provisions that the Cabinet of Ministers of which the President is a component is an integral part of the mechanism of government and the distribution of the Executive power and any attempt to by-pass it and exercise Executive powers **without the valve and conduit of the Cabinet** would be contrary to the fundamental mechanism and design of the Constitution. It could even be said that **the exercise of Executive power by the President is subject to this condition**. The People have also decreed in the Constitution that **the Executive power can be distributed to the other public officers only via the medium and mechanism of the Cabinet system**. This follows from the pattern of our Constitution modelled on the previous Constitution, which is a **Parliamentary democracy with a Cabinet system**. The provisions of the Constitution amply indicate that **there cannot be a government without a Cabinet**. The Cabinet continues to function even during the interregnum after Parliament is dissolved, until a new Parliament is summoned. **To take any other view is to sanction the possibility of establishing a dictatorship in our country, with a one man rule.**”*

60. Thus, when the Constitution as a whole is considered, what is of paramount importance is that the direction and control of government is by the Cabinet. This would continue to be so even with the President as the head of the Executive, though not being the Head of Cabinet.

61. In fact, a similar position will exist under the present Constitutional structure, since any future President would not be entitled to hold any Ministerial portfolio.

Amendment to Article 30(1)

62. If the amendment proposed by clause 3 of the Bill is enacted, Article 30(1) of the Constitution would read:

*There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive ~~and of the Government~~, and the Commander-in-Chief of the Armed Forces **who shall act in accordance with the Constitution.***

63. Article 4(b) (which in any event is not an Article referred to in Article 83) does not require that the President should be the Head of Government. Therefore there can be no objection in recognizing that the Head of Government is a person other than the President.

64. Your Lordships' will appreciate that in the 1972 Constitution the President was the Head of State (Article 19) and the Head of the Executive (Article 20). However, the Cabinet was charged with the direction and control of government (Article 92(1)), and the Prime Minister was the Head of the Cabinet (Article 92(2)). Thus the Head of Government and the Head of the Cabinet could be two separate persons.

Amendment to Article 33

65. Clause 5 of the Bill will take away the power of the President to make the Statement of Government Policy; remove the power to prorogue Parliament; and will also require the approval of Cabinet prior to appointing Ambassadors etc.

66. As the President is not the Head of Government, there would be no purpose in him attempting to present the Statement of Government Policy.

67. As the President's power to unilaterally dissolve Parliament has been taken away in respect of the first 4 ½ years of the life of Parliament (as permitted by Your Lordships' Court by **In Re the 19th Amendment** – Article 70(1), proviso), and as such there appears to be no justifiable reason why the President should be permitted to stifle the affairs of the legislature by exercising the power of prorogation.

68. Since the appointment of Ambassadors etc., have a direct bearing on governance, the consultative mechanism with the Cabinet of Ministers will enhance transparency and good governance. This is similar to the consultative mechanism with the Constitutional Council in the appointment of other high judicial and public officers – *Articles 41B and 41C*).

Amendment of Article 34

69. Clause 6 will also require the President to consult Cabinet prior to granting pardons.

70. As submitted above the consultative mechanism with the Cabinet of Ministers will enhance transparency and good governance.

Amendment of Article 41

71. Clause 12 will ensure that the Cabinet of Ministers will determine the ceiling of the number of members of the President's staff.

Amendment of Article 41C

72. Clause 13 will ensure that Article 41C is brought in line with Article 41B of the Constitution, and that recommendations in respect of the offices specified in Article 41C emanate from the Constitutional Council.

73. The appointment process with regard to Article 41B already forms part of the Constitution, and was held to be constitutional **In Re the Nineteenth Amendment to the Constitution (2015)**.

Amendment of Article 42(1)

74. Clause 14 will amend Article 42(1) and recognize the Prime Minister as the Head of the Cabinet of Ministers.

75. As submitted previously, as was the case in the 1972 Constitution, the Head of the Cabinet / Government need not be the Head of the Executive.

Amendment of Article 43 and 44

76. Clause 15 and 16 of the Bill will amend Articles 43 and 44 to bring them in line with the remaining provisions of Articles 43 and 44, which require the President to act on the advice of the Prime Minister in determining the respective matters relating to the appointment of Ministers and Deputy Ministers. Such procedure has been recognized as Constitutional by Your Lordships' Court **In Re the Nineteenth Amendment to the Constitution (2015)**.

Amendment of Article 50, 51 and 52

77. Clauses 19, 20 and 21 of the Bill will amend Articles 50, 51 and 52 to ensure that the Secretaries to the Cabinet, Prime Minister, and Ministers, are appointed on the advice of the Cabinet of Ministers. The requirement of the President acting on advice has been recognized as Constitutional **In Re the Nineteenth Amendment to the Constitution (2015)**.

Amendment of Article 70

78. The Nineteenth Amendment to the Constitution removed the discretion of the President to dissolve Parliament during its first 4 ½ years.

79. The amendment proposed by clause 23 will remove the discretion with regard to the remaining 6 months, and also remove the power of prorogation.

(5) ELECTION OF THE PRESIDENT BY PARLIAMENT

80. The Petitioners allege that the proposed 20th Amendment will violate the franchise of the People as recognized in Article 4(e) and will thus violate Article 3 of the Constitution.

81. For the reasons set out hereinafter it will be respectfully submitted that the proposed amendments are not inconsistent with Article 3 of the Constitution.

82. **Article 4(e) of the Constitution** provides that:

The Sovereignty of the People shall be exercised and enjoyed in the following manner:

...

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.

83. As submitted above, the legislature in its wisdom, has consciously decided that Article 4 should not be included in the Articles subjected to the Referendum.

84. Your Lordships will also appreciate that **Article 30 of the Constitution** provides that:

(1) There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces.

(2) The President of the Republic shall be elected by the People, and shall hold office for a term of five years.

85. However, the entirety of Article 30 is not included in the Articles subjected to a referendum. Article 83 only requires a referendum if the term of office is to be extended beyond six years.

86. Your Lordships' Court recognized that the clause in the 19th Amendment Bill reducing the term of office of the President from 6 years to 5 years passed muster, and Article 30(2) of the Constitution was amended accordingly. Your Lordships' Court had previously recognized that with regard to Article 30(2) a referendum would only be required if there was an attempt to increase the term of office (**In Re the Third Amendment to the Constitution (SC/SD 2-5/1982, 141)**).

87. Your Lordships would appreciate that pursuant to the envisaged amendments contained in clause 2 and 3, Article 4(b), 4(e) and 30(2) would read as follows:

Proposed Article 4(b) and (e)

*(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic ~~elected by the People~~ **and the Cabinet of Ministers as provided for in the Constitution**;*

(e) the franchise shall be exercisable at the election of ~~the President of the Republic and of the Members of Parliament~~ and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.

Proposed Article 30(2)

*The President of the Republic shall be elected by the ~~People~~ **Parliament in the manner provided in paragraph (3) of this Article, and shall ordinarily hold office for a term of five years.***

- 88.** Therefore, considering firstly, the omission of Article 4 from the Articles included in Article 83 (though it had been originally envisaged that Article 4 should be included), and secondly, the deliberate decision to only include the extension of the term of office as requiring a referendum, and to omit the rest of the sub-article from Article 83, it is clear that the election directly by the people was not a matter which the legislature intended should be subjected to a referendum.
- 89.** Your Lordships would appreciate that there is no prejudicial impact on the sovereignty of the People recognized in Article 3, because (unlike Article 4) Article 3 does not require the direct exercise of sovereignty.
- 90.** In this regard Your Lordships' attention is respectfully drawn to the fact that the procedure for impeachment / removal of a President as contained in Article 38(2), recognizes that a President can be removed by a mechanism which combines the unelected judiciary and the elected Members of Parliament, WITHOUT reference to the People.
- 91.** Similarly, in the case of a vacancy in the office of President, the Members of Parliament elect a Member of Parliament to hold office as President for the remainder of the term (Article 40(1)). There is no reference to the People.
- 92.** The Constitution is considered and referred to as the sovereign will of the People. However, even the Constitution has been enacted indirectly, through the People's elected representatives.

- 93.** Thus the exercise of sovereignty indirectly, does not amount to an alienation of sovereignty. Inasmuch as the People can exercise other aspects of sovereignty (such as powers of government) through agents, they can also exercise certain aspects of the franchise through their elected representatives.
- 94.** In the envisaged model, Parliament will elect a citizen (who has the requisite constitutionally specified qualifications) as President. In so doing, the People are exercising franchise through the Members of Parliament. This is not prohibited by Article 3.
- 95.** In the 1972 Constitution the People merely appointed their President, acting through their elected Prime Minister (Article 25). This did not change the fact that the President so elected was constitutionally recognized as the Head of State and Head of the Executive (Article 19 and 20).
- 96.** Your Lordships would appreciate that other well established democracies such as the United States of America and India also elect Presidents through an Electoral College system.
- 97.** Your Lordships would also appreciate that in 1994, 1999, 2005, and 2015 the people of Sri Lanka elected as President, candidates who had promised to 'abolish' what has been termed in this country as the 'Executive Presidency'.
- 98.** Thus although some of the Petitioners' counsel expressed umbrage at the taking away of the people's right to directly elect their President, it is clear that the People of this country having repeatedly voted for the abolition of the executive presidency. It thus does not lie in the mouth of the Petitioners to claim that the significant reforms proposed by the Private Member's Bill titled Twentieth Amendment to the Constitution Bill could have a *prejudicial impact* on the sovereignty of the People.

99. As submitted previously, any such alleged prejudicial impact must be established by the Petitioners.

100. On the contrary, it is our respectful submission that the Bill will have a net positive effect on the sovereignty of the People, being in line with the sovereign will of the People expressed at numerous elections over the course of several decades.

101. Your Lordships' Court has recognized that not all inconsistencies with the franchise referred to in Article 4(e) will amount to a violation of Article 3, and that therefore an inconsistency with Article 4(e) will not necessarily require a Referendum.

102. His Lordship Justice Mark Fernando, *In Re An Act To Make Provision Enabling The Commissioner Of Elections To Fix A New Date Of Poll For Western, Uva, Sabaragamuwa, Central And North Central Provincial Councils Elections, SC Special Determination No. 9/1998* (dealing with a continuation of the *Karunathilake v. Disanayake* saga) held that:

Not only is clause 2 inconsistent with Articles 12(1) and 104 as aforesaid, but it also interferes with the franchise, contrary to Article 4(e). Although that Article does not mention elections to Provincial Councils, that is because Provincial Councils were only introduced subsequently by the Thirteenth Amendment; Article 4(e) must now be interpreted to cover Provincial Council Elections as well. Further, the franchise is not restricted to merely voting at elections; it includes standing for elections, and, indeed, the entire election process from nomination to poll. (page 141)

However Your Lordships' Court thereupon went on to hold that a referendum was not required, and only required the Bill to be passed by a special majority:

“We determine that Clauses 2 and 3 of the Bill are inconsistent with, inter alia, Article 12(1) of the Constitution, and can only be passed with the special majority prescribed by Article 84(2).” (page 143)

(6) THE ENVISAGED ELECTION PROCESS

103. Some Petitioners alleged that the envisaged election process will result in a period of time in which there will be a vacancy in the presidency. This position is misconceived, and based on a failure to appreciate the provisions as a whole.

104. In any event, this does not raise any issues of unconstitutionality.

105. If enacted, clause 3 of the Bill will result in Article 30 of the Constitution being amended to read as follows:

Article 30

(1) There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive, and the Commander-in-Chief of the Armed Forces who shall act in accordance with the Constitution.

(2) The President of the Republic shall be elected by the Parliament in the manner provided in paragraph (3) of this Article, and shall ordinarily hold office for a term of five years.

Provided that, notwithstanding anything to the contrary in the Constitution, the person so elected as President shall, unless he ceases to hold office in accordance with the provisions of the Constitution, continue to hold office until a President is elected by the next Parliament.

Provided further that such person shall cease to hold office upon the election of a President by the next Parliament, notwithstanding the fact that a period of five year has not lapsed from the date of his appointment.

(3) A citizen qualified under Article 88 and not disqualified under Articles 89 or 92 shall be elected by a simple majority of Members of Parliament (including those not present), within four weeks of its first sitting, by secret ballot, in accordance with such procedure as Parliament may by law provide.

(4) If the office of President shall become vacant by death, resignation, removal or otherwise, an election shall be held not later than four weeks from the occurrence of the vacancy, in terms of paragraph (3) of this Article, to fill such vacancy. The person elected to fill such vacancy shall hold office for the remainder of the term of office.

Provided that if the office of President shall become vacant after the dissolution of Parliament, the Parliament shall be summoned by the Speaker, within one week of the occurrence of such vacancy, for the sole purpose of electing a President as aforesaid.

(5) A person elected as President shall not, as long as he holds office as President, hold office in, or be a member of, any political party.

106. Clause 37, by a transitional provision, provides that:

the person holding office as the President on the date on which this Act comes into operation shall continue to hold such office until 8th day of January 2020 subject to the provisions of the Constitution;

107. It was obviously necessary to provide that the term of office was 'ordinarily' five years, since there could be a slight fluctuation either way.

108. Your Lordships will appreciate that:

- (a)** The incumbent President will be in office until 8th January 2020;
- (b)** The Parliament will then elect a President in terms of Article 30(4), which mandates that *If the office of President shall become vacant by death, resignation, removal or otherwise, an election shall be held not later than four weeks from the occurrence of the vacancy, in terms of paragraph (3) of this Article, to fill such vacancy. The person elected to fill such vacancy shall hold office for the remainder of the term of office.*
- (c)** Since Parliament already knows that the office of President will fall vacant on 8th January 2020, they could decide in advance that Parliament should meet on 9th January 2020 for such purpose;
- (d)** Parliament may decide that in view of the short period until the next Parliament is convened, it would be practical to appoint the incumbent to serve for such period;
- (e)** The person elected by Parliament will hold office until the next Parliament elects a President in terms of Article 30(3);
- (f)** The next Parliament will then elect a President in terms of Article 30(3), within 4 weeks of its first sitting.

109. The term of Parliament is five (5) years (Article 62(2)).

110. Article 70(5)(b) provides that a proclamation be made summoning the next Parliament to sit not later than 3 months from the date of a proclamation calling for an election pursuant to the dissolution of Parliament in terms of Article 62(2).

111. Thus if the next Parliament (i.e. the Ninth Parliament) appoints a President on the day it first sits, and the succeeding Parliament (i.e. the Tenth Parliament) appoints a President on the very last day it is permitted (i.e. within four weeks of its first sitting), then the period of the President may extend to approximately 5 years, 3 months and 4 weeks (i.e. 5 years being the maximum duration of Parliament, 3 months being the maximum period of a proclamation summoning Parliament, and four weeks being the maximum period within which Parliament must elect a President).

112. On the other hand, as in the case of the President who will hold office from 9th January 2020 until the next Parliament is formed (somewhere later in 2020) the period of his office will be less than one year.

113. It was thus necessary to provide that the period was *ordinarily* 5 years, since the period could have been FAR shortened or slightly extended. Hence the provisos to Article 30(2) correctly go on to recognize that:

Provided that, notwithstanding anything to the contrary in the Constitution, the person so elected as President shall, unless he ceases to hold office in accordance with the provisions of the Constitution, continue to hold office until a President is elected by the next Parliament.

Provided further that such person shall cease to hold office upon the election of a President by the next Parliament, notwithstanding the fact that a period of five year has not lapsed from the date of his appointment.

ELECTION PROCESS

114. Some Petitioners contended that the proposed Article 30(3) may result in Parliament being unable to agree on a suitable candidate. The proposed Article 30(3) reads:

*A citizen qualified under Article 88 and not disqualified under Articles 89 or 92 shall be elected by a **simple majority of Members of Parliament (including those not present)**, within four weeks of its first sitting, by secret ballot, in accordance with such procedure as Parliament may by law provide.*

115. Parliament could enact such a law immediately upon the enactment of the 20th Amendment, providing that the law comes into effect on 9th January 2020.

116. Your Lordships are aware that there are numerous electoral systems that Parliament may adopt. Such is not a matter of constitutionality of the instant Bill.

117. However, since the matter was raised by some Petitioners, it is appropriate to mention at least two of those systems, **the exhaustive ballot system** and the **two-round system**.

118. The systems are explained on Wikipedia as follows:

*The **exhaustive ballot** is a voting system used to elect a single winner. Under the exhaustive ballot the elector simply casts a single vote for his or her favorite candidate. However, if no candidate is supported by an overall majority of votes then the candidate with the fewest votes is eliminated and a further round of voting occurs. This process is repeated for as many rounds as necessary until one candidate has a majority.*

(Source: https://en.wikipedia.org/wiki/Exhaustive_ballot)

*The **two-round system** (also known as the second ballot, runoff voting or ballotage) is a voting method used to elect a single winner, where the voter casts a single vote for their chosen candidate. However, if no candidate receives the required number of votes, then those candidates having less than a certain proportion of the votes, or all but the two candidates receiving the most votes, are eliminated, and a second round of voting is held.*

The two-round system is used around the world for the election of legislative bodies and directly elected presidents. For example, it is used in French presidential, legislative, and departmental elections. In Italy, it is used to elect mayors, but also to decide which party or coalition receives a majority bonus in city councils. A two-round system is used also to elect the presidents of Afghanistan, Argentina, Austria, Benin, Brazil, Bulgaria, Burkina Faso, Cape Verde, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Cyprus, Dominican Republic, East Timor, Ecuador, Egypt, El Salvador, Finland, Ghana, Guatemala, Haiti, India, Indonesia, Kyrgyzstan, Liberia, Macedonia, Peru, Poland, Portugal, Romania, Russia, Senegal, Serbia, Slovakia, Slovenia, Turkey, Ukraine, Uruguay and Zimbabwe.

(Source: https://en.wikipedia.org/wiki/Two-round_system)

119. In either system, one candidate will finally receive an absolute majority of the votes.

(7) DISCIPLINARY ACTION AGAINST MEMBERS OF PARLIAMENT

120. Some Petitioners contended that the proposed amendment to Article 99 of the Constitution in Clause 31 of the Bill, excluded a Member of Parliament from invoking the jurisdiction of Court to seek interim relief against proposed disciplinary action against a political party.

121. However, the proposed Article 99(14) contained in Clause 31 provides as follows;

Except as provided for in paragraph (13) of this Article, no court shall have jurisdiction to hear and determine any matter relating to disciplinary action taken or proposed to be taken by any recognized political party or independent group against a member thereof, who is a Member of Parliament, and accordingly no court shall have the power to grant writ, injunction, an enjoining order or any

other relief, preventing, restraining or prohibiting any such action or proposed action.

122. It is apparent that the submissions of the Petitioners on the alleged “encroachment of judicial sovereignty” of the people, is completely unfounded. The proposed Article 99(14) keeps in place the jurisdiction of Your Lordships’ Court hitherto exercised on such matters.

123. Moreover, it was suggested by the Petitioners that the proposed sub-paragraph prevents the “process” of expulsion from being stayed. However, the proviso to Article 99(13) expressly states;

Provided that in the case of the expulsion of a Member of Parliament his seat shall not become vacant if prior to the expiration of the said period of one month he applies to the Supreme Court by petition in writing...

The effect of the words “*Except as provided for in paragraph (13) of this Article*” in the proposed Article 99(14), seeks to preserve the jurisdiction and the authority of the Supreme Court as already provided.

124. Further, upon the expelled Member of Parliament filing a petition before Your Lordships’ Court, the expulsion itself is stayed, and thus no harm would be caused to the expelled Member of Parliament.

125. The provision merely seeks to place some control on the undesirable practice of Members elected on a Party ticket crossing over for pecuniary or other gain, and then staying disciplinary proceedings by obtaining enjoining orders from the District Court, and thus negating the People’s franchise.

126. Therefore the jurisdiction exercised by Your Lordships’ Court on such matters remains untouched. Nevertheless, the proposed amendment does seek to oust the jurisdiction of all other courts on such matters.

127. Constitutional ousters of jurisdiction as proposed by the aforesaid Clause 31 are not alien to the present Constitution. The following are similar constitutional ousters that presently exist in the Constitution:

With regard to the Constitutional Council:

Article 41I

Subject to the provisions of Article 126, no court shall have the power or jurisdiction to entertain, hear or decide or call in question, on any ground whatsoever, any decision of the Council or nay approval or recommendation made by the Council, which decision, approval or recommendation shall be final and conclusive for all purposes.

With regard to the Public Service Commission

Article 61A

Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon any or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

128. The ouster clauses have been upheld by the Court of Appeal in **Ratnasiri v. Ellawala (2004) 2 Sri L.R. 180** and **Katuqampola v. Commissioner General of Excise (2003) 3 Sri L.R. 207**

129. The Supreme Court **In Re the Eighteenth Amendment to the Constitution (SC/SD 12/2002) at page 304, 305-306** deliberated on the proposed amendment to Article 41H of the Constitution, which provided for an ouster clause excluding EVEN the jurisdiction of the Supreme Court exercised under Article 126. Your Lordships' Court held that the said Clause was inconsistent

with the Constitution and would require a referendum because there would have been NO judicial remedy available.

130. In contradistinction, the proposed amendment in Clause 31 of the present Bill seeks to keep in place the jurisdiction of Your Lordships' Court on such matters and the effect of such is to exclusively vest the Supreme Court with the jurisdiction of such matters.

131. Further, the original Bill titled "The Nineteenth Amendment to the Constitution" (2015) sought to include the identical amendment to Article 99 as subparagraph 14 by Clause 24 of the said Bill. The Determination by Your Lordships' Court, consequent to considering the entire Bill, did not find any inconsistency of such provision with the provisions of the Constitution.

132. However, at the 3rd Reading (Committee Stage), owing to objections by members of the opposition, the proposed clause was not proceeded with. Nevertheless, the exclusion of such was NOT a result of an inconsistency with the Constitution as reflected in the determination of Your Lordships' Court.

133. Therefore, the contention that it seeks to violate the judicial sovereignty of the people by "encroaching" on the powers exercised by Your Lordships' Court is misconceived.

134. In fact the clause will protect the People's sovereignty (by limiting the avenues for dishonest politicians to act contrary to the mandate given to them by the People), and provide a speedy judicial resolution of the question of the validity of the expulsion, by recourse to Your Lordships' Court.

(8) **UNITARY STATE**

135. An absurd proposition was also put forward by some of the Petitioners that the proposed amendment to the Constitution seeks to alter the unitary character of the State.

136. The essence of a Unitary State was explained **In Re the Thirteenth Amendment to the Constitution, [1987] 2 Sri L.R. 312, 319** as follows:

The term "unitary" in Article 2 is used in contradistinction to the term "Federal" which means an association of semi-autonomous units with a distribution of sovereign powers between the units and the centre. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that the sovereignty is undivided in other words, that the powers of the central government are unrestricted. The two essential qualities of a Unitary State are (1) the supremacy of the central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the absence of subsidiary law-making bodies, but it does mean that, they may exist and can be abolished at the discretion of the central authority.

137. The question of subsidiary law making bodies was relevant **In Re The Thirteenth Amendment** only because the presence of co-ordinate legislative bodies would mean that Article 2 (which recognized Sri Lanka as an unitary State) was contravened. Provincial Councils were held to be subsidiary law making bodies, and not coordinate law making bodies.

138. The question of a contravention of Article 2 cannot arise in the present Bill, since the amendment proposed to the Constitution, does not seek to set up any law making bodies (whether with co-ordinate jurisdiction or otherwise), and does not seek to vest (whether irrevocably or otherwise) any power (whether executive, legislative or judicial) in devolved units.

CONCLUSION

139. For the aforesaid reasons it is respectfully submitted that:

- (a) none of the provisions of the Bill are inconsistent with and / or violate the entrenched provisions (and in fact the Bill as a whole will strengthen and enhance the sovereignty of the People); and
- (b) accordingly, Your Lordships' Court will be pleased to determine that none of the clauses of the Bill titled "*Twentieth Amendment to the Constitution*" are inconsistent with any of the Articles referred to in Article 83 of the Constitution, and that therefore the said Bill does not need to be submitted for the approval of the People at a Referendum.

Registered Attorney for the Intervenant – Petitioners

On this 17th day of September 2018

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