

A BRIEF GUIDE
TO THE 20TH
AMENDMENT
TO THE
CONSTITUTION

CENTRE FOR POLICY ALTERNATIVES

JUNE 2021



The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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THE PASSAGE OF THE TWENTIETH AMENDMENT

A Summary of the Timeline capturing the Legal and Political Developments in relation to the Passing of the Twentieth Amendment to the Constitution



Introduction

The Sri Lankan government enacted a Constitutional Amendment within the first two months of its coming into power in August, 2020. The 20th Amendment to the Constitution, so enacted, bears as its central feature the concentration of powers in the Executive President, and thereby erodes several of the democratic reforms introduced by the 19th Amendment. The proposed amendment witnessed opposition from a range of parties including constituent members of the government and several challenges in the Supreme Court of Sri Lanka. This opposition resulted in several amendments proposed to the original Bill and the 20th Amendment to the Constitution was enacted in October 2020. It must be noted that such a significant Amendment with broad implications for Sri Lanka's democracy moved swiftly through the different steps in the law making process in Sri Lanka in a matter of weeks. This timeline captures the legal and political events surrounding the passing of this Constitutional Amendment.

This document also contains several annexes that can inform the reader on the various aspects discussed in this document.

The Election Victory

The Sri Lanka Podujana Peramuna ("SLPP") won the Parliamentary Elections held in August, 2020 with an overwhelming majority. The SLPP contested the Parliamentary Elections on the same Election Manifesto put forward by President Gotabaya Rajapakse when he contested the 2019 Presidential Election. The manifesto contained a promise to introduce a new constitution, while at the same time remarking that the introduction of the 19th Amendment "has resulted in the disruption of the smooth functioning of the government." During his [speech](#) at the Inaugural Session of the newly elected Legislature, President Gotabaya Rajapakse stated that the 19th Amendment to the Constitution would be abolished as a matter of priority, subsequent to which the drafting of a new constitution would commence. At the [Cabinet meeting](#) held on 19th August, 2020, a five member committee was appointed to study and make observations on drafting the 20th Amendment. The Committee comprised of Ministers Professor G.L. Peiris, Dinesh Gunawardena, Nimal Siripala de Silva, Mohamed Ali Sabry and Udaya Gammanpila. It was stated that the two-term limit on the Executive, the five year term for both the Executive and Legislature, and the right to information introduced by the 19th Amendment would be retained under the 20th Amendment.

The Bill

The Gazette containing the 20th Amendment Bill (“Bill”) received Cabinet approval and was issued on 2nd September, 2020. It was made available online a day later, and different factions of society, including key opposition stakeholders, civil society groups and clergy were quick to point out the unbridled power the Amendment sought to vest with the Executive, and the reversal of several democratic reforms introduced by the 19th Amendment to the Constitution. CPA released an analysis of the changes proposed by the 20th Amendment, shortly after the release of the Bill, while observing that the Bill “rolls back democratic reforms introduced by the Nineteenth Amendment in 2015 and are a return to unfettered executive power institutionalised by the Eighteenth Amendment introduced in 2010”, in an adjoining statement.

Notable changes proposed by the 20th Amendment Bill were as follows.:

- The Constitutional Council overseeing appointments to key public service institutions, both at individual and institutional levels was to be replaced by the Parliamentary Council, which comprised only of Members of Parliament.
- The Parliamentary Council was also limited in its influence in that it could only make observations to the President, who is not bound by them. Presidential Immunity was bolstered under the provisions of the Bill.
- The National Procurement Commission and the National Audit Commission were both to be abolished under the provisions of the Bill.
- The President’s powers over the Prime Minister, Cabinet, and the Parliament were also increased.
- Changes to the law making process including reintroducing the provisions relating to Urgent Bills and reducing the time duration a bill had to remain in the public domain prior to it being possible to table such bill in Parliament.

Opinions Over the Bill

Several opposition stakeholders were unequivocal in their disapproval of the Bill. The Samagi Jana Balawegaya opined that a “19+” with required changes to the 19th Amendment would serve larger democratic interests better than the Bill, while noting that the 20th Amendment would reduce the accountability of the President, and undermine independent institutions. The Janatha Vimukthi Peramuna decried the Bill stating that it would lead to authoritarianism, and any shortcomings in the 19th Amendment must be rectified, as opposed to introducing the 20th Amendment. The Tamil National Alliance also expressed their opposition to the proposed Bill in the days following its release.

Members of the Buddhist and Catholic clergy too expressed their disapproval of the Bill, fearing that excessive concentration of power in the Executive would go against democratic values. The Amarapura-Ramanna Samagri Maha Sangha Sabha, issuing a statement, highlighted that the proposed 20th Amendment could lead to dictatorship and hinders democracy.

The statement added that they have a responsibility to oppose the 20th Amendment and that all three sects are opposed to the passing of the Bill. The statement also expressed the view that shortcomings in the 19th Amendment must be rectified, rather than introduce the proposed 20th Amendment. Three members of the Buddhist Clergy, namely, Venerable Bengamuwe Nalaka Thera, Venerable Muruttettuwe Ananda Thera, and Venerable Elle Gunawansa Thera wrote to the President dissuading the passing of the proposed 20th Amendment and suggested several clauses for reform. The Catholic Bishops' Conference of Sri Lanka issued a statement opposing the proposed 20th Amendment and stating that, "the concentration of power in an individual without checks and balances does not auger well for a democratic country". It was opined by the Conference that a new Constitution must be the priority at the moment.

The Sri Lanka Audit Services Association writing to the President raised concerns that the proposed 20th Amendment compromises the scope of public audit, and that it could lead to a diminishing of accountability for public finances. The removal of State-owned Enterprises from the purview of the Auditor General removes a significant disbursement of public finances from oversight and accountability, the statement said. The Leader of the Opposition, Sajith Premadasa echoed these views that the 20th Amendment negatively impacts the independence of the Auditor General. Responding to these criticisms, Prime Minister Mahinda Rajapakse asserted that the only change sought to be effected to the post of the Auditor General is to reverse the effects of the 19th Amendment, and not to abolish it or reduce its independence.

Committees Appointed to Study the Bill

Several committees were appointed to study and report findings on the Bill, both within and outside the government. Committees were appointed by the Prime Minister, Mahinda Rajapakse[1], the Bar Association of Sri Lanka, the Sri Lanka Freedom Party[2] and the main opposition party, the Samagi Jana Balawegaya[3].

1. The Committee was composed of Ministers Professor G. L. Peiris, Udaya Gammanpila, Mohamed Ali Sabry, Nimal Siripala de Silva, Wimal Weerawansa, State Ministers Susil Premajayantha and S.Viyalendran, and Members of Parliament Dilan Perera and Premnath C. Dolawatta.
2. The 10-member Committee was comprised of Minister Nimal Siripala de Silva, Prof. Rohana Luxman Piyadasa, Minister Mahinda Amaraweera, State Minister Dayasiri Jayasekara, State Minister Duminda Dissanayake, Members of Parliament Shan Wijayalal De Silva, Sarathi Dushmantha, President's Counsel Faiszer Musthapha, Attorney-at-Law Sanjaya Gamage, and Dr. Chamil Liyanage.
3. The Action Committee was comprised of Members of Parliament Lakshman Kiriella, Imthiaz Bakeer Markar, Kabir Hashim, Mano Ganeshan, Eran Wickramaratne, Dr. Harsha De Silva, Dr. Rajitha Senaratne, Field Marshal Sarath Fonseka, Shiral Lakthilaka, Ranjith Madduma Bandara, and Suren Fernando.

The Committee appointed by Prime Minister Rajapakse also comprised of the following members from the Cabinet Sub - Committee appointed prior to the drafting of the 20th Amendment, Ministers Professor G.L. Peiris, Dinesh Gunawardena, Nimal Siripala de Silva, Mohamed Ali Sabry and Udaya Gammanpila, together with other Members of Parliament. Moreover, the General Secretary of the Sri Lanka Freedom Party Dayasiri Jayasekera stated that its report would be submitted to Prime Minister Mahinda Rajapakse. This report was never made public. The Bar Association of Sri Lanka appointed a Committee to study the 20th Amendment. The Committee submitted its report making various observations on the provisions of the Bill.

Who Drafted the Bill?

Amidst mounting criticism over the Bill, there was confusion as to who the main architect of the Bill was. Several Cabinet Minister's denied responsibility for the contents of the Bill. However eventually the Cabinet Spokesperson Keheliya Rambukwella stated that the President and the Cabinet together take collective responsibility for the initiation and drafting of the Bill.

The Supreme Court Special Determination

Subsequent to the Bill being presented to the Parliament in its First Reading on 22nd September, 2020 by the Minister of Justice, a total of 39 petitions were filed in the Supreme Court over the next week, challenging the Bill on the basis that the Bill required the approval of the people at a referendum. Petitioners included political parties, civil society groups including CPA and individuals[4].

The 5 Judge Bench of the Supreme Court comprising of Chief Justice Jayantha Jayasuriya, Justice Buwaneka Aluwihare, Justice Sisira de Abrew, Justice Priyantha Jayawardena and Justice Vijith K. Malalgoda commenced hearing of the submissions made by Petitioners, Interventient Petitioners and the Attorney General on the 29th of September 2020, subsequent to which the parties filed Written Submissions. The Attorney General commenced making submissions after filing lengthy Written Submissions. The Attorney General refused a request by Counsel appearing for the Petitioners for a copy of the Attorney General's Written Submissions. The request was made because the Supreme Court decided not to allow the Counsel for the Petitioners to respond to the Attorney General's submissions due to time constraints.

4. Amongst the Petitioners were Samagi Jana Balawegaya (SJB) Member of Parliament Mayantha Dissanayake, United National Party Deputy Leader Ruwan Wijewardene, United National Party General Secretary Akila Viraj Kariyawasam, former Parliamentarian Mangala Samaraweera, Member of Parliament Rauff Hakeem, Election Commission Member Professor Ratnajeewan Hoole, the Bar Association of Sri Lanka, the Chairman of the Sri Lanka Audit Services Commission E.A.D. Prasad Prasanna Pushpakumara, the Centre for Policy Alternatives the Sri Lanka Press Institute, Attorney-at-Law P. Liyanaarachchi, Arif Samsudeen, Ibrahim Lebbe, Adam Lebbe Thuan, Eric Senaratne Balasuriya, D.T. Pathmasiri, Dr. Visakesa Chandrasekaran, M.K. Jayatissa, A.S. Chulasinghe de Soyza, Bennett Samarasiri Jayawardena, P.D.S. Premasiri Gunathileka and S.K.S.H.K. Sooriyarachchi.

However, the Supreme Court made available the Written Submissions by the Attorney General in order to allow other parties to file submissions in response to same.

A majority of judges hearing the case ruled that Clauses 3, 5, 14 and 22 of the 20th Amendment Bill were inconsistent with Articles 3 and 4 of the Constitution and required approval of the people at a referendum as stipulated in Article 83 of the Constitution unless they were amended. The Supreme Court ruled that the remainder of the Bill can be passed with a Special Majority in Parliament without need for a referendum.

According to the Supreme Court,

- Removing the duty incumbent on the President to enable the conditions for the conducting of free and fair elections (Clause 3),
- The provision to dissolve Parliament within a year of its first sitting after an election (Clause 14),
- The expansive Presidential Immunity which among other things excluded Fundamental Rights challenges against the acts of the President by citizens (Clause 5), and
- The repeal of the constitutional duty imposed on public officers to adhere to the directives of the Election Commission, with the failure to do so constituting an offense (Clause 22).

All required the approval of the people at referendum.

A Slew of Committee Stage Amendments, Opposition and the Passing of the Bill

On the 19th of October 2020, the Cabinet decided on three changes to the 20th Amendment Bill to be incorporated at the Committee Stage amendments. (This was in addition to the Committee Stage amendments which had been proposed before that and tabled by the AG to the Supreme Court.) These are (i) the limiting of the Acts brought in as Urgent Bills to those pertaining to national security and disaster management, (ii) the limiting the number of Cabinet Ministers, and thereby retaining the maximum number imposed under the 19th Amendment, and (iii) the auditing of state institutions as envisaged under the 19th Amendment, to be continued.

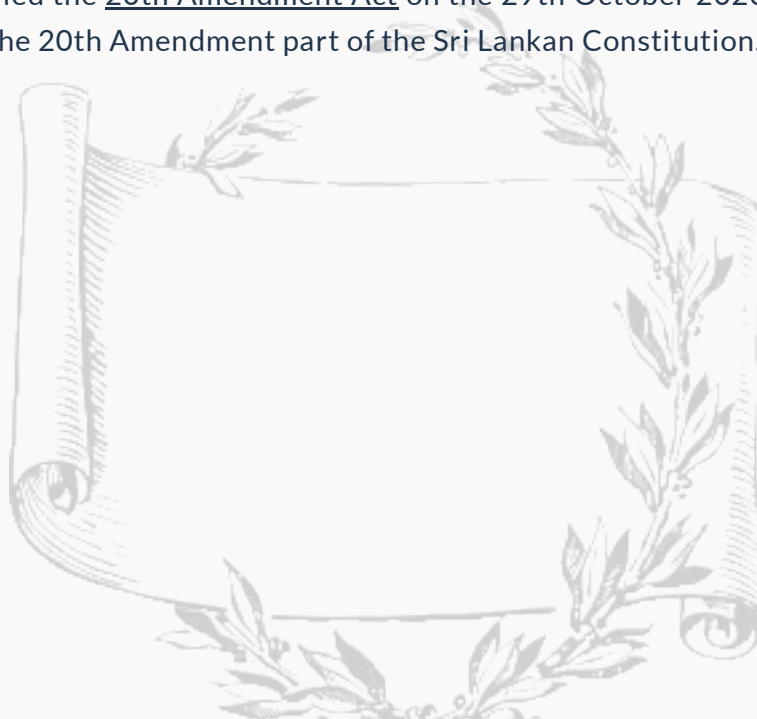
Subsequent to the delivering of the Supreme Court Special Determination on the 20th of October 2020, the Determination was presented to the Parliament by the Speaker of Parliament, Mahinda Yapa Abeywardena.

Minister of Justice, Mohamed Ali Sabry PC presented the 20th Amendment Bill in its Second Reading before Parliament, while indicating that the changes necessary according to the Supreme Court Determination are to be incorporated. However the Committee Stage amendments also included an amendment which increased the number of Judges of the Supreme Court and Court of Appeal. This provision was not included in the gazetted Bill and the Supreme Court did not have the chance to pronounce an opinion on this. It also violated a provision in the 20th Amendment which sought to prevent Committee Stage amendments being used to smuggle in completely new provisions not envisaged in the Bill.

Subsequent to the Second Reading of the Bill, a two-day Parliamentary debate on the Bill commenced. On the first day of the debate in Parliament, the Samagi Jana Balawegaya led a protest march to the Parliament in the form of a motorcade. Speaking at the debate, Prime Minister Mahinda Rajapakse stated that the 20th Amendment is sought to be passed in the interest of national security, and that it was the 19th Amendment that destabilized the country. He also indicated that the 20th Amendment was only a pre-cursor to the introduction of a new Constitution. These sentiments were also echoed by the Minister of Justice, who stated that the 20th Amendment was an interim measure until the introduction of a new constitution during the next year.

Upon the conclusion of a two-day debate, the 20th Amendment Bill was presented to the Parliament in its Third Reading, subsequent to which voting on the Bill commenced. The 20th Amendment to the Constitution was passed in Parliament on the 22nd of October, 2020, incorporating Committee Stage amendments, with a two-thirds majority. A total of 156 Members of Parliament from the Sri Lanka Podujana Peramuna and its allies voted in favour of the Amendment, while 65 Members of Parliament voted against it. Eight members of the Opposition voted in favour of the Amendment, while former President Maithripala Sirisena, the chief proponent of the 19th Amendment, was absent during the vote.

The Speaker certified the 20th Amendment Act on the 29th October 2020 and thereby made the provisions of the 20th Amendment part of the Sri Lankan Constitution.



SUMMARY OF KEY CHANGES MADE BY THE TWENTIETH AMENDMENT

Changes to the Executive Presidency

1) **Qualifications to be elected** as President have been changed by;

a. **Reducing the minimum age of eligibility** from 35 to 30 [See s. 16 of the 20th Amendment, Article 92 of the Constitution]

b. **Removing the disqualification on dual citizens** from being elected to the office of President (see below paragraph 12)

2) **Repeal the following duties** of the President which were previously included in Article 33(1) of the Constitution;

a. Ensure that the Constitution is respected and upheld;

b. Promote national reconciliation and integration;

c. Ensure and facilitate the proper functioning of the Constitutional Council and the institutions referred to in Chapter VIIa [See s. 3 of the 20th Amendment]

3) **The President can remove the Prime Minister at any time** at the President's discretion. [See s. 6 of the 20th Amendment, Article 47(2) of the Constitution]

4) **Repeal the provisions of the Constitution which previously required the President to act on the advice of the Prime Minister** when appointing or removing from office any Cabinet Minister, Non-Cabinet Minister or Deputy Minister.

The President can act on his discretion in making appointments and removals. The President may consult the Prime Minister, if the President considers such consultation necessary, when making appointments. [See s. 6 of the 20th Amendment, Article 46 (1) and 47(2) of the Constitution]

5) **The Immunity of the President.**

a. Actions of the President qua President continue to be subject to the Fundamental Rights jurisdiction of the Supreme Court.

b. **The Act allows the President to hold Ministerial portfolios**, any person can also invoke the jurisdiction of "any court" in relation to the exercise by the President of such Ministerial functions. [See s. 5 of the 20th Amendment, Article 35(3) of the Constitution]

c. **The scope of the immunity conferred on the President by the 19th Amendment has been expanded** from beyond actions in "civil" or "criminal" proceedings.

(Cont.)

Article 35 (1) of the 20th Amendment

While any person holds office as President, **no proceedings** shall be instituted or continued against him **in any court or tribunal** in respect of anything done or omitted to be done by him either in his official or private capacity.
(emphasis added)

Article 35 (1) of the 19th Amendment

While any person holds office as President of the Republic of Sri Lanka, **no civil or criminal proceedings** shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity (emphasis added)

It remains to be seen as to how the Supreme Court will interpret these provisions and the scope of the immunity that would be granted for the President's action.

The Constitutional Council Abolished



6) The Constitutional Council has been abolished and replaced with the Parliamentary Council. *[See s. 6 of the 20th Amendment, Chapter VII(A) of the Constitution]*

7) The Parliamentary Council **comprises of ONLY Members of Parliament** including;

- (a) The Prime Minister
- (b) The Speaker
- (c) The Leader of the Opposition
- (d) A nominee of the Prime Minister
- (e) A nominee of the Leader of the Opposition.

The nominee of the Prime Minister and the Leader of the Opposition should be nominated in such manner as would ensure that the nominees would belong to communities which are communities other than those to which Prime Minister and the Leader of the Opposition belong.

8) The Parliamentary Council can **ONLY make observations** in relation to the nominations made by the President to appoint individuals to the offices mentioned in Schedule I and Schedule II to Chapter VIIA of the Constitution.

9) **The President is not bound by the observations** of the Parliamentary Council, s/he only has to "seek observations". There is no obligation on the part of the President to even consider the observations.

Changes to the Legislature and the Law Making Process

10) **Repealing the limitation on the President's power to dissolve Parliament** placed by the 19th Amendment which allowed the President to dissolve Parliament only;

- a. If two thirds of the members of Parliament pass a resolution requesting him to dissolve Parliament.
- b. Any time after the expiration of four and a half years, since the first meeting of Parliament.

This provision was not only a check on the President; it also prevented the Prime Minister from dissolving Parliament and calling for early election at a time, which is more advantageous to his/her political party. Thereby it sought to reduce the advantage the incumbent government has at an election. *[See s. 12 of the 20th Amendment, Article 70 of the Constitution]*

11) Additionally, the 20th Amendment, imposes **new conditions regarding the dissolution of Parliament;**

a. The President shall not dissolve Parliament until the expiration of a period of two years and six months from the date appointed for Parliament's first meeting.

However, the President can dissolve Parliament earlier if;

i) Parliament by resolution requests the President to dissolve Parliament

ii) Where the President has not dissolved Parliament consequent upon the rejection of the Appropriation Bill, the President shall dissolve Parliament if Parliament rejects the next Appropriation Bill

b. the President shall not dissolve Parliament on the rejection of the Statement of Government Policy at the commencement of the first session of Parliament after a General Election;

c. the President shall not dissolve Parliament after the Speaker has entertained a resolution calling for the impeachment of the President in terms of Article 38 of the Constitution.

12) **Persons who are dual citizens are no longer disqualified from being elected as Members of Parliament** [by virtue of article 92(b)] this also means that a person who is a dual citizen is no longer disqualified from being elected as President of the Republic. *[See s. 15(2) of the 20th Amendment]*

13) Reintroducing provisions to the Constitution which allows the government to pass legislation as "**Urgent Bills**".

(Cont.) Where the Cabinet of Ministers has designated a Bill as “*urgent in the interest of national security or for the purpose of any matter relating to disaster management*”, the President can refer the Bill to the Supreme Court for a determination on the Constitutionality of the Bill.

a. **The Supreme Court has to decide on this issue within 24 hours** or such longer time as allowed depending on the instructions of the President.

b. This procedure cannot be used in relation to any Bill for the amendment, repeal and replacement, alteration or addition of any provision of the Constitution or for the repeal and replacement of the Constitution as a whole. *[See s. 26 of the 20th Amendment, Article 122 of the Constitution]*

14) Reduce the period of time which a Bill has to be made accessible to the public (by being published in the gazette), before it can be placed on the order paper of Parliament from 14 days to 7 days. *[See s. 13 of the 20th Amendment, Article 78(1) of the Constitution]*

15) Introduces a new requirement that any amendment proposed to a Bill in Parliament, during the committee stage, “*shall not deviate from the merits and principles of such Bill*”. However, the validity of an Act of Parliament enacted in violation of this process is protected by Article 80(3) of the Constitution. *[See s. 13 of the 20th Amendment, Article 78(3) of the Constitution]*

Changes to the Judiciary and Judicial Services Commission

16) The President can appoint the Chief Justice, the other judges of the Supreme Court, the President of the Court of Appeal and the other judges of the Court of Appeal at his discretion. *[See paragraphs 8 and 9 above]*

17) Increase the upper limit to the number of Judges of the Supreme Court from 11 to 17 judges. *[See s. 25 of the 20th Amendment, Article 119 of the Constitution]*

18) Increase the upper limit to the number of Judges of the Court of Appeal from 12 to 20 judges. *[See s. 31 of the 20th Amendment, Article 137 of the Constitution]*

19) The President may appoint any two judges of the Supreme Court as members of the Judicial Service Commission, at his discretion, subject to the conditions relating to their seniority and judicial experience serving as a Judge of a Court of First Instance as specified in Article 111D(2). *[See s. 23 of the 20th Amendment, Article 111D of the Constitution]*

TIMELINE OF THE 20TH AMENDMENT

Date	Process/ Events
05.08.2020	Sri Lanka Podujana Peramuna wins <u>Parliamentary Elections</u> by a clear majority
19.08.2020	A 5 member <u>Cabinet Sub - Committee</u> is appointed to draft/make observations regarding the 20th Amendment, at the Inaugural Meeting of the Cabinet appointed subsequent to the Parliamentary Elections.
03.09.2020	Gazette containing the proposed 20th Amendment Bill (Issued on 02.09.2020) made available online (<u>S,I,E</u>)
04.09.2020	CPA issues <u>statement</u> on the proposed 20th Amendment, together with a summary of the changes proposed under the 20th Amendment, comparing the changes introduced by the 19th and 20th Amendments.
04.09.2020	The <u>Janatha Vimukthi Peramuna</u> (JVP) states that the proposed 20th Amendment is anti-democratic and that any shortcomings in the 19th Amendment must be rectified rather than introduce the 20th Amendment.
07.09.2020	The <u>Tamil National Alliance</u> (TNA) expresses its opposition to the proposed 20th Amendment.
11.09.2020	The <u>Bar Association of Sri Lanka</u> (BASL) appoints Special Committee to study and make recommendations on the 20th Amendment Bill.
14.09.2020	<u>Prime Minister, Hon. Mahinda Rajapakse, appoints 9-member Committee</u> headed by Minister of Education, Hon. G. L. Peiris to study the 20th Amendment.

TIMELINE OF THE 20TH AMENDMENT (CONT.)

Date	Process/ Events
15.09.2020	The Committee appointed by Prime Minister, Hon. Mahinda Rajapakse, submits its <u>report</u> .
17.09.2020	Speaking at a <u>media briefing</u> , Cabinet Spokesperson Hon. Keheliya Rambukwella states that the President and Cabinet together initiated the 20th Amendment.
17.09.2020	CPA releases a brief <u>Question and Answer guide</u> to the proposed 20th Amendment.
17.09.2020	Speaking at a <u>media briefing</u> , members of the Samagi Jana Balawegaya (SJB) express their support towards rectifying any flaws in the 19th Amendment through a “19 plus”, as opposed to introducing the proposed 20th Amendment.
21.09.2020	The opposition party, SJB, appoints an <u>Action Committee</u> to take steps regarding the proposed 20th Amendment.
22.09.2020	The proposed 20th Amendment Bill presented to the Parliament in its <u>First Reading</u> by Minister of Justice, Hon. M. Ali Sabry PC.
25.09.2020	The Bar Association of Sri Lanka (BASL) submits report on the 20th Amendment Bill (Part I and II).
29.09.2020	The Sri Lanka Freedom Party appoints <u>10-member Committee</u> to study the 20th Amendment, whose findings will be submitted to the Committee appointed by the Prime Minister to study the 20th Amendment.

TIMELINE OF THE 20TH AMENDMENT (CONT.)

Date	Process/ Events
22-28.09.2020	<p><u>39 Petitions</u> filed in the Supreme Court challenging the 20th Amendment Bill, with the first Petition filed on 22.09.2020. Intervient Petitions were also filed.</p>
29-30.09.2020 02-05.10.2020	<p>Hearing of the parties on the 20th Amendment Bill by 5 Judge – bench of the Supreme Court.</p>
02.10.2020	<p>CPA files <u>Written Submissions</u> in the Supreme Court Special Determination on the 20th Amendment.</p>
06.10.2020	<p>CPA files <u>further Written Submissions</u> in the Supreme Court Special Determination on the 20th Amendment.</p>
12.10.2020	<p>The Amarapura-Ramanna Samagri Maha Sangha Sabha, issuing a <u>statement</u>, highlights that the proposed 20th Amendment could lead to dictatorship and hinders democracy.</p>
13.10.2020	<p>The Catholic Bishops’ Conference of Sri Lanka issues <u>statement</u> opposing the proposed 20th Amendment and stating that, “the concentration of power in an individual without checks and balances does not auger well for a democratic country”.</p>
15.10.2020	<p><u>Members of the Buddhist Clergy express views</u> on the proposed 20th Amendment.</p>
17.10.2020	<p>Three <u>members of the Buddhist Clergy</u> write to the President dissuading the passing of the proposed 20th Amendment and <u>suggest clauses for reform</u>.</p>

TIMELINE OF THE 20TH AMENDMENT (CONT.)

Date	Process/ Events
19.10.2020	<p><u>Cabinet decided on three changes</u> to the 20th Amendment Bill to be incorporated at the Committee Stage amendments. These are <u>limiting the Acts</u> brought in as Urgent Bills to those pertaining to national security and disaster management, limiting the number of Cabinet Ministers, and the auditing of state institutions as envisaged under the 19th Amendment.</p>
20.10.2020	<p><u>Determination of the Supreme Court</u> on the Bill titled Twentieth Amendment to the Constitution delivered by 5 Judge - bench</p>
20.10.2020	<p>Speaker of the House, Hon. Mahinda Yapa Abeywardena, <u>presents the Supreme Court Determination to Parliament.</u></p>
21.10.2020	<p>The SJB leads a <u>protest march</u>/motorcade to Parliament in opposition to the proposed 20th Amendment.</p>
21-22.10.2020	<p>Minister of Justice, Hon. M. Ali Sabry PC presents the 20th Amendment Bill for the <u>Second Reading</u> before Parliament, indicating that changes necessary according to the Supreme Court determination are to be included, without introducing any new clauses in the Committee Stage amendments. A two-day <u>Parliamentary debate</u> on the Bill commences, thereafter.</p>
22.10.2020	<p>20th Amendment passed in Parliament upon Third Reading, incorporating Committee Stage Amendments, with 156 MPs voting in favour, 65 MPs voting against (numbers abstaining and absent vary across sources) (<u>S,I,E</u>).</p>

Annexure

Petition filed by CPA challenging the 20th Amendment

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

In the matter of an application in terms of Article 121 read with Article 120, Article 78 and Article 83 of the Constitution to determine whether the Bill titled "The Twentieth Amendment to the Constitution" or any part thereof is inconsistent with the Constitution.

1. Centre for Policy Alternatives (Guarantee) Limited,
No. 6/5, Layards Road,
Colombo 00500
2. Dr. Paikiasothy Saravanamuttu
No. 03, Ascot Avenue,
Colombo 00500

PETITIONERS

Supreme Court Special Determination

No. **03** / 2020

Vs

The Attorney General,
Attorney General's Department,
Colombo 01200

RESPONDENT

On this 22nd day of September 2020

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

The Petition of the Petitioners abovenamed appearing by RAJ MOAHAN BALENDRA practicing in the name style and firm of

SINNADURAI SUNDARALINGAM & BALENDRA

and his Assistants their Registered Attorneys state as follows:

1. The 1st Petitioner above named is a body incorporated under the laws of Sri Lanka (and duly re-registered in terms of the Companies Act No.7 of 2007) and is made up of members, more than three-fourth (3/4th) of whom are citizens of Sri Lanka and is entitled to make this application in terms of Article 121(1) of the Constitution.
2. The primary objects of the 1st Petitioner are *inter alia* to make inputs into public policy-making and implementation process in constitutional, legislative and administrative spheres to ensure responsible and good governance, and to propose to the government and parliament and all other policy-making bodies and institutions, constructive policy alternatives aimed at strengthening and safeguarding democracy, pluralism, the rule of law, human rights and social justice.

True copies of the Certificate of Incorporation and Memorandum and Articles of Association of the Petitioner are annexed hereto marked '**P1**' and '**P2**' respectively and pleaded part and parcel hereof.

3. The 2nd Petitioner is a citizen of Sri Lanka and the Executive-Director of the 1st Petitioner above-named.
4. The Hon. Attorney General is made a Respondent under and in terms of the requirements of Article 134(1) of the Constitution.
5. The Bill titled "*The Twentieth Amendment to the Constitution*" (hereinafter referred to as "the Bill") was published as a Supplement to Part II of the Gazette of 28th August 2020. The said Gazette was only issued on 2nd September 2020 and placed on the Order Paper of Parliament on 22nd September 2020.

True copies of the said Bill (in Sinhala, Tamil and English) are annexed hereto marked '**P3a**', '**P3b**' and '**P3c**' respectively and are pleaded part and parcel hereof.

6. The long title of the said Bill describes it as "*An Act to Amend the Constitution of the Democratic Socialist Republic of Sri Lanka*".

CLAUSE 5 of the BILL "IMMUNITY OF PRESIDENT FROM SUIT" INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION

7. The Petitioners state that Clause 5 of the Bill, derogates from and infringes the provisions of Article 3 of the Constitution.
8. Article 3 of the Constitution 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**".(emphasis added)
9. As such Article 3 recognises *inter alia* that:
 - (a) The Sovereignty is in the People of the Republic (and not in the Republic itself or any instrument of the Republic); and
 - (b) Fundamental Rights and Franchise are part of the sovereignty of the People.
10. Clause 5 of the impugned Bill both on its own and read in the context of the entire Bill negatively impacts the Sovereignty of the people:
 - (a) It removes the direct control the People have over the individual they have elected to hold the office of President by conferring on that individual immunity from suit for any Application in terms of Article 17 and 126 of the Constitution in relation to powers exercised qua President.

- (b) It removes the only effective check and balance on the holder of the office of President during his tenure of office.

CLAUSE 27 & 28 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION

11. Clause 27 and 28 of the Bill, in relation to Bills which are “in the view of the Cabinet of Ministers, urgent in the national interest, and bears an endorsement to that effect under the hand of the Secretary to the Cabinet”, would;
- (a) Prevent the publication of such Bills in the gazette prior to being tabled in Parliament;
- (b) Preclude the citizens from being able to Petition the Supreme Court in terms of Article 121 of the Constitution and negates it;
- (c) Allow the President to directly refer the Bill to the Supreme Court for a “special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitution”.
- (d) Mandatorily require that Your Lordships of the Supreme Court make a determination within 24 hours of assembling the Court or such further time, not exceeding three days, as may be granted by the President.
12. In terms of Article 80(3) of the Constitution once a Bill becomes law upon the certification of the Speaker or the President as the case may be “no Court or tribunal shall inquire into, pronounce upon or in any manner call into question, the validity of such Act on any ground whatsoever”.
13. As such the Petitioners state that the limited pre-enactment review contained in Article 121 of the Constitution, is the only opportunity citizens will have to canvass the constitutional validity of a Bill / Act enacted by Parliament.
14. Clause 27 and 28 of the Bill thus derogates from and infringes the provisions of Article 3 of the Constitution.

CLAUSE 6 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION

15. Clause 6 of the Bill repeals the entire Chapter VIIA of the Constitution and replaces it with a new Chapter VIIA.
16. The Petitioners state that the main impact of the proposed Clause 6 would be to *inter alia* abolish the “Constitutional Council” and replace it with a “Parliamentary Council”. The Parliamentary Council;
- (a) Will only be made up of Members of Parliament, most likely only representing the Political party / coalition in government and main opposition party / coalition in Parliament.

- (b) Can only make “observations” and cannot make binding recommendations or approve the nominations made by the President. The President can disregard or completely ignore the “observations” of the Parliamentary Council.
 - (c) Will any way be under the full control of the President as the President has the power, to at any time remove three (the Prime Minister, the nominee of the Prime Minister and the nominee of the Leader of Opposition) out of the five Members of the Parliamentary Council for any reason [*proposed Article 47(a) of Clause 6 of the Bill and proposed Article 41(A)(7) of Clause 6 of the Bill*]
17. As observed by Your Lordships’ Court, the purpose of the Constitutional Council was to enhance the sovereignty of the People. The Constitutional Council, which was constitutionally mandated to endeavour to make its decisions “unanimously” provided a pluralistic and consultative approach to appoint individuals to key institutions which are required to function independent of the Executive.
18. The structure and powers of the Parliamentary Council allows the individual holding the office of President unfettered discretion to make appointments as she/he wishes, to these positions.
19. As recognized in a continuous line of judicial authorities of Your Lordships’ Court “our Law does not recognise that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power”.
20. Thus, the Petitioners state that the provisions in Clause 6 of the Bill derogates from and infringes the provisions of Article 3 of the Constitution.

CLAUSE 19, 20, 21 AND 22 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION

21. Clause 19, 20, 21 and 22 all pertain to a reduction of the powers of the Independent Election Commission.
22. Clause 6 of Bill grants the President absolute authority to appoint at his discretion the Members of the Elections Commission;
23. The cumulative effect of these provisions would *inter alia* include;
- (a) Removal of the power of the Election Commission to issue guidelines pertaining to any matter relating to the Public Service during the period of election to ensure a free and fair election.

- (b) Repeal of **Article 104GG** of the Constitution which makes it **an offence** for any public officer or any employee of a public corporation, business or undertaking vested in the Government to not fail to comply with the Election Commission to secure the enforcement of any law relating to the holding of an election or the conduct of a Referendum, or a failure to comply with any directions or guidelines issued by the Commission.
 - (c) The amendment as a whole denudes the ability of the Elections Commission to conduct a “free and fair election”
24. As Your Lordships’ Court has continuously held, the franchise of the People as recognized in Article 3, includes the right to a “free and fair election”.
25. Thus, the provisions in Clause 6, 19, 20, 21 and 22 of the Bill as they pertain to the ability of the Elections Commission to function effectively and independently, derogates from and infringes the provisions of Article 3 of the Constitution.

CLAUSE 7 AND 14 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION

26. Clause 7 of the Bill repeals the entire Chapter VIII of the Constitution and replaces it with a new Chapter VIII.
27. The proposed Clause 7 would *inter alia*;
- (a) Remove the security of tenure of the Prime Minister, as long as she/he holds the confidence of Parliament and makes the position of Prime Minister one of that which serves at the pleasure of the President.
 - (b) Remove the constitutional requirement that the President has to act on the advice of the Prime Minister when appointing from among Members of Parliament, Ministers, to be in charge of the Ministries determined by him.
 - (c) Remove the constitutional requirement that the President has to act on the advice of the Prime Minister when appointing from among Members of Parliament, Ministers who shall not be members of the Cabinet of Ministers.
 - (d) Remove the constitutional requirement that the President has to act on the advice of the Prime Minister when appointing from among Members of Parliament, Deputy Ministers to assist Ministers of the Cabinet of Ministers in the performance of their duties.
 - (e) Remove the constitutional requirement that the President has to act on the advice of the Prime Minister when removing a Minister of the Cabinet of Ministers, a Minister who is not a member of the Cabinet of Ministers or a Deputy Minister.
 - (f) Remove the constitutional limitations on the total number of Ministers of the Cabinet of Ministers, the number of Ministers who are not members of the Cabinet of Ministers and Deputy Ministers.

28. Clause 14 of the Bill would enable the President to decide when to dissolve Parliament at any time after the lapse of one year from the date of the last General Election, except in certain limited situations.
29. The cumulative impact of Clause 14 and Clause 7 of the Bill is that the President will have full control over Parliament, given the full power to co-opt any of its Members to the executive and to determine when Parliament should be dissolved.
30. If these provisions are enacted, Parliament would not be in a position to act as an effective check and balance over the President. Thus, the proposed amendments **violate the separation of powers**, which underpins the Constitution, and which is essential to protecting the sovereignty of the People in between two elections.
31. The Petitioners state that thus and otherwise the provisions in Clause 7 & 14 of the Bill derogate from and infringe the provisions of Article 3 of the Constitution.

CLAUSE 16 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND/ OR ARTICLE 83 OF THE CONSTITUTION

32. Clause 16 of the Bill, gives the President the power to submit to the People by way of a referendum any Bill (which is not a constitutional amendment), which has been rejected by Parliament.
33. Clause 16 provides that;

“Article 85 of the Constitution is hereby amended by the insertion, immediately after paragraph (1) of that Article, of the following paragraph:-

“(2) The President may in his discretion submit to the People by Referendum any Bill (not being a Bill for the repeal or amendment of any provision of the Constitution, or for the addition of any provision to the Constitution, or for the repeal and replacement of the Constitution, or which is inconsistent with any provision of the Constitution), which has been rejected by Parliament.”
34. The said Clause;
 - (a) Amends the provisions of Article 83 of the Constitution;
 - (b) Is contrary to, and inconsistent with, Article 3 of the Constitution as it removes a facet of the legislative power of the people from the Members of Parliament elected by the People and places it with the President.
35. The Petitioners state that thus and otherwise the provision in Clause 16 of the Bill derogates from and infringes the provisions of Article 3 and/or 83 of the Constitution.

CLAUSE 17 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION

36. Clause 17 repeals Article 91(1)(d)(xiii) of the Constitution which provides that “a citizen of Sri Lanka who is also a citizen of any other country” is disqualified from being elected as Members of Parliament. By virtue of Article 92(b) this provision also disqualifies such a person from being elected as President of the Republic.
37. The proposed clause will remove the constitutional restriction of dual citizens from contesting elections for the post of President and to be elected a Member of Parliament. Thus, it will allow for citizens of another country who may have assets in and loyalties to another country holding elected office in Sri Lanka.
38. Such a clause will allow individuals with divided loyalties and interests being elected to key offices in Sri Lanka, result in situations where conflict may arise and questions as to whether priority will be given to the interest of Sri Lanka and Sri Lankans or to the other country of citizenship.
39. The Petitioners state that Clause 17 of Bill derogates from and infringes the provisions of Article 3 of the Constitution.
40. The provisions of the impugned Clauses 5,6,7,14,16, 17, 19, 20, 21, 22, 27 and 28 of the Bill are thus and otherwise contrary to, and inconsistent with, Article 3 of the Constitution and /or the provisions of the impugned Clause 16 of the Bill are thus and otherwise contrary to, and inconsistent with, Article 83 of the Constitution.
41. It has thus become necessary for the Petitioners to invoke the jurisdiction of Your Lordships’ Court, and to respectfully seek a Determination that;
 - (a) The provisions of the impugned Clause 5, Clause 6, Clause 7, Clause 14, Clause 16, Clause 17, Clause 19, Clause 20, Clause 21, Clause 22, Clause 27 and Clause 28 of the Bill titled “*The Twentieth Amendment to the Constitution*” and/or the said Bill as a whole are contrary to, inconsistent with and derogate from Article 3 of the Constitution.
 - (b) The provisions of the impugned Clause 16 of the Bill titled “*The Twentieth Amendment to the Constitution*” and/or the said Bill as a whole is contrary to, inconsistent with and derogate from Article 83 of the Constitution.
 - (c) The provisions of the impugned Clause 5, Clause 6, Clause 7, Clause 14, Clause 16, Clause 17, Clause 19, Clause 20, Clause 21, Clause 22, Clause 27 and Clause 28 of the Bill titled “*The Twentieth Amendment to the Constitution*” and/or the said Bill as a whole are required to be enacted in terms of Article 83 of the Constitution.
42. The Petitioners respectfully reserve the right to furnish such further facts and documents in support of the matters set out herein at the hearing should the Petitioners become possessed of any such material.

43. The Petitioners have not previously invoked the jurisdiction of Your Lordships' Court in respect of this matter.
44. An affidavit of the 2nd Petitioner is appended hereto in support of the averments contained herein.

WHEREFORE the Petitioners respectfully pray that Your Lordships' Court be pleased to:

- (a) Determine that Clause 5 and/or Clause 6 and/or Clause 7 and/or Clause 14 and/or Clause 16 and/or Clause 17 and/or Clause 19 and/or Clause 20 and/or Clause 21 and/or Clause 22 and/or Clause 27 and/or Clause 28 of the Bill titled "*The Twentieth Amendment to the Constitution*" and/or the said Bill as a whole are thus and otherwise contrary to and/or inconsistent with the provisions of Article 3 of the Constitution;
- (b) Determine that the provisions of the impugned Clause 16 of the Bill titled "*The Twentieth Amendment to the Constitution*" and/or the said Bill as a whole is contrary to, inconsistent with and derogates from Article 83 of the Constitution.
- (c) Determine that Clause 5 and/or Clause 6 and/or Clause 7 and/or Clause 14 and/or Clause 16 and/or Clause 17 and/or Clause 19 and/or Clause 20 and/or Clause 21 and/or Clause 22 and/or Clause 27 and/or Clause 28 of the Bill titled "*The Twentieth Amendment to the Constitution*" and/or the said Bill as a whole are thus required to be enacted in terms of Article 83 of the Constitution.
- (d) Grant such further and other relief(s) as to Your Lordships' Court shall seem meet.

Sgd. Sinnadurai Sundaralingam & Balendra

REGISTERED ATTORNEYS FOR THE PETITIONERS

DOCUMENTS ANNEXED TO THE PETITION

Documents marked "P1" to "P3(c)"

Sgd. Sinnadurai Sundaralingam & Balendra

REGISTERED ATTORNEYS FOR THE PETITIONERS

Annexure

Further Written Submissions filed by CPA in the Supreme Court
Special Determination on the 20th Amendment

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

In the matter of an application in terms of Article 121 read with Article 120, Article 78 and Article 83 of the Constitution to determine whether the Bill titled "The Twentieth Amendment to the Constitution" or any part thereof is inconsistent with the Constitution.

1. Centre for Policy Alternatives (Guarantee) Limited,
No. 6/5, Layards Road, Colombo 5.
2. Dr. Paikiasothy Saravanamuttu
No. 03, Ascot Avenue,
Colombo 5.

Petitioners

S.C. (S.D.) No: 03/2020

- v -

The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

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

FURTHER WRITTEN SUBMISSION ON BEHALF OF THE PETITIONERS

1. These Further Written Submissions are made with regard to the Petitioners' Application for a Special Determination with regard to the Bill titled "*The Twentieth Amendment to the Constitution*" (hereinafter referred to as "the Bill").
2. The Petitioners have already filed Preliminary Written Submissions to Your Lordships' Court on 28th September 2020 and Comprehensive Written Submissions dated 2nd October 2020 in relation to matters arising from the Petition. The Petitioners' reiterate the submissions made in those two Written Submissions in addition to the present Written Submission.
3. These submissions are filed pursuant to the direction of Your Lordships' Court permitting same, in response to the arguments raised by several Counsel for the Interventient Petitioners (one of whom also appeared for a Petitioner) and the Hon.

Attorney General. As such these submissions should be read in addition to and in light of the said Comprehensive Written Submissions dated 2nd October 2020.

4. These Written Submissions, will deal with the following issues:
 - (a) Explain why the Clauses of the Bill which re-introduce provisions of the 1978 Constitution that were repealed by the Nineteenth Amendment to the Constitution require to be reviewed by Your Lordships' Court **[Para 5 to 9]**
 - (b) The Sovereignty of the People and the Fundamental Values of Our Constitution **[Para 10 to 17]**
 - (c) Clause 5 of the Bill "*Immunity of the President from Suit*" Infringes/Derogates from Article 3 of the Constitution. **[Para 18 to 23]**
 - (d) Clause 27 & 28 of the Bill "Urgent Bills" Infringes/Derogates from Articles 3 And 4 of the Constitution. **[Para 24 to 30]**
 - (e) Clause 17 of the Bill Infringes/Derogates from Articles 3 And 4 of the Constitution. **[Para 31 to 35]**

Contains the citizenship Oaths of the United States of America, Australia, Switzerland, Canada, Germany and South Africa.
 - (f) Conclusion. **[Para 36 to 38]**

CLAUSES OF THE BILL WHICH INTRODUCE PROVISIONS OF THE 1978 CONSTITUTION THAT WERE REPEALED BY THE NINETEENTH AMENDMENT TO THE CONSTITUTION.

5. Several Counsel for the Intervenient – Petitioners and the Attorney General sought to argue that the clauses of the Bill which reintroduced provisions of the original 1978 Constitution (2nd Republican Constitution) should be allowed to pass without a referendum.
6. It is respectfully submitted that this position is without merit and undercuts the very jurisdiction exercised by Your Lordships' Court in relation to Bills of this nature.
7. When the 2nd Republican Constitution was promulgated, there was no provision in the 1st Republican Constitution which was analogous to Article 83 and Article 121 of the present Constitution. As such there was no opportunity for the Supreme Court or the Constitutional Court (which existed at that time), to scrutinise the provisions of the 1978 Constitution before they were enacted.

8. This was a question posed by Your Lordships to the Intervient Petitioners on several occasions during oral arguments, but which did not receive a response from Counsel for the Intervient Petitioners.
9. The provisions of the Bill, especially Clause 5 (immunity of President from suit) and Clause 27 and 28 (Urgent Bills) having been repealed and now being reintroduced, these provisions have to conform to the requirements of Article 83 and 121 of the 2nd Republican Constitution.

SOVEREIGNTY OF THE PEOPLE AND THE FUNDAMENTAL VALUES OF OUR CONSTITUTION

10. The Petitioners have exhaustively explained their position in **paragraphs 11 to 24** of their Comprehensive Written Submissions dated 2nd October 2020.
11. The Petitioners in this case are not arguing for Your Lordships' Court to recognize the basic structure doctrine. The Petitioners' position as set out in the Petition and oral submissions is that the Bill as a whole or individual Clauses of the Bill need to be passed by a special majority and be approved by the people at a referendum.
12. It is respectfully submitted that the Petitioners however maintain that the Bill as a whole is flawed beyond repair and cannot be salvaged by any amendments and as such the Bill as a whole requires to be approved by the people at a referendum.
13. The positions taken up in the Comprehensive Written Submissions dated 2nd October 2020 were that;
 - (a) Article 3 (sovereignty of the People) is a unique and fundamental feature in the 2nd Republican Constitution and Your Lordships' Court should closely scrutinize the impact of each provision of the Bill on the sovereignty of the People.
 - (b) Your Lordships' Court should jealously guard the right of the sovereign people to exercise control over the Executive and the Legislature, not merely through free and fair elections, but also in-between elections.
 - (c) The People temporarily give their executive and/or legislative sovereignty to the elected leaders to exercise such power in terms of the Constitution. Therefore, all significant changes to these powers as specified in the Constitution, mandatorily require the approval by the people at a referendum.

- (d) Over a period of time Your Lordships' Court has recognised several important Constitutional values that underpin the Constitution, in addition to the sovereignty of the People.
- (e) These ideas, principles, values are not dispersed ideas. They are interrelated and connected concepts that play out in a Constitutional democracy.
14. These Constitutional values / principles were developed by Your Lordships' as a response to trying to reconcile several countervailing Constitutional provisions. Over time Your Lordships' Court developed these values / principles as guides to interpretation in order to try to temper the undemocratic aspects of the 2nd Republican Constitution.
15. Even some Intervenients and the Hon. Attorney General agreed that Your Lordships' had tempered the harshness of several provisions of the 2nd Republican Constitution, including the immunity of the President.
16. In fact, in *Centre for Policy Alternatives (Guarantee) Ltd and another v Dayananda Dissanayake and others 2003 (1) SLR 277* Your Lordships' Court was faced with the argument that since the some of the constitutional norms, prevalent at the time the Provincial Council's Election Act was enacted, "were undemocratic and unprincipled" Your Lordships' Court should give a similar interpretation to the relevant statutory provision. Your Lordships' Court responded unequivocally by stating
- "When constitutional or statutory provisions have to be interpreted, and it is found that there are two possible interpretations, **a Court is not justified in adopting that interpretation which has undemocratic consequences in preference to an alternative more consistent with democratic principles, simply because there are other provisions, whether in the Constitution or in another statute, which appear to be undemocratic.**..... The Judiciary is part of the "State", and as such is pledged to play its part in establishing a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all people; and it is mandated to strengthen and broaden the democratic structure of government [see Articles 27(2)(a) and 27(4) read with Article 4(d).]
- (at pg 292) (emphasis added)
17. As such, the Petitioners' are only urging Your Lordships' Court to look at the impact of the provisions of the Bill in light of the aforementioned Constitutional values / Principles, when examining their impact on the sovereignty of the People.

CLAUSE 5 of the BILL "IMMUNITY OF PRESIDENT FROM SUIT" INFRINGES/DEROGATES FROM ARTICLE 3 OF THE CONSTITUTION

18. The Petitioners reiterate their position as explained in **paragraphs 25 to 42** of their Comprehensive Written Submissions dated 2nd October 2020.
19. In response to the argument by the Intervenients and the Hon. Attorney General that the President's actions qua President remain reviewable by the Supreme Court, it is respectfully submitted that;
 - (a) It is disingenuous for them to downplay the impact / scope of this immunity sought to be imposed by Clause 5.
 - (b) If their position is accurate then what purpose would Clause 5 of the Bill serve? The existing Constitutional provision does not allow the President to be impleaded in proceedings before Your Lordships' Court, even when the acts of the President are being challenged.
 - (c) The Attorney General represents the President and the President does not need to be physically present in Court.
 - (d) The Written Submissions dated 2nd October 2020 has already cited extensive authority, where upon the objections raised on behalf of the Attorney General, Your Lordships' Court has been constrained to conclude that the Court does not have jurisdiction to review such acts even where the President is accused of acting contrary to the Constitution.
 - (e) Furthermore, where there is imminent infringement by an act/omission of a President, it can only be effectively redressed under Article 126. In this situation the "immunity shields the doer not the act" principle lacks efficacy in upholding fundamental rights which is part of the sovereignty of the People recognised in Article 3.
 - (f) As such it is clear that the amendment in Clause 5 is aimed at limiting the sovereignty of the People, by preventing citizens from coming before Your Lordships' Court to challenge the acts of the President.
20. In response to the argument by the Intervenients that the President's immunity is a restriction on Fundamental Rights of the citizens, it is respectfully submitted that;
 - (a) A restriction of a fundamental right pertains to its scope, not in relation to whom it applies to.

- (b) The provisions of Clause 5 of the Bill do not restrict the scope of any fundamental right or its content, it specifically seeks to make the acts of the President qua President immune from the jurisdiction of Your Lordships' Court.
 - (c) This is a violation of the sovereignty of the People, both in terms of fundamental rights and in terms of an unacceptable alienation of the judicial power of the people.
 - (d) It is also a violation of the executive power of the people, as it seeks to make the holder of the office of President immune from any scrutiny during the tenure of his office. This is an unacceptable position and would render the servant (the holder of the office of President) more powerful than the master (the sovereign people).
21. In response to the argument by the Intervenients and the Hon. Attorney General that the President's immunity is not a derogation of the sovereignty of the People because the Constitution provides for an impeachment procedure, it is respectfully submitted that;
- (a) The Comprehensive Written Submissions dated 2nd October 2020 has already exhaustively explained why this position is wrong [See **paragraphs 38 to 41**]
 - (b) Even if it is assumed that the impeachment procedure is a safeguard of the sovereignty of the People, which it is not, exempting all actions of the President qua President from judicial scrutiny would still continue to be a derogation of the sovereignty of the People.
 - (c) It is conceivable that some Presidential acts may warrant judicial review without the more extreme measure of impeachment. To propose impeachment as a remedy for any/every mistake/ violation by the President would itself be unfair on the President (apart from being extreme, harsh and untenable).
22. In response to the argument by the Hon. Attorney General that the President's actions qua President can be reviewed after the President leaves office, it is respectfully submitted that;
- (a) This will not address the consequences faced by the citizens at that time itself and citizens will be forced to delay redress for up to 10 years.
 - (b) Even then a determination from Your Lordships' Court in favour of a citizen will only be enforceable (if at all) against the former President and a sitting President is able to act with impunity whilst in office.

- (c) As such it is respectfully submitted that this is not an effective and expeditious remedy.
 - (d) The Constitutional values that underpin the Fundamental Rights jurisdiction of Your Lordships' Court is that it is citizen centric.
 - (e) Article 126(5) states that Your Lordships' Court should dispose of a Fundamental Rights application within two months. Your Lordships' Court has held that this provision is only directory, in order to protect the rights of citizens from being vitiated. However, this provision does indicate the strong legislative intent that the remedy available to citizens should be effective and expeditious and not merely notational.
23. As such it is respectfully submitted that Clause 5 of the Bill derogates from and infringes the provisions of Article 3 of the Constitution and is required to be passed at a referendum in addition to being approved by 2/3rds of the Members of Parliament.

CLAUSE 27 & 28 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 OF THE CONSTITUTION

24. The submissions on these Clauses, as set out in **paragraphs 43 to 57** of the Comprehensive Written Submissions dated 2nd October 2020 is respectfully reiterated.
25. It is respectfully submitted that the Intervenients and the Hon. Attorney General did not have a response to any of the Petitioners' arguments other than to say that;
- (a) This is a necessary power;
 - (b) It has always been exercised in good faith;
 - (c) Your Lordships' Court is fully capable of examining the provisions of a Bill in 24 hours and provide a detailed opinion. To suggest otherwise would be an affront on Your Lordships' Court.
26. It is respectfully submitted that none of these arguments explain how the said clauses do NOT violate Article 3 of the Constitution. Thus, the Intervenients and the Hon. Attorney General implicitly conceded to the arguments advanced by the Petitioners.

27. In response to the arguments advanced by the Intervenients and the Hon. Attorney General, it is respectfully submitted that;
- (a) There is no necessity for urgent legislation as;
 - i. The Constitution and other laws provide for the exercise of executive power in times of emergencies including *inter alia* in terms of Article 155 of the Constitution; S.2(3), S. 16 and 21 of the Public Security Ordinance; S. 10 & 11 of the Sri Lanka Disaster Management Act.
 - ii. These significant powers that are to be exercised in an emergency are only for a limited time, thus allowing the government to continue until legislation can be passed or the emergency ends.
 - iii. These powers are subject to judicial review when required.
 - iv. Enacting laws in the situation of an actual emergency might not be possible and in any event a law once enacted will be active until it is repealed by Parliament.
 - (b) The urgent Bill provisions have rarely been used in good faith;
 - i. As the Hon. Attorney General conceded there have been over one hundred emergency Bills sent for review by the Supreme Court. This also included several constitutional amendments.
 - ii. As such it is clear this provision has been predominantly used for situations which are not emergencies.
 - (c) Your Lordships' Court has itself stated that urgent Bills, which were cleared by Court in terms of Article 122, violate several provisions of the Constitution [see example already cited in **In re Recovery of Loans by Banks (Special Provisions) Amendment Bill** SC SD 22/2003]
 - (d) Thus, Your Lordships' Court is aware of the inherent dangers of the Urgent Bill procedure.
28. Your Lordships' would also appreciate that the Hon. Attorney General recently argued before Your Lordships' court that the Constitution and other laws had given the executive all the necessary powers to govern the country even without a sitting Parliament for more than 3 months in the midst of a pandemic.
29. It is further respectfully submitted that through this procedure, any government could enact laws which violate provisions of the Constitution, including

entrenched provisions and in a manner that is detrimental to the sovereignty of the People.

30. As described previously, the urgent Bill procedure does not provide for any meaningful access to Your Lordships' Court. Thus, it is respectfully submitted that Clause 27 and 28 of the Bill derogates from and infringes the provisions of Article 3 of the Constitution and is required to be passed at a referendum in addition to being approved by 2/3rds of the Members of Parliament.

CLAUSE 17 OF THE BILL INFRINGES/DEROGATES FROM ARTICLES 3 AND 4 OF THE CONSTITUTION

31. The submissions on this Clause, as set out in **paragraphs 85 to 89** of the Comprehensive Written Submissions dated 2nd October 2020 is respectfully reiterated.
32. Additionally, Your Lordships' attention is invited to consider the following oaths an individual would have to take when taking up citizenship in another country
33. It is respectfully submitted that this clearly demonstrates the nature and extent of dual loyalties that would afflict any dual citizen and could result in a situation where conflicts may arise as to whether such person should give priority to the interests of Sri Lanka and Sri Lankans or to the other country of citizenship.

United States of America

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have therefore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform non-combatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God."

Australia

"From this time forward, I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey."

Switzerland

"I swear or I solemnly promise: to be loyal to the Republic and the canton of ____ as to the Swiss Confederation; to scrupulously observe the constitution and the laws; to respect the traditions, to justify my adhesion to the community of Geneva by my actions and behaviour; and to contribute with all my power to keeping it free and prosperous."

Canada

"I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen."

Germany

"I solemnly declare that I will respect and observe the Basic Law and the laws of the Federal Republic of Germany, and that I will refrain from any activity which might cause it harm."

South Africa

"I, do hereby solemnly declare that I will be loyal to the Republic of South Africa, promote all that will advance it and oppose all that may harm it, uphold and respect its Constitution and commit myself to the furtherance of the ideals and principles contained therein."

34. Further, the Attorney General in his submissions stated that the Citizenship Act provides for the Minister to declare on an application on resuming Sri Lankan citizenship in terms of a 'benefit to Sri Lanka'. It is respectfully submitted that the impugned clause could result in a situation where the Minister in question may have dual citizenship and thus the decision whether its of 'benefit to Sri Lanka' may be influenced by his or her own divided loyalties.
35. It is therefore respectfully submitted that Clause 17 of Bill derogates from and infringes the provisions of Article 3 of the Constitution and would also potentially compromises/derogates from Article 1 ('independence of the Republic').

CONCLUSION

36. Your Lordships' attention is respectfully drawn to the fact that no substantive submissions were made by the Intervenients and the Hon. Attorney General challenging the Petitioners' argument that CLAUSE 19, 20, 21 AND 22 OF THE BILL as they pertain to the ability of the Elections Commission to function effectively

and independently, derogates from and infringes the provisions of Article 3 of the Constitution.

37. In the context of the aforementioned submissions it is respectfully submitted that the provisions of the impugned Clauses 5, 6, 7, 14, 16, 17, 19, 20, 21, 22, 27 and 28 of the Bill are thus and otherwise contrary to, and inconsistent with, Article 3 of the Constitution.
38. For the reasons set out above, it is respectfully submitted that Your Lordships' Court will be pleased to grant the relief prayed for in the Petition of the Petitioners above named.

On this 6th Day of October 2020

Settled by

Luwie Ganeshathasan
Dr. Gehan Gunatilleke
Ermiza Tegal
Bhavani Fonseka
Viran Corea

Attorneys-at-Law

M. A. Sumanthiran

President's Counsel

Registered Attorney-at-Law for the Petitioners

Annexure

Written Submissions filed by the Attorney General in the Supreme Court Special Determination on the 20th Amendment

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

In the matter of an Application under Article 121 of the Constitution of the Democratic Socialist Republic of Sri Lanka in relation to a Bill titled "TWENTIETH AMENDMENT TO THE CONSTITUTION".

Indika Gallage
Attorney-at-Law
No. 167A, Horekele Junction
Kalapugama
Moronthuduwa.

Petitioner

SC.S.D. 01/2020

Vs.

Hon. Attorney General
The Attorney General's Department
Colombo 12.

Respondent



On this 02nd day of October 2020

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL

BACKGROUND

1. The Bill titled "Twentieth Amendment to the Constitution" was published as a Supplement to Part II of the Gazette of 28th August 2020 in accordance with Article 78(1) of the Constitution. Therefore, it was duly placed on the Order of Parliament by the Minister of Justice on 22nd September 2020.

2. The several Petitioners in Special Determination Nos. 01 to 39/20 invoked the jurisdiction of Your Lordships' Court in terms of Article 121(1) of the Constitution. A number of Petitioners also sought to intervene in this proceedings under Article 134(3) of the Constitution. The Bill was taken up for deliberation by Your Lordship's Court on the 29th and 30th of September and the 1st of October 2020.

JURISDICTION OF THE SUPREME COURT IN RELATION TO A BILL DESCRIBED IN ITS LONG TITLE AS BEING AN ACT TO AMEND THE CONSTITUTION

- (i) The Bill being an amendment to the Constitution, would necessarily have to be passed by the special majority of Parliament stipulated in Article 82(5). Therefore, **the 'only' question to be determined in these proceedings is whether the Bill or any provision thereof requires the approval of the People at a referendum by virtue of Article 83.**



3. Article 120 proviso (a) of the Constitution, reads:

“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” (emphasis added)

4. It is therefore evident, that when proviso (a) of Article 120 of the Constitution becomes applicable, the Supreme Court’s general constitutional jurisdiction under Article 123 to determine “any question” relating to the constitutionality of a Bill becomes limited to a “single question”, namely whether such Bill requires the approval by the People at a Referendum in accordance with Article 83 of the Constitution. (See, “Second Amendment to the Constitution” S.C.(SD)3/1979, “Third Amendment to the Constitution” S.C.(SD) 2/1982, “Fifth Amendment to the Constitution” S.C.(SD) 1/1983, “Seventeenth Amendment to the Constitution” S.C.(SD) 8/2000 and “Seventeenth Amendment to the Constitution” S.C.(SD) 6/2001).

5. Article 123 reads as follows:

(1) The determination of the Supreme Court shall be accompanied by the reasons therefor and shall state whether the Bill or any provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution.



(2) *Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –*

(a) *whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82 ; or*

(b) *whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or*

(c) *whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83, and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.*

(4) *Where any Bill, or the provision of any Bill, has been determined or is deemed to have been determined, to be inconsistent with the Constitution, such Bill or such provision shall not be passed except in the manner stated in the determination of the Supreme Court :*

Provided that it shall be lawful for such Bill to be passed after such amendment as would make the Bill cease to be inconsistent with the Constitution.



(ii) **Amendments to the Constitution that would attract a Referendum**

6. Article 83 of the Constitution sets out an exhaustive list of *entrenched* provisions. It reads as follows:

“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,*

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.”

SUBMISSIONS

7. These written submissions are made further to the oral submissions made by the Hon. Attorney General at the said deliberations, and will proceed to address in detail the question as to whether the Bill or any provision thereof requires the approval of the People at a Referendum.





Proposed Amendments

8. At the outset, Your Lordships may be pleased to appreciate the proposed amendments in the context of provisions in the 1978 Constitution and their evolution by amendments to the Constitution, as introduced from time to time. For ease of reference, a table is set out below tracing the constitutional origins of the several clauses sought to be re-introduced through this Bill.

Clause No. in the Bill	Content	Similar provision in 1978 Constitution as amended up to 17A	Similar provision in 18 th Amendemnts
1	LONG TITLE OF THE BILL		
2	NEW AMENDMENT TO ARTICLE 31(1)(b)		
3	Powers and functions of the President	Article 33	
4	President to be responsible to Parliament	Article 42	
5	Immunity of President from suit	Article 35	
6	Parliamentary Council		Chapter VIIA – Article 41A
7	Cabinet of Ministers	Article 42 – Article 53	



8	Public Service Commission		Article 54(1) (Section 7)
9	Power of delegation by Public Service Commission to a Committee		Article 56(1)
10	Power of delegation by Public Service Commission to a Committee		Article 57
11	AMENDS ARTICLE 61A BY REMOVING THE POWER OF THE ADMINISTRATIVE APPEALS TRIBUNAL TO HEAR AND DETERMINE APPEALS IN RELATION TO DECISIONS OF THE PUBLIC SERVICE COMMISSION		
12	Appointments by the President		Article 61E
13	Secretary General of Parliament		Article 65
14	Dissolution of Parliament	Article 70(1)	
15(1)	Publication of Bills	Article 78(1)	
16	Submission of Bills to the People by Referendum	Article 85(2)	



17	Disqualification for election as a Member of Parliament	Article 91(1)(d)	
18	Disqualification for election as President	Article 92	
19	Election Commission		Articles 103(1) and 103 (7)
20	Powers of the Election Commission to issue Guidelines		Article 104B(4a)
21	Appointment of Commissioner General of Elections		Article 104E(1)
22	REPEALS ARTICLE 104GG INTRODUCED BY THE 19 TH AMENDMENT		
23	Appointment of Judges to the Superior Courts		Article 107(1)
24	Acting appointments		Article 109
25	Constitution of the Judicial Service Commission		Article 111D
26	Power to grant leave or remove a member of the Judicial Service Commission		Article 111E(5) and 111E(6)

27	Urgent Bills	Article 122	
28	Deeming provision to apply in the event the Supreme Court entertains a doubt with regard to an Urgent Bill	Article 123(3)	
29	Ouster clause with regard to the Validity of Bills and the legislative process	Article 124	
30	Right to be heard by the Supreme Court in relation to Urgent Bills	Article 134(1)	
31	Appointment of the Auditor General		Article 153(1) and 153(4)
32 -39	REPEALS THE NATIONAL AUDIT SERVICE COMMISSION INTRODUCED UNDER THE 19 TH AMENDMENT		
40	Duties and functions of the Auditor General		Article 154(1)
41	Appointments to the Finance Commission		Article 154R(1)(c)





42	National Police Commission		Article 155(1) and 155(4)
43	REPEALS THE IGP'S RIGHT TO ATTEND MEETINGS OF THE NATIONAL POLICE COMMISSION		
44	Power to challenge a decision of the National Police Commission		Article 155C(1)
45	Interference with the National Police Commission		Article 155F(1)
46	Powers of the National Police Commission		Article 155FF
47-51	Ancillary of the National Police Commission		Repealed by Section 28 to 32 of the Act
52	Power of National Police Commission to make rules		Article 155M
53	Parliamentary Commissioner for Administration		Article 156(2) and 156(5)
54	REPEAL OF CHAPTER XIX A – COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY AND CORRUPTION		
55	REPEAL OF CHAPTER XIX B – NATIONAL PROCUREMENT COMMISSION		



56	Interpretation of Public Officer		Article 170
57	TRANSITIONAL PROVISIONS		
58	INCONSISTENCY BETWEEN SINHALA AND TAMIL TEXTS		

9. As evident, provisions in clause 3 (Article 33), clause 4 (Article 42), clause 5 (Article 35), clause 7 (Articles 42 to 53), clause 14 (Article 71), clause 15(1) (Article 78(1)), clause 16 (Article 85(2)), clause 17 (Article 91(1)(d)), clause 18 (Article 92), clause 27 (Article 122), clause 28 (Article 123(3)), clause 29 (Article 124) and clause 30 (Article 134(1)) were included in the 1978 as amended to the Seventeenth Amendment. Therefore, when read in the light of the Preamble to the Constitution (SVASTI), these provisions should be construed as having been enacted in terms of the **Mandate which the People of Sri Lanka had freely expressed and granted on 21st July 1977 and entrusted to and empowered their Representatives elected on that day to draft, adopt and operate as a new Republican Constitution and subsequently by the exercise of this legislative power of the people through their representatives.**
10. The provisions in the remaining clauses were effected by the Eighteenth Amendment in the following manner:

Clause 6 (Chapter VIIA – Article 41A), clause 8 (Article 54(1)), clause 9 (Article 56(1)), clause 10 (Article 57), clause 12 (Article 61E), clause 13 (Article 65), clause 19 (Article 103(1) and 103(7)), clause 20 (Article 104B(4a)), clause 21 (Article 104E(1)), clause 23 (Article 107(1)), clause 24 (Article 109), clause 25 (Article 111D), clause 26 (Article 111E(5) and Article 111E(6)), clause 31 (Article 153(1) and Article 153(4)), clause 40 (Article 154(1)), clause 41 (Article 154R(1)(c)), clause 42 (Article 155(1) and Article 155(4)), clause 44

(Article 155C(1)), clause 45 (Article 155F(1)), clause 46 (Article 155FF), clauses 47-51 (repealed by sections 28 to 32 of the Act), clause 52 (Article 155M), clause 53 (Article 156(2) and Article 156(5)) and clause 56 (Article 170).

11. Thus, it is seen that the proposed amendments contained in the impugned Bill have either been part of the 1978 Constitution with the approval of the Sovereign People acting through their Representatives exercising their legislative power or such power being exercised subsequent to determinations of the Supreme Court which exercising its judicial power.

Submissions on the Amendments to be moved at the Committee Stage of the Bill

12. It is respectfully submitted that the government has agreed to move further amendments to the Bill at the committee stage of Parliament and such proposed amendments were tendered to Your Lordships' Court at the commencement of the hearing on 29th September 2020 by the Attorney General, with copies to all the Petitioners and Intervient Petitioners. A copy of same is also annexed here to marked 'X' for the easy reference of Your Lordships.
13. In this regard, it was contended by several Petitioners that the content of the said proposed amendments was intended to deviate from the principles underlying the Bill in its present form. However, it is respectfully submitted that the only purpose of tendering the proposed committee stage amendments was to give notice to Your Lordships' Court and the several proceedings to the parties that the Government intends to move such amendments at Committee Stage of Parliament which is a matter that is provided for by the Constitution and the Standing Orders of Parliament.





- 14. In this context it is also to be noted that the content of the proposed committee stage amendments in no way deviates from the principles underlying the Bill. It is respectfully submitted that the proposed amendments are intended to provide further clarity to the legislative policy underlying the Bill and not to address any issues relating to the constitutionality of the Bill as alleged by the Petitioners.
- 15. Therefore, it is submitted that Your Lordship's are not precluded from considering the proposed committee stage amendments and exercising Your Lordships' jurisdiction in terms of Article 123(4) of the Constitution.

Petitioners' Submissions

- 16. The Petitioners sought to impugn the Bill on *inter alia* the following grounds, which are dealt with hereinafter:
 - The impact of the Bill on the purported basic structure of the Constitution
 - The prejudicial impact on Sovereignty
 - Specific clauses of the Bill

The Bill nor any of its provisions affect the basic features of the Constitution

- 17. In his oral submissions, the Learned President's Counsel for the Petitioner in SC.SD Application No.04/2020 claimed that *inter alia* the instant Bill in its entirety has no force in law as it "destroys" the basic structure of the Constitution and, as such, not even approval by the People at a Referendum can cure it. It was further submitted that only a constituent assembly with a mandate to formulate a new Constitution could engage in such a pursuit. Several other Counsel who made subsequent oral submissions supported



such a contention. Accordingly, their common position was that when the *Twentieth Amendment to the Constitution Bill* is taken as a whole, compliance with the procedure set out in Article 83 is insufficient for its enactment. However, as much as the Petitioners may urge that this Bill be struck down on such basis, any emotive pleas on their part must ultimately be considered through the prism of the law, particularly the ambit of the jurisdiction conferred on Your Lordships by the Constitution and, therefore, founded on the provisions of the Supreme Law of the Democratic Socialist Republic of Sri Lanka.

18. In this regard, Your Lordships may be pleased to appreciate that the several Applications before Your Lordships' Court with regard to the instant Bill seek to invoke the constitutional jurisdiction of the Supreme Court in terms of Article 121 read with proviso (a) to Article 120 of the Constitution. Article 120 and proviso (a) thereto read as follows:

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 the 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;*

19. In the Special Determination SC.SD. No.17/2013, where the Petitioner in that Application sought to impugn matters pertaining to the placing of the Private Member's Bill titled *Twenty First Amendment to the Constitution* on the Order Paper of Parliament, Your Lordships unequivocally drew the boundaries of jurisdiction under proviso (a) to Article 120 in the following manner:

"...It would be appropriate to take cognizance of the Constitutional jurisdiction of the Supreme Court in regard to Bills and it is condign to bear in mind, in the consideration of the grounds of challenge, the constitutional prescriptions as particularly set out in proviso (a) to Article 120 of the Constitution.

*...
The proviso (a) to Article 120 of the Constitution which pertains to a Bill for the amendment of any provisions of the Constitution or for the repeal and replacement of the Constitution has been commented upon by this Court in a number of determinations which in unison lay down that in view of Article 120(a) of the Constitution, the only question which this Court has to determine is whether the Bill requires the approval of the people at a referendum by virtue of the provisions of Article 83...*

*...
It is a basic tenet of law that a Court must be clothed with jurisdiction as any assumption of jurisdiction would render a decision devoid of legal effect and null and void. It is to be noted that the jurisdiction remit of the Supreme Court as stipulated in Article 120 of the Constitution has not been enlarged and the Court is constrained to hold fast to the bounds of its jurisdiction assigned to it by the grundnorm – the Supreme Law of the nation."*

20. Indeed, even in the Applications of the Petitioners on whose behalf Learned Counsel made oral submissions, posing the ramifications of the instant Bill vis-à-vis the purported "basic structure" of the Constitution as the thrust of their argument, the reliefs sought in such Applications are confined to prayers seeking compliance with Article 83. For instance, in SC.SD Application No.04/2020, the Petitioner prays that Your Lordships' Court be pleased to:



- (a) Determine that Clause 5 and/or Clause 6 and/or Clause 7 and/or Clause 14 and/or Clause 16 and/or Clause 17 and/or Clause 19 and/or Clause 20 and/or Clause 21 and/or Clause 22 and/or Clause 27 and/or Clause 28 of the Bill titled "The Twentieth Amendment to the Constitution" and/or the said Bill as a whole are thus and otherwise contrary to and/or inconsistent with the provisions of Article 3 of the Constitution;
- (b) Determine that Clause 16 of the Bill titled "The Twentieth Amendment to the Constitution" and/or the said Bill as a whole are thus and otherwise contrary to and/or inconsistent with and derogate from Article 83 of the Constitution;
- (c) Determine that Clause 5 and/or Clause 6 and/or Clause 7 and/or Clause 14 and/or Clause 16 and/or Clause 17 and/or Clause 19 and/or Clause 20 and/or Clause 21 and/or Clause 22 and/or Clause 27 and/or Clause 28 of the Bill titled "The Twentieth Amendment to the Constitution" and/or the said Bill as a whole are thus required to be enacted in terms of Article 83 of the Constitution.
21. Therefore, it is respectfully submitted that the Counsel for the Petitioners cannot now abandon the position of their clients manifest in the pleadings and make submissions contrary to the reliefs sought. They cannot approbate and reprobate by, on the one hand, praying for a determination that the Bill be enacted in terms of Article 83 and, simultaneously on the other hand, contending that even the approval of the People at a Referendum is insufficient for its passage into law. Further, the Supreme Court cannot transcend the parameters of its own constitutional jurisdiction under proviso (a) to Article 120. As such, the Petitioners are estopped from seeking any relief from Your Lordships which goes beyond a determination that the Bill attracts compliance with Article 83.



22. Further, any proposition that a Bill which alters the purported "basic structure" of the Constitution cannot be enacted even with the approval of the People at a Referendum is untenable in the context of Sri Lanka for more than one reason. As evident, Article 82 and Article 75 of the Constitution contemplate repeal and replacement of the Constitution by Parliament and "amendment" includes repeal, alteration and addition. These provisions read as follows:

Article 82 –

- (1) *No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution.*
- (2) *No Bill for the repeal of the Constitution shall be placed on the Order Paper of Parliament unless the Bill contains provisions replacing the Constitution and is described in the long title thereof as being an Act for the repeal and replacement of the Constitution.*
- (3) *If in the opinion of the Speaker, a Bill does not comply with the requirements of paragraph (1) or paragraph (2) of this Article, he shall direct that such Bill be not proceeded with unless it is amended so as to comply with those requirements.*



- (4) *Notwithstanding anything in the preceding provisions of this Article, it shall be lawful for a Bill which complies with the requirements of paragraph (1) or paragraph (2) of this Article to be amended by Parliament provided that the Bill as so amended shall comply with those requirements.*
- (4) *A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of 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) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon in accordance with the provisions of Article 80 or 79.*
- (5) *No provision in any law shall, or shall be deemed to, amend, repeal or replace the Constitution or any provision thereof, or be so interpreted or construed, unless enacted in accordance with the requirements of the preceding provisions of this Article.*
- (7) *In this Chapter, "amendment" includes repeal, alteration and addition.*

Article 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.*

23. Furthermore, in terms of **Article 76(1)**, "Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power".
24. Hence the Constitution itself recognizes the legislative power of the People vested in Parliament to effect amendments, including repeal and replacement of provisions of or the whole of the Constitution. Subject to the provisions of Article 83, therefore, the Constitution does not envisage any other procedure, including a constituent assembly, by which the Constitution could be amended, repealed, altered or added to.
25. However, the Learned President's Counsel for the Petitioner in SC.SD. No.04/2020 placed sole reliance on the dictum in the separate Determination by Wanasundera J. in SC.SD Applications Nos.7-48/1987 *In Re The Thirteenth Amendment to the Constitution* and sought to advance an argument regarding the purported "basic structure" of the Constitution. There, His Lordship relied on Indian jurisprudence, comparing the amending power contained in Article 368 of the Constitution of India with the provisions of Article 83 of our Constitution and observed that "*there could be in theory a fourth category even outside the amending provisions*" of Article 83. Quite apart from the speculative language in which such observation is couched, it is also inconceivable that the act of amending the "basic structure" by resort to a "Constituent Assembly" which is a body specially assigned to create a new Constitution could be more reflective of the Sovereignty of the People, over both Parliament exercising representative democracy through the legislative power

of the People or the People at a referendum exercising direct democracy. Most pertinently, the same Counsel conceded that this issue is not settled law in Sri Lanka as four of Their Lordships from the nine-Judge Bench in the aforesaid Special Determination were in agreement, four others disagreed and one of Their Lordships did not commenting on the issue. Further, Your Lordships may be pleased to see that Wanasundera J., despite having concluded that the Bill had the effect of altering the "basic structure of our Constitution", determined in the end that the Bill could be enacted with a Referendum:

"It would be seen from the foregoing that the Thirteenth Amendment seek to create an arrangement which is structurally in conflict with the structure of the Constitution and with its provisions both express and implied. Further, the provisions of the Thirteenth Amendment also contravene both the express and implied provisions of the Constitution. The Bill therefore cannot be passed without at least a Referendum."

26. Yet, with all due respect to Wanasundera J., the above dictum is flawed in that it fails to appreciate the distinguishing elements between the Constitution of India and the Constitution of Sri Lanka. Firstly, the concept of a "basic structure" is alien to our Constitution. Secondly, there is no provision under the Constitution of India which permits amendments of any provisions thereof through a referendum. The said **Article 368 of the Indian Constitution** which Wanasundera J. compared with Article 83 of the Constitution of Sri Lanka contains a vastly different procedure and reads as follows:

(1) *Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.*





(2) *An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:*

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or*
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or*
- (c) any of the Lists in the Seventh Schedule, or*
- (d) the representation of States in Parliament, or*
- (e) the provisions of this article,*

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

27. In any event, as the aforesaid separate Determination of Wanasundera J. with which only three of Their Lordships out of the nine-Judge Bench agreed, was a minority view, it cannot serve as a binding authority in support of the Petitioners' contention on this issue. Your Lordships may recall that it was the Determination of Their Lordships Sharvananda CJ, Colin-Thome J., Atukorale J. and Tambiah J. along with the separate Determination by Ranasinghe J. in SC.SD Applications Nos.7-48/1987 which prevailed and saw the enactment of the Thirteenth Amendment to the Constitution without recourse to a Referendum. Reproduced below are the observations in that majority view:



"it was contended that the scope of amendment contemplated by Article 82 and Article 83 is limited and that there are certain basic principles or features of this Constitution which can in no event be altered even by compliance with Article 83. Reliance was placed for this proposition on the decisions of the Supreme Court of India in Kesavananda Vs. State of Kerala, A.I.R. (1973) and Minerva Mills Ltd., Vs. Union of India (1980) A.I.R., S.C. 1789. Those decisions of the Supreme Court of India were based on Article 368 of the unamended Indian Constitution which reads as follows:

"An amendment of this Constitution may be initiated only by the introduction of a Bill for the purposes in either House of Parliament..."

The said section 368 carried no definition of "amendment" nor did it indicate its scope. It was in this context that the Supreme Court in Kesavananda case, reached the conclusion by a narrow majority of seven to six that the power of amendment under Article 368 is subject to implied limitation and Parliament cannot amend those provisions of the Constitution which affect the basic structure or framework of the Constitution...

...

But both our Constitution of 1972 and 1978 specifically provide for the amendment or repeal of any provision of the Constitution or for the repeal of the entire Constitution – Vide Article 51 of the 1972 Constitution and Article 82 of the 1978 Constitution. In fact, Article 82(7) of the 1972 (sic) Constitution states "In this chapter "Amendment "includes repeal,



alteration and addition.” In view of this exhaustive explanation that amendment embraces repeal in our Constitution, we are of the view that it would not be proper to be aided by concepts of “Amendment” found in the Indian judgments which had not to consider statutory definition of the word “Amendment”. Fundamental principles or basic features of the Constitution have to be found in some provision or provisions of the Constitution and if the Constitution contemplates the repeal of any provision or provisions of the entire Constitution, there is no basis for the contention that some provisions which reflects fundamental principles or incorporate basic features are immune from amendment. Accordingly, we do not agree with the contention that some provisions of the Constitution are unamendable.”

28. Subsequent Special Determinations by Your Lordships’ Court have also endorsed the above majority view in *In Re The Thirteenth Amendment* by distinguishing the position under the Constitution of India from the constitutional framework of Sri Lanka. In SC/SD No.32/2004 re the **Bill titled Nineteenth Amendment to the Constitution** proposed in 2004, it was determined thus:

“It was contended that that this Bill seeks to amend the basic structure of the Constitution and goes beyond the legislative competence of Parliament. The basis for this submission was that Clause 9.1 makes Buddhism the official religion and destroys the secular notion of the State.

*Reliance was placed for this proposition on the decision of the Supreme Court of India in *Kesavananda Vs. State of Kerala*, (AIR 1973, S.C. 1461). The aforesaid decision of the Supreme Court of India was based on Article 368 of the Indian Constitution. This Article of the Indian Constitution carried no definition of “Amendment”. On the contrary Article 82 of our*

Constitution provides that "Amendment" includes repeal, alteration and addition. In view of this definition it would not be appropriate to be guided by concept of "Amendment" found in the Indian Judgment. Basic features of the Constitution are to be found in some provisions of the Constitution and if the Constitution contemplates the repeal of any provision of the Constitution, there is no basis for the contention that some provisions which incorporate basic features are immune from amendment.

...

Article 82(5) provides that a Bill for amendment of any provision of the Constitution or for the repeal or replacement of the Constitution shall become law if the number of votes cast in favour of it amount to not less than two-thirds of the whole number of members (including those not present.)

However, Article 83 provides for a special procedure for a Bill to amend, repeal or replace or which is inconsistent with the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11 of the Constitution. Accordingly, any repeal or replacement or which is inconsistent with the aforesaid Article would require a two-third majority and a Referendum on the basis that it affects the basic features of the Constitution. Accordingly this Bill which seeks to repeal a basic feature of the Constitution namely Article 9 of the Constitution, and to substitute a new Clause in its place require two thirds majority in Parliament, and approval by the People at a Referendum in terms of Article 83."





29. Hence, it is evident that Your Lordships' Court has determined that the basic features of our Constitution are those entrenched provisions exhaustively referred to in paragraphs (a) and (b) of Article 83 of the Constitution, ie. Articles 1, 2, 3, 6, 7, 8, 9, 10, 11 and 83, as well as Articles 30(2) and 62(2) insofar as the extension of the term of office of the President or the duration of Parliament respectively is concerned. To argue that there is a "basic structure" or other basic features over and above those expressly and exhaustively set out in Article 83 is to write into the Constitution provisions which do not exist and were never intended by the Sovereign People or the Legislature. Such a course of action by judicial intervention would be contrary to well-settled principles governing the interpretation of Constitutions and has been frowned upon by Your Lordships.

30. The following extracts from Bindra on Interpretation of Statutes are cited in this regard:

"The simplest and most obvious interpretation of a Constitution; if in itself sensible, is the most likely to be that meant by the people in its adoption. (Green v. United States, 2 L Ed 2d 672, 703; 356 US 165 cited in Bindra, 10th Edn. at p.858.)

If the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such cases, but declare the intention of the law-giver. (Sussex Peerage Case, (1844) 11 Cl and Fin 85 at 143 cited in Bindra, 10th Edn. At p.861)



To get at the thought or meaning expressed in a statute, a contract or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involve no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it...So also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature left for construction...There is even stronger reason for adhering to this rule in the case of a Constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers...while the Constitution although framed by conventions, are yet created by the votes of the entire body of electors in a State... (Lake Country Commissioners v. Rollins, 132 L Ed 1060: 130 US 662, cited in Bindra, 10thEdn. at p.863)"

31. The literal rule of interpretation has been applied by Your Lordships' Court on numerous occasions involving constitutional interpretation. Following are extracts from the judgment of Amerasinghe J. in *Somawathie v. Weerasinghe* (1990) 2 Sri.L.R. 121:

"How should the words of this provision of the Constitution be construed? It should be construed according to the intent of the makers of the Constitution. Whereas in the Article before us, the words are in themselves precise and unambiguous and there is no absurdity, repugnance or inconsistency with the rest of the Constitution, the words themselves do best declare that intention. No more can be necessary



than to expound those words in their plain, natural, ordinary, grammatical and literal sense. [Cf. *Sussex Peerage Claim per Lord Wensleydale in Grey v. Pearson*]. In *Moti Ram Deka, Sudhir Kumar Das and Priya Gupta v. General Manager North East Frontier Railway and General Manager, North Eastern Railway Suba Rao, J.* at p. 621 paragraph 65 said:

"The general rule of interpretation which is common to statutory provisions as well as to constitutional provisions is to find out the expressed intention of the makers of the said provisions from the words of the provisions themselves."

...
...Unless it is apparent that there was such an omission to deal with an eventuality that required to be dealt with if the purposes of the Constitution were to be achieved, I am precluded from giving any construction other than the literal meaning of the Article. (Cf. per Lord Diplock in Jones v. Wrotham Park Estates.

...
*Even assuming that a certain situation had been inadvertently overlooked by the makers of the Constitution, with what certainty can we add any words to convey the intention of the makers of the Constitution, had their attention been drawn to the omission? Unless it is possible to state with certainty the additional words that would have been inserted, any attempt by this Court to repair the omission in the Constitution cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a provision in the Constitution. **The Court would go beyond its duty of construction.** (Cf. per Lord Diplock in Jones v. Wrotham Park Estates (ibid.))...*



29

...I do not know how to repair the supposed omission in accordance with the intentions of the makers of the Constitution because I do not know, and have no way of discovering, what they might have said. There is nothing I can necessarily imply from the words used. In such circumstances, to add some words of my own might transform the certain text of Article 126(2) into one that raises doubts. Judicial intervention would then, by introducing private beliefs, render a disservice to the Rule of Law which rests on the certainty of the law. (Cf. Cross, op. cit. p. 45 ;Bindra, op.cit. 990 fin. - 991).

Moreover, the separation of powers requires me as a Judge not to presume that I know how best to complete the legislative scheme. In such a situation, any attempt on my part to fill the supposed gaps would lead me to cross the boundary between construction or interpretation and alteration or legislation. It would become, in the words of Lord Diplock in Jones v. Wrotham Park Estates Ltd. "a usurpation of the function which under the Constitution of this country is vested in the legislature to the exclusion of the Courts." (See also Sir Rupert Cross, Statutory Interpretation, 2nd Ed. at p. 45. It is one thing to put in words to express more clearly what the makers of the Constitution said by implication; but quite another to make them say what I conjecture they could have or would have said if a particular situation had been brought to their attention. (Cf. E.A. Driedger, Construction of Statutes. 1983, 2nd Ed. 101). I do not wish to cross the boundary I have referred to without clear necessity for doing so by reading into the Constitution a large number of words which are not there. (Cf. per Scorman L.J. in Western Bank Ltd. v. Schindler). I have no difficulty in understanding why, as a Judge, I should refrain from becoming unduly creative in this way. It is a wrong thing to

do. (Cf. per Lord Mersey in *Thompson v. Gould & Co.*, per Lord Loreburn in *Vickers, Sons and Maxim Ltd. v. Evans*).

...

...In *Srimathi Champakam Dorairajan and another v. The State of Madras* ViswanathaSastri, J. at pp. 130-131 paragraph 31 said:-

"We have been told on high authority that a Constitution must not be construed in any narrow and pedantic sense... We have also been warned by equally high authority that we have to interpret the Constitution on the same principles of interpretation as apply to ordinary law and that we have no right to stretch or twist the language in the interest of any political, social or constitutional theory... I consider it to be both legally and constitutionally unsound, even though the invitation has been extended to us by learned counsel, to eviscerate the Constitution by our own conceptions of social, political or economic Justice".

*Where the rights of citizens have been abridged, restricted or denied by the Constitution, in their description or in the manner of their exercise, I can only give effect to the intention of the makers of the Constitution, however inexpedient, or unjust or immoral it may seem. (Cf. per Lord Diplock in *Dupont Steels Ltd. v. S/rs per Mahajan, J. in State of Bihar v. Kameshwar Singh*). I cannot twist, stretch or pervert the language of the Constitution under the guise of interpretation. In *Moti Ram Deka and others v. General Manager, North East Frontier Railway and another (supra)*, after stating*



that the intention of the makers of the Constitution must be gathered from the words of the Constitution itself. Suba Rao, J. at p. 621 said:

"It is also equally well settled that, without doing violence to the language used, a constitutional provision shall receive a fair, liberal and progressive construction, so that its true objects might be promoted."



In the matter of the Central Provinces and Berar Sales of Motor Spirits and Lubricants Act, 1938 Chief Justice Gwyer at p. 4. said he conceived that "a broad and liberal spirit should inspire those whose duty it is to interpret" the Constitution, "but", his Lordship added, "I do not imply by this that they are free to stretch or pervert the language in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors." These words were quoted with approval by Chief Justice Kania in A. K. Gopalan v. State of Madras.

As for the "spirit" of the Constitution, it is to be expected that arguments founded upon it are, as Das J. observed in Keshavan Madhava Menon v. The State of Bombay, 'always attractive' because they have a powerful appeal to sentiment and emotion. However, it has been held that the spirit of the Constitution is an "elusive and unsafe guide" (per Das. J. in Rananjaya Singh v. Bajinath Singh and Others Cf. per Mahajan, J. in State of Bihar v. Kameshwar Singh). In any event it cannot be invoked by a court for the purpose of altering the words of the Constitution. In Keshava Madhava Menon's case (ibid.). Das, J. observed that 'A court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not



support the view'. The spirit of the Constitution cannot prevail against the plain language of its letter. (See State of Bihar v. Kameshwar Singh (supra) at p. 309 paragraph 201 per Mahajan, J. and at p. 315 paragraph 231 per Das, J.; Rananjaya Singh v. Bajinath Singh (supra) at p. 752 per Das, J.; Ramakrishna Singh. Ram Singh and others v. State of Mysore and others per Das Gupta, C. J ;Kesavananda Bharati v. State of Kerala. To hold otherwise would, as Clifford, J. observed in Loan Association v. Topoka (see also Bindra, Interpretation of Statutes, 7th Ed., at p.990), 'make the courts sovereign over both the Constitution and the people and convert the Government into a judicial despotism'.

32. In *The Attorney General v. Shirani Bandaranayke and Others* SC Appeal No.67/2013, SC Minutes of 21.02.2014, a five-judge Bench of the Supreme Court interpreted the provisions of Article 107(3) of the Constitution by confining itself to the plain text. Accordingly, the artificial replacement of the words "by law or by Standing Orders" with the words "by law and by Standing Orders" within that text by Their Lordships in SC Reference No.3/2012 was criticized and overruled in the following manner:

By so deleting or rendering nugatory clear words of the Constitution, the Divisional Bench has flouted the concept of Sovereignty of the People enshrined in Article 3 of the Constitution and the basic rule reflected in Article 4(a) of the Constitution that the legislative power of the People may be "exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum"...

It is significant that Article 107(3) of the Constitution does not contain any words indicating that only certain matters contemplated by that provision may be provided for by Standing Orders and certain other matters must be provided for by law. If that was the intention of the makers of the Constitution, they would probably have adopted language sufficient to



convey such a meaning, and used, for instance, the formula "by law and Standing Orders". They would also have indicated clearly what matters should necessarily be provided for by law. Thus, in my view, the determination of this Court in SC Reference No. 3/2012 is not only erroneous but also goes beyond the mandate of this Court to interpret the Constitution, and intrudes into the legislative power of the People.

In my opinion, to conclude, as this Court did, in SC Reference No. 3/2012, that it is mandatory for Parliament to provide for the matters in question by law, and law only, not only does violence to the clear language of Article 107(3), but also takes away from Parliament, a discretion expressly conferred on it by the Constitution itself. In my opinion, this Court has no authority, whether express or implied, to do so. As this Court observed in *Attorney General v Sumathipala* (2006) 2 Sri LR 126, at page 143,

"A judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the judge thinks is desirable in the interests of justice. Therefore the role of the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any court and the function of every Judge to do justice within the stipulated parameters."

Thus, in my view, the determination of this Court in SC Reference No.3/2012 is not only erroneous but also goes beyond the mandate of this Court to interpret the Constitution, and intrudes into the legislative power of the People. Hence, to conclude, as this Court did, in SC Reference No.3/2012, that it is mandatory for Parliament to provide for matters in

question by law, and law only, not only does violence to the clear language of Article 107(3), but also takes away from Parliament, a discretion expressly conferred on it by the Constitution itself."

- 33. Therefore, Your Lordships may be pleased to reject the Petitioners' contention that the provisions of the instant Bill or the Bill taken as a whole alter the purported "basic structure" or grundnorm of the Constitution, locating it outside the scope of enactment even by compliance with the procedure set out in Article 83.
- 34. It is respectfully submitted that the Bill nor any of its provisions attract the requirement of approval of the People at a Referendum and, therefore, certainly no further procedural requirements for its passage into law. It may be enacted with the special majority stipulated in Article 82(5) of the Constitution.
- 35. Since the above contention of the Petitioners arose from their submissions that the Bill as a whole has a prejudicial impact on the Sovereignty of the People recognized in Article 3 of the Constitution, the concept of sovereignty as contemplated in our Constitution and elucidated by several determinations of Your Lordships' Court will be considered next, prior to addressing the specific provisions in the clauses of the Bill impugned by the Petitioners.

SOVEREIGNTY OF THE PEOPLE AND THE LINK BETWEEN ARTICLES 3 AND 4 OF THE CONSTITUTION

- 36. Article 3 of the Constitution 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 franchise."*



- 37. The origins of the concept of 'Sovereignty in the People' of Sri Lanka can be found in the Preamble to the 1978 Constitution (SVASTI), which states that the People of Sri Lanka, by their Mandate freely expressed on the 21st of July 1977, had entrusted to and empowered their Representatives to draft, adopt and operate a new Republican Constitution in order to achieve the goals of a Democratic Socialist Republic.

- 38. The Preamble to our Constitution also records that the freely elected representatives of the People of Sri Lanka, in pursuance of such mandate and humbly acknowledging their obligations to the People, had thereafter enacted this Constitution as the "Supreme Law" of the Democratic Socialist Republic of Sri Lanka, ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY, 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.

- 39. Accordingly, Article 3 which embodies the sovereignty of the People is expressly included in Article 83(a) of the Constitution and thus is an entrenched provision.

- 40. However, Article 4 of the Constitution is not expressly referred to in Article 83 of the Constitution and thus, is not an entrenched provision of the Constitution.

- 41. Sharvananda CJ. In Re. Thirteenth Amendment to the Constitution [1987] 2 SLR 312 at p.324 observed as follows:





“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 Articles 6, 7 and 8 were added to the list.” (emphasis added)

- 42. Article 4 sets out the manner in which “the Sovereignty of the People” shall be exercised and enjoyed.

- 43. In *In Re Thirteenth Amendment to the Constitution* [1987] 2 SLR 312 at page 324, Sharvananda CJ. observed that Article 4 was complementary to Article 3 of the Constitution.

“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.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. Article 4 does not define or demarcate the sovereignty of the People. It



merely provides one form and manner of exercise of that sovereignty. A change in the institution for the exercise of legislative or executive power incidental to that sovereignty cannot ipso facto impinge on that sovereignty."

44. **In Re Eighteenth Amendment to the Constitution** (S.C.S.D 12/2002-36/2002), [2002] 3 SLR 70, a seven judge bench of the Supreme Court observed (citing SC.SD 5/80, SC.SD SC.SD 1/82, SC.SD 2/83, SC.SD 1/84 and SC.SD 7/87), that Article 3 is linked with Article 4 of the Constitution and therefore these two Articles must be read together.
45. **In Re Nineteenth Amendment to the Constitution** [2002] 3 SLR 85, a seven judge bench of the Supreme Court observed that the "statement in Article 3 that sovereignty is in the People and is "inalienable", being an essential element which pertains to the sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4."
46. In the determination on the "Nineteenth Amendment to the Constitution", S.C.S.D. 04-19/2015, the Supreme Court observed that:

"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. Although Your Lordships' Court has in some instances drawn a link between Articles 3 and 4, it is respectfully submitted that Article 4 is so linked only to the extent of setting out the manner in and the agencies of government through which the Sovereignty of the People is to be exercised. Therefore, not every violation of Article 4 would necessarily result in a violation of Article 3. A mere inconsistency with the provisions contained in Article 4 of the Constitution *per se* would not impinge on Article 3, **unless such an amendment would have a "prejudicial impact on the sovereignty of the People"**.



48. Therefore, it is submitted that Your Lordship's Court would be required to examine whether the impugned Bill or any of its clauses would have a prejudicial impact on the sovereignty of the People as set out in Article 3 by itself or when read with other provisions.

WHAT CONSTITUTES A "PREJUDICIAL IMPACT ON THE SOVEREIGNTY OF THE PEOPLE"?

49. The concept of "prejudicial Impact" on the Sovereignty of the People, though not specifically defined by Your Lordships' Court, can be construed from the jurisprudence that has emerged from several determinations of the Supreme Court.

50. **In Re Nineteenth Amendment of the Constitution** [2002] 3 SLR 85, a seven judge bench of the Supreme Court at p.97 observed,

"Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution in one organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution. It necessarily follows that the balance that has been struck between the three organs of

government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained. This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another."

- 51. In "Local Authorities (Special Provisions) Bill", S.C.S.D. 12/2003, the Supreme Court observed that "Article 3 is a safeguard which prevents an alienation of the elements that constitute the sovereignty of the People and its exercise as provided in Article 4."
- 52. Having regard to the above, it is respectfully submitted that **where an amendment causes the transfer, relinquishment, removal or erosion of the powers** contained in Article 4 of the Constitution, **amounting to an alienation from one organ to another**, which would affect the balance of power between the three organs of government, such an amendment would constitute a prejudicial impact on the sovereignty of the People as enshrined in Article 3 of the Constitution. See: **In Re Eighteenth Amendment to the Constitution** S.C.S.D 12/2002-36/2002, "Nineteenth Amendment to the Constitution", S.C.S.D. 04-19/2015 and more recently the Supreme Court's determination in the Bill titled "Office for Reparations", S.C.S.D.19,20/2018. It is respectfully submitted that the instant Bill does not contain any such provisions.
- 53. Therefore, neither the Bill titled "Twentieth Amendment to the Constitution" nor its provisions have a prejudicial impact on the Sovereignty of the People. Hence, it does not attract the procedure set out in Article 83 of the Constitution.



ATTORNEY GENERAL'S POSITION IN RELATION TO SPECIFIC CLAUSES OF THE BILL

Clause 3 of the Bill – Repeal and substitution of Article 33

- 54. By this clause, Article 33 of the Constitution is sought to be repealed and substituted. The cumulative effect of this amendment is that certain specific duties of the President set out under sub-article (1) of Article 33, as well as the power to summon, prorogue and dissolve Parliament under Article 33(2)(c), now stand removed. Since the only question before Your Lordships' Court is whether the Bill contains any provisions which are inconsistent with any of the entrenched provisions of the Constitution and thus requires to be approved by the People at a Referendum by virtue of Article 83, the implications of removing the said provisions are analysed from that perspective.

- 55. At the outset, it should be borne in mind that, in Special Determination in SC.SD 8/2000 re the **Bill titled *Seventeenth Amendment to the Constitution***, a five-Judge Bench of Your Lordships' Court comprising the then Chief Justice observed that **it would be illogical to contend that a constitutional amendment which was introduced only with a special majority can be repealed only if it is submitted to a Referendum.**

- 56. However, quite apart from the wisdom of this general approach, there are cogent reasons as to why, even if taken individually, the repeal of each of the duties imposed on the President in Article 33(1) introduced by the Nineteenth Amendment to the Constitution do not impinge on entrenched provisions.



a) **Removal of duty to ensure that the Constitution is respected and upheld**

57. As Your Lordships may be pleased to see, sub-article (a) of Article 33(1) in its current form, requires the President to "ensure that the Constitution is respected and upheld". One may argue that the nature of this duty is two-fold; firstly, that the President himself respects and upholds the Constitution and, secondly, that the President secures through others, such respect for and upholding of the Constitution. It is evident that this two-fold duty already exists elsewhere in the Constitution.

58. For instance, Article 28(a) imposes a duty on every person in Sri Lanka, which would necessarily include the President, to **uphold and defend the Constitution**. Further, in terms of Article 32(1), the person elected or succeeding to the office of President shall assume office upon taking and subscribing the oath or making and subscribing the affirmation set out in the Fourth Schedule to the Constitution. In terms of Article 157A(7)(b), the President is also required to take and subscribe the oath or make and subscribe the affirmation set out in the Seventh Schedule to the Constitution. As per both the Fourth Schedule and the Seventh Schedule, the President affirms or swears that *inter alia* he will **uphold and defend the Constitution** of the Democratic Socialist Republic of Sri Lanka. Furthermore, under Article 38(2)(a)(i), one of the grounds upon which a sitting President may be impeached is if he is found guilty of "intentional violation of the Constitution". As such, there is an implied duty on the part of the President to refrain from violating the Constitution, which if cast in positive language, is a duty to act in accordance with the Constitution, which is a manifestation of respecting and upholding it.





59. Whereas all of the aforesaid provisions relate to the duty cast on the President to himself respect and uphold the Constitution, other provisions are illustrative of how the President ensures that others within his control act in a similar manner. For example, in terms of Article 154B(4)(a)(i), one of the grounds on which the President may, on the advice of a Provincial Council and subject to the procedure in Article 154B(4)(b), remove the Governor of that Province is if he has intentionally violated the provisions of the Constitution. In any event, insofar as securing respect for and compliance with the Constitution from others is concerned, the President can only act within the four corners of the powers vested in him by the Constitution and the law. To interpret Article 33(1)(a) in such a manner so that the President is duty-bound to guarantee that each and every person in Sri Lanka respects and upholds the Constitution would result in imposing an unfair and impractical burden on him. Even the fundamental duty of every person in Sri Lanka to uphold and defend the Constitution under Article 28(a) is not justiciable as per Article 29. Therefore, other than in instances such as in the said case of a Governor of a Province where express provision is available for the President to take action where the Constitution is not respected or upheld by a person, he can only act as a force of guidance to ensure that others respect and uphold the Constitution. Indeed, the law provides for mechanisms to ensure compliance with the Constitution by others, such as by Article 17 read with Article 126 under which executive and administrative action which infringes fundamental rights can be challenged before the Supreme Court.
60. Therefore, Article 33(1)(a) as it stands is only a restatement of the duty of the President to ensure that the Constitution is respected and upheld, which duty already continues to be encompassed explicitly and implicitly in other parts of the Constitution. There is no necessity to make express reference to the same duty in multiple Articles. After all, it is a well-established principle in the interpretation of Constitutions, that Constitutions are devoid of surplussage.



61. Further, in view of the legal and practical limitations for the President to actually ensure that others respect and uphold the Constitution, this provision is dispensable and its repeal does not attract the application of Article 83 of the Constitution. After all, there was no such obligation cast on a President until the Nineteenth Amendment to the Constitution in 2015 and the removal thereof is only a reversion to the Constitution as it existed prior to such Amendment. Such removal does not result in any erosion or, for that matter, even a restriction of Executive power of the People reposed in the President, with any adverse consequences for the Sovereignty of the People recognized by Article 3 read with Article 4(b) of the Constitution.

b) Removal of duty to promote national reconciliation and integration

62. The provisions of sub-article (b) of Article 33(1) in its current form, requiring the President to "promote national reconciliation and integration" are similarly a reinforcement of provisions contained elsewhere in the Constitution. Although the very same expressions "national reconciliation and integration" may not be found, the objective of promoting "national unity" is recognized in other provisions of the Constitution, "unity" being a synonym for "integration".

63. In this regard, Your Lordships may appreciate that, within the Unitary State of Sri Lanka, the President does not represent any single or specific community of the country, but is the "President of the Republic", as per Articles 4(b) and 30(1) of the Constitution. Although a person contesting a Presidential election may be a candidate from a particular recognized political party or independent group, once elected, he as President exercises the Executive power of the People as a whole, regardless of the diverse communities which constitute the People. In Special Determination SC.SD Nos.11-40/2002 re the Bill titled the *Nineteenth Amendment to the Constitution*, seven Judges of Your Lordships

Court observed that "The Constitution conceives of a President, who is the "Head of the State" and who would stand above party politics".

64. Further, in Special Determination SC.SD Nos.4-19/2015 re the Bill titled **Nineteenth Amendment to the Constitution**, the proposal to recognize the President as the symbol of National unity was determined by Your Lordships to be incorrect since it is the National Flag which can lay claim to being such a symbol. Therefore, it is quite clear that promoting national reconciliation and integration with a view to creating national unity is a duty which is both implicitly and explicitly vested in the President by existing provisions of the Constitution. This is particularly evident in Chapter VI wherein Article 27(1) stipulates that the Directive Principles of State Policy shall guide *inter alia* the President and thereafter sets out *inter alia* the following Directive Principles which are clearly aimed at promoting national reconciliation and integration:

Article 27(2)(b) – The State is pledged to establish in Sri Lanka a Democratic Socialist Society, the objectives of which include, the full realization of the **fundamental rights and freedoms of all persons**

Article 27(3) – The State shall safeguard the independence, sovereignty, **unity and the territorial integrity** of Sri Lanka

Article 27(5) – The State shall **strengthen national unity by promoting co-operation and mutual confidence among all sections of the People of Sri Lanka**, including the racial, religious, linguistic and other groups and shall take effective steps in the fields of teaching, education and information in order to eliminate discrimination and prejudice

Article 27(6) – The State shall ensure equality of opportunity to citizens, so that **no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation**





Article 27(10) – The State shall assist the development of the culture and languages of the People

Article 27(11) – The State shall create the necessary economic and social environment to enable people of all religious faiths to make reality of their religious principles

65. Although the Learned Counsel for the Petitioner in SC SD 01/2020 sought to draw a distinction between the duties of the President as presently contained in Article 33(1) and obligations which the President has under the Directive Principles of State Policy on the basis that the latter is not justiciable, Your Lordships may be please to appreciate the dicta in the Special Determination in **In Re Thirteenth Amendment to the Constitution**:

"True the Principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government.

66. Further, Article 28(b) imposes a duty on every person in Sri Lanka to further the national interest and to foster national unity. Since this duty extends to a person holding the office of President, the duty of the President to promote national reconciliation and integration is encapsulated in this provision too.

67. Moreover, Article 157A(7)(b) requires the President and others referred to therein to take and subscribe or make and subscribe an oath or affirmation, in the form set out in the Seventh Schedule to the Constitution. Such Schedule contains *inter alia* an oath/affirmation not to, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka". Therefore, being duty-bound to protect the unity of Sri Lanka, the President is implicitly obligated to promote reconciliation and integration among all People of Sri Lanka, irrespective of the pluralistic character of its society.



68. In light of the aforesaid provisions of the Constitution, the duty of the President to promote national reconciliation and integration or, in other words, national unity, need not be specifically reiterated again. In any event, Your Lordships may be pleased to see that, in terms of the preamble to the Office for Reparations Act, No.34 of 2018, an objective of that Act is the "promotion of reconciliation" and, as such, the concept of reconciliation is now firmly embedded in our legal framework. The President having a general obligation to act in accordance with the Constitution and the laws of Sri Lanka, no adverse consequences and certainly no impingement of Article 83 would occur due to the removal of sub-article (b) of Article 33(1).

c) **Removal of duty to ensure and facilitate the proper functioning of the Constitutional Council and the institutions referred to in Chapter VIIA**

69. The third duty referred to in sub-article (c) of Article 33(1) which stands removed under the proposed Bill is the duty of the President to ensure and facilitate the proper functioning of the Constitutional Council and the institutions referred to in Chapter VIIA of the Constitution. Considering that Clause 6 of the Bill seeks to repeal Chapter VII as it currently exists and that, consequently, there will no longer be a Constitutional Council, Your Lordships may be pleased to see that Article 33(1)(c) becomes partially redundant.

70. Without prejudice, it is also respectfully submitted that whether or not the Constitutional Council and even some of the other institutions may be retained in a revised form, what the President can practically do to ensure and facilitate their proper functioning is confined to the ambit of his powers in respect of those institutions. The manner in which institutions established under Chapter VIIA in its current form or sought to be established under the proposed new Chapter VIIA are required to function are set out in that Chapter itself. The extent of the President's role in relation to those institutions having been articulated therein, imposing any duty above and beyond such role would be meaningless.



71. Therefore, the duty that exists under Article 33(1)(c) is in actual fact empty rhetoric. Unless specific duties to ensure and facilitate the proper functioning of such institutions are stipulated elsewhere, imposing or indeed retaining a general duty carries no effect and can be easily dispensed with without attracting the application of Article 83.

(d) **Duty to ensure the creation of proper conditions for the conduct of free and fair elections and referenda, on the advice of the Election Commission**

72. In terms of sub-article (d) of Article 33(1) as it stands, it shall be the duty of the President to, on the advice of the Election Commission, ensure the creation of proper conditions for the conduct of free and fair elections and referenda. The Petitioners may argue that since the Sovereignty of the People, as described in Article 3 includes franchise, any attempt to take away a provision which advances such franchise through the holding of free and fair elections would undermine such Sovereignty and, thus attract Article 83. However, it is respectfully submitted that the mere removal of the duty of the President in this regard does not result in these consequences.

73. Demonstrably, the framers of the 1978 Constitution appear to have been satisfied that, for purposes of securing the franchise of the People, it was not necessary to include an express duty on the President in that regard. This duty was introduced only by the Nineteenth Amendment to the Constitution in 2015, almost 40 years later, evidently as a supporting mechanism for the Election Commission to carry out its functions. For, as per Article 103(2), it is the objective of the Election Commission to conduct free and fair elections, not that of the President.

74. Further, even though the President is expected to act on "the advice of the Election Commission" insofar as discharging this duty is concerned, there is no corresponding duty cast on the Election Commission to provide such advice to the President.



75. Most significantly, when several Fundamental Rights Applications were filed pursuant to the postponement of the Parliamentary Elections 2020, one of the allegations of the Petitioners was that the President had, in view of the prevailing COVID-19 pandemic, failed to create proper conditions for the conduct of free and fair elections in terms of the said Article. However, it was submitted on behalf of the President and the Attorney General that the Election Commission had in fact failed to tender any such advice to the President and Your Lordships' Court was pleased to refused leave to proceed in these Applications.
76. However, Your Lordships may be pleased to see that, under the amendments to Clause 3 proposed to be moved at Committee Stage, the aforesaid duty is to be restored in the form of a power of the President, by virtue of an amendment to proposed Article 33. Accordingly, in terms of proposed Article 33(c), the President shall have the power "to ensure the creation of proper conditions for the conduct of free and fair elections, at the request of the Election Commission".
77. In addition to repealing existing sub-article (1) of Article 33, Clause 3 of the Bill also has the effect of re-introducing powers enjoyed by the President under the provisions of sub-article (2) of Article 33 as it stands, albeit minus the reference to the power to summon, prorogue and dissolve Parliament which is contained in Article 33(2)(c). This revised formulation is justified in the aftermath of the Judgment in SC/FR. 351/2018 [Dissolution Case]. In that case, the crux of the matter begged an interpretation of the President's power to dissolve Parliament as set out in Article 33(2)(c) vis-à-vis the proviso to Article 70(1). The argument put forth on behalf of the then President justifying his act of dissolving Parliament before the expiration of the period set out in Article 70(1) was that, he had exercised power under Article 33(2)(c) which gave a blanket power to dissolve Parliament. However, seven Judges of Your Lordships' Court including the then Chief

Justice held that the power to dissolve Parliament as set out in Article 33(2)(c) was subject to the procedure set out in the proviso to Article 70(1) and as such, the power under Article 33(2)(c) cannot be read in isolation. In this context, the removal of Article 33(2)(c) serves to clarify an ambiguity which exists in the Constitution and the power of dissolution continues to be reposed in the President in terms of the provisions of Article 70.

- 78. Overall, therefore, the repeal of Article 33 and the proposed substitution therefor does not adversely affect the Sovereignty of the People recognized in Article 3 read with Article 4 nor is it inconsistent with any other entrenched provisions of the Constitution.

Clause 4 of the Bill – Repeal of Article 33A

- 79. Article 33A is sought to be repealed by this Clause. However, the provisions of Article 33A introduced by the Nineteenth Amendment to the Constitution in 2015, setting out the President’s responsibility to Parliament already existed in previously numbered Article 42. As observed in the Special Determination in SC.SD Nos.4-19/2015 re the **Bill titled Nineteenth Amendment to the Constitution**, *“the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance”* and the roots of this provision actually lay in Article 91 of the First Republic Constitution of 1972. Accordingly, Your Lordships determined; *“Thus, the position of the President vis-à-vis the legislature, in which the President is responsible to the legislature, was untouched by the 1978 Constitution.”* In this backdrop, current Article 33A is reinstated as Article 42 of the Constitution, as per Clause 7 of the instant Bill and does not attract the application of Article 83 of the Constitution.



Clause 5 of the Bill – Repeal and replacement of Article 35

80. This clause repeals and replaces Article 35 of the Constitution with the following provisions:

35. (1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.

(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:



Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General."

- 81. The aforesaid provision sets out the ambit of the immunity sought to be conferred on the President of the Democratic Socialist Republic of Sri Lanka.
- 82. It was contended by some of the Counsel for the Petitioners that right to invoke the jurisdiction of Your Lordship's Court under Article 17 read with Article 126 is eroded by the introduction of this clause.
- 83. However, it is submitted that the said contention is misconceived, having regard to the scheme of judicial review made available in terms of the provisions of the Constitution and the system of checks and balances envisaged in the present constitutional scheme, which remain unaltered as more fully set out hereinafter.
- 84. It is submitted with respect that the repeal of the present provisions of Article 35 of the Constitution and its substitution by **Clause 5 of the impugned Bill would only restore the status quo ante that prevailed prior to the Nineteenth Amendment to the Constitution.**
- 85. It is pertinent to note that the repeal of the identical provisions of clause 5 of the Bill and the substitution of the present provisions of Article 35 of the Constitution was permitted by Your Lordships Court on the premise that such a process did not attract a Referendum.



86. In this regard it would be apt to draw Your Lordships' attention to the Determination by Your Lordships Court in the Bill titled "**In Re Seventeenth Amendment to the Constitution**", SC Special Determination 8/2000, SC Minutes of 7th August 2000, where it was opined thus:

"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".

87. As such, it is respectfully contended that the substitution of the provisions that prevailed prior to the Nineteenth Amendment to the Constitution, in terms of Clause 5 of the Bill, by parity of reasoning of the Special Determination in **In Re Seventeenth Amendment to the Constitution** referred to above, would not attract a referendum by virtue of the repeal of the present provisions of Article 35 of the Constitution and substitution therefor the provisions contained in Clause 5 of the impugned Bill.
88. Without prejudice to the above contention, it is respectfully submitted that the rationale underlying the immunity from suit conferred on the President in terms of Clause 5 of the Bill more fully set out hereinafter would further fortify the legislative policy, which would have the impact of enhancing the sovereignty of people as opposed to having a prejudicial impact on the sovereignty of the people.
89. In the above context, in order to facilitate a perceptive interpretation of the provisions of Article 35 to be introduced in terms of Clause 5 of the Bill, it would be relevant to consider the evolution of Presidential Immunity in the constitutional context.





Evolution of Presidential Immunity

90. The Soulbury Constitution introduced a Westminster style parliamentary democracy with a Cabinet form of Government, Governor General and an independent judiciary.
91. The Republican Constitution of 1972 retained the cabinet form of Government but provided for a President (nominated) and a unicameral legislature called the National State Assembly.¹
92. It is pertinent to note that Presidential Immunity was first conferred by Section 23(1) of the 1972 Constitution, which read thus:

'While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity.'

93. Thus, from the outset, the Republican Constitution conferred wide immunity on the President while in office, extending to actions of the President in his private capacity.
94. The 1978 Constitution saw a transition into a hybrid Presidential System with a Cabinet of Ministers answerable to Parliament.
95. The 1978 Constitution, further widened the immunity conferred on the President and moved beyond the terms "civil and criminal proceedings" and stipulated that 'no proceedings' shall be instituted or continued against the President 'in any court or tribunal'.

¹ See J.L.M Cooray 'Constitutional Government in Sri Lanka 1976 - 1977', page 10

96. As observed in the case of *Kumaranatunge v Jayakody*² :

"Under the 1972 Constitution the President enjoyed immunity from civil or criminal proceedings but under that Constitution the President was a constitutional figurehead. He had no executive powers; he was not a member of the Cabinet and could not engage in politics. Under the 1978 Constitution the President is an executive President and the head of the Cabinet and he could engage in political activities. Hence his range of immunity was widened to protect him from proceedings of any description in any court or tribunal."

97. In the above context, it may be noted that in the United States of America, where immunity is not expressed in the Constitution but developed by case law, in *Nixon Vs Fitzgerald*³ the court noted that a grant of absolute immunity to the President would not leave the President with unfettered power. The Court stated that there were formal and informal checks on presidential action that did not apply with equal force to other executive officials. The court observed that the President was subjected to constant scrutiny by the press. It noted that vigilant oversight by Congress would also serve to deter presidential abuses of office, as well as to make credible the threat of impeachment. The court determined that other incentives to avoid misconduct existed, including a desire to earn re-election, the need to maintain prestige as an element of presidential influence, and a President's traditional concern for his historical stature.

² 1984 2(Si.R) Page 45

³ Nixon v Fitzgerald 457 U.S. 731 (1982)





98. In Sri Lanka, the Immunity conferred by the 1978 Constitution to the President are qualified by the exceptions set out in Article 35(3). It is to be noted that the exception to immunity set out in Article 35(3)⁴ as it originally stood was not limited to a particular jurisdiction.
99. Thus, in respect of the exercise of powers of the President in his capacity as a Minister of the Cabinet of Ministers, the immunity is waived in respect of *'any proceedings in any court'*.
100. It is evident therefore, that originally, though there was absolute immunity in respect of any conduct not covered by exceptions in Article 35(3), there was a blanket withdrawal of immunity where any action was filed against the President in respect of ministerial functions by the President. Thus, there was wide scope to review the President's conduct through the judicial arm of government.
101. The Nineteenth Amendment to the Constitution moved away from the previously established constitutional equilibrium regarding judicial checks and balances on the powers of the President.
102. As such, in respect of judicial review of President's actions, the amended Article 35(1) of the Constitution pursuant to the Nineteenth Amendment reads as follows:

'While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity:

⁴ Ministerial Functions, Impeachment and Election Petition

Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney General, in respect of anything done or omitted to be done by the President, in his official capacity:

Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under Article 33(2) (g).

- 103. It is thus evident that after the Nineteenth Amendment to the Constitution it is **no longer possible to initiate 'any proceedings in any court' against the President.** The conduct of the President in his official capacity, can presently be justiciable, only under Article 126 of the Constitution, for an infringement of Fundamental Rights.
- 104. The sole and exclusive jurisdiction of the exercise of Fundamental rights jurisdiction being vested in the Supreme Court undoubtedly excludes any other Court from reviewing any action or inaction of the President.
- 105. As such, by the reintroduction of the provisions that prevailed prior to the Nineteenth Amendment to the Constitution, proposed in terms of Clause 5 of the Bill, in respect of the President's exercise of powers in his capacity as a Minister of the Cabinet of Ministers and the immunity being waived in that regard in respect of 'any proceedings in any court', would once again attract judicial oversight in respect of the President's exercise of powers in his capacity as a Minister of the Cabinet of Ministers, by any other competent court including the Supreme Court.



Justification for immunity from suit conferred on the President

106. The rationale underlying immunity of the President from suit was expounded by the Supreme Court in the case of **Malikarachchi v Shiva Pasupathi**⁵, where the Supreme Court opined thus:

"Such a provision as Article 35 (1) is not something unique to the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978. There was a similar provision in the Article 23 (1) of the Constitution of Sri Lanka of 1972. The corresponding provision in the Indian Constitution is Article 361. The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary court of law. It is very necessary that when the Executive Head of the State is vested with paramount power and duties, he should be given immunity in the discharge of his functions."

107. Thus, in the reasoning of the Chief Justice, the following justifies the conferring of immunity on the President.

⁵ *Malikarachchi v. Shiva Pasupati*, [1985]1 SLR 74





First, the President – for the duration of his term in office – ought not to be answerable to the jurisdiction of any, except the representatives of the people by whom he may be impeached. Second, the efficient working of the government would be impeded if the President were not to be provided with immunity.

108. In similar vein in **Nixon v Fitzgerald**,⁶ one of the seminal cases that shaped the conversation on presidential immunity in the US, the majority decision granting absolute immunity rested on the recognition that the President holds a unique position under the Constitution. Justice Powell relied on this concept to support two arguments for immunity:

- (1) the President cannot make important and discretionary decisions if he is in constant fear of civil liability, and
- (2) diverting the President's time and attention with a private civil suit affects the functioning of the entire federal government, thereby abrogating the separation of powers mandated by the Constitution.⁷

As Justice Powell explained,

"Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. [...] a President must concern himself with matters likely to "arouse the most intense feelings." [...] it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially

⁶ Nixon v. Fitzgerald, 457 U.S. 731 (1982)

⁷ Amy Marshall, *Jones v. Clinton: Reconsidering Presidential Immunity*, 1 RICH. J.L. & PUB. INT. 101 (1996).

with” the duties of his office. This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President’s office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.”⁸

109. Invoking this same reasoning, the Supreme Court refuted that the President should be given only qualified immunity. It was the majority’s view that unlike cabinet members or state governors, the President is the only member of the executive branch with such an exalted status, and he is the only one in a singular position that can make critical decisions affecting the entire nation.⁹

“In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. [...] We find these cases to be inapposite. The President’s unique status under the Constitution distinguishes him from other executive officials.”

⁸ Nixon v. Fitzgerald, 457 U.S. 731 [1982], at p. 752.

⁹ Ray, Laura, From Prerogative to Accountability: The Amenability of the President to Suit [1991]. Kentucky Law Journal, Vol. 80, 1991, Available at SSRN: <https://ssrn.com/abstract=1967693>: “the opinion identifies immunity as “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.” The word “unique” appears four times in less than three pages; each time distinguishing the demands of the President’s office from those of other executive officials granted only qualified immunity by earlier decisions of the Court.” at p. 779.

110. Chief Justice Burger further observed that the separation of powers doctrine mandates presidential immunity from civil liability. *"The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches."* The Court quoted the words of Thomas Jefferson, an advocate for absolute immunity in support of their argument.

"Thomas Jefferson also argued that the President was not intended to be subject to judicial process. When Chief Justice Marshall held in United States v. Burr, 25 F.Cas. 30 (No. 14,692d) (CC Va.1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the Independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?"

The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive."¹⁰

¹⁰ Nixon v. Fitzgerald, 457 U.S. 731 (1982), footnote 31 of the majority opinion.





111. As such in their opinion, immunity was an incidental but necessary tool that attached to the office of President to curb intrusion into the executive sphere by the Judiciary.

Constitution has mandated a procedure to deal with alleged violations by the President

112. In order to appreciate the aforementioned limitation placed on the exercise of jurisdiction by Courts, it is opportune, at the outset, to consider the constitutional framework under our Constitution.
113. In terms of Article 4(c) of the Constitution, it is apparent that the judicial power of the people is exercised by Parliament through Courts. Hence the courts in Sri Lanka are not vested directly with the judicial power of the People.
114. In terms of Article 105(1) of the Constitution of Sri Lanka, the Supreme Court, is at the apex of the *'institution for the administration of justice which protect, vindicate and enforce the rights of the People.'*
115. However, even the general jurisdiction vested in the Supreme Court by Article 118 of the Constitution, is not an untrammelled jurisdiction. The jurisdiction, inter alia in respect of the 'protection of fundamental right under Article 118(b), is expressly made 'subject to the provisions of the Constitution.'
116. Consequently, even the fundamental rights jurisdiction vested in the Supreme Court by Article 126(1) and the power to grant just and equitable relief under Article 126(4) are necessarily subject to other provisions of the Constitution, which may limit, abridge or fetter the exercise of such jurisdiction and powers.



117. One such fetter upon the exercise of judicial power would be a situation where a specific mechanism has been specified in the Constitution regarding the manner in which the jurisdiction of court may be exercised.

118. indeed, it is a settled principle of law that a specific provision of the law overrides a general provision.

119. As such, in respect of the allegations of abuse of power and specific violations of the Constitution, by the President, [set out in Article 38(2)(a)] such a specific procedure has been set out in Article 38 (2) of the Constitution.

120. *Article 38(2) reads as follows:*

(a) *Any Member of Parliament may, by a writing addressed to the Speaker, give notice of a resolution alleging that the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of –*

- (i) *intentional violation of the Constitution,*
- (ii) *treason,*
- (iii) *bribery,*
- (iv) *misconduct or corruption involving the abuse of the powers of his office, or*
- (v) *any offence under any law, involving moral turpitude and setting out full particulars of the allegation or allegations made and seeking an inquiry and report thereon by the Supreme Court.*



- (b) *No notice of such resolution shall be entertained by the Speaker or placed on the Order Paper of Parliament unless it complies with the provisions of sub-paragraph (a) and –*
- (i) *such notice of resolution is signed by not less than two thirds of the whole number of Members of Parliament; or*
 - (ii) *such notice of resolution is signed by not less than one-half of the whole number of Members of Parliament and the Speaker is satisfied that such allegation or allegations merit inquiry and report by the Supreme Court.*
- (c) *Where such resolution is passed by not less than two-thirds of the whole number of Members (including those not present) voting in its favour, the allegation or allegations contained in such resolution shall be referred by the Speaker to the Supreme Court for inquiry and report.*
- (d) *The Supreme Court shall, after due inquiry at which the President shall have the right to appear and to be heard, in person or by an attorney-at-law, make a report of its determination to Parliament together with the reasons therefor.*
- (e) *Where the Supreme Court reports to Parliament that in its opinion the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of any of the other allegations contained in such resolution, as the case may be, Parliament may by a resolution passed by not less than two thirds of the whole number of Members (including those not present) voting in its favour remove the President from office.*



- 121. Thus, exercising jurisdiction over the identical or closely comparable allegations, under provisions such as Article 126 of the Constitution, would circumvent the express requirement of the Constitution for the Supreme Court to exercise jurisdiction, 'subject to the provisions of the Constitution'.

- 122. The reason being, where the Constitution has prescribed a specific mode for the Supreme Court to exercise jurisdiction in respect of particular conduct, it cannot disregard such specific provision and exercise jurisdiction under a general jurisdiction arising from Article 118(b) of the Constitution, for the protection of fundamental rights.

- 123. Thus, the Supreme Court acknowledged in **Mallikarachchi v. Shiva Pasupati** that Article 38, provided a specific remedy in respect of allegations of types of conduct set out in Article 38(2)(a). The judgment also opines that Article 38 also acts as an effective check on the President's powers under the 1978 Constitution.

- 124. Although it was argued that Clause 5 of the Bill would erode judicial power as a result of the amendments to Article 35 of the Constitution, it is respectfully submitted that this would not be the case, as the Supreme Court or any other court would continue to exercise jurisdiction in respect of the conduct of the President qua Minister pursuant to and notwithstanding the enactment of clause 5 of the impugned Bill.

Responsibility to Parliament

- 125. It is also pertinent to note that the President's *Responsibility* to Parliament in terms of Article 33A of the Constitution, remains in the identical form in Clause 7 of the Bill which introduces a new Article 42 as follows:



"The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security."

126. Further, Article 32(3) of the Constitution makes it mandatory for the President to attend Parliament once in every three months.
127. Therefore, the contention of the Petitioners that immunity conferred on the President would tantamount to 'unbridled power' being vested in the President, are clearly unfounded given that in terms of proposed Article 42 under Clause 7 of the Bill, the President is responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution. Further, under Article 148 of the Constitution, Parliament controls public finance including allocations to the President. Parliament also has the power to impeach the President under Article 38(2) of the Constitution. These are important checks attributed to Parliament by the Constitution to ensure that the powers of the President, as Head of the Executive are kept in check.
128. As such, it emerges from the above provisions of the Constitution, that a fine balance is struck in relation to each organ of government, and an effective system of checks and balances is put in place on the powers to be exercised by the President in trust for the people, for the governance of Sri Lanka and the establishment of a just and free society as laid down in the Directive Principles of State Policy contained in Article 27(1) of the Constitution.



129. While the Constitution does not expressly stipulate the manner in which the responsibility of the President should be exercised it is well settled that in interpreting the said provision, care would have to be taken to interpret it in a manner so as to not render the same superfluous or ineffective.
130. "It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicit in respect of a certain right or matter. When the fundamental law has not limited either in terms or by necessary implication, the general powers conferred on the legislature, it is not possible to deduce a limitation from something supposed to be inherent in the spirit of the constitution. The spirit of the constitution cannot prevail as against its letter."¹¹
131. As such the responsibility of the President to Parliament with regards to the performance of his powers, functions and duties has to be considered as a deliberate check imposed on the powers functions and duties of the President imposed by the sovereign people who elected him to office.

Powers of Parliament in relation to the President

132. Without prejudice to the above position, it may also be contended that, where there is express provision for Parliament to exercise judicial powers of parliament, the exercise of general jurisdiction by courts, is ousted and that the judicial power of court may only be exercised subject to the procedure set out in the Constitution.

¹¹ Bindra, N.S. *Interpretation of Statutes*, Twelfth Edition at 694



(b7)

133. In this context, it must be noted that the 1978 Constitution vests the Parliament with different powers. This is clear when comparing Article 4(a) of the Constitution with Article 4(c) of the Constitution:

"4(a) the legislative power of the People shall be exercised by Parliament..." (emphasis added)

"4(c) the judicial power of the People shall be exercised by Parliament..., except 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;" (emphasis added)

Article 4(a) refers to "legislative power" while Article 4(c) uses the words "privileges, immunities and powers of Parliament".

134. The use of different words "legislative power" and "power" makes it clear that **Parliament possesses powers other than legislative powers.** If this distinction is not recognized, the use of different words "legislative power" in Article 4(a) and "power" in Article 4(c) of the Constitution becomes redundant. It is also clear that "powers" of Parliament are distinct to "privileges" and "immunities" of Parliament.

135. These "powers" of Parliament are elaborated in other parts of the Constitution. Examples of such powers are:

(1) The power to impeach the conduct of the President in terms of Article 38 of the Constitution



(2) The power to remove judges of the Supreme Court and Court of Appeal in terms of Articles 107(2) and 107(3) of the Constitution

136. As noted above, where the conduct of the President as itemized in Article 38(2) is impeached, the Parliament is vested with the 'power' to pass a resolution by not less than two third of its members, to have the allegation referred to by the Speaker to the Supreme Court for inquiry and report.

137. Here, the Constitution has expressly made the judicial power of the people to be exercised by courts in respect of certain conduct of the President, referred to in Article 38(2), subject to an *Ex-ante* exercise of the 'powers' of Parliament. Thus, where such conduct by the President is directly or indirectly alleged, the jurisdiction of courts will be ousted unless the procedure prescribed in the Constitution is followed.

The proposed clause 5 of the Bill introducing Article 35 and the Courts exercising jurisdiction over alleged acts or omissions by the President

138. The constitutional provisions on presidential immunity as found in the original text of Article 35 of the 1978 Constitution and sought to be reintroduced as clause 5 of the Bill [Article 35(1)] lays down the substantive rule in relation to Presidential immunity:

"[w]hile any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity"



139. The text of the article thus at first blush appears to provide absolute immunity to the person of the President for the duration of his presidency. However, it is pertinent to note that Article 35(2), which suspends the running of time during the pendency of a person's tenure in office as President for the purpose of determining the prescription of a claim also confirms that Article 35 envisages immunity for an individual only for as long as he holds the office of President. Immunity is granted to the office and the person holding the office enjoys immunity on a temporary basis. Thus, a President may be made a party to an action – civil or criminal – in respect of acts committed during the pendency of his term after he ceases to hold office.

140. Further, as noted above, Article 35(3) lists the exceptions to the substantive rule in Article 35(1). It provides that the provisions of Article 35(1) would not apply to proceedings in any court, *"... In relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) [relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament]"*.

141. Besides the exceptions relating to election petitions heard by the Supreme Court in relation to the election of a President, or those relating to petitions heard in the Court of Appeal relating to the election of a Member of Parliament¹², the exercise of the consultative jurisdiction of the Supreme Court under Article 129, an important exception

¹² 1 The Fourteenth Amendment to the Constitution that came into effect on 24th May 1988 amended Article 35 so as to not grant the President immunity in relation to election petitions in the Court of Appeal against the election of a Member of Parliament.

is provided in relation to the exercise of powers exercised by the President qua Cabinet Minister. Article 44(2) provides that the President may assign to himself the subjects and functions of a Minister and determine the number of Ministries in his charge. The effect of the exception in Article 35(3) would be to render Article 35(1) inapplicable to the exercise of power pertaining to any such subject or function.

142. The first of these pronouncements was made by a full bench comprising of 9 Judges of the Supreme Court in Visuvalingam v. Liyanage (No.1) [1983] 1 SLR 203, at p. 240 the Supreme Court held that;

"...an intention to make acts of the President non-justiciable cannot be attributed to the makers of the Constitution. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President cannot be summoned to Court to justify his action. But that is a far cry from saying that the President's acts cannot be examined by a Court of Law."

143. In 1999, His Lordship Justice Mark Fernando elaborated on the aforesaid distinction in Karunatilake v. Dayananda Dissanayake (No.1) [1991] 1 SLR 157, 177 and pronounced that:

"I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or respondent who relies on an act done by the President, in order to justify his own conduct ... It is the Respondents who rely on the Proclamation and



Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President.” (page 177)

144. Justice Mark Fernando’s observation in *Karunatilake* was affirmed by Justice Wadugodapiliya in *Victor Ivan v. Hon. Sarath N. Silva* [2001] 1 SLR 309,325;

“Justice Fernando takes the matter beyond doubt when he clearly states that for such a challenge to succeed, there must be some other officer who has himself performed some executive or administrative act which is violative of someone’s fundamental rights, and that, in order to justify his own conduct in the doing of such impugned act, the officer in question falls back and relies on the act of the President. It is only in such circumstances that the parent act of the President may be subjected to judicial review.”

145. In 2003, the Supreme Court in *Senasinghe v. Karunatileke* [2003] 1 SLR 172, 186; affirmed the reasoning in the *Karunathilake* case;

“[...] this Court has reviewed the acts [...] of the President (Wickremabandu v Herath, ; Karunathilaka v Dissanayake) despite Article 35 which only provides a shield of personal immunity from proceedings in courts and tribunals, leaving the impugned acts themselves open to judicial review.”

146. In *M.N.D. Perera v Balapatabendi Secretary to the President and others* [2005] 1 SLR 185, 193

“Article 35 of the Constitution provides only for the personal immunity of the President from proceedings in any Court of Law and that too only during his or her tenure of office. The President cannot be summoned to Court to justify his or her action. But nothing prevents a Court of Law from

examining the President's acts. Justice Sharvananda (as he then was) said as follows in the case of Visualingam v Liyanage Full Bench consisting of 9 Judges held; "Actions of the executive are not above the law and can certainly be questioned in a Court of Law. Though the President is immune from proceedings in Court a party who invokes the acts of the President' in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden"

147. **Senarath Vs Chandrasena 2007 1 SLR 59** was another situation where the acts of the President were subject to judicial review after the President had ceased to hold office. Similarly, even in the case of the former President, Maitihripala Sirisena, Fundamental Rights Applications filed in respect of official acts performed whilst holding the office of President are now being continued in his personal capacity: eg., SC (F/R) 216/2019 in respect of placing the former Inspector General of Police on compulsory leave, SC (F/R) 163/2019 et al relating to the Easter Sunday attacks and SC (F/R) 446/2019 pertaining to the granting of a pardon under Article 34 of the Constitution.

148. Accordingly, there is very clear jurisprudence affirming that 'immunity' conferred on the President cannot be translated into "immunity for acts". What is prohibited under the Constitution is instituting proceeding 'against him' (meaning the President) and as Justice Fernando observed, it does not immune the acts from being impeached before a competent court.

149. It appears therefore from the foregoing analysis that in the context of the proposed Article 35 that confers the President immunity from suit have been subject to judicial review and have been questioned other than through the exceptions created by Article 35(3).



150. As such, even when the Constitution afforded full immunity to the President, his actions have been reviewed on the basis that "immunity shields only the doer and not the act". It would only shield the person of President from punitive consequences during the tenure of his office, but would not shield the unconstitutional/illegal act.

The Constitution provides immunity to each organ of government

151. Apart from Presidential immunity, the Constitution also provides immunity to legislative and judicial acts / omissions.

152. Article 126 of the Constitution, which reviews executive and administrative acts /omissions, expressly leaves out any reference to 'legislative' and 'judicial' acts.

153. However, the mere use of the term 'legislative' or 'judicial' will not take a particular act outside the scope of review. As per **Faiz v AG [1995] 1 SLR 372**, the Court will look into the nature of the action, and will only remove **plainly legislative or judicial** acts from the ambit of Article 126 of the Constitution.

154. For example, if the act impugned is only an administrative act that does not attract judicial discretion, the Court will not desist from reviewing it under Article 126 of the Constitution. No pronouncement has yet been made about the amenability of legislative acts to the jurisdiction of Article 126 of the Constitution.



155. Subject to the aforesaid, Article 80(3) and Article 124 of the Constitution confer absolute immunity on all legislation and the legislative process. Legislative enactments are not amenable to judicial review once they receive the certificate of the President or the Speaker. A Bill, once enacted into law, could be amended or repealed by Parliament alone.

156. Similar to Parliament, Judiciary is its sole judge in respect of judicial acts. Article 111C (1) of the Constitution states that;

Every judge, presiding officer, public officer or other person entrusted by law with judicial powers or functions or with functions under this Chapter or with similar functions under any law enacted by Parliament shall exercise and perform such powers and functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal, institution or other person entitled under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or performance of such powers or functions. (emphasis added)

157. The review system of judicial acts performed by judicial officers is premised on a hierarchical structure. Judges of lower Courts are subject to review and scrutiny of the Higher Courts, leaving the higher judicial officers to be checked by and held accountable to other branches of the Government. In this respect, immunity enjoyed by the Judges of the Supreme Court in their 'official sphere' is similar to that enjoyed by the Head of the Executive and the Parliament.





Immunity to person by virtue of office

158. **Article 4(c) of the Constitution** envisages that judicial determinations/power on matters relating to the privileges, immunities and powers of Parliament and of its Members are to be exercised by Parliament itself and no other body or person recognized by the Constitution or any other law. Article 4(c) read with Article 67 of the Constitution gives constitutional recognition to the Parliamentary Powers and Privileges Act no 21 of 1953 as amended. Section 4 of the said Act confers limited immunity on members of Parliament for "*anything which he may have said in Parliament or by reason of any matter or thing which he may have brought before Parliament by petition, bill, resolution, motion or otherwise*" Their person is protected so long as they are "*proceeding to, or in attendance at, or returning from, any meeting or sitting of Parliament*" (Section 5). Immunity in respect of members of Parliament is by default taken cognizance of by the Judiciary under section 10 of the Act whether or not it is pleaded.
159. Similar to presidential immunity, a member of Parliament so long as he continues as a member of Parliament has his person protected. However, his immunity does not extend to acts done in private capacity. Under section 5, he is not liable to be arrested even in respect of acts done in private capacity, if he is proceeding to, in attendance or returning from any meeting or sitting of Parliament. The reference to Parliament in every such section indicates that limited immunity conferred on the person of a member of Parliament has more to do with the sanctity attached to the institution of Parliament than the holder of the office himself.
160. In contrast, there is no specific provision conferring immunity on the person of Judicial officers. The limited immunity granted to person of members of parliament "*proceeding to, or in attendance at, or returning from, any meeting or sitting of Parliament*" does not find expression in relation to judicial officers.



161. However, a limited form of functional immunity attaches to members of the Judicial Services Commission (who are Judges of the Supreme Court under Article 111D (1) of the Constitution, so long as they perform their functions in good faith.

"No suit or proceeding shall lie against the Chairman, Member or Secretary or Officer of the Commission for any lawful act which in good faith is done in the performance of his duties or functions as such Chairman, Member, Secretary or Officer of the Commission."

162. It is seen that the framers of the 1978 Constitution had vested the pinnacle of each arm of the Government with **absolute immunity from judicial process in respect of official acts/ omissions**: the President *qua* President was granted absolute immunity, the legislative process and the legislation enacted by Parliament was immune from judicial review and there is no process put in place to review acts or omissions by the Judges of the Supreme Court. This was a deliberate constitutional device to ensure continuity of the executive, legislative and judicial functions of such persons/bodies without impediment, in order to ensure dignity attached to same. In so far as the President was concerned, immunity from suit **in respect of acts performed qua President, was designed to protect the State, more so as the President was elected by the people to exercise executive power including the Defense of Sri Lanka, and as such conferring such immunity was paramount to protect the very existence of State.**

163. The 1978 Constitution in its basic scheme has granted a degree of immunity to the holders of such office. The only form of accountability was removal from office. The power to remove was vested in each other's spheres. If absolute immunity attached to the office was to be abused, the holder of such office would risk his removal from office by the process of impeachment or by the people at an election; in the case of Parliament, this



meant dissolution. This resonates with the observation made by His Lordship Justice Sharvananda that *“The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office, and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary courts of law.”*

Absolute ouster from judicial review envisaged in terms of the Constitution

164. It is also pertinent to note that apart from the immunity from suit conferred on organs of government as referred to above, the Constitution has also ensured a complete ouster of judicial review by courts set out under the Constitution, in terms of the following provisions of the Constitution:

Article 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.

Article 81(3)

The Speaker shall endorse on every resolution passed in accordance with the preceding provisions of this Article a certificate in the following form: –

“This resolution has been duly passed by Parliament in accordance with the provisions of Article 81 of the Constitution.”

Every such Certificate shall be conclusive for all purposes and shall not be questioned in any court, and no court or tribunal shall inquire into, or pronounce upon or in any manner call in question, the validity of such resolution on any ground whatsoever.



Article 154F (2)

If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question in any Court on the ground that he ought or ought not have acted on his discretion. The exercise of the Governor's discretion shall be on the President's directions

Article 154F (3)

The question whether any, and if so what, advice was tendered by the Ministers to the Governor shall not be, inquired into in any Court.

Article 154J (6)

A Proclamation under the Public Security Ordinance or the law for the time being relating to public security, shall be conclusive for all purposes and shall not be questioned in any Court, and no Court or Tribunal shall inquire into, or pronounce on, or in any manner call in question, such Proclamation, the grounds for the making thereof, or the existence of those grounds or any direction given under this Article.

Article 154 L (6)

A Proclamation under this Article shall be conclusive for all purposes and shall not be questioned in any Court, and no Court or Tribunal shall inquire into, or pronounce on, or in any manner call in question, such Proclamation or the grounds for making thereof.



Article 154 R (8)

No Court or Tribunal shall inquire into, or pronounce on, or in any manner entertain, determine or rule upon, any question relating to the adequacy of such funds, or any recommendation made, or principle formulated by, the Commission.

- 165. As such, it is respectfully submitted that the scheme of the Constitution both at the time of promulgation by Article 80(3) and subsequently by amendments including the Thirteenth Amendment to the Constitution that introduced Articles 154 F (2), (3), 154(J) (6), 154(L)(6) and 154 R (8) clearly envisaged the judicial power being redefined by Parliament and Your Lordships' Court has in the Special Determination in **In Re the Thirteenth Amendment to the Constitution** held that such a process was permissible without attracting a Referendum by the people.

- 166. It is evident therefore from the foregoing analysis that the jurisprudence evolved by Your Lordships' Court has clearly established that, **notwithstanding the immunity from suit conferred on the office of President, any official act or omission by holder of such office could be impugned before Your Lordships' Court either directly or through a collateral challenge.**

- 167. Therefore, in summary, the following is reiterated in respect of Article 35 in Clause 5:
 - a) The holder of the office of President enjoys immunity from suit in respect of all acts or omissions, whether private or official matters done by him during his tenure of office, although such immunity will not preclude actions against a former President in respect of acts done by him during his tenure of office.



- b) Institution of civil and criminal actions against the President are temporarily suspended until the person ceases to hold the office of President, subject to the proviso that the period of suspension will not be considered in computing time limits or prescription relating to such actions.
- c) Article 35 shields the doer and not the act. Thus, the burden of proving the validity of any act of the President will be on the person who relies on such act to justify his own conduct. In the event the President's act is found to be invalid, the court may deem it void.
- d) The process of impeachment provided in terms of Article 38 (2) read with Article 129 (2) of the Constitution ensures that any allegation of intentional violation of the Constitution by the President would be subject to inquiry by the Supreme Court.
- e) The scheme of the Constitution has conferred immunity from suit in similar vein in respect of the legislature and judiciary in order to facilitate the functioning of these institutions and the persons holding such office, subject to the checks and balances set out within the scheme of the Constitution.
- f) A further manifestation of immunity from suit has also been provided to organ of government within the scheme of the Constitution in terms of ouster clauses in the Constitution.



168. In the above context, it is respectfully submitted that the contention before Your Lordships Court in the Special Determination on the Bill titled the **Eighteenth Amendment to the Constitution**¹³ where it was proposed to confer total immunity on the Constitutional Council in perpetuity and permitting the Constitutional Council to function without any check by any organ of government including the judiciary, was rejected.

169. In fact, Your Lordships in the said Eighteenth Amendment Determination observed thus;

"The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. Even the immunity given to the President under Article 35, has been limited in relation to Court proceedings specified in Article 35(3). Moreover, the Supreme Court has entertained and decided the question in relation to Emergency Regulations made by the President [Joseph Perera Vs Attorney General (1992 SLR pg 199)] and Presidential appointment (Silva Vs Bandaranayake(1997 1 SLR pg 92).

By the envisaged 18th amendment, the Constitutional Council is clothed with unlimited and unfettered immunity on their decisions, recommendations and approvals. If such immunity is given to the Constitutional Council, it would in effect be elevated to a body that is not subject to law, which is inconsistent with the Rule of Law."

¹³ SC/SD/ 12,14,22,23,24,29,36, /2002 Supreme Court Minutes of 3rd October 2002 (Decisions of the Supreme Court of Sri Lanka Volume VII)



170. In the above circumstances, it is respectfully submitted that the Eighteenth Amendment Determination referred to above only fortifies the contention that the immunity from suit conferred on the holder of the office of President, which in fact prevailed prior to the Nineteenth Amendment to the Constitution and which is to be reintroduced in terms of Clause 5 of the impugned Bill is justified and does not violate any of the provisions of the Constitution, including entrenched provisions, and the rule of law. Therefore, these provisions do not attract a referendum by virtue of Article 83.

Clause 6 of the Bill – Repeal and replacement of Chapter VIIA (The Executive – Parliamentary Council)

171. The proposed amendment seeks to repeal and replace Chapter VIIA of the Constitution. **This in effect would redefine the Constitutional Council and replace the same with a ‘Parliamentary Council’ in the same manner as it was under the Eighteenth Amendment to the Constitution.** The said Parliamentary Council will be responsible for making observations pertaining to appointments to various, specified posts and Commissions as will be examined in detail below.

172. Counsel for Petitioners were heard to say that they were not challenging the composition of the Parliamentary Council nor were concerned with the transfer of its powers from one body of the Executive to another body within the Executive itself. However, they expressed concern at the manner in which the Parliamentary Council is mandated to perform its functions, ie. by forwarding observations to the President on his nominees for appointment of persons to the offices and institutions referred to in the Schedules to proposed Article 41A.



173. The Petitioners argued that these “observations” were not binding on the President and therefore could be wilfully disregarded by the President in making appointments to the Superior Courts, the Commissions and the office of Attorney General. The main concern of the Petitioners as articulated in their submission was that this clause would adversely affect judicial appointments and thereby erode the independence of the judiciary.

174. It is respectfully submitted that the Petitioners contention is entirely baseless and without merit for the following reasons:

- (a) This clause makes it mandatory for the President to seek the observations of the Parliamentary Council prior to making any appointments to the Superior Courts. The President, being a creature of the Constitution, is therefore obliged to consider the observations made by the Parliamentary Council (which is also a creature of the Constitution), prior to making any judicial appointments and therefore cannot lightly disregard the same.
- (b) Considerations of comity require that there should be cooperation and consultation between the organs of Government in making appointments to the Superior Courts by the President.

Fernando J in **Silva v Bandaranayake and others** [1997] 1 SLR 92 at page 94 held:

“Admittedly, Article 107 confers on the President the power of making appointments to the Supreme Court, and does not expressly specify any qualifications or restrictions. However, considerations of comity require that, in the exercise of that power, there should be cooperation between the Executive and the Judiciary, in order to fulfil the object of Article 107.”



Apart from considerations of comity, those appointments are of such a nature that co-operation between the Executive and the Judiciary is vital. The President, naturally, would be anxious to appoint the most suitable person available. But it is not easy, except in broadly stated terms, to spell out the qualifications needed for high judicial office, nor is it easy to determine with any degree of certainty whether a person has all those qualifications. The Chief Justice, as the head of the Judiciary, would undoubtedly be most knowledgeable about some aspects, while the President would be best informed about other aspects. Thus co-operation between them would, unquestionably, ensure the best result. Of course, the manner, the nature and the extent of the co-operation needed are left to the President and the Chief Justice, and this may vary depending on the circumstances, including the post in question. Constitutional law and practice are not static. Whatever the position earlier, *prima facie* by 1994 there had developed a practice, in proof of which Mr Goonesekera relied on the explanation given by S. N. Silva, P/CA, as he then was, to the question "what is the process by which judges of the higher courts are selected?".

"Under the Constitution the President of the Republic has the sole prerogative to appoint Judges of the High Court, the Court of Appeal and the Supreme Court. In practice Judges are selected through a process of nomination by the Chief Justice, the Attorney-General and the Minister of Justice." (emphasis added) *DANA*, Vol XIX, Nos. 1-4, Jan-April 1994."



- (c) The President's discretion of appointing judges to the Supreme Court is not absolute.

Fernando J. in **Silva v Bandaranayake** further observed at page 95:

"The learned Attorney-General submitted that the President in exercising the power conferred by Article 107 had a "sole discretion". I agree with this view. This means that the eventual act of appointment is performed by the President and concludes the process of selection. It also means that the power is neither untrammelled nor unrestrained, and ought to be exercised within limits, for, as the learned Attorney-General said, the power is discretionary and not absolute. This is obvious. If, for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed: because it is the will of the People, which that provision manifests, that such a person cannot hold that office. Article 125 would then require this Court, in appropriate proceedings, to exercise its judicial power in order to determine those questions of age and ineligibility. Other instances which readily come to mind are the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude.



In common with Courts in other democracies founded on the Rule of Law, this Court has consistently recognised that powers of appointment are not absolute."

- (d) Independence of the Judiciary is guaranteed by virtue of the Oath of office taken by every Judge upon assuming office.
 - (e) Independence of the Judiciary is also guaranteed by ensuring security of tenure for Judges of the Superior Courts and their salaries and pension entitlements which cannot be reduced.
175. Therefore, the contention of the Petitioners that the President has "unfettered discretion" in the appointment of the Judges of the Superior Courts and the same is a threat to the "independence of the judiciary" is entirely misconceived.
176. It is further submitted that the manner of appointment alone cannot be the yardstick by which one should measure the independence of such offices and institutions including the judiciary.
177. In a system of checks and balances, the manner of removal of the Chief Justice and the judges of the Superior Court should also be considered, in ascertaining if the scheme envisaged by the Bill erodes the independence of the judiciary. It is notable that once appointed, judges enjoy security of tenure and the process of removal from office as provided in Article 107 requires a procedure involving both the Executive and the Legislature. Removal from office, therefore, cannot be effected unilaterally without the sanction of Parliament. Where one organ of government is subject to the checks and balances by the other two organs of government, acting in collaboration, there can be no erosion of judicial independence, irrespective of the manner in which the appointments are sought to be made.



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178. It must be noted that Article 4 (b) stipulates that *"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"*. The Supreme Court has been of the consistent view that the People are the repository of Executive power and that such power is exercised through the President, and that though the methodology used in the exercise of such power may, in accordance with legislative policy, be subject to change, this would not amount to an erosion of the executive power of the President.

179. When the **Seventeenth Amendment to the Constitution**¹⁴ came up for Special Determination before the Supreme Court in **S.C.S.D 06/2001**, Your Lordship's Court observed that the establishment of the Constitutional Council places a restriction on the discretion vested in the President and the Cabinet of Ministers. Your Lordship's Court however held that:

"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."

180. In view of the fact that the aforesaid provisions pertaining to the Parliamentary Council are identical to those contained in the Eighteenth Amendment, which were later repealed by the Nineteenth Amendment to the Constitution, it is submitted that the determination of Your Lordship's Court in connection with the Seventeenth Amendment and the subsequent Eighteenth Amendment to the Constitution would apply. In both the said Special Determinations, Your Lordship's held that the said

¹⁴ S.C.S.D. 6/2001 Supreme Court Minutes of 21st September 2001



amendments did not require a referendum. As such, it is submitted that this clause would not be inconsistent with Article 3 and 4(b) of the Constitution and would therefore not attract a referendum.

181. It was also submitted that the composition of the Parliamentary Council does not in any way affect the sovereignty of the People as reflected in Article 3 of the Constitution.
182. It is submitted that the Prime Minister is the Member of Parliament who commands the confidence of Parliament. He thus possesses the confidence of the majority of the Members of Parliament and the Leader of the Opposition, naturally commands the confidence of the Members of Parliament in the Opposition. The Constitution imposes no bar on a Member of Parliament from expressing his views to the Prime Minister or the Leader of the Opposition with regard to any proposed nominees to the Parliamentary Council. Similarly, there is no Constitutional bar on the Prime Minister and the Leader of the Opposition seeking the views of Members of Parliament with regard to the same. In those circumstances, the will of the majority of the Members of Parliament would be considered by the Parliamentary Council.
183. As such in the above context, it is relevant to note the views of the Supreme Court in **Re the Eighteenth Amendment to the Constitution**¹⁵ where Your Lordships Court opined thus:

"On a consideration of the totality of the provisions dealing with the establishment of the Parliamentary Council, it is abundantly clear for the reason aforesaid that the proposed amendment is only a process of redefining the restrictions that was placed on the President by the Constitutional Council under the Seventeenth Amendment in the exercise of the executive power vested in the President, which is inalienable"

¹⁵ SC/SD/01/2010 SC Minutes of 31st August 2010



184. Fortifying this position, the Supreme Court in *Re the Nineteenth Amendment*¹⁶ to the Constitution opined thus;

"The President must be in a position to monitor or give directions to others who derive authority from the President in relation to the exercise of his Executive power. Failure to do so would lead to a prejudicial impact on the sovereignty of the People."

185. In the above circumstances, the substitution of the Constitutional Council with the Parliamentary Council in terms of the above provisions of the Bill, which only results in the manner of the exercise of the sovereignty does not have a prejudicial impact on the sovereignty of the people.

186. In the above context, *Your Lordships attention is drawn to the majority view of Your Lordships, In Re Thirteenth Amendment to the Constitution*¹⁷ at p.324-325:

"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.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. Article 4 does not define or demarcate the sovereignty of the People. It merely provides one form and manner of exercise of that sovereignty. A change in the institution for the exercise of legislative or executive power incidental to that sovereignty cannot ipso facto impinge on that sovereignty."

¹⁶ SC/SD/5,6,7,8,9,10,14,15,16,17,19/2015, SC Minutes of 1st,2nd and 6th April 2015

¹⁷ 1987 2 SLR 312 @324



187. In *Re 19th Amendment to the Constitution*¹⁸, Sarath N Silva C.J observes that;

"The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People."

188. In this backdrop it would be pertinent to examine the changes envisaged by the proposed amendment. New Chapter VII in Clause 6 of the Bill reads thus;

¹⁸SC/SD11, 13, 15, 16, 17, 18, 19, 20, 21, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40/2002, SC Minutes of 1st and 3rd October 2002

41A.(1)The Chairmen and members of the Commissions referred to in Schedule I to this Article and the persons to be appointed to the offices referred to in Part I and Part II of Schedule II to this Article shall be appointed to such Commissions and such offices by the President. In making such appointments, the President shall seek the observations of a Parliamentary Council (hereinafter referred to as "the Council"), comprising-

- (a) the Prime Minister;
- (b) the Speaker;
- (c) the Leader of the Opposition;
- (d) a nominee of the Prime Minister, who shall be a Member of Parliament; and
- (e) a nominee of the Leader of the Opposition, who shall be a Member of Parliament:



Provided that, the persons appointed in terms of sub-paragraphs (d) and (e) above shall be nominated in such manner as would ensure that the nominees would belong to communities which are communities other than those to which the persons specified in paragraphs (a), (b) and (c) above, belong.

SCHEDULE I

1. The Election Commission.
2. The Public Service Commission.
3. The National Police Commission
4. The Human Rights Commission of Sri Lanka.
5. The Commission to Investigate Allegations of Bribery or Corruption.
6. The Finance Commission.
7. The Delimitation Commission.



SCHEDULE II

PART I

- 1. The Chief Justice and the Judges of the Supreme Court.
- 2. The President and Judges of the Court of Appeal.
- 3. The Members of the Judicial Service Commission, other than the Chairman.

PART II

- 1. The Attorney-General.
 - 2. The Auditor-General.
 - 3. The Parliamentary Commissioner for Administration (Ombudsman).
 - 4. The Secretary-General of Parliament.
112. The composition of the Parliamentary Council differs from that of the Constitutional Council as is apparent when considering Article 41A (1) of the present Constitution, which reads as follows;

41A.(1) There shall be a Constitutional Council (in this Chapter referred to as the "Council") which shall consist of the following members: -

- (a) the Prime Minister;
- (b) the Speaker;
- (c) the Leader of the Opposition in Parliament;
- (d) one Member of Parliament appointed by the President;
- (e) five persons appointed by the President, on the nomination of both the Prime Minister and the Leader of the Opposition of whom two persons shall be Members of Parliament; and



(f) one Member of Parliament nominated by agreement of the majority of the Members of Parliament belonging to political parties or independent groups, other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belong, and appointed by the President.

Composition

189. The composition of the Parliamentary Council would in terms of the Bill be composed solely of Members of Parliament. There is no provision to appoint *“persons of eminence and integrity who have distinguished themselves in public or professional life and who are not members of any political party.”* (Article 41 A (5) of the present Constitution)

190. It is respectfully submitted that Members of Parliament are, elected by the people and have a mandate given by the people to carry out the will of the people.

191. The proposed Parliamentary Council would consist of 5 members as opposed to ten members of the Constitutional Council.

192. Article 41A (4) stipulates that;

“In nominating the five persons referred to in sub- paragraph (e) of paragraph (1), the Prime Minister and the Leader of the Opposition shall consult the leaders of political parties and independent groups represented in Parliament so as to ensure that the Constitutional Council reflects the pluralistic character of Sri Lankan society, including professional and social diversity.”



193. The Parliamentary Council in the proviso to Clause 41A provides for diversity in terms of community;

"Provided that, the persons appointed in terms of sub-paragraphs (d) and (e) above shall be nominated in such manner as would ensure that the nominees would belong to communities which are communities other than those to which the persons specified in paragraphs (a), (b) and (c) above, belong"

194. Article 41A (f) of the Constitution provides as follows;

"One Member of Parliament nominated by agreement of the majority of the Members of Parliament belonging to political parties or independent groups, other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belong, and appointed by the President."

195. Clause 41A (9) of the Bill provides that;

"Where the Leader of any recognized political party represented in Parliament desires to propose the name of any person for appointment as Chairman or member of a Commission referred to in Schedule I to paragraph (1) of this Article, he may within a period of one week from the date of the President seeking such observations of the Council, forward to the Speaker the name of any person in relation thereto. The President may take such names into consideration when making such appointments."



Removal of Members

196. While the tenure of the Parliamentary Council will not be affected by a prorogation of Parliament, powers of removal of members lies with the President.

197. Clause 41 A (7) of the bill provides as follows;

"(7) The tenure of the Council constituted under this Article shall extend for such period as specified in paragraph (2) of Article 62 and such tenure shall not be affected by any prorogation of Parliament in terms of Article 70:

Provided that, the persons appointed as nominees of the Prime Minister and the Leader of the Opposition respectively, may during such tenure be removed by the President or in the event of an incapacity of such nominee, the President may require the Prime Minister or Leader of the Opposition, as the case may be, to nominate taking into consideration the criteria specified in the proviso to paragraph (1), another Member of Parliament to be his nominee in the Council. In such an event, the Member of Parliament nominated to fill the vacancy created by either removal or incapacity, as the case may be, shall continue as member of the Council only for the unexpired period of the tenure of the member for whose vacancy he was nominated."

198. Under the present Constitution, Members of the Constitutional Council hold office for a period of three years unless he resigns or both the prime minister and the Leader of the Opposition form an opinion that such member is physically or mentally incapacitated and is unable to function further in office or is convicted by a court of law for any offence involving moral turpitude or if a resolution for the imposition of civic disability upon him has been passed.



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Every member of the Council appointed under sub- paragraphs (d), (e) and (f) of paragraph (1), shall hold office for a period of three years from the date of appointment unless the member earlier resigns his office by writing addressed to the President, is removed from office by the President on both the Prime Minister and the Leader of the Opposition forming an opinion that such member is physically or mentally incapacitated and is unable to function further in office or is convicted by a court of law for any offence involving moral turpitude or if a resolution for the imposition of civic disability upon him has been passed in terms of Article 81 of the Constitution or is deemed to have vacated his office under paragraph (7) of Article 41e.

199. The above provisions seek to re-introduce the Parliamentary Council which was originally enacted under the Eighteenth Amendment to the Constitution. As such the provisions of the said Clause has no prejudicial impact on the sovereignty of the people more so as the person's and institutions functioning are all amenable to judicial review in the performance of the powers, functions and duties conferred on the said institutions by the Constitution.
200. As such it is respectfully submitted that the reintroduction of the Parliamentary Council into the constitutional scheme in terms of clause 7, while only redefining the institution that places certain restrictions on the President pertaining to the exercise of executive power is incidental to sovereignty and cannot ipso facto impinge on that sovereignty.



Clause 7 of the Bill – Repeal and replacement of Chapter VIII (Executive – The Cabinet of Ministers)

201. By this Clause, Chapter VIII of the Constitution titled Cabinet of Ministers within the Executive arm of the State, as was amended by the Nineteenth Amendment to the Constitution in 2015 is sought to be repealed and Chapter VIII as it stood prior to such Amendment is reintroduced *ad verbatim*. However, Your Lordships may be pleased to see that, in this process, several of the provisions of Chapter VIII of the Constitution under the Nineteenth Amendment are retained, albeit numbered differently, as evident from the Table below and, as such, submissions will be made only in respect of those provisions which stand amended and revert to the pre-2015 position.

Proposed by 20A	Content	Current position as per 19A	Difference under 20A
Article 42	The responsibility of the President to Parliament	Article 33A	None
Article 43(1)	The Cabinet of Ministers charged with direction and control of government and its collective responsibility and answerability to Parliament	Article 42(1) + Article 42(2)	None
Article 43(2)	The President shall be a Member and the Head of the Cabinet of Ministers	Article 42(3)	Reversion to pre-19A position by including proviso that the President shall continue in office



			notwithstanding the dissolution of the Cabinet of Ministers
Article 43(3)	Appointment of the Prime Minister	Article 42(4)	None
Article 44(1)	The power of the President to determine the number of Ministers, assign subjects and functions of Ministers and appoint the Cabinet of Ministers	Article 43(1) + Article 43(2)	None
Article 44(2)	The power of the President to assign to himself any subject or function and determine the number of Ministries in his charge	None	Reversion to pre-19A position that the President can hold Ministerial portfolios
Article 44(3)	The power of the President to, at any time, change the assignment of subjects and functions and change the composition of the Cabinet of Ministers	Article 43(3)	None
Article 45	The power of the President to appoint Ministers who shall not be Members of the Cabinet of Ministers, assignment of subjects and functions to such Ministers, changing such appointment or assignment and the responsibility and answerability of such Ministers to Parliament	Article 44	Exercise of the President's power of appointment and assignment, "in consultation with the Prime Minister, where he considers such consultation to be necessary" instead of "on the advice of the Prime Minister"



Article 46	The power of the President to appoint Deputy Ministers to assist the Ministers of the Cabinet of Ministers and delegation of powers and duties to such Deputy Ministers by any such Minister	Article 45	
Article 47	Tenure of office of the Prime Minister, Ministers and Deputy Ministers	Article 46	Removal of limit on total number of Ministers, re-introduction of provision for removing the Prime Minister and removal of reference to forming a National Government
Article 48	Cabinet of Ministers after dissolution of Parliament	Article 47	Removal of requirement for the Cabinet of Ministers to comply with the criteria set out by the Commissioner of Elections and not cause any undue influence on the General Election and removal of the requirement for the President to act "on



			the advice of the Prime Minister" in appointing a Minister of the Cabinet of Ministers during the intervening period
Article 49	Dissolution of the Cabinet of Ministers	Article 48	None
Article 50	Appointment of Acting Ministers and Deputy Ministers	Article 49	Removal of the requirement for the President to act "on the advice of the Prime Minister" in appointing Acting Ministers and Deputy Ministers.
Article 51	Secretary to the Cabinet of Ministers	Article 50	None
		Article 51	Removal of provisions on Secretary to the Prime Minister
Article 52	Secretaries to Ministries	Article 52	Reversion to pre-19A position by including provisions on filling a vacancy when the Secretary to a Ministry ceases to hold office and by removing reference



			to certain offices and institutions from being deemed to be departments of Government and the inclusion of the National Audit Office therein
Article 53	Requirement that every person appointed to any office under this Chapter takes and subscribes the oath, or makes and subscribes the affirmation set out in the Fourth Schedule	Article 53	None

202. The inclusion of a proviso in Article 43(2) that the President shall continue in office notwithstanding the dissolution of the Cabinet of Ministers was the position as it was prior to the Nineteenth Amendment. Your Lordships may be pleased to see that the provisions pertaining to the dissolution of the Cabinet of Ministers as presently contained in Article 48 and proposed as Article 49 in the instant Bill pre-suppose that the President will continue to function in office even after the dissolution of the Cabinet of Ministers, since he is empowered thereunder to appoint a new Prime Minister and other Ministers and Deputy Ministers. Therefore, the said proviso brings about consistency between provisions of the Constitution and serves to erase any ambiguity. Far from impinging on entrenched provisions, this amendment affirms the Sovereignty of the People under Article 3 read with Article 4(b).



203. Article 44(2) as proposed in the Bill enables the President to once again assign to himself subjects and functions and Ministries as was the position from the commencement of the 1978 Constitution until the enactment of the Nineteenth Amendment in 2015. In this regard, Your Lordships may be pleased to see that since Article 4(b) reposes in the President the Executive power of the People, including the defence of Sri Lanka, he is the Commander-in Chief of the Armed Forces in terms of Article 32 and he is also the authority solely empowered to declare war and peace under Article 33. Even when Clause 11 of the Bill re the *Nineteenth Amendment to the Constitution* sought to recognize the Prime Minister as the Head of the Cabinet of Ministers, Your Lordships in Special Determination SC.SD Nos.4-19/2015 frowned on this provision as it was viewed as a relinquishment of the Executive power of the President and, thus, a violation of Article 3. Therefore, an amended provision was introduced at committee stage as Article 42(3).
204. It stands to reason that the President, as a Member of, and more so, as the Head of the Cabinet of Ministers, should be in a position to hold not only the subject of defence but any other Ministerial portfolio, if he so desires. In this light, proposed Article 44(2) not only brings about consistency within the Constitution, but also enhances the Sovereignty of the People and, as such, does not attract the application of Article 83.
205. The only difference between Article 45 as proposed in the Bill and the corresponding provision in the Constitution as it presently stands, ie. Article 44, is that, in appointing Ministers who are not Members of the Cabinet of Ministers, the President is required to act from time to time, "in consultation with the Prime Minister, where he considers such consultation to be necessary" instead of "on the advice of the Prime Minister". Since the former expression is what is used in proposed Article 44 and current Article 43 in relation to the appointment of Cabinet Ministers, it is not obnoxious to the scheme of the Constitution and certainly does not impinge on any entrenched provisions. The additional



element of discretion found in the phrase "where he considers such consultation to be necessary", further enhances the Executive power of the People via the President. It is also a reversion to the position as it stood prior to the Nineteenth Amendment.

206. Likewise, where Article 46 as proposed in the Bill in relation to the appointment of Deputy Ministers is concerned, the only difference between the provisions thereof and the corresponding provisions in the Constitution as it presently stands, i.e. Article 45, is that the President is required to act from time to time, "in consultation with the Prime Minister, where he considers such consultation to be necessary" instead of "on the advice of the Prime Minister". The foregoing submissions with regard to proposed Article 45 are relevant here as well and, therefore, the provisions of Article 83 are not attracted.
207. Article 47 as proposed in the Bill restores the position as it was prior to the Nineteenth Amendment to the Constitution. Accordingly, one change is the repeal of the limit on the number of Ministers who may be appointed. Thus a restriction on the exercise of Executive power of the People by the President is thereby taken away and it cannot be said that this results in an adverse impact on any entrenched provisions of the Constitution. Although the Petitioners may argue that this amendment imposes a burden on public finance, it is evident from the provisions of Article 46(4) read with Article 46(5) as they stand currently, and from the practical experience of its implementation that the formation of a National Government by the recognized political party or independent group who holds the majority in Parliament and even a party or group which has only one elected Member in Parliament is sufficient to overcome the hurdle of the numerical limitation imposed on the number of Ministers. Therefore, the said restriction has not achieved and will not achieve the desired objective. Another change in the status quo is the absence of a reference to the formation of a National Government. Since the only purpose served by this reference was its role in creating an exception to the requirement of a maximum number of Ministers, there is no longer any necessity to retain such reference in view of the removal of that limitation. Formation of coalition governments, which in effect is what is contemplated by a "National Government" as per the meaning



given to it under Article 46(5), is in no way hampered by the mere removal of a reference to same.

208. The other significant amendment envisaged by the proposed Article 47 is the removal of the Prime Minister by the President. **This provision is a reintroduction of Article 47 which was introduced in the 1978 Constitution.** Considering that the Constitution provides for the removal of other persons who hold office under it, including the President and the Chief Justice, the highest offices in two out of the three organs of the State, ie. the Executive and the Judiciary respectively, there is no justifiable reason as to why the Prime Minister should be the only person who cannot be removed. Further, proposed Article 43(3) corresponds to Article 42(4) under the Constitution as it stands, thereby continuing to require that "The President shall appoint as Prime Minister, the Member of Parliament who, in the President's opinion, is likely to command the confidence of Parliament". The appointing authority of the Prime Minister and the qualification to hold such office being thus articulated, it is only correct that the authority for removing the Prime Minister be also articulated in an unambiguous manner. Even though the provisions of the Interpretation Ordinance, No.21 of 1901 as amended does not apply to the interpretation of Constitutions, the power of the President to both appoint and remove the Prime Minister is consonant with section 14(f) of the Ordinance which states that "for the purpose of conferring power to dismiss, suspend, or reinstate any officer, it shall be deemed to have been and be sufficient to confer power to appoint him". Further, this amendment brings about an important check on the Legislature by the Executive as it should be in a healthy democracy, and thus enhances the Sovereignty of the People, far from impinging thereon.

209. **Proposed Article 48 also restores the pre-Nineteenth Amendment status, with regard to the continuation of the Cabinet of Ministers, even after the dissolution of Parliament.** There is no question that this should be the case, particularly, in view of the observations of Wanasundera J. in the dissenting judgment in *Re the Thirteenth Amendment Determination* (1987) 2 Sri.L.R. 312 at 241, re-affirmed in the SC SD Nos.4-19/2015:



"It is quite clear that 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 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."

210. However, by the proposed Article 48, the additional requirement under the Nineteenth Amendment, that the Cabinet of Ministers which continues to function after the dissolution of Parliament shall comply with the criteria set out by the Commissioner of Elections and not cause any undue influence on the General Election is sought to be removed. However, the prohibition on the Cabinet of Ministers nor indeed anyone in power from unduly influencing an election is already captured in other parts of the Constitution and by law. For instances, under Article 104B(4)(a), the Election Commission has the power during the period of an election, to prohibit the use of any movable or immovable property belonging to the State or any public corporation for the purposes of promoting or preventing the election of any candidate or any political party or independent group contesting at such election. Likewise, by virtue of the offences created by the Parliamentary Elections Act, No.01 of 1981 in relation to undue influence on elections held thereunder, there are sufficient safeguards to prevent any person, including Members of the Cabinet of Ministers from exerting such influence. Further, without corresponding provisions clarifying what is meant by "criteria set out by the



Commissioner of Elections”, not least because the Commissioner of Elections is not an office that exists any longer and has been replaced by the Election Commission and the retention of this requirement gives rise to ambiguity. Furthermore, the requirement for the President to act “on the advice of the Prime Minister” in appointing a Minister of the Cabinet of Ministers during the period intervening between the dissolution of Parliament and the conclusion of the General Election is also not essential and carries little or no consequence, certainly none which impinge on entrenched provisions. Certainly, no binding effect emanates from the inclusion of such phrase, as more fully explained in foregoing submissions.

211. The only difference between proposed Article 50 and the provisions of Article 49 as they stand with regard to the appointment of Deputy Ministers is the requirement for the President to act “on the advice of the Prime Minister” which is sought to be removed. As evident, this phrase has been consistently removed in the case of all appointments made under this Chapter. Therefore, for reasons articulated above, this does not attract the application of Article 83.
212. Chapter VIII as proposed by this Bill also repeals Article 51, under which express provision was made by the Nineteenth Amendment to the Constitution for the appointment of the Secretary to the Prime Minister. However, this is not a matter which results in an inconsistency with any entrenched provisions. Further, the office of the Secretary to the Prime Minister is not a post which specially features in any other provisions of the Constitution and was not even among the offices and institutions, such as the office of the Secretary to the President, which the Nineteenth Amendment thought fit to specifically exclude from being deemed departments of Government as per Article 52(4).

However, by the proposed committee stage amendments, provisions on the Secretary to the Prime Minister as introduced by the Nineteenth Amendment to the Constitution are sought to be retained.



213. Insofar as proposed Article 52 is concerned, sub-articles (1), (2) and (3) of the current Article 52 remain unchanged. **The first substantial amendment is the restoration of sub-articles (4), (5) and (6) as was the case prior to the Nineteenth Amendment to the Constitution**, thereby including provisions on filling a vacancy when the Secretary to a Ministry ceases to hold office. Re-introducing provisions to cater to Secretaries to Ministries ceasing to hold office is by no means an infringement of any entrenched provision, but rather a matter of procedure which only seeks to address a lacunae and bring in more clarity. The second substantial amendment is that, as per proposed sub-article (7) which replaces sub-article (4) of Article 52 as it stands at present, the office of the Secretary to the President, the office of the Auditor General, the Human Rights Commission of Sri Lanka, the Commission to Investigate Allegations of Bribery and Corruption, Finance Commission and Delimitation Commission are excluded from being deemed as departments of Government, whilst the National Audit Office is specifically included. These variations in what offices and institutions are and are not deemed to be departments of Government is consequential to the proposed abolition of the Constitutional Council and other Commissions. **It is a reversion to the position as it was prior to the Nineteenth Amendment**, except that there is a reference to the National Audit Office instead of the department of the Auditor General. This is reflective of the prevailing ground reality, i.e. the Auditor General's Department having been abolished and replaced by the National Audit Office as per the National Audit Act, No.19 of 2018. However, neither of these amendments attract the application of Article 83.
214. It is respectfully submitted that insofar as the overall impact of the aforesaid Clauses of the Bill which touch upon the powers of the President and the Cabinet of Ministers are concerned, there can be no allegation that such provisions give unfettered powers to the Executive and are, therefore, inconsistent with the Sovereignty of the People. This is primarily because Your Lordships have recognized that what the President exercises as Executive power is ultimately a reflection of the Sovereignty of the People.



215. Special Determination SC.SD Nos.11-40/2002 re the Bill titled the **Nineteenth Amendment to the Constitution**, it was observed:

“Mr. H.L. de Silva P.C. submitted and correctly so, that the two Constitutions of Sri Lanka of 1972 and 1978 are unique in proclaiming that sovereignty is in the People and specifically elaborating the content of such sovereignty, whilst in most Constitutions the term “sovereignty” is used only as descriptive of the power of the State...

...

The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4(a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and Judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power “of the people” shall be exercised by Parliament; the executive power “of the people” shall be exercised by the President and judicial power “of the people” shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.

...



Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People....Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as "weapons" in the hands of the particular organ of government."

216. In the Special Determination SC,SD Nos.4-19/2015 re the Bill titled the *Nineteenth Amendment to the Constitution*, part of the aforesaid dicta was cited and relied upon by Your Lordships. Therefore, time and time again, the President has been considered as the agent of the People in the realm of Executive power and it is the erosion, as opposed to the enhancement, of Executive power which has been determined to be a violation of the entrenched provisions in Article 3 of the Constitution. Hence, it is respectfully submitted that the Clauses in this Bill which reinstate or reinforce the powers of the President in line with the position as it stood prior to the Nineteenth Amendment in 2015 should be viewed from that perspective, i.e. not merely as a strengthening of the power of the President, but as a strengthening of the Executive power of the People exercising their Sovereignty through him. Since the President is not the sole repository of Executive power as determined by Your Lordships in SC,SD Nos.4-19/2015, it follows then that powers conferred on the Cabinet of Ministers, which is also part of the Executive, should also be subject to the same logic.
217. Accordingly, Clause 7 of the Bill which deals with provisions relating to both manifestations of the Executive, i.e. the President and the Cabinet of Ministers, do not attract the application of Article 83 of the Constitution. It is also respectfully reiterated that, since the provisions of these Clauses are those which were amended by the Nineteenth Amendment to the Constitution in 2015 without resort to a Referendum, any attempt to revert to the *status quo ante* as intended by the proposed Twentieth Amendment should not attract a Referendum either, as per the yardstick set out by Your Lordships in the Special Determination in SC,SD 8/2000 re the Bill titled *Seventeenth Amendment to the Constitution*.



218. It is also submitted that Article 53 in Clause 7 is proposed to be amended at committee stage by adding reference to the affirmation in the Seventh Schedule to the Constitution.

**Clauses 8 to 12 of the Bill – Amendment to Articles 54, 56,57,61A and 61F of the Constitution
Public Service Commission**

Clause 8 of the Bill

219. This clause seeks to amend Article 54 of the Constitution, relating to the Public Service Commission, by deleting the requirement that appointment of members to the Public Service Commission by the President should be on the recommendation of the Constitutional Council.

220. In the proposed Committee Stage amendment:

- the requirement of a minimum of number of members has been included.
- The maximum number of members remains as nine.
- the fact that the President's power of appointment is subject to Article 41A has been expressly stated)

221. With regard to the clause as it stands without the proposed amendments amendment, it is submitted as follows:

- a. In terms of the proposed draft, the Public Service Commission is included in Schedule I of Chapter VIIA of the Constitution and the President is now required to seek the observations of the Parliamentary Council prior to the appointment of the members of the Public Service Commission;



- b. Thus, the appointment cannot be made on an arbitrary basis, and will have to be carried out in keeping with the principles of public trust reposed on the President;
 - c. The Constitutional implications of abolishing the Constitutional Council and replacing it with the Parliamentary Council has been fully considered elsewhere in these written submissions and are reiterated;
 - d. The Public Service Commission, remains an Independent Commission with a Constitutional function and is subject to review by the apex court of the Country.
 - e. Therefore, this change has no detrimental impact on the independence and integrity of the Public Service Commission and cannot be construed as diminishing the rule of law or the equal protection of the law.
222. In the circumstances, it is submitted that this clause cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Accordingly, it does not attract the requirement of a referendum under Article 83 of the Constitution.
223. **By expressly referring to Article 41A, the proposed Committee Stage amendment eliminates any form of doubt that the appointments under reference would be subject to the Parliamentary Council framework.**



Clauses 9 & 10 of the Bill

224. These clauses amend Articles 56 and 57 of the Constitution, relating to delegation by the Public Service Commission of its powers of appointment, promotion, transfer, disciplinary control and dismissal of Public Officers. Articles 56 and 57 relate to delegation by the Public Service Commission of its powers and functions to a Committee a public officer respectively.
225. **By the proposed Committee Stage amendments, both these clauses have been deleted and therefore Articles 56 and 57 will be retained, without any amendment.**
226. **However, the implications of the proposed amendment will be considered below.**
227. As the Article now stands, the *categories* of public officers, in respect of whom the Commission may delegate its powers to Committees, is decided by the Public Service Commission itself. This provision was introduced by the Seventeenth Amendment to the Constitution but Section 9 of the Eighteenth Amendment amended same by vesting upon the Cabinet of Ministers, the power to determine the categories of public officers in respect of whom such delegations may be made. The Nineteenth Amendment to the Constitution, reverted to the position as was in the Seventeenth Amendment. **The proposed draft, now seeks to reintroduce the scheme in the Eighteenth Amendment, whereby the Cabinet of Ministers decide on the *categories* of officers in respect of whom the Public Service Commission can delegate its powers either to a Committee or a Public Officer.**



228. In this regard it is respectfully submitted as follows:

- a. The identical provision was part of the Eighteenth Amendment to the Constitution, which was not found by Your Lordships' Court to trigger the requirement of a referendum in terms of Article 83. Therefore, this provision has previously passed the test of Constitutionality;
- b. In any event, as the Constitution now stands, in terms of Article 55(1) of the Constitution, matters of policy will be determined by the Cabinet of Ministers and the, instant amendment, giving the Cabinet of Ministers the power to identify categories of officers, is also a matter of policy and is therefore no more than an extension/expansion of the powers exercised by the Cabinet under Article 55(1);
- c. Your Lordships' Court has held that a decision of policy would be based on general considerations. Thus, in the case of *Abhaya Thilaksiri v Tara de Mel* (SCFR 367/2005- SC Minutes 19.10.2006), Your Lordships' Court reiterated the position that *'a decision of policy is one where the authority has to draw on general considerations of social, economic or ethical kind in deciding an issue, where the decision is likely to affect a range of groups and interest'*.
- d. In this instance to power exercised by the Cabinet would be based on general consideration. Accordingly,
- e. as the nature of the power given to the Cabinet of Ministers remains in the realm of policy, any argument that the power of the Public Service Commission has been eroded, would therefore be misplaced;



- f. providing the Public Service Commission with clear guidelines on delegation, would enhance efficient functioning of the Public Service Commission, particularly in view of the proposed framework where all public officers including officers of Sri Lanka Police and the Sri Lanka Audit Service are brought within its purview;
 - g. in the circumstances, this change has no detrimental impact on the independence and integrity of the Public Service Commission and cannot be construed as diminishing the rule of law or the equal protection of the law.
229. In view of the foregoing, this clause cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Therefore, it does not attract the requirement of a referendum under Article 83 of the Constitution.
230. In view of the proposed Committee Stage amendments, the decision on the categories of public officers for the purposes of delegation, will remain with the Public Service Commission.

Clause 11 of Bill

231. This clause seeks to amend Article 61A of the Constitution. By deleting the reference to Article 59 of the Constitution. Thus, the Public Service Commission, stands removed from the pale of review by the Administrative Appeals Tribunal, established under the said Article.
232. In the proposed Committee Stage amendment, clause 11 as it now stands is deleted. Therefore, the decisions of the Public Service Commission, will continue to be subject to review by the Administrative Appeals Tribunal. A new clause 11 has been introduced

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amending Article 61D of the Constitution, whereby a reference to the oath and affirmation under the Seventh Schedule has been added to Art 61D.

233. However, clause 11 as it presently stands, will be fully considered below.

234. In this regard it is submitted as follows:

- a. The decisions of the Public Service Commission remain subject to review under Article 126 of the Constitution. It is common place for the decisions of the Public Service Commission to be challenged before the Supreme Court and therefore the decisions of the Public Service Commission will continue to be subject to rigorous scrutiny and judicial review;
- b. It is also to be noted that the appeal from a decision of the Public Service Commission to the Administrative Appeals Tribunal did give rise to several ambiguities. For instance, whilst the decision of the Public Service Commission could not be reviewed by any court other than the Supreme Court, the constitutional ouster in Article 61A did not apply to the Administrative Appeals Tribunal. Therefore, a decision of the Public Service Commission could be challenged before the Administrative Appeals Tribunal and if the Administrative Appeals Tribunal held against the applicant, that decision could be challenged before the Court of Appeal. As ouster clauses are applied strictly, the Court of Appeal would entertain such applications in the exercise of its writ jurisdiction. Therefore, the decision of the Public Service Commission would be indirectly reviewed by the Court of Appeal. Thus, a type of review that the Constitution had directly prohibited, was taking place indirectly. Further, the multiple layers of review, from the Administrative Appeals Tribunal, to the Court of Appeal and finally to the Supreme Court gives rise to long delay in the administrative functions of the Public Service Commission and the Public Service





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- c. Hence, streamlining the process and subjecting the decisions of the Public Service Commission to a single point of review, under Article 126 of the Constitution, is therefore a step in the process of achieving administrative efficacy, consistency and uniformity in the process of review;
- d. Therefore, removing the Public Service Commission from the purview of the Administrative Appeals Tribunal, has no negative impact on the rule of law or equal protection of the law;

235. In the circumstances, it is submitted that this clause cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Accordingly, it does not attract the requirement of a referendum under Article 83 of the Constitution.

236. **By the proposed Committee Stage amendment, the Public Service Commission will continue to be within the purview of the Administrative Appeals Tribunal, and therefore, any perception of violation of the Constitution, by clause 11 can no longer be entertained.**

Clause 12

237. Proposed Article 61E repeals firstly, the requirement to have the appointment of the Attorney General and the Inspector-General of Police "subject to be approval of the Constitutional Council" and secondly, the age of retirement in the case of both these offices which was sixty years.



238. In the proposed Committee Stage amendment, clause 12 is amended to provide that the Inspector General of Police and the Attorney General will be appointed by the President subject to Article 41A.
239. However, Clause 12 of the Bill as it presently stands is fully considered below;
240. The first amendment under this Clause makes a consequential amendment in view of the provisions of Clause 6 whereby the Constitutional Council has been replaced with the Parliamentary Council as was the case prior to the Nineteenth Amendment to the Constitution. Although the Petitioners allege that this amendment would adversely affect the independence of the office of the Attorney General and the Inspector-General of Police, Your Lordships may be pleased to see that, when read with proposed Article 41A(1) under the said Clause 6, the President is required to seek the observations of the Parliamentary Council with regard to the appointment of the Attorney General. **Further, this was the very position at the time the Eighteenth Amendment to the Constitution Bill was challenged on similar grounds, ie. when the Constitutional Council established under the Seventeenth Amendment was sought to be replaced with the Parliamentary Council.** However, in Special Determination in SC.SD. No.01/2010 re the Bill titled *Eighteenth Amendment to the Constitution*, a five-judge Bench of Your Lordships' Court did not strike down a similar provision on the basis of its inconsistency with any entrenched provision of the Constitution. Furthermore, the implications of Clause 6 under which *inter alia* the Constitutional Council stands replaced, including its bearing on appointments made by the President, is already addressed in foregoing submissions which deal specifically with that provision and such submissions. It cannot be over-emphasized that allegations based on surmise and the mere possibility of arbitrary exercise of discretion by the President in matters such as these are not sufficient to attract the application of Article 83.



241. Secondly, the appointment of the Inspector General of Police is sought to be vested with the Cabinet of Ministers and therefore such appointment is amenable to judicial review of Your Lordships' Court.
242. Thirdly, with regard to the removal of the reference to the age of retirement of the Attorney General and the Inspector-General of Police, it is respectfully submitted that, both being public officers, the retirement age of sixty years is applicable to them whether or not it is recognized by the Constitution. Further, the removal of persons holding either of these offices is also governed by a separate and special law which remains in force, i.e. Removal of Officers (Procedure) Act, No.5 of 2002. Therefore, the reference to the retirement age as presently contained in Article 61E(2) is superfluous.
243. Proposed Article 61F is different from the existing provisions only insofar as the references to "a police officer appointed by the National Police Commission" and "a member of the Sri Lanka State Audit Service" are sought to be removed from the meaning of "public officer" for purposes of Chapter IX only. Since the Public Service Commission is being restored with powers of appointment, promotion, transfer, disciplinary control and dismissal of police officers and officers of the Sri Lanka State Audit Service as per the Bill, this amendment is only a consequential amendment and does not give rise to any constitutional issue.



Clause 13 – Amendment to Article 65 of the Constitution – Secretary General of Parliament

244. This Clause seeks to amend Article 65 of the Constitution by removing the reference to the approval of the Constitutional Council with regard to the appointment of the Secretary General of Parliament, as well as acting appointments made to such office. The foregoing submissions in respect of the appointment of the Attorney General and the Inspector General of Police are reiterated in this instance as well and, therefore, no matter of a constitutional nature infringing on entrenched provisions arises from such amendment.
245. However, by the proposed committee stage amendments it has been expressly stated that the powers of the President to make appointments to the office of Secretary General of Parliament, is subject to Article 41A of the Constitution.

Clause 14 of the Bill – Repeal and replacement of Article 70(1) – Dissolution of Parliament

246. This clause seeks to restore the powers of the President to dissolve Parliament which prevailed prior to the enactment of the Nineteenth Amendment to the Constitution.
247. The Nineteenth Amendment to the Constitution sought to restrict the power of the President to dissolve Parliament to only two specified instances:
- a. upon the expiration of a period of not less than four years and six months from the date appointed for its first meeting



- b. Upon receipt of a resolution passed by not less than two thirds of the whole number of Members of Parliament (including those not present) requesting dissolution.

248. However, the proposed amendment to the Constitution provides for the President to dissolve Parliament:

- a. Upon the expiration of one year from the date of the General Election held consequent upon a dissolution of Parliament by the President;
- b. Upon a resolution by Parliament requesting the President to dissolve Parliament; and
- c. If Parliament rejects two consecutive Appropriation Bills.

249. It was contended on behalf of the Petitioners that this proposed amendment to Article 70(1) of the Constitution, is inconsistent with Article 3 read with Articles 4(b) and 4(e) of the Constitution in as much as it enables the President to arbitrarily dissolve Parliament upon the expiry of one year, notwithstanding the fact that the sovereign people through the exercise of their franchise had elected members to Parliament to serve for a period of 5 years.

250. The Petitioners allege that the President could misuse this power to ensure that the political composition of the Parliament accords to the satisfaction of the President by dissolving a Parliament which comprises of a majority of members who do not belong to the President's political party by having frequent elections.



251. The Petitioners allege that this amendment prejudicially impacts upon the sovereignty of the People, who in the exercise of their franchise elect representatives to Parliament to serve for a period of five years and exercise the People's legislative power.
252. It is respectfully submitted that the Petitioners' aforesaid contention is entirely baseless and unfounded for the following reasons:
- a. The power to dissolve Parliament is an important check on the legislature provided for under the Constitution;
 - b. The power of dissolution of Parliament is a component of the executive power of the People attributed to the President;
 - c. The power to dissolve Parliament must be exercised in trust for the People and not to tame or vanquish Parliament;
 - d. The President elected under the Constitution is expected to act above partisan party politics;
 - e. The need to reduce the period within which the President can dissolve Parliament from four and a half years to one year is necessary to ensure the efficacy of the check on Parliament;
 - f. A dissolution of Parliament would enhance the sovereignty of the People by enabling them to exercise their franchise.



- (a) The power to dissolve Parliament is an important check on the legislature provided for under the Constitution

253. In *Re Nineteenth Amendment to the Constitution* [2002] 3 SLR 85 at page 98, seven Judges of Your Lordship's Court observed as follows:

"It necessarily follows that the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained.

This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another. The dissolution of Parliament and impeachment of the President are some of these powers which constitute the checks incorporated in our Constitution. Interestingly, these powers are found in chapters that contain provisions relating to the particular organ of government subject to the check. Thus, provision for impeachment of the President is found in Article 38 (2) contained in Chapter VII titled 'The Executive, President of the Republic'. Similarly, the dissolution of Parliament is found in Article 70 (1), which is contained in Chapter XI titled, 'The Legislature, Procedure and Powers.'. (emphasis added)



(b) The power to dissolve Parliament is a component of the executive power of the People attributed to the President by the Constitution

254. In Re. Nineteenth Amendment to the Constitution at page 101 Your Lordship's Court observed as follows:

"It is clear that according to the framework of our Constitution, the power of dissolution of Parliament is attributed to the President, as a check to sustain and preserve the balance of power that is struck by the Constitution. This power attributed to the President in broad terms in Article 70 (1) is subject in its exercise to specifically defined situations as set out in provisos (a) to (c) referred to above. Even in these situations, the final say in the matter of dissolution remains with the President.

The only instance in which dissolution is mandatory, is contained in proviso (d), in terms of which, if the Appropriation Bill (the Budget) has been rejected by Parliament and the President has not dissolved Parliament, when the next Appropriation Bill is also rejected, the President shall dissolve Parliament. This is a situation of a total breakdown of the government machinery, there being no money voted by Parliament for the government to function. In such an event dissolution is essential and the Constitution removes the discretion lying in the President by requiring a dissolution. As the Constitution now stands this is the only instance where Parliament could enforce a dissolution by the President and that too through the oblique means of rejecting the Appropriation Bill twice. This demonstrates the manner in which the Constitution has carefully delineated the power of dissolution of Parliament. The People in whom

sovereignty is reposed have entrusted the organs of government, being the custodians of the exercise of the power, as delineated in the Constitution. It is in this context that we arrived at the conclusion that any transfer, relinquishment or removal of a power attributed to an organ of government would be inconsistent with Article 3 read with Article 4 of the Constitution."

255. At page 103 of that Determination, Your Lordship's court further observed:

"We have stated clearly, on the basis of a comprehensive process of reasoning, that the dissolution of Parliament is a component of the executive power of the People, attributed to the President, to be exercised in trust for the People and that it cannot be alienated in the sense of being transferred, relinquished or removed from where it lies in terms of Article 70 (1) of the Constitution."

(c) The power to dissolve Parliament must be exercised in trust for the People and not to tame or vanquish Parliament

256. It was contended by the Petitioners that the mandate received from the People by Members of Parliament, who exercise the legislative power of the People in terms of Article 4(a) of the Constitution, is distinct from the mandate given by the People to the President of the Republic, who exercises the executive power of the People in terms of Article 4(b) of the Constitution.

257. Accordingly, the Petitioners argued that it would be inconsistent with the sovereignty of the People, if the President, who is not elected to exercise legislative power, is permitted to prematurely dissolve Parliament before the expiry of the term for which Parliament had been elected by the People.





258. In fact, the late Mr.H.L. De Silva P.C. in his submission before Your Lordship's Court in **Re. Nineteenth Amendment to the Constitution** sought to categorise checks such as the power to dissolve Parliament as "weapons" placed in the hands of each organ of government.
259. However, rejecting the aforesaid contention, Your Lordship's Court in **Re. Nineteenth Amendment to the Constitution** at page 98 observed:

"Sovereignty as pointed out above, continues to be reposed in the People and organs of government are only custodians for the time being, that exercise the power for the People. Sovereignty is thus a continuing reality reposed in the People.

Therefore, executive power should not be identified with the President and personalised and should be identified at all times as the power of the People.It should be seen at all times as the power of the People. Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as "weapons" in the hands of the particular organ of government. These checks have not been included in the Constitution to resolve conflicts that may arise between the custodians of power or, for one to tame and vanquish the other. Such use of the power which constitutes a check, would be plainly an abuse of power totally antithetic to the fine balance that has been struck by the Constitution.

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

260. At page 100 of the said determination, Your Lordship's Court further observed:

"To sum up the analysis of the balance of power and the checks contained in the Constitution to sustain such balance, we would state that the power of dissolution of Parliament and the process of impeachment being some of the checks put in place, should be exercised, where necessary, in trust for the People only to preserve the sovereignty of the People, and to make it meaningful, effective and beneficial to the People."

261. Therefore, as correctly observed by Your Lordship's Court above, the power of the President to dissolve Parliament is an important check on the legislature provided for in the Constitution to be exercised in trust for the People to preserve the sovereignty of the People.

262. Therefore, the proposed clause only enhances the sovereignty of the people by providing for an effective check on the legislature, necessary to maintain the balance of power between the organs of government under the doctrine of separation of powers.

(d) The President elected under the Constitution is expected to act above partisan party politics

263. Your Lordship's Court in **Re. Nineteenth Amendment to the Constitution** at page 98 observed at page 103 as follows:

"Article 4(b) of the Constitution provides that the executive power of the People shall be exercised by the President of the Republic, elected by People. Thus, upon election the incumbent becomes the "President of the

Republic", who in terms of Article 30 (1) is "the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces." The power attributed to such an office cannot possibly be different, dependent on the absence of membership of a political party or group. The Constitution conceives of a President, who is the "Head of the State", and who would stand above party politics..... the Constitution is the "Supreme Law" of Sri Lanka and should not be seen only from the perspective of such considerations that arise in the moment, but as a body of law, which we could uphold according to the oath that we have taken."

- (e) **The need to reduce the period within which the President can dissolve Parliament from four and a half years to one year is necessary to ensure the efficacy of the check on Parliament**

264. Pursuant to the enactment of the Nineteenth Amendment to the Constitution, the President cannot dissolve Parliament unless upon the expiration of a period of not less than four years and six months from the date appointed for its first meeting. The duration of Parliament in terms of Article 62(2) of the Constitution is now five years.

265. Therefore, the check placed in the hands of the President vis-à-vis the Legislature has become meaningless and this was evident from the facts which gave rise to SC (F/R) 351/2018 [Dissolution Case]. It is for this reason that it has been sought to revert to the original text of Article 70(1).

266. The systems of checks and balances are thus necessary to ensure that each organ of government maintains the balance of power that has been struck between them under the Constitution, which is vital if the Constitution itself is to be sustained.





267. In Re. Nineteenth Amendment, at page 105 of the Determination, Your Lordship's Court observed:

"Article 70 (1) (a) is intended to provide for such a situation in terms of which during the first year after a General Election held pursuant to a dissolution of Parliament by the President, Parliament could be dissolved only if there is a resolution requesting such dissolution. Thus, in effect during this period the matter of deciding on the dissolution of Parliament becomes a responsibility shared by the President with Parliament. There is no alienation of the power of dissolution attributed to the President. Any extension of this period of one year may be seen as a reduction or as contended by Mr. H. L. de Silva an erosion of that power. However, we are of the view that on an examination of the relevant provisions in the different contexts in which they have to operate, that every extension of such period would not amount to an alienation, relinquishment or removal of that power. That would depend on the period for which it is extended. If the period is too long, it may be contended that thereby the power of dissolution attributed to the President to operate as a check to sustain the balance of power, as noted above, is by a side wind, as it were, denuded of its efficacy." (emphasis added)

- (f) **A dissolution of Parliament would enhance the sovereignty of the People by enabling them to exercise their franchise**

268. It is respectfully submitted that in terms of Article 3, Sovereignty is in the People and is inalienable. Sovereignty includes the powers of Government, franchise and fundamental rights.



269. In the Special Determination on the **Third Amendment to the Constitution**, Your Lordship's Court affirmatively held that the "*election symbolises the Sovereignty of the People*" and "*Election by the People connotes acknowledgement of the Sovereignty of the People. It is the only ground of democratic legitimacy.*"
270. It is respectfully submitted that when the President dissolves Parliament in the manner provided in Article 70(1), he does so in trust for the People in the exercise of the executive power of the People.
271. The people are then given another opportunity to elect new representatives to Parliament pursuant to another General Election through the exercise of their franchise.
272. In those circumstances, this clause is aimed at enhancing the franchise of the People as guaranteed under Articles 3 and 4(e), in that it aims to ensure that the will of the People is secured and respected.
273. Therefore, this Clause maintains the important safeguard of checks and balances that previously existed by continuing to repose the power to dissolve Parliament in the President but in a more efficacious and effective manner. Accordingly, this clause would not attract the provisions contained in Article 83 of the Constitution.
274. Without prejudice to the above, the attention of Your Lordship's Court is also drawn to the proposed amendment to be moved by the Government at the Committee Stage of the Bill in relation to this clause, where the period of "one year" within which a President can dissolve Parliament is to be extended to a period of "two and a half years", which is upon one half of the period of Parliament as stated in Article 62(2) of the Constitution.



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275. In *Re Nineteenth Amendment* [2002] 2 SLR 85 at page 106, Your Lordship's Court observed as follows:

"We are of the view that if Clauses 4 and 5 of the Bill, dealt with in the preceding portion of this determination are removed and replaced with a clear amendment to proviso (a) of Article 70 (1), whereby the period of one year referred to therein is extended to a period to be specified not exceeding three years (being one half of the period of Parliament as stated in Article 62 (2)) that would not amount to an alienation, relinquishment or removal of the executive power attributed to the President. The inconsistency with Article 3 read with Article 4 (b) would thereby cease."

276. In these circumstances, it is respectfully submitted that even the proposed amendment to this clause would not be inconsistent with the provisions of Article 3 read with Article 4(b) of the Constitution in as much as the power of the President to dissolve Parliament would be exercisable only after Parliament has completed one half of its 5 year term, as spelt out under Article 62(2) of the Constitution.

Clause 15 of the Bill - Amendment of Article 78

277. This clause seeks to amend Article 78(1) of the Constitution by reducing the mandatory time period for a Bill to be published in the Gazette prior being placed on the Order Paper of Parliament from 14 days to 7 days.

278. This clause in effect seeks to restore the status quo that existed under the 1978 Constitution prior to the Nineteenth Amendment and therefore cannot be construed as an amendment which is obnoxious or antithetic to the Constitution.



279. The Petitioners in SCSD 01/20 and SCSD 06/2020 contend that this amendment seeks to remove a vested right conferred on the People under the Nineteenth Amendment to be made aware of a Bill at least 14 days prior to being placed on the Order Paper of Parliament and thereby infringes Articles 3, 4(d), 12(1), 27(2)(a) and 27(3) of the Constitution.
280. However, it is respectfully submitted that the Petitioners' contention is entirely baseless in view of the fact that the People's right to be informed of the Bill through its publication in the Gazette has been retained.
281. It is only the timeframe between the publication of the Bill in the Gazette and the placing of the Bill on the Order Paper of Parliament, which is a matter of procedure, that is sought to be reduced from 14 days to 7 days. The proposed amendment thereby enables a Bill to be placed before Parliament much earlier than before, without diluting in anyway the salutary safeguard of judicial review of the Bill prior to the same being enacted by Parliament. In this regard it is also relevant to mention that, unlike in the past, developments in communication technology enables citizens to access proposed Bills instantaneously.
282. In any event, it is trite law that no person can claim a vested right over procedure. As observed by Sharvananda J. (as he then was) in *Gunatilake vs. Walker Sons & Co. Ltd* 1979(2) NLR 563 at page 571:

"No person has a vested right in any course of procedure, and he is bound to follow such modes of seeking redress as the law may enjoin from time to time. When a new remedy is granted or a defective remedy is rectified, ...it cannot be said that the rights of any one are injuriously affected by the reforms ..."

- 283. It is also respectfully submitted that in terms of Article 3 read with Article 4(a) and Article 75 of the Constitution, Parliament shall have power to make laws including laws having retrospective effect, repealing or amending any provision of the Constitution or adding any provision to the Constitution. In those circumstances, if the Petitioners contention of "vested rights" of the People over procedure is accepted, then that would constitute a fetter on the power of Parliament to enact laws including laws amending the Constitution and would be inconsistent with Article 3 read with Article 4(a) and Article 75 of the Constitution.
- 284. It is therefore respectfully submitted that Clause 15 of the Bill is not in anyway inconsistent with Article 3 or with Article 4 or Article 12 of the Constitution.
- 285. It has been proposed to delete the amendment to Article 78(3) by way of a committee stage amendment. The said provision restricted amendments that deviated from the merits and principles of a Bill from being moved at the committee stage of Parliament.

Clause 16 of the Bill – Amendment of Article 85 – Submission of Bills defeated by Parliament to the People by Referendum

- 286. This clause seeks to empower the President in his discretion to submit to the People by Referendum any Bill, not being a Bill for the repeal or amendment of any provision of the Constitution or for the repeal or replacement of the Constitution, which has been rejected by Parliament.
- 287. This clause in effect seeks to restore the status quo that existed under the 1978 Constitution prior to the Nineteenth Amendment and therefore cannot be construed as an amendment which is obnoxious or antithetic to the Constitution.



288. It is respectfully submitted that this clause enhances the Sovereignty of the People in that:

- (a) it allows the Sovereign People to exercise their franchise at a Referendum as contemplated under Article 3 read with Article 4(e) of the Constitution; and
- (b) provides for the Sovereign People to exercise their fundamental right to the freedom of speech and expression guaranteed under Article 14(1)(a) read with Article 3 and 4(d) of the Constitution,
- (c) To exercise the legislative power of the people directly and not through their representatives.

289. It is respectfully submitted that this clause enhances the Sovereignty of the People in that:

- (a) it allows the Sovereign People to exercise their franchise at a Referendum as contemplated under Article 3 read with Article 4(e) of the Constitution; and
- (b) provides for the Sovereign People to exercise their fundamental right to the freedom of speech and expression guaranteed under Article 14(1)(a) read with Article 3 and 4(d) of the Constitution.

290. Accordingly, this clause seeks to provide the People with a right to directly exercise and enjoy their sovereignty through a Referendum.

291. It was however contended by some of the Petitioners that this clause seeks to permit the President to encroach or interfere with the legislative power of the People which is exercised by Parliament and thereby prejudicially impacts upon the sovereignty of the People.



- 292. It is respectfully submitted that the aforesaid contention of the Petitioners is entirely flawed and misconceived in that this clause does not seek to allow the President to exercise the legislative power of the People.
- 293. Instead, what this clause aims to do is to enable the President to refer a Bill "which has been rejected by Parliament" in the exercise of the People's legislative power, directly to the Sovereign People. The President therefore cannot utilize this clause to refer any Bill directly to the People by Referendum, bypassing Parliament, as was sought to be suggested by some of the Petitioners.
- 294. The President's power to refer a Bill under the proposed clause therefore is restricted to Bills, which are not for the amendment or repeal of the Constitution and which have been "rejected" or not approved by Parliament.
- 295. The Sovereign People have therefore been afforded an opportunity to directly exercise their sovereignty through a Referendum in relation to a Bill, which their representatives in Parliament exercising the People's legislative power, has not approved.
- 296. This clause therefore clearly enhances sovereignty including franchise and fundamental rights and accordingly no issues with regard to the constitutionality of this clause arise.



Clause 17(4) of the Bill – Amendment of Article 91 – Disqualification for Election as a Member of Parliament

297. This clause seeks to repeal sub-paragraph (xiii) of Article 91(1) (d) of the Constitution, which currently operates as a disqualification for a person who is a citizen of Sri Lanka and who is also a citizen of any other country from being elected as a Member of Parliament or to the office of President.

298. Several of the Petitioners contended that with the repeal of the disqualification in Article 91(1)(d)(xiii), a person who has pledged allegiance to another Sovereign or State as a dual citizen would have divided loyalties, if he is permitted to exercise the legislative power of the People as a Member of Parliament or the executive power of the People as the President, of Sri Lanka. The Petitioners further contended that in that event, the election of such persons would undermine the free, sovereign, and independent status of the Republic of Sri Lanka and thereby infringe Articles 1 and 3 read with Article 4 of the Constitution.

299. It is respectfully submitted that the Petitioners aforesaid contention is entirely flawed for the following reasons.

- (a) A dual Citizen is recognized as a citizen of Sri Lanka and enjoys parity of status with other citizens of Sri Lanka.
- (b) Dual Citizenship is only granted in terms of the Citizenship Act, No.18 of 1948 as amended, to persons of benefit to Sri Lanka





- (c) The fundamental right to equality and freedom from discriminatory treatment is guaranteed to all persons including dual citizens under Article 3 read with Article 12(1) of the Constitution and is an integral component of the inalienable Sovereignty of the People, which must be respected, secured and advanced by all organs of government.
- (d) This clause enhances the Franchise of the People guaranteed to every Citizen under Article 3 and 4(e) of the Constitution.

300. Based on above reasons enumerated morefully below, it is respectfully submitted that this Clause of the Bill does not attract a Referendum.

(a) Dual Citizenship is only granted in terms of the Citizenship Act, No.18 of 1948 as amended to persons of benefit to Sri Lanka

301. A person who is a citizen of Sri Lanka is entitled to also be a citizen of another country only in terms of the provisions contained in the Citizenship Act, No.18 of 1948 as amended.

302. Section 2 of the Citizenship Act provides as follows:

(2) A person shall be or become entitled to the status of a citizen of Sri Lanka in one of the following ways only :

(a) by right of descent as provided by this Act;

(b) by virtue of registration as provided by this Act or by any other Act authorizing the grant of such status by registration in any special case of a specified description.



(3) Every person who has possessed of the aforesaid status is hereinafter referred as a "Citizen of Sri Lanka".

303. Section 3 of the Citizenship Act provides that:

"A citizen of Sri Lanka may, for any purpose in Sri Lanka, describe his nationality by the use of the expression "Citizen of Sri Lanka ".

304. The right to obtain dual citizenship under our law was introduced by the Citizenship (Amendment) Act, No.45 of 1987 by amending Section 19 of the Citizenship Act, No.18 of 1948. Section 19 of the Citizenship Act was thereafter further amended by Citizenship (Amendment) Act, No. 15 of 1993.

305. The relevant legal provisions that govern the granting of dual citizenship in Sri Lanka and the revocation of such dual citizenship as contained in Section 19 of the Citizenship Act state as follows:

(2) Any person who ceases, under subsection (1) of this section or section 20 or section 21, to be a citizen of Sri Lanka may at any time thereafter make application to the Minister for a declaration that such person has resumed the status of a citizen of Sri Lanka, notwithstanding the fact that he is, and continues to be, a citizen of any other country; and the Minister may make the declaration for which the application is made if he is satisfied that the making of such declaration would, in all the circumstances of the case, be of benefit to Sri Lanka.

(3) Any citizen of Sri Lanka may, at any time prior to his ceasing, under subsection (1) of this section or section 20 or section 21, to be a citizen of Sri Lanka, make application to the Minister for a declaration that such person retains the status of a citizen of Sri Lanka from and after a date to be specified in such declaration, notwithstanding the fact that he is, and continues to be, from and after that date a citizen of any other country; and the Minister may make the declaration ; for which application is made, if he is satisfied that the making of such declaration, would, in all the circumstances of the case, be of benefit to Sri Lanka.

(4) Where a declaration is made in relation to any person under subsection (2) or subsection (3), that person shall, with effect from such date as may be specified in the declaration again have or continue to have, as the case may be, the status of a citizen of Sri Lanka, notwithstanding the fact that he is a citizen also of any other country.

(5) So long as a declaration under subsection (2) or subsection (3), is in force in relation to any person, the provisions of this Act shall not be read and construed as requiring that person to renounce the citizenship of any other country of which he is a citizen.

(6) The provisions of section 23 and section 24 shall not apply to any person in relation to whom a declaration under subsection (2) or subsection (3) has been made.

(7) The Minister may, at any time, revoke a declaration made under subsection (2) or subsection (3) if he is satisfied that the person in relation to whom such declaration was made has so conducted himself that his continuance as a citizen of Sri Lanka will not be of benefit to Sri Lanka.



(8) Every person in relation to whom a declaration is made under subsection (2) or subsection (3) shall pay in the prescribed manner, a fee according to the prescribed rates, in respect of such declaration.

306. Therefore, in terms of the existing law, dual citizenship is only granted to two categories of persons.
- (a) Under Section 19(2) of the Citizenship Act to **any person whose citizenship of Sri Lanka has ceased** due to obtaining of citizenship in another country and who thereafter desires to **resume** the status of a citizen of Sri Lanka.
- (b) Under Section 19(3) of the Citizenship Act to **any person who is a citizen of Sri Lanka** and who has a desire to obtain citizenship in another country, while **retaining** his citizenship of Sri Lanka.
307. It is thus a *sine qua non* for a person seeking dual citizenship under our law to have first been a Citizen of Sri Lanka, either by descent or by registration. An alien, who has not been a Citizen of Sri Lanka, has no right to obtain dual citizenship under our law.
308. It is further observed that Citizenship Act restricts the power of the Minister to make a declaration permitting a person to resume or retain the status of a Citizen of Sri Lanka only if he is satisfied that the applicant will be "of benefit to Sri Lanka."
309. Therefore, an applicant under Section 19(2) and Section 19(3) of the Citizenship Act would not be entitled to a declaration unless he has provided sufficient material and justification to satisfy the Minister that he would be of benefit to Sri Lanka.



310. In fact, Section 19(7) of the Citizenship Act empowers the Minister to revoke a declaration made under Sections 19(2) or 19(3) if he is satisfied that the person in relation to whom such declaration was made, has so conducted himself that his continuance as a citizen of Sri Lanka will not be of benefit to Sri Lanka. Therefore, the law provides sufficient safeguards to ensure that only persons of benefit to Sri Lanka will be entitled to be a Citizen of Sri Lanka and also a citizen of any other country.
311. Therefore, the Petitioners contention that this clause would pave the way for persons with divided loyalties to govern Sri Lanka to the detriment of its national and economic security is untenable, given that:
- (a) by virtue of the provisions of the Citizenship Act, dual citizens are persons of "benefit to Sri Lanka", and if such benefit ceases to exist, their Sri Lankan citizenship can be revoked and they would then stand disqualified to be an elector under Article 89(a) of the Constitution, and
 - (b) dual citizens who stand for election as a Member of Parliament or to the office of President, must ultimately be elected by the Sovereign People at an election in the exercise of their franchise. It is therefore the Sovereign People who will ultimately decide on the suitability of a dual citizen to hold elected office and it must be assumed that the People will not elect any person who would endanger their national or economic security.



(b) A dual citizen is a Citizen of Sri Lanka and enjoys the status of a Citizen of Sri Lanka

312. As set above, a dual citizen of Sri Lanka is for all intents and purposes of our law is a "Citizen of Sri Lanka" and is entitled under Section 19(4) of the Citizenship Act to the "status of a Citizen of Sri Lanka" from the date specified in the declaration made by the Minister under Section 19(2) or 19(3) of the Act.

313. Article 26 of the Constitution which relates to "Citizenship" provides as follows:

- (1) *There shall be one status of citizenship known as "the status of a citizen of Sri Lanka".*
- (2) *A citizen of Sri Lanka shall for all purposes be described only as a "citizen of Sri Lanka", whether such person became entitled to citizenship by descent or by virtue of registration in accordance with the law relating to citizenship.*
- (3) *No distinction shall be drawn between citizens of Sri Lanka for any purpose by reference to the mode of acquisition of such status, as to whether acquired by descent or by virtue of registration.*
- (4) *No citizen of Sri Lanka shall be deprived of his status of a citizen of Sri Lanka, except under and by virtue of the provisions of sections 19, 20, 21 and 22 of the Citizenship Act :*

Provided that the provisions of sections 23 and 24 of that Act shall also be applicable to a person who became entitled to the status of a citizen of Sri Lanka by virtue of registration under the provisions of section 11, 12 or 13 of that Act.



(5) *Every person who immediately prior to the commencement of the Constitution was a citizen of Sri Lanka, whether by descent or by virtue of registration in accordance with any law relating to citizenship, shall be entitled to the status and to the rights of a citizen of Sri Lanka as provided in the preceding provisions of this Article.*

(6) *The provisions of all existing written laws relating to citizenship and all other existing written laws wherein reference is made to citizenship shall be read subject to the preceding provisions of this Article.*

314. Section 19(4) of the Citizenship Act read with Article 26 of the Constitution makes it abundantly clear that a person who has obtained dual citizenship under and in terms of Section 19(2) or Section 19(3) of the Citizenship Act cannot be deprived of their "status of a Citizen of Sri Lanka" or discriminated or denied the rights of a "citizen of Sri Lanka" unless they cease to be Citizen of Sri Lanka subsequently in accordance with Sections 19, 20, 21 and 22 of the Citizenship Act.

(c) **The State is obliged to respect, secure and advance the Fundamental Right to equality and freedom from discriminatory treatment**

315. Article 3 read with Article 4(d) of the Constitution provides that the sovereignty of the people which includes fundamental rights shall be enjoyed and exercised by the people and that the fundamental rights which are by the constitution declared and recognized shall be respected, secured and advanced by all organs of government.

316. Article 27(2)(a) of the Constitution provides that the State is pledged to establish in Sri Lanka a Democratic Society, the objectives of which include the full realisation of the fundamental rights and freedoms of all persons.



317. Article 12 of the Constitution guarantees that ;

- (1) All persons are equal before the law and are entitled to the equal protection of the law.
- (2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.

318. In SC SD 14-16/2003, "Intellectual Property" Bill, Your Lordship's Court observed as follows:

"Article 12(1) of the Sri Lanka Constitution not only guarantees equality before the law, but also provides for equal protection of the law. It is well settled law that just as much equals should not be placed unequally, at the same time unequals should not be treated as equals.

Equal protection means the right to equal treatment when similar circumstances are prevailing allowing no discrimination between two persons who are similarly circumstanced. Similarly equal protection in terms of Article 12(1) guarantees protection not only from the executive but also from the legislature.As it has been decided in a series of cases in India, the guarantee of equal protection of the laws is an injunction issued by the framers of the Legislature against enactment of discriminatory laws. Although the legislature has a wide choice in articulation of subject matter of its laws, it should not treat unequals as equals and equals as unequals."



319. It is observed that a citizen of Sri Lanka who is also a citizen of another country by virtue of the provisions of Section 19(2) or 19(3) of the Citizenship Act, is qualified to be an elector and exercise his franchise at an election of the President or Members of Parliament or at a Referendum in terms of Articles 88 and 89 read with Articles 3 and 4(e) of the Constitution. However, such person though having the "status of a Citizen of Sri Lanka" has been disqualified to be elected as a Member of Parliament or to the office of President by virtue of Article 91(1)(d)(xiii) of the Constitution.

320. However, as set out above, Article 26 of the Constitution read with Section 19(4) of the Citizenship Act, guarantees to every Citizen of Sri Lanka who is also a citizen of another country, the "status of a Citizen of Sri Lanka" and therefore forbids a distinction from being drawn between Citizens of Sri Lanka and dual citizens.

321. In those circumstances, it is respectfully submitted that Clause 17(4) of the Bill enhances and advances the sovereignty of the People including their fundamental rights by removing the disqualification under Article 91(1)(d)(xiii) of the Constitution enabling equal opportunity for Citizens of Sri Lanka who are also Citizen of another country in terms of the Citizenship Act to stand for election at a General Election and at an election for the office of President.

(d) This clause enhances the Franchise of the People guaranteed to every Citizen under Articles 3 and 4(e) of the Constitution

322. Article 3 read with Article 4(d) of the Constitution provides that the sovereignty of the people which includes franchise shall be enjoyed and exercised by the people at an 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 in terms of the Constitution, has his name entered in in the register of electors.





323. As stated above, a citizen of Sri Lanka who is also a citizen of another country by virtue of the provisions of Sections 19(2) or 19(3) of the Citizenship Act, is qualified to be an elector at an election of the President or Members of Parliament or at a Referendum in terms of Articles 88 and 89 of the Constitution.
324. However, as observed by Your Lordships' Court in S.C S. D 9-14/98, "Provincial Councils Elections (Special Provisions) Bill";
- "franchise is not restricted to merely voting at elections, it includes standing for election and indeed the entire election process from nomination to poll."*
325. It is therefore respectfully submitted that by virtue of the disqualification under Article 91(1)(d)(xiii) of the Constitution, a Citizen of Sri Lanka who is also a Citizen of another Country by virtue of the provisions of the Citizenship Act is precluded from standing for election as a Member of Parliament or to the office of President.
326. Article 27(4) of the Constitution provides that the State shall strengthen and broaden the democratic structure of government and democratic rights of the People **by affording all possible opportunities to the People to participate at every level in national life and in government.**
327. Article 27(6) of the Constitution provides that the **State shall ensure equality of opportunity to citizens.**
328. Therefore, the effect of clause 17(4) of the Bill is to provide an opportunity for Citizens of Sri Lanka who are also Citizens of another Country to stand for election, which will enhance franchise as guaranteed under Articles 3 and 4(e) of the Constitution.



329. It is further submitted that providing an opportunity for Citizens of Sri Lanka who are also Citizens of another Country by virtue of the Citizenship Act to stand for election at a General Election or at a Presidential election, would provide the People, in whom sovereignty is reposed, a wider choice of candidates to choose from.

330. In **S.C S. D 8/2000**, Your Lordship's Court stated that the choice to elect representatives is necessary for the exercise of franchise;

"They are, firstly the voters would in terms of the Amendment have a choice of electing candidates to represent their respective Electorate, being a choice not provided as the law stands and which is necessary if franchise is to have its true meaning as provided in Article 3 read as 4 (a) and (e) of the Constitution."

331. Fernando J. in **Mediwaka and others v. Dayananda Dissanayake and others** [2001] 1 SLR 177 at p.211 further held:

"The citizen's right to vote includes the right to freely choose his representatives, through a genuine election which guarantees the free expression of the will of the electors: not just his own."

332. In SC S.D. 01/2010 "**Eighteenth Amendment to the Constitution**", Your Lordship's Court when considering the removal of the bar under Article 31(2) for a President who had been twice elected by the People to contest a further Presidential election observed:

"it is to be noted that the aforesaid Article 4(e) of the Constitution refers to the exercise of the franchise of the People and the amendment to Article 31(2) of the Constitution by no means would restrict the said franchise. In

fact, in a sense, the amendment would enhance the franchise of the People granted to them in terms of Article 4(e) of the Constitution since the voters would be given a wide choice of candidates including a President who had been elected twice by them.

333. In these circumstances, it is respectfully submitted that this clause would enhance the franchise of the People in terms of Articles 3 and 4(e) of the Constitution and would not attract a referendum.

Clause 18 of the Bill – Amendment of Article 92 – Disqualification for Election as President

334. The effect of this clause is to reduce the minimum age limit of a person who seeks to contest for the office of President, from thirty-five to thirty years. In this regard, Your Lordships may be pleased to recall that in the Special Determination in SC.SD. No.01/2010 re the Bill titled *Eighteenth Amendment to the Constitution*, where *inter alia* the removal of the two-term limit of the President was challenged as being inconsistent with Article 3, Your Lordships were of the opinion that the lifting of this restriction is an enhancement of franchise, giving the People a wider choice. Similarly, when affirmative provisions to secure increased youth and women representation were sought to be introduced by the Local Authorities Elections Ordinance (Amendment) Bill, Your Lordships determined them to be constitutional in Special Determination SC.SD. No.02-11/2010. Therefore, an amendment easing the restrictions on the age of a person qualified to stand for election as President, does not in any way violate any entrenched provisions, but rather enhances franchise and, thereby, the Sovereignty, of the People.



Clauses 19, 20, 21 and 22 of the Bill – Amendment of Article 103, 104B and 104E and repeal of 104GG

335. **Clauses 19, 20, 21 and 22 of the Bill seek to repeal provisions which were introduced in relation to the Election Commission by the Nineteenth Amendment to the Constitution and restore the position as it was ante.** In this context, Your Lordships may appreciate that, as per the Special Determination in SC.SD 8/2000 re the Bill titled *Seventeenth Amendment to the Constitution*, Your Lordships' Court has determined that it would be illogical to contend that a constitutional amendment which was introduced with a special majority can be repealed only if it is submitted to a Referendum. Further, as **these very proposed provisions have already been cleared in Special Determination SC.SD 01/2010 re the Bill titled *Eighteenth Amendment to the Constitution*, without requiring approval of the People at a Referendum**, there is no basis for the Petitioners to claim that the Instant Bill attracts the application of Article 83. However, a detailed analysis of each of the said Clauses is provided below for Your Lordships' consideration.

Clauses 19 and 22 of the Bill – Amendment of Article 103

336. This clause seeks to amend Article 103 with regard to the composition of the Election Commission. Your Lordships may be pleased to see the evolution of Article 103 from the inception of the Election Commission, under the Seventeenth Amendment to the Constitution in 2001, which introduced a new Chapter XIVA specific to the Election Commission. Accordingly, the Election Commission originally comprised five members appointed by the President on the recommendation of the Constitutional Council, which too was an introduction by the Seventeenth Amendment. Accordingly, Article 103(7) provide for temporary members to be appointed to the Election Commission during the period a member is on leave and, such appointed had to be on the recommendation of the Constitutional Council. Thereafter, by the Eighteenth Amendment to the Constitution in 2010, the composition was reduced to three members and the reference to the recommendation of the Constitutional Council was deleted from both Articles 103(1) and



103(7), in view of the abolition of the Council by the same Amendment. When the Eighteenth Amendment Bill was challenged before Your Lordships' Court in Special Determination SC.SD. 01/2010, this was never in issue as there was no impact on entrenched provisions of the Constitution and, as such, no pronouncement was made thereon. Consequently, with the re-introduction of the Constitutional Council by the Nineteenth Amendment, the reference to its recommendation was restored in both Articles 103(1) and 103(7) and, additionally, another requirement imposed to the effect that "one of the members so appointed shall be a retired officer of the Department of Elections, who has held office as Deputy Commissioner of Elections".

337. Under the proposed Article 103, the *status quo ante* is restored, ie. the provision as it was under the Eighteenth Amendment. In this regard, it is respectfully submitted that the deletion of the reference to the recommendation of the Constitution Council is a consequential amendment pursuant to the amendment proposed to Clause 6 of the Bill. Although the Petitioners contend that such removal provides the President absolute authority to appoint at his discretion the Members of the Election Commission, this is not tenable for several reasons. Article 41A(1) of proposed Chapter VIIA by Clause 6 of the Bill requires the President to mandatorily seek the observations of the Parliamentary Council in making appointments to *inter alia* the Election Commission. Whilst it may be surmised that, despite this mandatory requirement, the President will exercise unfettered discretion, this is not the case.

338. Your Lordships determined in the Special Determination in SC.SD Nos.2-5/1982 re the Bill titled *Third Amendment to the Constitution*, as follows:

"Further, a clear distinction must be borne in mind between the law and the administration of the law. A law cannot be struck down as discriminatory because of the fear that it may be administered in a discriminatory manner. Mere possibility of abuse of power is not sufficient ground to hold that a law offends the fundamental right of equality".





339. Further, as observed by Your Lordships in the Special Determination in SC.SD Nos.2-5/1982 re the Bill titled *Eighteenth Amendment to the Constitution Bill*:

"The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. Even the immunity given to the President under Article 35, has been limited in relation to Court proceedings specified in Article 35(3)."

340. In this regard, Your Lordships may also be pleased to note that a committee stage amendment has been proposed in respect of this clause, increasing the number of members to be appointed to the Election Commission from three to five and also requiring that one of the members appointed to the Election Commission shall be a retired officer of the Department of Elections or Election Commission, who has held office as a Deputy Commissioner of Elections or above.

Clause 20 of the Bill – Amendment of Article 104B

341. Sub-clause 1 of this clause seeks to rectify a typographical error occurring in Article 104B(4)(i) as it stands now, by substituting the word "of" for "or" in the phrase "election or a candidate".
342. Sub-clause 2 of this clause adds a new provision numbered as Article 104B(4a) with what appears to be an attempt at bringing clarity to Article 104B(4), ie. whereby the Election Commission is empowered to issue "a direction in writing" prohibiting, during the period of an election, the use of any movable or immovable property belonging to the State or any public corporation for the purposes of promoting or preventing the election of any candidate or any political party or independent group contesting at such election by any candidate or any political party or any independent group contesting at such election.

Accordingly, proposed Article 104B(4a) clarifies that "guidelines" issued by the Election Commission shall be "(a) limited to matters which are directly connected with the holding of the respective election or the conduct of the respective Referendum, as the case may be; and (b) not be connected directly with any matter relating to the public service or any matter within the ambit of administration of the Public Service Commission or the Judicial Service Commission, as the case may be, appointed under the Constitution". Although there is a discrepancy between the words "direction" and "guidelines" as occurring in Article 104B(4) and proposed Article 104B(4a), this does not affect any entrenched provisions and may be given a harmonious interpretation, if need be, as the intention of the legislature is clear.

343. Further, the content of the said clarification in proposed Article 104B(4a) is not inconsistent with any entrenched provision of the Constitution, including in relation to the holding of free and fair elections vis-a-vis franchise, which is included in the concept of Sovereignty under Article 3. This very same provision was carefully analysed by a five-judge Bench of Your Lordships' Court when it was sought to be introduced under Clause 14 of the Bill titled *Eighteenth Amendment to the Constitution* and determined to be not inconsistent with Article 3 of the Constitution in Special Determination SC.SD. No.01/2010:

"As could be seen, the amendments are in addition to the present powers, functions and duties of the Election Commission. A careful perusal of the proposed amendments indicate that they are for the purpose of ensuring that other organizations of the Government are not stifled in their functions during the pendency of Elections. It is to be borne in mind that the Commissions such as the Public Service Commission and the Judicial Service Commission are also independent Commissions established under the Constitution, whose functions should not be curtailed at any time. As stated by Mark Fernando, J., in Karunathilake and Another V Dayananda



*Dissanayake, Commissioner of Elections and Others (1999) 1 Sri.L.R. 157
in reference to Article 104 of the Constitution,*

"Article 104 refers to the powers, duties and functions of the Commissioner of Elections. But that is not exhaustive of his powers and duties. Article 93 of the Constitution requires that voting be free, equal and secret and it follows that the Commissioner of Elections has such implied powers and duties as are necessary to ensure that voting be free, equal and secret."



It is therefore apparent that the said amendments in terms of Article 104B of the Constitution do not in any way curtail the powers of the Election Commission, but only bring a safeguard in terms of the functions of the other Commissions."

344. In any event, Your Lordships may be pleased to appreciate that as per the construction of proposed Article 104B(4a), the exceptions to the guidelines (ie. directions) which may be issued by the Election Commission in order to give effect to the prohibitions imposed in Article 104B(4) are not absolute exclusions. Paragraphs (a) and (b) of proposed of Article 104B(4a) which are joined by the conjunctive "and" impose two restrictions which, read together, amount to a single qualified exclusion. The guidelines should be "limited to matters which are directly connected to the holding of the election or referendum", but "not be connected directly with any matter relating to the public service or any matter falling within the ambit of the administration of the Public Service Commission or the Judicial Service Commission". In other words, matters which are directly connected to the holding of an election or a referendum, but have only an indirect connection with any matter relating to the public service or any matter within the ambit of the administration of the Public Service Commission or the Judicial Service Commission are not excluded. It is amply demonstrable that the intention of this provisions is to ensure that two organs

of State, the Executive (vis-à-vis the public service and the administration of the Public Service Commission) and the Judiciary (vis-à-vis the administration of the Judicial Service Commission) are not hamstrung simply because an election is pending. It is a means of ensuring that the People in whom Sovereignty is reposed are not deprived of the smooth functioning of government machinery.

345. Sub-clause 3 seeks to repeal and substitute Article 104(5)(b). In this regard, Your Lordships may be pleased to see that, as per Article 104(5)(a), the Election Commission may issue guidelines to "any broadcasting or telecasting operator or any proprietor or publisher of a newspaper", to ensure a free and fair election. However, as per Article 104(5)(b) as it now stands, pursuant to the Nineteenth Amendment to the Constitution, only the Chairmen of the Sri Lanka Broadcasting Corporation, Sri Lanka Rupavahini Corporation and Independent Television Network, as well as Chief Executive Officers of every other media enterprise owned or controlled by the State have a corresponding duty to comply with such guidelines. Therefore, private media operators do not have a duty to comply with guidelines issued by the Election Commission under Article 104(5)(a). This exclusion ceases to be with the proposed amendment and all media operators, whether State or private, will be equally bound under Article 104(5)(b) to comply with the said guidelines. It would ensure that all media act with responsibility, with a common objective of facilitating free and fair elections. Far from being an affront to any entrenched provision of the Constitution, such an amendment removes any discrimination between State and private media operators in conformity with the right to equal protection of the law guaranteed by Article 12(1) and the freedom to engage in any lawful business under Article 14(1)(g), and also enhances franchise through the stronger guarantee of holding free and fair elections. It is, therefore, a progressive articulation of the Sovereignty of the People under Article 3, which includes both fundamental rights and franchise.

346. In this regard, Your Lordships may also be pleased to see that there is yet another ground to justify the applicability of the said guidelines to private media operators, ie. because the airwaves and frequencies they use are public property. In the ~~Special Determination~~



re the Bill titled Sri Lanka Broadcasting Authority Bill in SC. SD Nos.01-15/1997, His Lordship the then Chief Justice G.P.S. de Silva placed reliance on the dictum of *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal (1995) 2 SCC 161* and observed that "The airwaves/frequencies, as we have seen, are universally regarded as public property".

Clause 21 of the Bill – Amendment to Article 104E

347. The effect of this Clause is to remove the requirement as is presently in Article 104E, that the appointment of the Commissioner-General of Elections by the Election Commission should be subject to approval by the Constitutional Council. The foregoing submissions with regard to the appointment of the members of the Elections Commission are respectfully reiterated, ie. that this is consequential to the replacement of the Constitutional Council by the Parliamentary Council and that as the Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution, including the President, the Election Commission too is expected to act without exercising its discretion in an arbitrary manner.

Clause 22 of the Bill – Repeal of Article 154GG

348. This Clause seeks to repeal Article 104GG and, as such, the refusal or failure without reasonable cause to co-operate with the Election Commission, to secure the enforcement of any law relating to the holding of an election or the conduct of Referendum or the failure without reasonable cause to comply with any direction or guideline issued by the Commission under Article 104B(4) or Article 104B(5)(a) is no longer an offence. Although the Petitioners argue that this would adversely affect the holding of free and fair elections, it is relevant to note that the enforcement of any law relating to the holding of an election or the conduct of a Referendum is still intact under the relevant election laws, ie. Parliamentary Elections Act, No.1 of 1981, the Presidential Elections Act, No.15 of



1981, Provincial Council Elections Act, No.2 of 1988, Local Authorities Elections Ordinance (Chapter 262) and Referendum Act, No.7 of 1981. Illegal and corrupt acts pertaining to elections are offences which are punishable under these laws and, as such, the mere removal of Article 104GG does not in any manner paralyze the Election Commission from securing the enforcement of laws relating to the holding of an election or the conduct of Referendum. Further, the removal of sanctions attached to non-compliance with directions or guidelines set out in Articles 104B(4)(a) and Article 104B(5)(a) must be read with the re-introduction of private media responsibility by proposed Article 104B(5)(b). With the greatest respect, it is a matter of policy as to how a government will set about advancing the rights of People and not a matter open for judicial scrutiny.

Clause 23 of the Bill – Amendment of Article 107

349. This clause seeks to amend Article 107 of the Constitution by the repeal of Article 107(1). The amendment proposes, to remove the requirement imposed on the President to obtain the approval of the Constitutional Council in respect of the appointment of the Chief Justice, President of the Court of Appeal and any other Judge of the Supreme Court and the Court of Appeal. Instead, in terms of proposed Article 41A (Clause 6 of the Bill), the President is required to seek the observations of the proposed Parliamentary Council.

350. By the proposed Committee Stage amendment, it has been expressly stated that the power of the President to make the substantive appointment of judges, is subject to Article 41A of the Constitution.

351. The Constitutional implications of the abolition of the Constitutional Council and replacement thereof by the Parliamentary Council, has been fully considered elsewhere in this written submission and are reiterated.



352. However, in order to address the issue, in the Context of the superior courts, a few salient points are set out below:

- a. In terms of Article 4 of the Constitution, the Sovereignty of the People is expressly reposed in three organs, (i)Parliament, (ii)The President and (iii) Courts. The said organs exercise legislative, executive and judicial power of the People.
- b. It is pertinent to observe that the Constitutional Council is not a feature that is inherent in the exercise of the sovereignty of the people, as contemplated by Article 4;
- c. Therefore, obtaining the approval of the Constitutional Council, for the appointment of judges to the superior courts, is not a *sine qua non* for the exercise of the executive power of the People by the President;
- d. consequently, the removal of the requirement of obtaining the approval of the Constitutional Council, cannot be construed in law as having an impact on the sovereignty of the People as envisaged in Articles 3 and 4 of Constitution.
- e. In fact, in **Special Determination No. 06/2001**, where the Supreme Court considered the Seventeenth Amendment to the Constitution, which introduced the Constitutional Council, the Court recognised that the *'executive power of the People including defence is exercised by the President who is elected by the People'*. (emphasis added). Therefore subjecting the discretion of the President to the Constitutional Council was considered as a *'restriction in the exercise of the discretion hitherto vested in the President'*. However, such a restriction was considered not a violation of Articles 3 and 4(b) as the introduction of the Constitutional Council did not amount to an *erosion* of the executive power of the President



- f. The instant Bill only removes a fetter that was recognised by the Supreme Court itself as a restriction on the powers of the President. Consequently, it is perverse to suggest that a restoration of *status quo ante* amounts to infringement of Articles 3 and 4 or that it detrimentally impacts upon the Sovereignty of the People;

- g. Furthermore, in *SC Determination 1/2010 In Re Eighteenth Amendment to the Constitution*, where the provision identical to the proposed amendment, was challenged, the contention of counsel that the Constitutional Council was established '*with the intention of safeguarding the independence of the judiciary and the purpose and the objective of the said introduction was to place a restriction on the discretion of the President in appointment of judges*' was rejected by the Supreme Court. A Bench of five judges took the view that '*the Seventeenth Amendment was brought into effect only in 2001 and from 1978 up to the date the Seventeenth amendment came into effect, for a period of over 13 years, judges were appointed in terms of the provisions laid down under the 1978 Constitution*'. The Court concluded that, regardless of the existence or otherwise of the Constitutional Council, the framework of the 1978 Constitution provided the '*necessary safeguards which restricted the discretion of the appointing authorities*'.

- h. Therefore, however laudable the introduction of the Constitutional Council may have been, the replacement thereof by the Parliamentary Council, cannot be considered as an abolition of a necessary safeguard that has an impact on the sovereignty of the People.

- i. In the context of judicial appointment and the responsibility of the President it must be emphasised that the President remains singularly answerable for the appointments made and his responsibility is enhanced:



- j. Even with the Constitutional Council in place, the ultimate appointing authority with regard to the appointment of judges remained with the President and therefore the abolition of the Constitutional Council and replacement with the Parliamentary Council mechanism, does not create such a significant qualitative variation in the decision making so as to impact the Sovereignty of the People;
- k. In any event, the judges of the Superior Court take an oath of allegiance to the Constitution and are presumed to function with integrity and independence, and are subject to the Constitutionally prescribed mechanism for removal;
- e. Therefore, abolishing the Constitutional Council and replacing same with the Parliamentary Council, has no negative impact on the rule of law or equal protection of the law;

353. In the circumstances, it is submitted that clause 23 cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Accordingly, it does not attract the requirement of a referendum under Article 83 of the Constitution.

354. Whilst the position is clear from the clause as it now stands, the proposed Committee Stage amendment referred to above removes any doubt that may have been entertained, that the President, is required to act having sought the informed observations of the Parliamentary Council.

Clause 24 of the Bill – Repeal and replace Article 109 – Acting Appointments to Superior Courts

355. This Clause repeals and replaces Article 109 of the Constitution. It provides for acting appointment to be made where a sitting judge of the superior courts is temporarily unable to function.



356. Hereto, the substantive change is the removal of the fetter of the Constitutional Council on the power of the President to make such acting appointment. The proposed Article 109(1), also provides for making acting appointments to the posts of Chief Justice, the President of the Court of Appeal and for the Judges of the Court of Appeal and Supreme Court.

357. By the proposed Committee Stage Amendment:

- it has been expressly stated that power of the President to make all acting appointment, is subject to Article 41A of the Constitution.
- An acting appointee is required to be 'another judge'

358. However, the clause as it presently stands will be fully considered below.

359. On the basis submitted above, the repeal of the requirement to obtain the approval of the Constitutional Council for an acting appointment which covered a period of over 14 days cannot in and of itself be construed as attracting the requirement of a referendum under Article 83.

360. With regard to the acting appointments, other than the removal of the role of the Constitutional Council, the proposed Article 109(1) does not depart from the Nineteenth Amendment Framework, in respect of acting appointments to the posts of Chief Justice and the President of the Court of Appeal.

361. However, the provisions relating to acting appointment of judges of the Supreme Court and Court of Appeal, does differ from the Nineteenth Amendment framework. Under the Nineteenth Amendment, only another 'judge', could act for a judge of the superior court. In terms of the present amendment however, 'another person' can be appointed as an acting judge.



362. It is submitted that this provision, that may cause some disquiet at a first glance, is in fact malign in terms of impact, and cannot in any way be construed as having an implication on the sovereignty of the People. Expounding this position, it is submitted that:

- a. the original 1978 Constitution had the identical provision;
- b. Even under the Nineteenth Amendment framework any suitable person can be appointed as a judge of the superior courts, and previous judicial experience is not a pre requisite for the post;
- c. Similarly, under the proposed amendment too, any suitable person is eligible to be appointed to the substantive judicial post in the superior courts;
- d. Therefore there is no perversity in policy, to permit a suitable person who is not a judge, to function in an acting capacity, on a temporary basis;
- e. In any event, this provision can only be used in cases of temporary unavailability of the permeant judge and therefore there is no realistic possibility of abuse;

363. Clearly therefore, the cumulative impact of the proposed change, does not bring about any negative or detrimental impact on the rule of law or equal protection of the law.

364. In the circumstances, this provision has no impact on Articles 3 and 4 of the Constitution and has no material implication on the exercise of Sovereignty by the people in general and/or on the judicial power of the People, in particular.

365. In the circumstances, it is submitted that clause 24 cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the



Constitution. Accordingly, it does not attract the requirement of a referendum under Article 83 of the Constitution.

366. The proposed Committee Stage amendment removes any doubt that may have been entertained, that the President, is required to act having sought the observations of the Parliamentary Council. It has also been clarified that an acting appointee will only be another judge.

Clause 25 and 26 of the Bill – Repeal and replace Article 111D – Judicial Service Commission

367. This clause proposes to repeal and replace Article 111D of the Constitution, pertaining to the constitution of the Judicial Service Commission.

368. The substantive amendments are:

- a. The removal of the role of the Constitutional Council in appointing the Judicial Service Commission,
- b. The repeal of the provision pertaining to the composition of the Judicial Service Commission,

369. By the proposed Committee Stage amendments:

- it has been expressly stated that the power of the President to make all appointments to the Judicial Service Commission, is subject to Article 41A of the Constitution
- the provision pertaining to the composition of the Judicial Service Commission, is retained



370. However, the implications of the clause as it presently stands will be fully considered below.
371. With regard to the abolition of the Constitutional Council, the submissions made with regard to the replacement of the Constitutional Council with the Parliamentary Council are reiterated.
372. Turning to the repeal of the provision on the composition of the Judicial Service Commission, it is submitted as follows:
- a. the prescriptive provision relating to composition of the Judicial Service Commission introduced by the Nineteenth Amendment to the Constitution was that, other than the Chief Justice, the two most senior judges of the Supreme Court had to be the members of the Judicial Service Commission, but if both senior most judges do not possess experience as a Judge of a Court of First Instance, the most senior Judge of the Supreme Court, with experience as a Judge of a Court of First Instance, becomes the third member of the Judicial Service Commission;
 - b. the proposed amendment reverts to the position that existed in the 1978 Constitution. In terms of Article 112 of the Constitution as it stood in 1978, the Judicial Service Commission consisted of the Chief Justice and two judges of the Supreme Court appointed by the President;
 - c. the prescription in respect of the composition of the Judicial Service Commission, is not found in the Seventeenth Amendment either;
 - d. Therefore, Nineteenth Amendment framework was an over prescriptive measure which propelled a matter of procedure into a constitutional norm;



- e. under the proposed amendment, the President reverts to the pre Nineteenth Amendment framework, enabling a choice from the entire panel of sitting judges; which provides a degree of flexibility to consider the diverse experiences of the judges in order to select two persons most suitable for the various administrative functions of the Judicial Service Commission;
- f. the President is required to seek the observations of the Parliamentary Council, and therefore will be in a position to take an informed decision on the matter;
- g. in any event, the membership of the Judicial Service Commission is confined to the sitting Judges of the Supreme Court alone, and not even an acting judge can qualify to be a member of the Judicial Service Commission, under a strict interpretation of the proposed Article 111D (1). All sitting judges of the Supreme Court enjoy parity of status and are presumed to be entirely independent. therefore, the functioning of the Judicial Service Commission can in no way be undermined, by a composition consisting of any of the judges of the Supreme Court. In this backdrop, the notion of abuse of process cannot be entertained;

373. Clearly therefore, the proposed changes have no negative impact on the rule of law or equal protection of the law.

374. In the circumstances, it is submitted that clause 25 cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Accordingly, it does not attract the requirement of a referendum under Article 83 of the Constitution.

375. The proposed Committee Stage amendments are consistent with the provisions of proposed Article 41A under Clause 6 of the Bill and also restores the seniority based composition of the Judicial Service Commission, which will maintain the continuity of the existing process.



Clause 26 of the Bill – Amendment of Article 111E

376. This clause amends Article 111E of the Constitution. The proposed amendment consists of removing the role of the Constitutional Council in granting leave to the members of the Judicial Service Commission and in the removal of such members.
377. By the proposed Committee Stage amendments, it has been expressly stated that power of the President, is subject to Article 41A of the Constitution.
378. However, the implications of the clause as it presently stands will be considered fully, below.
379. Once again, the submissions on the replacement of the Constitutional Council with the Parliamentary Council are reiterated.
380. With regard to the President's power of removal it is submitted that:
- a. **this reverts to the position in Article 112(5) of the 1978 Constitution and is therefore not a provision carrying an inherent contravention of Articles 3, 4 or any other entrenched provisions of the Constitution;**
 - b. the removal has to be for cause assigned, and therefore cannot be arbitrary or capricious;
 - c. in any event, only a Supreme Court Judge can be appointed in place of person removed and therefore any suggestions of potential for abuse are necessarily exaggerated.



381. Clearly therefore, the proposed changes have no negative impact on the rule of law or equal protection of the law.
382. In the circumstances, it is submitted that clause 26 cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Accordingly, it does not attract the requirement of a referendum under Article 83 of the Constitution.
383. The proposed Committee Stage amendments achieve consistency with the provisions of Article 41A with regard to the role of the Parliamentary Council.

Clauses 27, 28, 29 and 30 of the Bill – Insertion of Article 122 and amendment of Article 123, 124 and 134 – Urgent Bills

384. These clauses seek to re-introduce the procedure for enactment of Bills which in the view of the Cabinet of Ministers, are urgent in the national interest, and bear an endorsement to that effect under the hand of the Secretary to the Cabinet.
385. These clauses in effect seek to restore the status quo that existed under the 1978 Constitution prior to the Nineteenth Amendment and therefore cannot be construed as an amendment which is obnoxious or antithetic to the Constitution.
386. Several of the Petitioners contended that these Clauses prevent a Bill from being published in the Gazette prior to being tabled in Parliament and precludes a citizen from being able to challenge the Constitutionality of the Bill by way of Petition filed in the Supreme Court in terms of Article 121 of the Constitution. The Petitioners further contended that Article 121 of the Constitution is the only opportunity available to a citizen to canvass the constitutionality of a Bill and therefore this proposed amendment seeks to



deny the citizen of this right and therefore infringes Article 3 read with Article 4(c) of the Constitution in relation to the judicial power of the People.

387. It is respectfully submitted that the aforesaid contention of the Petitioners is flawed for the following reasons:

- (a) Clause 27(1) of the Bill provides that in the case of an Urgent Bill, the President is mandatorily required to obtain a special determination of the Supreme Court through a written reference addressed to the Chief Justice, as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Supreme Court is thereafter required to make its determination within 24 hours of the assembling of the Court or such longer period not exceeding three days as the President may specify.

Therefore, the Supreme Court, which is the Court vested with sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution (Article 125 of the Constitution) or in respect of any question relating to the infringement or imminent infringement of any fundamental right or language right (Article 126 of the Constitution) will continue to be seized and possessed with the power to make a determination with regard to the constitutionality of an Urgent Bill. Therefore, the power of the Supreme Court on judicial review of Bills as provided for under Article 121 of the Constitution is also preserved under the proposed new Article 122 of the Constitution.

- (b) Clause 28 of the Bill provides that in the case of an Urgent Bill, 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 thereafter provide for the manner in which such



Bill shall be passed in to law in accordance with Articles 123(2) and 123(4) of the Constitution.

Therefore, if the Supreme Court is in doubt as to whether the Bill or any provision thereof is inconsistent with the Constitution, then by operation of law, the Bill shall be deemed to be inconsistent with the Constitution, and the Supreme Court would thereafter be required to provide for the manner in which such Bill should be passed.

Accordingly, the argument of the Petitioners that the time period given to the Supreme Court of 24 hours to make a determination on a Bill being insufficient, is wholly untenable. Your Lordships' Court has in the past delivered several special determinations pursuant to References made by the President in respect of Urgent Bills within the time frame of 24 hours of the Court assembling. In those circumstances, the Petitioners' contention only seeks to undermine and underestimate the competence and capability of Your Lordships' Court, but not otherwise raise any credible issues with regard to constitutionality.

- (c) Clause 27(2) of the Bill provides that no proceedings shall be had in Parliament in relation to such Bill until the determination of the Supreme Court has been made. This safeguard ensures that Parliament will not proceed to enact an Urgent Bill until the special determination of Your Lordships' Court with regard to the constitutionality of the Bill has been communicated to the President and the Speaker. Therefore, no Urgent Bill can be enacted without the sanction of the Supreme Court, which is entrusted with the task of keeping every organ of government within the limits of the law and thereby making the Rule of law meaningful and effective.
- (d) Clause 27(3) of the Bill provides that **the procedure for the enactment of Urgent Bills will not apply to any Bill for the amendment, repeal and replacement,**



alteration or addition of any provision of the Constitution or for the repeal and replacement of the Constitution.

This is a new feature, which was not part of the original text of the 1978 and Constitution ensures that constitutional amendments cannot be tabled in Parliament as Urgent Bills.

(e) Article 134(3) of the Constitution provides that the Supreme Court may in its discretion grant to any other person or his legal representative such hearing as may appear to the Court to be necessary in the exercise of its jurisdiction under this Chapter.

388. Accordingly, Your Lordships' Court has consistently allowed persons to intervene in any Petition concerning Urgent Bills and be heard in relation to the constitutionality of same during the course of its deliberations under Article 122 of the 1978 Constitution. Two of the most significant examples of this *cursus curiae* is found in SC SD No. 6/2001 "Seventeenth Amendment to the Constitution" and SC S.D. 01/2010 "Eighteenth Amendment to the Constitution, which were referred as Urgent Bills, where Your Lordships considered the submissions that were made by persons other than the Attorney General. In those circumstances, the Petitioners' contention that Article 121 is the only mode in which a citizen can challenge the constitutionality of a Bill before the Supreme Court is entirely baseless.

389. In these circumstances, having regard to the fact that the procedure for the enactment of Urgent Bills is subject to the review of Your Lordships' Court, it is respectfully submitted that Bills which are considered by the Cabinet of Ministers to be urgent in the national interest do not impinge on the sovereignty of the People. On the contrary, these proposed clauses only strengthen the executive power, the legislative power and the judicial power of the People which is part of the inalienable sovereignty of the People as guaranteed under Article 3 of the Constitution.



Clauses 31 and 40 of the Bill – Amendment to Articles 153 and 154

390. This clause amends Article 153 of the Constitution, pertaining to the appointment of the Auditor General. The key features of the proposed amendment are that :

- a. the role of Constitutional Council in the appointment of the Auditor General is removed and replaced by the Parliamentary Council mechanism;
- b. the requirement introduced by the Nineteenth Amendment to the Constitution, that the Auditor General should be a qualified auditor, is removed.

391. By the proposed Committee Stage amendment, the requirement that the Auditor General should be a qualified auditor, is retained.

392. However, the implications of the clause as it presently stands, will be fully considered below.

393. The submissions on the replacement of the Constitutional Council with the Parliamentary Council mechanism are reiterated in this context as well.

394. With regard to the removal of the requirement of the Auditor General being a qualified auditor, it is submitted as follows:

- a. this reverts to the position in Article 153 of the 1978 Constitution and is therefore not an inherent contravention of Articles 3, 4 or any other entrenched provisions of the Constitution;



b. This is the legal position in the Constitution of India as well. Article 148 of the Indian Constitution reads thus:

- (1) *There shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court.*
- (2) *Every person appointed to be the Comptroller and Auditor-General of India shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him,*
- (3) *The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule*



c. In fact, constitutionally prescribing the qualifications for a holder of a high office to be appointed by the President is not the general norm in the Constitution of Sri Lanka. In this context, the following provisions are particularly noted:

- Article 107 does not prescribe qualifications for the Chief Justice, the President of the Court of Appeal or judges of the Supreme Court or Court of Appeal
- Article 61E does not prescribe qualifications for the posts referred to therein (Commanders of the tri-forces, the Inspector General of Police and the Attorney General)
- Article 156(2) does not prescribe qualifications for the post of the Parliamentary Commissioner for Administration (Ombudsman)

- Article 65(1) does not prescribe qualifications for the post of the Secretary General of Parliament.

d. In appointing the Auditor General, the President is mandated to seek the observations of the Parliamentary Council, and will be required to make the most suitable appointment for the post, in keeping with the principles of public trust reposed in him as the head of the Executive.

395. Clearly therefore, the proposed changes have no negative impact on the rule of law or equal protection of the law.

396. In the circumstances, it is submitted that this clause cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Accordingly, it does not attract the requirement of a referendum under Article 83 of the Constitution.

397. By the proposed Committee Stage amendment, any concern that person without competency in the field of auditing may be appointed to the post have been allayed.

Clause 40 of the Bill – Amendment of Article 154 – Auditor General

398. This clause amends Article 154 of the Constitution, pertaining to the duties and functions of the Auditor General. The proposed amendments have the effect of removing the following from the applicability of Article 154 as it is presently formulated:

- a. the Office of the Secretary to the President
- b. the Office of the Secretary to the Prime Minister



- c. companies registered or deemed to be registered under the Companies Act, No. 7 of 2007 in which the Government or a public corporation or local authority holds fifty per centum or more of the shares of that company

399. By the proposed Committee Stage amendment, the offices of the Secretaries to the President and Prime Minister, have been reintroduced. Additionally, Offices of the Ministries appointed under Articles 44 or 45, and the Provincial Public Service Commission have also been added to Article 154.
400. However, the implications of the clause as it presently stands will be fully considered below.
401. Once again, this provision reverts to the position in Article 154 of the 1978 Constitution and therefore, it is submitted that this clause does not contain an inherent contravention of Articles 3, 4 or any other entrenched provisions of the Constitution.
402. In fact, even Seventeenth Amendment to the Constitution did not include, the three entities referred to above in Article 154. The expansion of Article 154 was consequent to the Nineteenth Amendment to the Constitution.
403. It is important to note that though the Constitutional provision reverts to the pre Amendment position, the general law pertaining to powers of the Auditor General stand expanded after the enactment of the National Audit Act, No. 19 of 2018, and there the general legal framework with regards to the powers of the Auditor General are far more extensive.





404. As the law now stands;

- a. the three institutions not covered by the 1978 Constitution and the Seventeenth Amendment, now fall within the purview of the Auditor General, in terms of the National Audit Act, No. 19 of 2018.
- b. Section 6 (1) (a) thereof authorizes the Auditor -General or any person authorised by him to, inspect accounts of any auditee entity including treasuries and initial or subsidiary accounts of such auditee entities.
- c. In Section 55 of the Audit Act, the 'auditee entity' is defined to include *inter alia* :
 - the Presidential Secretariat [s 55(c)]
 - Office of the Secretary to the Prime Minister [s 55(d)]
 - and
 - any company registered or deemed to be registered under the Companies Act, No. 7 of 2007 in which the Government or a public corporation or local authority holds fifty per centum or more of the shares of that company [s 55(m)]
- d. In terms of Section 3(1) of the Audit Act, The Auditor-General shall:
 - (a) audit all income received to the Consolidated Fund and all expenditure from the Consolidated Fund;
 - (b) ascertain whether the moneys shown in the accounts of auditee entities as having been disbursed were legally available for and applicable to, the services or purposes to which they have been applied for or charged with;

- (c) determine whether the expenditure conforms to the authority which governs it; and
- (d) in each audit, examine income, expenditure, transactions and events.

405. Therefore, the adoption of the provision in the 1978 Constitution, does not result in the three entities added to Article 154 by the Nineteenth Amendment, falling outside the pale of scrutiny by the Auditor General.
406. Further, in terms of Article 148 of the Constitution, Parliament is vested with full control over public finance, and therefore the appropriation of funds for all institutions and entities from the Consolidated Fund is subject to the control of Parliament.
407. Additionally, in terms of the Standing Order 119(2) of the Parliament, all entities in respect of which sums have been appropriated by Parliament, would become subject to review by the Committee on Public Accounts. Further, in terms of Standing Order 120(2), the Committee on Public Enterprises is mandated to examine the accounts of public corporations, institutions funded wholly or in part by the Government and of any business or other undertaking vested under any written law in the Government laid before Parliament. As such, the Office of the Secretaries to the President and Prime Minister as well as companies in which the stipulated number of shares are held by the Government, would be subject to Parliamentary scrutiny and oversight.
408. With regard to the Companies in which shares are held by the Government, in addition to the obligation to audit financial statements of a company under Section 154 of the Companies Act, such companies may also fall within the supervisory purviews of the Sri Lanka Accounting and Auditing Standards Monitoring Board, established by the Sri Lanka Accounting and Auditing Standards Act, No. 15 of 1995. In addition to types of companies described by the nature of the business and licensing, companies which have a turnover in excess of the prescribed limit or which had liabilities to banks in excess of prescribed



limits are also included in the schedule to the Act, which sets out the institutions which fall within the purview of the Act. As such, most companies in which the Government owns shares are likely to fall within the said schedule. In terms of section 6 of the said Act, it shall be the duty of every specified business enterprise to prepare accounts in compliance with the Sri Lanka Accounting Standards and in terms of Section 7 thereof, such accounts are required to be audited by a qualified auditor. In terms of Section 30 of the said Act, the Sri Lanka Accounting and Auditing Standards Monitoring Board, is required to report any non-compliance to the authority which is empowered by law to regulate or supervise the activities of such specified business. In the circumstance, it is open to the Sri Lanka Accounting and Auditing Standards Monitoring Board to report companies in which the Government holds shares to, the Committee on Public Accounts, the Committee on Public Enterprises or any sector regulator for necessary action.

409. Thus, the fact that the companies in which more than fifty per cent of the share are held by State entities are not captured by Article 154 of the Constitution, cannot *per se* be construed as diminishing of the rule of law or as a measure that regresses the fundamental rights of the People, as such companies will be subject to progressive auditing standards, that are made applicable by the National Audit Act and the Sri Lanka Accounting and Auditing Standards Act.

410. In all of the circumstances, set out above reverting to the wording of Article 154, as contained in the 1978 cannot cause any detriment to accountability or the rule of law and Clause 40 cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Therefore, it does not attract the requirement of a referendum under Article 83 of the Constitution.

411. The proposed Committee Stage Amendments makes the list of entities in Article 154 more comprehensive and the exclusion of companies in which State entities own fifty per cent or more of the shares will be covered by the provisions of the National Audit Act and the other legal provisions referred to above.



Clauses 32, 33, 34, 35, 36, 37, 38 and 39 of the Bill – Repeal of Articles 153A to 153H – Audit Service Commission

412. The said clauses repeal Articles 153A -153H. These clauses relate to the Establishment and Constitution of the Audit Service Commission and the matters related thereto. This was an entirely new body created by the Nineteenth Amendment to the Constitution.
413. In this regard, it is submitted with respect that the substantive impact of the said amendment is only a transfer of power within the Executive from one independent Commission to another, namely from the Audit Service Commission to the Public Service Commission.
414. In terms of Article 153C of the Constitution, the Audit Service Commission is vested with the following powers and functions:
- a) Appointment, promotion, transfer, disciplinary control and dismissal of the members of the Sri Lanka Audit Service,
 - b) Make rules pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of the members of the Sri Lanka Audit Service, subject to policy as may be determined by the Cabinet of Ministers,
 - c) Exercise, perform and discharge other powers, functions and duties as may be provided by law.
415. Clearly therefore, the Audit Service Commission, is an institution created as a separate and distinct appointing and disciplinary authority only for the Sri Lanka Audit Service.



- 416. The said service was not in existence at the time the Nineteenth Amendment was promulgated, but was created by the National Audit Act, No. 19 of 2018.
- 417. Prior to the creation of the Sri Lanka Audit Service, the officers of the Auditor General's Department, being public officers within the meaning of Article 170 of the Constitution, had parity of status with all other public officers. Thus in the 1978 Constitution, the appointing/disciplinary authority was the Cabinet of Ministers, but after the Seventeenth Amendment to the Constitution, until the creation of the Audit Service Commission and the National Audit Service in 2018, the appointing/disciplinary authority became the Public Service Commission in terms of Article 55 of the Constitution as amended by the Seventeenth, Eighteenth and Nineteenth Amendments to the Constitution.
- 418. Thus, the carve out created for the public officers, carrying out the national audit function, is of very recent origin.
- 419. With the repeal of Article 153 C of the Constitution, the special status granted to this group of public officers is removed and they fall back, within the purview of the Public Service Commission.
- 420. As the Public Service Commission remains an independent commission, there is no valid or reasonable basis to object to this transfer of the power to the Public Service Commission. So far, the Public Service Commission has carried out their functions independently and there is no reason to suggest that this independence will be compromised only with respect to the officers of the Sri Lanka Audit Service.
- 421. Clearly therefore, the proposed changes have no negative impact on the rule of law or equal protection of the law.



422. The contention that abolition of the Audit Service Commission would compromise the adoption of international standards is also misplaced.

423. As Your Lordships' Court is aware, any professional audit is carried out in accordance with general or sector specific standards. In Sri Lanka, the Auditing and Standards Committee established under the Sri Lanka Accounting and Auditing Standards Act, No. 15 of 1995 is empowered by law, to determine the Sri Lanka Auditing standards. Section 5 (1) of the National Audit Act makes the said standards applicable to the audits undertaken by the National Audit Office. Thus, there is a specific body mandated to adopt auditing standards for Sri Lanka. Nevertheless, In terms of Section 5(2) of the National Audit Act, where there are no Sri Lanka Auditing Standards for the performance of audits, the Audit Commission may by order published in the Gazette, specify the provisions of International Standards which *shall* apply to such audits.

424. Thus, Section 5(2) is an enabling clause, which empowers the Audit Service Commission to adopt certain international standards which would then become mandatorily applicable to audits by the National Audit Office.

425. It is to be noted however that Sri Lanka has been a full member of the International Organization of Supreme Audit Institutions (INTOSAI) over a long period, very much prior to enactment of the National Audit Act in July 2018. INTOSAI operates as an umbrella organization for the external government audit community and even prior to the enactment of Section 5(2), International Standards were routinely adopted for audits in Sri Lanka., by the Auditor General's Department. For instance, the *Sri Lanka Auditor General's Department Performance Audit Manual* published in June 2016, (published and made available on the web site of the Auditor General's Department) provides, (at paragraph 1.6) that :



'The Manual is a "Living document" which will need to be updated as the audit environment changes and as performance auditing methodology and practice develops. For example, the manual is based on current INTOSAI Standards i.e. International Standards of Supreme Audit Institutions (ISSAI's). The relevant ISSAI's for Performance Audit are: • ISSAI 300 Fundamental Principles of Performance Auditing • ISSAI 3000 Standards and guidelines for performance auditing based on INTOSAI's Auditing Standards and practical experience • ISSAI 3100 Performance Audit Guidelines: Key Principles In December 2016, these Standards will be replaced: • ISSAI 3000 Performance Audit Standard • ISSAI 3100 Guidelines on central concepts for Performance Auditing • ISSAI 3200 Guidelines for the performance auditing process. The changes in these updated Standards will be minimal, but this Manual should be updated to reflect any changes in the above Standards. 1.7 While the Auditor General's Department adopts these guidelines as minimum requirements for performance audits, the users of this manual are also expected to draw upon the standards and practices of other disciplines, regulations, and legislative enactments (such as – Local Authorities Act, Central Environmental Authority Act, Finance and Administrative Regulations and the Finance Act).'

426. Adoption of international regulatory standards through regulatory measures is not confined to the area of Audit alone. The Basel Committee on Banking Supervision (BCBS) is the primary global standard setter for the prudential regulation of banks and the Basel standards are incorporated by the Central bank of Sri Lanka. Similarly, the Securities and Exchange Commission being a member of The International Organization of Securities Commissions (IOSCO) (the international body that brings together the world's securities regulators and recognized as the global standard setter for the securities sector), introduces and adopts IOSCO standards in its regulatory practice.



427. Section 5(2) of the National Audit Act does not make the continued voluntarily adoption of such standards, illegal. Therefore, until such time the legislature makes consequential amendment to Section 5(2) or, where applicable, formulation of regulations by the Minister with regard to the mandatory adoption of international standards, the voluntary adoption of same will continue to prevail. There is no doubt that Your Lordships will enforce such published standards, as in the case of the Procurement Manual, Financial Regulations and other guidelines that impact upon the public sector.
428. In the circumstances, the potential impact on Section 5(2) alone cannot render the proposed amendment unconstitutional.
429. Accordingly, the abolition of the Audit Service Commission, will not have a detrimental effect of the proportions in a manner that would impact the rule of law.
430. In the circumstances, it is submitted that clauses 32, 33, 34, 35, 36, 37, 38 and 39 cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Accordingly, it does not attract the requirement of a referendum under Article 83 of the Constitution.

Clause 41 of the Bill – Amendment of Article 154R – Finance Commission

431. This clause seeks to amend Article 154R of the Constitution, which established the Finance Commission.
432. The only effect of the proposed change is the deletion of the reference to the Constitutional Council, which is merely a consequential amendment in view of proposed Article 41A under Clause 6 of the Bill.



433. By the proposed Committee Stage amendments, it has been expressly stated that the power of the President in making appointments to the Finance Commission is subject to Article 41A of the Constitution.
434. However, the following submissions are made in respect of the clause as it now stands.
435. In this regard, the submissions pertaining to the replacement of the Constitutional Council with the Parliamentary Council are reiterated.
436. The Finance Commission remains an institution falling within Schedule I to Section 41A, and therefore all appointments to the said Commission will have to be made by the President after having sought the observations of the Parliamentary Council and in keeping with the principles of public trust, reposed in him as the Head of the Executive.
437. In the circumstances Clause 41 cannot be considered as having an impact on the Sovereignty of the People or any of the entrenched provisions of the Constitution. Therefore, it does not attract the requirement of a referendum under Article 83 of the Constitution.
438. The argument that the proposed amendment to Article 154R of the Constitution is subject to the procedure prescribed in Article 154G(2) is also without any merit whatsoever, *inter alia* for the following reasons:
- Article 154R was introduced by the Thirteenth Amendment to the Constitution. It was amended by the Seventeenth Amendment to the Constitution, when provisions pertaining to the Constitutional Council were made applicable to appointments made by the President to the Finance Commission. Thereafter, it was subject to the consequential amendments introduced by Eighteenth and Nineteenth Amendments to the Constitution;



- As such, it is misleading to suggest that the consequential amendment to Article 154R sought to be introduced by the proposed Bill attracts the procedure set out in Article 154G(2). This position has been expressly upheld by Your Lordships' Court in several Determinations.

- In SC (SD No 01/2010) **The Eighteenth Amendment to the Constitution**, it was observed that:

"Hon. The Attorney General has submitted that the objective of the aforementioned amendment is to make consequential amendments brought about by the change of the terminology to the body known as the Constitutional Council for the terms 'Parliamentary Council' referred to in the proposed amendment. It is an amendment to amend the provisions, which were originally contained in the Seventeenth Amendment to the Constitution. In the Bill pertaining to the Seventeenth Amendment of the Constitution the specific provision has been introduced as clause 19. The said clause was considered by this Court in that Determination as a consequential amendment, which did not require any other procedure to follow such as being Gazetted and referred to the Provincial Councils.

Accordingly, it is pertinent that the said amendment does not attract the provisions of Article 154(G) (2) of the Constitution. (page 13)

439. It is also to be noted that, in the Twenty First Amendment to the Constitution Your Lordships Court held that procedure set out in Article 154(G)(2), was pre-enactment procedure which fell outside the remit of review under Article 120 of the Constitution. Your Lordships' Court determined that:

'When proviso (a) to Article 120 conferred the Supreme Court with jurisdiction to determine (in relation to Bills amending, repealing or replacing the Constitution) only the question of whether such Bill required



to be passed by the People at a Referendum, it is crystal clear that the Constitution excluded all other questions in relation to the Constitutional Jurisdiction on Bills. In the circumstances, the Court takes the view that the proviso (a) to Article 120 of the Constitution enacts an exclusionary rule which on the canon of interpretation namely, express provisions excluded things omitted – warrants a narrow interpretation of proviso (a) to Article 120. Thus the provisions of 154G(2) would stand pari materia with other provisions of the Constitution.’ (page 95)

440. In any event, no Provincial Councils are presently constituted. In the past, Your Lordships' Court has not permitted a legislative impasse to be created by such a situation and held that in such a situation a Bill can be passed by the special majority under Article 82 of the Constitution. In **S.C (SD) No 04/2012 to S.C (SD) No 14/2012 (The Divineguma Bill)**, Your Lordships' Court addressed a situation where the Northern Provincial Council was not constituted and held that it is,

“the duty of the Court to interpret Article 154G(3) which do not deny to the people or a section thereof, the full benefit to foster, develop and enrich democratic institutions. No Court should construe any provisions of the Constitution so as to defeat its obvious ends. A harmonious and workable interpretation is always preferred in order to achieve the objects and to obviate a conflicting situation. The worst possible inference that could be drawn is that the Provincial Council of the Northern Province, if constituted could refuse to give its consent to the passing of the Bill.

In such circumstances the only workable interoperation that could be given is that since the views cannot be obtained from the Provincial Council due to it being not constituted, the Bill could be passed by the special majority required by Article 82 of the Constitution taking into consideration the



provisions stipulated in Article 154 G (3) (b) of the Constitution." (at page 101)

441. In the circumstances, the position that the proposed amendment to Article 154R attracts the requirement of a referendum in terms of Article 83, as well as the procedure in Article 154G(2), is flawed and contrary to the decisions of Your Lordships Court.

Clauses 42, 43, 44, 45 and 52 of the Bill – Amendments to Article 155A, 155B, 155C, 155F, 155FF, 155G, 155H, 155I 155K, 155L and 155M – National Police Commission

442. The said clauses amend Articles 155A, B, C and F of the Constitution, relating to the National Police Commission. The key changes by the said clauses are:

- a. to remove the power of appointment, promotion, transfer, disciplinary control and dismissal of police officers vested in the National Police Commission, and re-impose the said duties and functions upon the Public Service Commission
- b. to provide for National Police Commission to entertain and investigate complaints from members of the public or any aggrieved person against the police and related matters (proposed Article 155FF)
- c. to delete the reference to the Constitutional Council in respect of appointment to the National Police Commission
- d. To remove the right of the Inspector General of Police to be present at the meetings of National Police Commission



- e. To do away with the appeal to the Administrative Appeals Tribunal, from the decisions of the National Police Commission

443. The proposed Committee Stage amendments:

- Expressly refer to the President's power of appointment being subject to Article 41A
- Prescribes that the composition of the National Police Commission shall be not less than five and no more than seven, members.
- Increases the quorum of the National Police Commission from four to five members

444. The National Police Commission, was an institution created by the Seventeenth Amendment to the Constitution with the powers of appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector General of Police. However, by the Eighteenth Amendment to the Constitution, this wide power was removed from the National Police Commission and reverted to the Public Service Commission. By the Eighteenth Amendment, Article 155FF was introduced changing the role of National Police Commission to that of addressing public grievances. By the Nineteenth amendment, the powers of the National Police Commission introduced by the Seventeenth Amendment were restored.

445. The aforesaid provisions proposed in this Bill seek to restore the position introduced by the Eighteenth Amendment. In this regard, it is submitted that:

- a. Accordingly, all public officers, including those in the Police Department and Sri Lanka Audit Service would fall within the purview of the Public Service Commission. This introduces parity of status for all public officers and enables consistent procedures to be adopted in respect of appointments, promotions,



transfers, disciplinary control and dismissal of public officers across the board. In the absence of a strong conflict of interest, between the Public Service Commission and the public service in question, there is no legal basis to object to all public officers coming under the purview of the Public Service Commission.

- b. As the Public Service Commission remains an independent commission, there is no valid or reasonable basis to object to this transfer of such power to the Public Service Commission. So far, the Public Service Commission has carried out their functions independently and there is no reason to suggest that this independence will be compromised only with respect to the officers of the Sri Lanka Audit Service.
- c. Removed of the heavy burden of appointment/ transfer/promotion and disciplinary control, the National Police Commission, could be remodelled to dedicate adequate time, effort and attention to redress the grievances of the public in respect of the police force. This aspect, would be largely neglected, when the National Police Commission is vested with the administrative functions.
- d. The other changes described above are consequential changes that have no material impact.

446. In the circumstances clauses 42, 43, 44 and 45 which have the primary effect of reverting powers to the Public Service Commission, and enable an effective mechanism for addressing public grievances, cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Therefore, it does not attract the requirement of a referendum under Article 83 of the Constitution.



447. The proposed Committee Stage amendments, eliminate any ambiguity with regard to the role of the Parliamentary Council. Further, the new provisions pertaining to composition and quorum provide added clarity.

Clauses 47, 48, 49, 50 and 51 – Repeal of Articles 155G to Article 155L

448. The above Articles are sought to be repealed in their entirety. Since the effect thereof is to name the Public Service Commission as the appointing authority of police officers instead of the National Police Commission, there are no implications of a constitutional nature, including any that attract Article 83. It is only of a consequential nature now that the Public Service Commission is proposed to have a wider role just as it did prior to the Nineteenth Amendment.

Clause 53 of the Bill – Amendment to Article 156 – Parliamentary Commissioner for Administration

449. This clause seeks to amend Article 156 of the Constitution relating to the Parliamentary Commissioner for Administration by deleting the reference to the Constitutional Council in the said Article.

450. By the proposed Committee Stage Amendment, express reference has been made to Article 41A of the Constitution.



451. The submissions on the replacement of the Constitutional Council with the Parliamentary Council are reiterated and it is submitted that this clause cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Therefore, it does not attract the requirement of a referendum under Article 83 of the Constitution.
452. By the proposed Committee Stage Amendment, any ambiguity with regard to the fact that the President should seek the informed observations of the Parliamentary Council, has been eliminated.

Clause 54 of the Bill – Repeal of Chapter XIXA – Commission to Investigate Allegations of Bribery and Corruption

453. This clause repeals Chapter XIXA of the Constitution, which was introduced by the Nineteenth Amendment to the Constitution.
454. Article 156A, which is the only article under this chapter, makes it imperative for Parliament to provide for the establishment of a Commission to Investigate Allegations of Bribery or Corruption and to provide for measures to implement the UN Convention Against Corruption and any other International Convention relating to the prevention of corruption, to which Sri Lanka is a party. In terms of Article 156A(2) until Parliament so provides, the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994 shall apply subject to the modification that the Commission under the Act, may inquire into, or investigate, an allegation of bribery or corruption, whether on its own motion or on a written complaint to it.



455. With regard to the mandate to pass laws contained in the said Article, it is submitted as follows:

- a. This Chapter was not part of the 1978 Constitution and it was not part of the Seventeenth or Eighteenth Amendments to the Constitution. As such, its repeal per se cannot be construed as having a direct impact on the Sovereignty of the People or any of the entrenched clauses of the Constitution
- b. In any event, **in the last 5 years, Parliament has not promulgated any laws thereunder**
- c. With or without this provision, Parliament is empowered to enact such a law and the fact that no laws were passed in the last 5 years goes to show that imposing a Constitutional imperative to legislate, has been of little practical consequence.

456. Notwithstanding the proposed repeal, it is to be noted that the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994 and the Act to Provide for the Prevention and Punishment of Bribery and to Make Consequential Provisions Relating to the Operation of Other Written Law, No 11 of 1954 (as amended), will continue in force, and any lacuna in the law can be cured by the exercise of legislative power of the People, through Parliament.

457. Concern is expressed, that with the repeal of Article 156A(2) the Commission to Investigate Allegations of Bribery or Corruption established under Act, No. 19 of 1994 would be emasculated, as it will not be able to inquire or investigate into matters on its own motion. In this regard, it is submitted that:



- a. In terms of Section 3 of the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994, the Commission is mandated to investigate allegations contained in communications made to it under section 4;
- b. Section 4 thereof provides that allegations of bribery or corruption may be made against a person by a communication to the Commission;
- c. The mode of communication is not prescribed, and therefore, written, oral or any other form of communication by any means whatsoever, would be captured under the said sections.
- d. Due process would require that the Commission has reason to suspect a commission of an offence under its purview. As the members of the Commission are not investigators, such a suspicion would necessarily have to arise from an external trigger.
- e. Therefore, requiring the Commission to act on a communication, is in keeping with the principle that the liberty of the subject would only be impacted upon there being a reason to suspect a commission of an offence;
- f. As such, the provision for the Commission to act on its own motion is not of significant legal import, the Commission would have to have reason to suspect, which it would acquire by a broad range of 'communication'.
- g. Therefore, there is no substantive prejudice caused in respect of the functions of the Commission under Act, No. 19 of 1994, by the repeal of this chapter.



458. In the circumstances, clause 54 cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Therefore, it does not attract the requirement of a referendum under Article 83 of the Constitution

Clause 55 of the Bill – Repeal of Chapter XIXB - National Procurement Commission

459. This clause repeals Chapter XIXB of the Constitution, which establishes the National Procurement Commission.

460. This too was a provision introduced by the Nineteenth Amendment. As it was not part of the 1978 Constitution, nor the Seventeenth or Eighteenth Amendments, the repeal thereof cannot be considered as being inherently unconstitutional or having any direct implication on the Sovereignty of the People.

461. It is also to be noted that in terms of 156C of the Constitution, the function of the Commission is confined to the following:

- Formulation of procedures and guidelines for the procurement;
- Monitoring and reporting on procurement
- Investigate reports of procurements made outside the established the procedure.

462. At this juncture, though the Commission has promulgated guidelines, these have not been placed before Parliament within three months, as required by Article 156C(1). Therefore, the guidelines would now stand lapsed. In the absence of such guidelines, the monitoring and investigation task of the Commission would also be hamstrung. Clearly therefore, in the last five years though the reference to the Commission adorned the Constitution, no steps had been taken to make it function effectively by placing the guidelines before Parliament.



- 463. Further, the investigation and report provisions are general in nature. Other than the vague reference to 'relevant authorities', there is no clear guide as to whom reports of the Commission should be submitted nor is there an enforcement mechanism specified.
- 464. Even in respect of such limited powers, there has been an absence of a commitment to give full effect to the provisions of Chapter XIXB since its introduction in 2015.
- 465. Therefore, the value addition by this Commission, in the area of procurement has been limited.
- 466. It is important to note, that even prior to the Nineteenth Amendment, the procurement process was subject to the Procurement Guidelines, the Financial Regulations and judicial review by the Court of Appeal and Supreme Court. The introduction of Chapter XIXB, did not change this legal framework which continues to be adopted notwithstanding Chapter XIXB.
- 467. Thus, as the Commission's new guidelines did not come into force, existing law continued to apply notwithstanding Chapter XIXB.
- 468. In any event, the law as it exists, subjects the procurement process to rigorous scrutiny.
- 469. The General law pertaining to procurement is primarily contained in the following guidelines:
 - Procurement Guidelines 2006 -Goods and Works
 - The Procurement Manual
 - Guidelines on selection & Employment of Consultants 2007
 - Consulting Services Manual 2007
 - Guidelines on Private Sector Infrastructure Projects -1998
 - Guide to Project



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470. These guidelines are supplemented and varied from time to time by circulars issued by relevant Departments of the Ministry of Finance.
471. In addition, bespoke procurement processes are included in sector specific legislation such as the Sri Lanka Electricity Act, No. 20 of 2009. Government Procurement would also attract the general provisions contained in legislations such as the Public Contracts Act, No. 03 of 1987 and the Public Utilities Commission Act, No. 35 of 2002.
472. In fact, the Jurisprudence of Your Lordships' Court has consistently emphasized that the Procurement Guidelines have the force of law in Sri Lanka and therefore the legal force of the existing procurement process is well entrenched. The Fundamental Rights, thereby guaranteed, are frequently invoked by the People, before Your Lordships Court. To illustrate this point, the constraints of space only permit the reproduction extracts from a few landmark cases, set out below:

In **SmithKline Beecham SA v Pharmaceutical Corporation of Sri Lanka (1997) 3 SLR 20**, Amerasinghe J stated that the *'State is not in the same position as a private individual. Recognising its unique role and special responsibilities the Government has prescribed procedures to be followed in the matter of procurement in its Financial Regulations and the Guidelines of 1996'* (at 41)

In **Noble Resources International Pte Limited V Siyambalapitiya (SCFR 394/2015-SC Minutes 24.06.2016**, Sripavan CJ considered the failure to adhere to the Government Procurement Guidelines, as a serious procedural lapse, in an award of a tender for the procurement of a Coal Power Plant. Accordingly, the Supreme Court directed that (i) the contract may be terminated and (ii) to call for fresh tenders.



In *Tiranthai Public Ltd v Ceylon Electricity Board* (SCFR 108/2016 – SC Minutes 11.10.2018), Priyantha Jayawardena, P.C, J held that 'Supplement 7 of the Procurement Manual had the force of law, and that the failure to comply with same was violative of the Fundamental Rights of the Petitioner, enshrined in Article 12(1) of the Constitution.

473. Whilst the establishment of effective monitoring of the procurement process is no doubt vital, the introduction of Chapter XIXB as part of the Constitution has had no notable impact on the process. Any lacuna in the law can be addressed by the legislature, through well considered legislation on the subject, without being constrained by a constitutional provision that has not been effective so far.
474. In the circumstances, clause 55 cannot be considered as having an impact on the sovereignty of the people or any of the entrenched provisions of the Constitution. Therefore, it does not trigger the requirement of a referendum under Article 183 of the Constitution.

CUMULATIVE EFFECT OF THE PROVISIONS OF THE BILL

475. The arguments made on behalf of several Petitioners with regard to the cumulative effect of the provisions of the Bill can be summarized as follows:
- (a) The Bill alters the purported 'basic structure' of the Constitution and is therefore unamendable.



- (b) The Bill has repealed the President's duties which include the duty to uphold and defend the Constitution
- (c) The Bill concentrates the power of the people in the executive organ of government and has thereby affected the balance of power that has been struck between the three organs of government vide the President's power of dissolution of Parliament.
- (d) The Bill confers immunity on the President and thereby undermines the Rule of law and important checks and balances in built in to the Constitution.
- (e) The Bill confers unfettered discretion on the President to make appointments to Public Officers and Institutions in Article 41A, such as Judges of the Superior Courts, the Attorney General and members of the Independent Commissions and undermines the Public Trust Doctrine
- (f) The Bill threatens the free, independent sovereign and Democratic Socialist Republic of Sri Lanka by permitting dual citizens to hold elected office.

476. Other Petitioners contended that the Bill at the very minimum infringes Articles 1, 3, 4 and 10 of the Constitution and therefore the Bill as a whole would require to be passed at a referendum by the People in addition to being passed by two-thirds of the members of Parliament.

477. It is respectfully submitted that the Petitioners contention is entirely flawed, misconceived and untenable for the reasons morefully described above and concisely explained below.

478. Firstly, the provisions sought to be enacted through this Bill are largely provisions that were part of the original 1978 Constitution and amendments effected thereafter. The proposed amendments are therefore in no way "antithetic" or "alien" to the Constitution.



479. In fact, contentious clauses such as Clause 5 of the Constitution which confers immunity to the President in relation to his official acts of the President and clause 14 which seeks to provide for the President to dissolve Parliament upon the conclusion of one year from the date of the General election held pursuant to a dissolution of Parliament by the President are clauses which the Sovereign People, through their elected representatives, as part of their "intangible heritage" as set out in the Preamble to the Constitution, had thought fit to include in the 1978 Constitution.

480. If so, it is untenable for the Petitioners to now claim that Clauses 5 and 14 of the Bill violate the Sovereignty of the People, when the Sovereign people who drafted and enacted the 1978 Constitution thought it necessary that the safeguards provided under Clauses 5 and 14 of the Bill should be enacted to ensure that *"the Dignity and Freedom of the Individual may be assured, Just, Social, Economic and Cultural Order attained, the Unity of the Country restored and the Concord established with other Nations."*, as stated in the Preamble.

481. **Secondly**, it must be noted that the concept of "Basic Structure" is a constitutional theory propounded by the Indian Supreme Court in relation to the Indian Constitution. Your Lordship's Court however has in several determinations rejected the concept of "Basic Structure" in respect of the Constitution and has observed that it has no place in our constitutional setting. In **RE. THIRTEENTH AMENDMENT TO THE CONSTITUTION** [1987] 2 SLR 312 at p.329 (the majority) held:

"Fundamental principles or basic features of the Constitution have to be found in some provision or provisions of the Constitution and if the Constitution contemplates the repeal of any provision or provisions of the entire Constitution, there is no basis for the contention that some provisions which reflects fundamental principles or incorporate basic



features are immune from amendment. Accordingly, we do not agree with the contention that some provisions of the Constitution: are unamendable."

482. **Thirdly**, even though Clause 3 of the Bill seeks to repeal Article 33(1) of the Constitution, the Constitution has not in anyway removed the President's duties as contended by the Petitioners. For example, even though Article 33(1)(a) of the Constitution requires the President to ensure that the Constitution is respected and upheld, the very same duty is cast on the President under Article 28(a) of the Constitution which states that it is the duty of every person in Sri Lanka (not just the President) to uphold and defend the Constitution and the law. Therefore, as explained above, the duties of the President are spelt out in several other provisions of the Constitution and by law, and therefore the mere repeal of Article 33(1) of the Constitution cannot be construed to mean that the President is no longer required to exercise any of the duties that were hitherto referred to in Article 33(1)(a) of the Constitution or to mean that the President has no duties assigned to him under the Constitution.

483. **Fourthly**, the Bill does not in anyway seek to "alienate" the powers of government presently attributed to the legislature or the Judiciary, to the executive organ of government. **In Re. Nineteenth Amendment of the Constitution** [2002] 3 SLR 85, at p.97 Your Lordship's Court observed, that *"any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution."*

484. For example, Clause 14 of the Bill which provides for the President to dissolve Parliament within 1 year after the date of the General Election held pursuant to a dissolution of Parliament by the President, only reduces the period within which the President can dissolve Parliament from four and a half years to one year. The power to dissolve



Parliament, which is a component of executive power and constitutes a check on Parliament, continues to remain with the President. Therefore, there is no alienation, transfer or relinquishment of any legislative power as sought to be argued by some of the Petitioners.

485. **Fifthly**, the Bill does not undermine the Rule of Law nor does it erode the judicial power of the People through Clause 5 of the Bill, which confers immunity on the President for official acts.

486. As observed by Your Lordship's Court in **Karunatilake v. Dayananda Dissanayake (No.1) [1991] 1 SLR 157, 177;**

"Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; It imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act."

In fact, there are several judgments of Your Lordships' Court in which the validity of the acts done by the President even whilst enjoying immunity under the Constitution were considered. (See. **Perera v Attorney General [1992] 1 SLR 199, Mediwaka and others v. Dayananda Dissanayake and others [2001] 1 SLR 177)**

487. Judicial review in relation to the President's acts qua Minister is also now available through Clause 5 of the Bill by virtue of the proposed amendment to Article 35(3) of the Constitution.

488. In fact, Your Lordship's Court in **SC SD 12-36/2002 in Re. Eighteenth Amendment to the Constitution** having considered the very same provisions that are now sought to be reintroduced to the Constitution through Clause 5 of the Bill observed that the



Constitution had not attributed any unfettered discretion or authority to the President under the Constitution even though he had been conferred with immunity in a limited sense. Therefore, the Petitioner's contention that the Bill seeks to undermine the Rule of Law and the judicial power of the People is misconceived in law.

489. **Sixthly**, the Bill does not confer "unfettered discretion" on the President with regard to appointments to the Judiciary, the Attorney General or other independent Commissions and violates the Public Trust doctrine. It is respectfully submitted as observed by Your Lordship's Court in SCSD 01/2010, "Eighteenth Amendment to the Constitution", citing the judgments of *Silva v Bandaranayake* [1997] 1 SLR 92 and *Premachandra v Jayawickrema* [1994] 2 SLR 90, even prior to the enactment of the Seventeenth Amendment to the Constitution which first introduced the Constitutional Council, that the Constitution had not attributed any unfettered discretion or authority to the President and that discretion must be exercised by public functionaries in trust for the People. Your Lordship's Court also observed in the said special determination that the introduction of the Parliamentary Council was only a process of redefining the restrictions that was placed on the President under the Seventeenth Amendment in the exercise of the executive power of the President but did not confer any unfettered discretion on the President. Therefore, the Petitioners' contention that the Bill confers unfettered discretion on the President in violation of the Public trust doctrine must fail.

490. **Finally**, the Bill does not in any way seek to threaten the free, independent sovereign and democratic socialist republic of Sri Lanka by permitting dual citizens to hold elected office. It is respectfully submitted that "dual citizens" as contemplated under Article 91(1)(d)(xiii) of the Constitution are Citizens of Sri Lanka, who have either lost or are likely to lose their Sri Lankan Citizenship by virtue of becoming a Citizen of another country.

491. Accordingly, a person can only hold a dual citizenship under our law if the Minister makes a declaration upon being satisfied that such a person would "be of benefit to Sri Lanka".



Under the Citizenship Act, the Minister retains the power to revoke a declaration granted to a dual citizen, if such person "ceases to be of benefit to Sri Lanka".

492. Several Petitioners contended that based on the oath of allegiance that a person may make as a citizen of another country, it would be dangerous for such person to hold elected office and exercise the sovereign Peoples' legislative or executive power since he may not act in good faith for the benefit of the Republic of Sri Lanka.

493. Whilst the contention of the Petitioners are based entirely conjecture, it is respectfully submitted that there is no possibility for a dual citizen to exercise legislative power or executive power in a manner detrimental to the People of Sri Lanka given that:

(a) Such persons are Citizens of Sri Lanka, who have only subsequently become citizens of another country. Therefore, their allegiance and fidelity to Sri Lanka are apparent by their subsequent application to the Minister under the Citizenship Act to "resume" or "retain" their Sri Lankan Citizenship.

(b) Such a dual citizen must be first elected by the People through the exercise of their franchise at a General Election or a Presidential election. It must be assumed that the People would not elect any person who would betray the public trust reposed in such person including the sovereign independent status of Sri Lanka.

(c) If he does act in such a detrimental manner, the Minister can revoke the declaration made in granting such person dual citizenship, which would result in such person losing his Sri Lankan Citizenship and thereby being subject to a disqualification to hold elected office under Article 89(a) read with Articles 91(1)(a) and 92(b) of the Constitution.

(d) If he does act in a detrimental manner, he can also be charged and convicted for offences akin to Treason under the Penal Code and thereby become subject to a



disqualification to hold elected office under Article 89 read with Articles 91 and 92 of the Constitution.

494. It is therefore, respectfully submitted that the Petitioners' contention is based entirely on surmise and unsubstantiated fears.
495. It is respectfully submitted that Dual Citizens as recognized under our law our "electors" under Article 88 of the Constitution and have been guaranteed franchise in terms of Article 3 read with Article 4(e) and Article 26 of the Constitution by virtue of their status as a Citizen of Sri Lanka. As stated herein before, franchise includes the right to stand for election and therefore the removal of dual citizens standing for election would only enhance the franchise and the fundamental rights of the People which is an important component of the Sovereignty of the People guaranteed under Article 3 of the Constitution.
496. For the foregoing reasons, it is submitted that neither the Bill nor its provisions impinge on Articles 1, 3, 4 and/or 10 of the Constitution.
497. It is submitted that the sovereignty of the People guaranteed under Article 3 of the Constitution is preserved and there is no prejudicial impact on Article 4 of the Constitution.
498. It is also submitted that, the Bill has:
- (A) only sought to restore some of the provisions which were in the Constitution previously and then repealed, without seeking a referendum from the People,
 - (B) not alienated any of the powers of government,
 - (C) preserves the separation of powers;
 - (D) strengthens the existing checks and balances under the Constitution; and
 - (E) enhances the franchise of the People.



CONCLUSION

499. It is respectfully submitted that in terms of Article 120 proviso (a) of the Constitution the only question to be determined by Your Lordships' Court is whether the Bill or any provisions thereon requires approval of the People at a Referendum by virtue of Article 83 of the Constitution.

500. Therefore, if the Bill or any provision thereof is found to be inconsistent with any other provision of the Constitution other than Article 83, such inconsistency would cease as the Bill, being an amendment to the Constitution, should necessarily be passed with a Special majority.

501. As stated above, this Bill seeks to reintroduce provisions which were previously in the Constitution but later repealed by successive amendments through the Seventeenth, Eighteenth and Nineteenth Amendments to the Constitution. The said amendments to the Constitution were all scrutinized by Your Lordships' Court and were all determined not to require a Referendum.

502. Accordingly, the Seventeenth Amendment, Eighteenth Amendment and the Nineteenth Amendment to the Constitution were enacted into law without a Referendum. It is therefore inconceivable how this Bill which seeks to reintroduce provisions that were previously in the Constitution could attract a Referendum.

503. In these circumstances, it is respectfully submitted that Your Lordships' Court be pleased to determine in terms of the proviso to Article 120 (a) of the Constitution that the Bill:

- (a) complies with the provisions of Article 82(1) of the Constitution;



- (b) requires to be passed by a special majority specified in Article 82(5) of the Constitution; and
- (c) that there is no provision in the Bill which requires approval of the People at a Referendum in terms of the provisions of Article 83 of the Constitution.

M. Chandana

**State Attorney
for Attorney General**



Annexure

The Supreme Court Special Determination on the 20th Amendment

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

"TWENTIETH AMENDMENT TO THE CONSTITUTION"

S.C.S.D.No. 01/2020	Petitioner	Indika Gallage Attorney-at-Law No. 167A, Horekele Junction Kalapugama Moronthuduwa.
	Counsel	Dharshana Weraduwege.
S.C.S.D.No. 02/2020	Petitioner	Ranjith Madduma Bandara 31/3, Kandawatte Terrace Nugegoda.
	Counsel	Suren Fernando with Khyati Wikramanayake and Sanjit Dias instructed by Lilanthi de Silva
S.C.S.D. No. 03/2020	Petitioner	1. Centre for Policy Alternatives (Guarantee) Limited, No. 6/5, Layards Road Colombo 05. 2. Dr. Paikiasothy Saravanamuttu No. 03, Ascot Avenue Colombo 05.
	Counsel	M.A.Sumanthiran P.C. with Viran Corea, Bhavani Fonseka, Kesavan Sayandan, Ermiza Tegal, Dr. Gehan Gunathilake and Luwie Ganeshathasan

instructed by Sinnadurai Sundaralingam and Balendra.

S.C.S.D. 04/2020	Petitioner	Rajavarothium Sampanthan 176, Customs Road Trincomalee.
	Counsel	Dr. K. Kanag-Isvaran P.C. with M.A.Sumanthiran P.C. Shivaan Kanag-Isvaran, Bhavani Fonseka and Aslesha Weerasekera instructed by Sinnadurai Sundaralingam and Balendra.
S.C.S.D. 05/2020	Petitioner	Hettithanthrige Anil Kariyawasam 56/1, St. Rita's Road Mt. Lavinia.
	Counsel	Chula Bandara with Anuradha Dias, Lakmini Edirisinghe Kanchana Madhushani Jayalath, Nadun M. Agampodi, Inesha Gunaseena, Hasini P. de Silva and Kashyapa Divisekara instructed by K.J.K.Gayathri Kodagoda.
S.C.S.D. 06/2020	Petitioner	Nagananda Kodithuwakku General Secretary Vinivida Foundation Sri Lanka No. 99, Subadrarama Road Nugegoda
		Appeared in person.
S.C.S.D. 07/2020	Petitioner	S.C.C. Elankovan Bar Maniam Lane Thelippalai Jaffna.
	Counsel	Geoffrey Alagarathnam P.C. with Prof. Savithri Gunasekara, Pulasthi Hewamanna, Ramesh Fernando, Thahira Cader and Harini Jayawardhana instructed by Gowry Thavarasha.
S.C.S.D. 08/2020	Petitioner	Sithara Shreen Abdul Saroor

No. 202, W.A. Silva Mawatha
Colombo 06.

Counsel Pulasthi Hewamanne with Harini Jayawardhana
instructed by Gowry Thavarasha.

S.C.S.D. 09/2020

Petitioner

1. Transparency International Sri Lanka
5/1, Elibank Road, Colombo 05.
2. Mr. S.C. Asoka Obeysekera
Executive Director
11/5, Rajakeeya Mawatha
Colombo 07.

Counsel Pulasthi Hewamanne with Fadhila Fairuze,
Vishmila Fernando instructed by Gowry
Thavarasha.

S.C.S.D. 10/2020

Petitioner

Rajith Keerthi Tennakoon
No. 482/4, Rajagiriya Road,
Rajagiriya.

Counsel Shiral Lakthilake with Chathura Galhena and
Kavindu Indatissa instructed by Manoja
Gunawardena.

S.C.S.D. 11/2020

Petitioner

Marion Lihini Fernando
31/17, First Lane
Moratuwella
Moratuwa.

Counsel Viran Corea with Ms. S.A.Beling and Thilini
Vidanagamage instructed by Ms. Dharshika
Ariyanayagam.

S.C.S.D. 12/2020

Petitioner

Jayakody Arachchige Rasika Lakmal Jayakody
141, Kandy Road
Kadawatha.

Counsel Dr. Gehan Gunatilleke instructed by Dharshika
Ariyanayagam.

S.C.S.D. 13/2020	Petitioner	<ol style="list-style-type: none">1. Dr. Ajantha Perera 16, Temple Road Rattanapitiy Boralesgamuwa2. H.D. Oshala Lakmal Anil Herath 22, Wata Mawatha Piliyandala.3. Dr. Chandima Wijegunawardana 94/6, Woodland Mawatha Kalubowila, Dehiwela4. Jeran Jegatheesan 155/8, 4th Lane Dolalanda Gardens Thalawathugoda.
	Counsel	Christmal Wamasuriya with Priyantha Fernando, Wardani Karunaratne and Arjun Arsecularatne instructed by Mayomi Ranawaka.
S.C.S.D. 14/2020	Petitioner	<ol style="list-style-type: none">1. Sylvester Jayakody General Secretary Ceylon Mercantile, Industrial and General Workers Union No. 3 Bala Thampoe Lane Colombo 03.2. Linus Jayatilake President United Federation of Labour 17, Barracks Lane Colombo 02.3. Ekeshwara Kottegoda Vithana F 24, National Housing Scheme Polhena, Kelaniya.
	Counsel	Ermiza Tegal with Swasthika Arulingam, Shalomi Daniel and Mark Schubert instructed by Kulani Ranaweera.

S.C.S.D. 15/2020	Petitioner	<ol style="list-style-type: none">1. Jayantha Dehiattage Attorney-at-Law2. Migara Doss Attorney-at-Law <p>Both Executive Committee members Of Young Lawyers Association of Sri Lanka, No. 121/1/1, First Floor Hulftsdorp Street Colombo 12.</p>
	Counsel	Nuwan Bopage with Chathura Weththasinghe and Kaneel Maddumage instructed by Manjula Balasuriya.
S.C.S.D. 16/2020	Petitioner	Thisath D.B. Wijegunawardana No. 31/2, Guildford Crescent Colombo 07.
	Counsel	Farman Cassim PC with Taraka Nanayakkara, Budwin Siriwardane & Nimesh Kumarage instructed by Lanka Dharmasiri.
S.C.S.D. 17/2020	Petitioner	Gebalanage Kapila Renuka Perera 102/1, Solomon Mawatha Panadura.
	Counsel	Boopathy Kahathuduwa with Dhanujaya Samarasinghe instructed by Minoli Jayawardhana.
S.C.S.D. 18/2020	Petitioner	<ol style="list-style-type: none">1. Lanka Guru Sangamaya 64/4, Chittampalam A. Gardiner Mawatha, Colombo 02.2. Academy of Health Professionals 889/1/1 Maradana Road, Colombo 08.

		3. Postal and Telecommunication Services Union P.O. Box 28, Colombo 01.
	Counsel	Rushdie Habeeb with Chinthala Magonaarachchi, Rizwan Uwais, Sandeepa Gamaethige and Shahila Rafeek
S.C.S.D. 19/2020	Petitioner	Mayantha Yaswanth Dissanayake No. 219/1 B, Kottegoda Gardens Kadugannawa, Kandy.
	Counsel	Farman Cassim PC with Taraka Nanayakkara, Budwin Siriwardana, Nimeshh Kumarage instructed by Lanka Dharmasiri.
S.C.S.D. 20/2020	Petitioner	1. Aarif Samsudeen Ibra Lebbe Hadjar Road Nintavur 13. 2. Adam Lebbe Thavam No. 41 East Road Akkaraipattu 01.
	Counsel	Nizam Kariapper PC with A.M. Faaiz, Wasantha Wanigasekera, M.C.M. Nawas and M.S.S. Sanfara instructed by M.I.M. Iynullah.
S.C.S.D. 21/2020	Petitioner	P. Liyanaarachchi Attorney-at-Law No 44/6 Vauxhall Street Colombo 02.
	Counsel	Dharshana Weraduwege.
S.C.S.D. 22/2020	Petitioner	Sri Lanka Press Institute No. 96, Kirula Road Colombo 05.

	Counsel	Lakshmanan Jeyakumar with Raaya Gomez instructed by Sinnadurai Sundaralingam & Balendra.
S.C.S.D. 23/2020	Petitioner	Samuel Ratnajeewan Herbert Hool No.88, Chemmaray Road Nallur, Jaffna.
	Counsel	A.M. Faaiz with Palitha Subasinghe instructed by .A.P. Buddhika Jayakody.
S.C.S.D. 24/2020	Petitioner	Balasooriya Arachchige Erick Senarathne Balasooriya, 132/4, Giridara Junction, Kapugoda.
	Counsel	Niran Anketell with Mr.Munee instructed by Vidanapathirana Associates.
S.C.S.D. 25/2020	Petitioner	Akila Viraj Kariyawasam "Sirikotha" 400, Kotte Road Pitakotte.
	Counsel	Ronald Perera PC with Neomal Pelpola, Dinesh Vidanapathirana and Yasas de Silva. Instructed, by Vidanapathirana Associates.
S.C.S.D. 26/2020	Petitioner	Ruwan Wijewardena 157 B, Kynsey Road, Colombo 07.
	Counsel	Eraj de Silva with Manjuka Fernandopulle, Daminda Wijerathna and S. Janagan Sundramoorthy instructed by Dinesh Vidanapathirana Associates.
S.C.S.D. 27/2020	Petitioner	1. Mr. Kalinga N. Indatissa President's Counsel The President

The Bar Association of Sri Lanka
No. 153, Minindu Mawatha, Colombo 12.

2. Mr. Rajeev Amarasuriya
Attorney-at-Law
The Secretary
The Bar Association of Sri Lanka
No. 153, Minindu Mawatha, Colombo 12.
3. Mr. A.W. Nalin Chandika De Silva
Attorney-at-Law
The Treasurer
The Bar Association of Sri Lanka
No. 153, Minindu Mawatha, Colombo 12.
4. Mr. Pasindu Silva
Attorney-at-Law
The Assistant Secretary
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No. 153, Minindu Mawatha, Colombo 12.

Counsel

Faisz Musthapha PC with L.M.K.Arulanandam
PC, Riad Ameen, Thushani Machado, Samantha
Premachandra, Rashmini Indatissa, Anne
Devananda and Ravindu Bandara by instructed
by Lanka Dharmasiri.

S.C.S.D. 29/2020

Petitioner

Rauff Hakeem
263, Galle Road
Colombo 03

Appeared in person.

S.C.S.D. 30/2020

Petitioner

Dr. Visakesa Chandrasekaram
No. 62/3, Mayura Place, Colombo 06.

Counsel

Shantha Joyawardane with Kaneel Maddumage,
Chamara Nanayakkarawasan, Niranjana
Arulpragasam, Hiranya Damunupola instructed by
Manjula Balasooriya.

S.C.S.D. 31/2020	Petitioner	Mangala Punsiri Samaraweera No. 141/5, Galkanuwa Road Moratuwa.
	Counsel	Shantha Jayawardane with Kameel Maddumage, Chamara Nanayakkarawasam, Niranjan Arulpragasam, Hiranya Damunupola instructed by Manjula Balasooriya.
S.C.S.D. 32/2020	Petitioner	1. Ruwan Lakhath Jayakody Arachchige Jayakody No. 19/3Sulaiman Terrace Colombo 05.
		2. Kavindya Christopher Thomas No.80, Station Road, Udahamulla Nugegoda.
		3. Silvester Mariya Chamika Manoj Dilush Kumar No.36, Koswadiya, Mahawewa.
	Counsel	Sanjaya Wilson Jayasekera with Swasthika Arulingam. Kaushalya Sendanayake Arachchi instructed by Manjula Balasooriya.
S.C.S.D. 33/2020	Petitioner	1. MBC Networks (Private) Limited No. 146, Dawson Street Colombo 02.
		2. MTV Channel (Private) Limited No. 146, Dawson Street Colombo 02.

	Counsel	Sanjeewa Jayawardena PC with Charitha Rupasinghe, Lakmini Warusavithana and Dr. Milhan Mohamed instructed by Ms. Ashoka Niwunhella.
S.C.S.D. 34/2020	Petitioner	<ol style="list-style-type: none">1. E.A.D. Prasad Prasanna Pushpakumara President, Sri Lanka Audit Service Association, National Audit Office No.306/72, Polduwa Road Battaramulla.2. R.M.P.A. Janaka Secretary, Sri Lanka Audit Service Association, National Audit Office No.306/72, Polduwa Road Battaramulla.
	Counsel	Gamini Hettiarachchi with Dasun Nagashena instructed by Mudith Dissanayake.
S.C.S.D. 35/2020	Petitioner	<ol style="list-style-type: none">1. Massala Korallalage Jayatissa No. 516, Kawudulla Hingurakgoda.2. Wijethunga Appuhanyge Herman Kumara No. 10, Malwatta Road, Negombo.3. Paramananda Kalandarige Chamila Thushari No. 35/36, Gallawatta, Ekala, Ja-Ela.4. Juwairiya Mohideen Farcethabath Colombo Road, Palavi, Puttalam.5. Rajapakse Mudiyanse Lage Chinthaka Pradeep Rajapakse No. 25/A/11, Rukmalgama, Pannipitiya

6. Fr. Marimuthu Sathiveloo
No. 102/1, Wasala Road, Kotabena,
Colombo 13.
7. Rohan Michael Fernando
No. 24/3, Hotel Road, Mount Lavinia.

Counsel

Sbantha Jayawardena with Swasthika Arulingam,
Chamara Nanayakkarawasam, Niranjan
Arulpragasam and Hiranya Damunupola instructed
by Kulani Ranweera.

S.C.S.D. 36/2020

Petitioner

1. Agampodi Sendaman Chulasinghe
De Zoyiza
No. 02, Mallika Home,
Galagoda, Kuligoda.
2. Rajapaksha Arachchilage Namal
Ajith Rajapaksha
No. 44/48, Agoda Village
Kandy Road, Paliyagoda.
3. Nanayakkara Godakanda Achala
Shanika Senevirathna
No. 215, Kanaththa Road,
Pannipitiya.
4. Rathnayake Mudiyanseelage
Prabodha Chinthaka
No Ranjani
Damanwara, Badulla.
5. Chula Ranjeeva Adhikari
No. 283/1/1, Weda Mawatha
Gorakagas Junction
Wewita, Bandaragama.
6. Teril Manoj Uduwana
No. 211 Uduwana, Homagama.
7. Rathnayake Mudiyanseelage Upali
Amarawansa Rathnayake

No. 1/62, Ihala Imbulgoda,
Imbulgoda.

8. Jayaweera Arachchilage Manju Sri Chandrasena
No. 06/D/126, Jayawadanagama,
Battaramulla.
9. Mewala Gedera Amila Indika
No. 83, Temple Road,
Kalutara North.
10. Dulan Dassanayake
No. 21 I Maithree Mawatha
Vidagama, Bandaragama.
11. Waduge Shammi Chinthaka Fernando
No. 294/A, Katupathgoda Road,
Kumbuka West, Gonapola.
12. Sachindra Thushara De Zoysa
No. 174, Wattegedera Junction
Maharagama.
13. Mohomed Nazim Zainul Luthufi
6/2, Megoda Kolonnawa, Wellampitiya.
14. Mohomad Najeem Mohomed Fazeer
No. 478/4/6, Thakkiya Road,
Daluwakotuwa.
15. Mahapatabendige Srinath Perera
No. 74A, Wadduwa Road,
Morontuduwa.
16. Dhanapala Archchige Prema Aruna
Kumarasiri
No. 30/14, Sanchi Archchi Wattage
Colombo 12.
17. Kariyawasam Pandi Kankanange
Upali Ranjan
No. 103V, Sunflower Garden,
Kahathuduwa, Polgasowita.
18. Sardha Kumara Manjula Pathiraja

No. 27/7D, Koholwila Road
Gonawala(WP) Kelaniya.

19. Kalinga Nalaka Priyawansa
No. 117F, Indigasthuduwa,
Meegama, Darga Town.
20. Wamakulesooriya Mahanuge
Madhushani Sugandhika Fernando
No. 33/9, W. David Perera Mawatha
Koswatte, Battaramulla.

Counsel

Lakshan Dias.

S.C.S.D. 37/2020

Petitioner

Bannet Sumanasiri Jayawardana
No. 139/3, Kandy Road,
Ihala Imbulgoda,
Imbulgoda.

Counsel

Appeared in person.

S.C.S.D. 38/2020

Petitioner

Palpolage Don Samarapala
Pemasiri Gunathileke.
'Upul'
Bolgoda
Bandaragama.

Appeared in person.

S.C.S.D. 39/2020

Petitioner

Suriyaarachchi Kankanamalage
Susantha Harsha Kumar Sooriyaarachchi.
423/8, Samagi Mawatha,
Udahamulla, Nugegoda.

Appeared in person

Vs.

1. Hon. Attorney General
Attorney General's Dept.
Colombo 12.

(Respondent in all cases)

2. **Hon. M.U.M. Ali Sabry , PC**
Minister of Justice
Ministry of Justice
Superior Court Complex
Colombo 12.

(1st Respondent in SD 33/20 and SD 37/20)

3. **Legal Draftsmen's Department of Sri Lanka, Colombo 12.**

(2nd Respondent in SD 37/20)

Counsel for the State

Hon. Dappula De Livera P.C. A.G. with Sanjaya Rajaratnam P.C. ASG, Indika Demuni de Silva P.C. ASG, Farzana Jameel P.C. ASG, Nerin Pulle SD SG, Shaheeda Barrie SSC, Dr. Avanti Perera SSC, Suren Granaraj SSC, Kanishka De Silva SSC, Induni PUNCHIHewa SC and Nishara Jayaratne S.C.

Intervenients

Petitioner

Prof. G.L. Pieris

Counsel

Gamini Marapana, PC with Navin Marapana, PC Kaushalya Molligoda, Uchitha Wickramasinghe, Gimhana Wickramasurendra and Thanuja Meegahawatta.

Petitioner

W.A.D. V. Weerathilake

Counsel

Kushan D' Alwis, PC with Kaushalya Nawaratne, Chamath Fernando, Milinda Munidasa and Sashendra Madanayake instructed by Sanjay Fonseka.

Petitioner

D.G.V. Abeyratne

Counsel	Kaushalya Nawaratne with Prabudha Hettiarachchi, D. Devapura, Hansika Iddamalgoda and M. Mohotti.
Petitioners	Omara Kassapa Thero, R. Welagedara, R. Pathberiya, M.P.J. Pathmasiri, H.M.T. Bandara, M. Ananthavel, K.M.P.B. Kothwala, K. Egodawatta and Prabath N. Gunasekara.
Counsel	Sanjeeva Jayawardena, PC with Ruwantha Cooray, Charitha Rupasinghe, Lakmini Warusawithana, Rukshan Senadheera, Dr. Milhan Mohamed, Ridmi Benaragama, Eranga Thilakarathne, Gimhani Arthanayake.
Petitioner	Sagara Kariyawasam.
Counsel	Shavindra Fernando, PC with Ananda Weerasinghe, Kapila Liyanagamage, Sajitha Weerasuriya, Umayangi Wijayasuriya and M. Skandaraja instructed by Mrs. Kethaki Siriwardena.
Petitioner	D.M. Dayaratne.
Counsel	R. Abeynayake with P. Wickremaratne.
Petitioners	Nimal Siripala de Silva. Gamini Lokuge.
Counsel	Sanjeeva Jayawardena, PC with Charitha Rupasinghe, Lakmini Warusawithana, Rukshan Senadheera, Dr. Milhan Mohamed,

Ridmi Benaragama, Eranga Thilakarame,
Gimhani Arthanayake.

Petitioner	Dadallage Titus Padmasiri (S.C.S.D. 28/2020)
Counsel	K.G. Nissanka .
Petitioners	Mahaaya Sobitha Thero . Moragoda Nandarathana Thero . Ranjith Danapala Abeysekara.

Before : Hon. Jayantha Jayasuriya, PC, CJ
Hon. B.P. Aluwihare, PC, J
Hon. Sisira J. de Abrew, J
Hon. Priyantha Jayawardene, PC, J
Hon. Vijith K. Malalgoda , PC, J

The Court assembled for the hearing on 29th and 30th September, 2020 and 2nd and 5th October, 2020 at 10.00 a.m.

A Bill in its long title referred to as "An Act to Amend the Constitution of the Democratic Socialist Republic of Sri Lanka" was published in the Government Gazette dated 28th August 2020 and placed on the Order Paper of the Parliament on 22nd September 2020. The short title of the Bill is cited as "Twentieth Amendment to the Constitution".

Thirty-eight petitions in number, were filed invoking jurisdiction of this Court under Article 121(1) of the Constitution. in relation to the aforementioned Bill.

Upon receipt of these Petitions, Court issued notices on the Attorney-General as required under the Constitution.

There were petitions eleven in number for intervention. Court allowed intervention of all those Interveniend Petitioners.

Petitioners in two of these matters failed to comply with Article 121(1) of the Constitution. Therefore, this Court rejected those two petitions as the jurisdiction of the Court was not duly invoked.

Court heard submissions of Counsel representing Petitioners, some of the Petitioners in person, Counsel representing Interveniend Petitioners and the Attorney-General.

There are fifty-eight Clauses in the Bill and they relate to different subject matters in the Constitution. Matters and areas relating to which these Clauses relate to can be briefly set out as follows:

1. Powers and Functions of the President
2. President's responsibility to Parliament
3. Immunity of the President from suit
4. Constitutional Council
5. Cabinet of Ministers
6. Public Service Commission
7. Appointments by President
8. Secretary General of Parliament
9. Dissolution of Parliament
10. Publication and passing of Bills
11. Submission of Bills to People by Referendum
12. Disqualification for election as a Member of Parliament
13. Disqualification for election as President
14. Election Commission and Commissioner General of Elections
15. Appointment of Judges and acting appointments
16. Judicial Service Commission
17. Exercise of Constitutional Jurisdiction on Urgent Bills
18. Attorney-General

19. Auditor-General
20. Audit Service Commission
21. Finance Commission
22. National Police Commission
23. Parliamentary Commissioner for Administration
24. Commission to Investigate Allegations of Bribery or Corruption
25. National Procurement Commission
26. Definition of Public Officer

Article 120 of the Constitution stipulates the Constitutional Jurisdiction of the Supreme Court.

Proviso (a) of Article 120 reads as follows:

"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;*

Article 83 of the Constitution reads as follows.

"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,

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”.

At the outset, the Attorney-General submitted that he had received instructions from the Minister of Justice that the Government has decided to make series of amendments at the committee stage and a document containing these proposed committee stage amendments drafted by the Legal Draftsman was tendered to Court as well as to the Counsel for the Petitioners in open Court and followed up with a motion dated 30th September 2020 filed at the Registry. However, all Counsel for the Petitioners submitted that they are unable to make any submissions based on such proposed committee stage amendments but would make their submissions in relation to the Bill as it is placed on the Order Paper.

It is an accepted practice, when the Supreme Court examines the constitutionality of Bills, for the Attorney-General to inform the proposed amendments to the Bill that will be made at the committee stage. Such process facilitates efficient disposal of determinations of the Supreme Court. Therefore, the Court took into consideration the proposed committee stage amendments submitted to Court along with the motion dated 30th September 2020, which contained the reference number L.D.- O 7/2020. (A copy of which is annexed hereto).

There are fifty-eight Clauses in the Bill under consideration and none of them seek to amend or repeal and replace Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2), 62(2) or 83 of the Constitution. (hereinafter also referred to as “entrenched Articles”)

However, Petitioners contended some of the Clauses of the Bill are inconsistent with some of the Articles enumerated in Article 83 and hence require to be approved by the People at a Referendum in addition to the number of votes cast in favour of the said Bill being not less than two thirds of the whole number of Members (including those not present) (hereinafter referred to as the special majority) and the certificate of the President is endorsed thereon as provided under

Article 82(5) of the Constitution, if the said Bill is to become law. Furthermore, they submitted that not only in situations where any Clause is directly inconsistent with any of the entrenched Articles that attracts the need to obtain the approval of the People at a Referendum. They however submitted the said requirement arises in situations where any of the Clauses have a prejudicial impact on Sovereignty of the People, too.

On behalf of some of the Petitioners, it was contended that the Bill under consideration could not become law even if it is approved by the People at a Referendum in addition to it being passed with two-thirds majority in Parliament. They contend that the provisions of the Bill affect the basic structure of the Constitution and therefore could not become law under any circumstances. It is their contention that the preamble to the Constitution assures the People Freedom, Equality, Justice, Fundamental Human Rights and the Independence of the Judiciary as intangible heritage and ratifies republican principles of Representative Democracy as an immutable republican principle. They contended, that the Bill as a whole violates such principles and therefore cannot become law, even adhering to the procedure stipulated under Article 83.

However, the Supreme Court in Tenth Amendment to the Constitution Bill, [SC No 3 /86 (special), Decisions of the Supreme Court on Parliamentary Bills (1984-1986) Vol. II page 47 at 48], in the majority decision in Thirteenth Amendment to the Constitution Bill and Provincial Councils Bill [SC No 7/87 (Special) & SC No 8/87 (Special), Decisions of the Supreme Court on Parliamentary Bills (1987) Vol. III page 21 at 37] and Nineteenth Amendment to the Constitution Bill [SC SD No 32/2004, [Decisions of the Supreme Court on Parliamentary Bills (2004-2006) Vol. VIII page 58 at 60] declined to follow such construction.

Furthermore, it is pertinent to observe that Articles 1, 2 and 3 of the Constitution expresses the nature of the State and the Sovereignty of the People. They encapsulate core features described in the preamble to the Constitution. Article 120(a) read with Article 83 of the Constitution provides that Articles specified therein, including Article 1 of the Constitution can be amended if such amendment is approved by People at a Referendum in addition to it being passed with the special majority in Parliament. Hence, we are unable to agree with the contention that some of the provisions of the Constitution cannot be amended even with the approval of the People, in addition to the special majority in Parliament.

In numerous occasions, the Supreme Court had determined that when a Bill falls within the ambit of Article 120(a), the only question this Court has to determine is whether the Bill under consideration requires the approval by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution. In the Decision of the Supreme Court in **Fourth Amendment to the Constitution Bill**, [SD No 3 of 1982 P/Parl, Decisions of the Supreme Court on Parliamentary Bills (1978-1983) Vol. I page 157], decided that it does not have jurisdiction when the draft Bill in its long title has described as being for the amendment of the Constitution and is intended to be passed with the special majority required by Article 83 and submitted to the People at a Referendum.

These proceedings, however relate to applications that had invoked the jurisdiction of this Court in terms of Article 121 read with Article 120(a) of the Constitution where the sole question this Court is called upon to determine is whether the Bill as a whole or any of its provisions is required to be approved by the People at a Referendum in addition to it being passed with the special majority in Parliament, if it is to become law.

Interventient Petitioners (save for one Interventient Petitioner) and the Attorney-General contended that none of the Clauses in the Bill are inconsistent with any of the entrenched Articles that are referred to in Article 83 of the Constitution. They, therefore contended that the Bill under consideration can 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) and upon a certificate being endorsed thereon by the Speaker.

Furthermore, it is their contention that the amendments effected by most of the Clauses in the Bill would result in the re introduction of the provisions that were in operation prior to the Nineteenth Amendment to the Constitution. Further, they contended that no Referendum would be required to reverse the changes that had taken place due to an amendment that was passed only with the special majority in Parliament. The Supreme Court in **SC SD No 8/2000, (Determination on Seventeenth Amendment to the Constitution Bill)** [Decisions of the Supreme Court on Parliamentary Bills (1999-2003) Vol. VII, page 213 at 218], observed;

"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".

This observation in our view, should be considered in the proper context of the circumstances, under which the Court made its' determination. Court had taken into account the unique features in the surrounding factors when it made the final determination. The Amendment that was considered by Court was to introduce a new electoral process.

The Parliament, which enacted the 1978 Constitution, did consist of members that were elected through an election held under first past the post system. However, in 1978 Constitution the election process was to be held under Proportional Representation system where the voter did not have an opportunity to express their preferential vote. Fourteenth Amendment to the Constitution introduced the opportunity for a preferential vote in to the Proportional Representation system. The amendment the Court was considering (Seventeenth Amendment) changed the electoral system to a mixed system comprising both elements of First Past the Post system as well as Proportional Representation system. However, it did away, with the preferential vote that was introduced by the Fourteenth Amendment.

The core question (in the Seventeenth Amendment Determination) therefore, was the Constitutionality of the change of the electoral system of which one component was the removal of the preferential vote. The Court in its determination recognizes the fact that the change in the Proportional Representation system by introducing the preferential vote was introduced through the Fourteenth Amendment, that was passed only with the special majority in Parliament.

However, the said factor is not the sole matter that the Court took into consideration, in finally deciding the Constitutionality of the Bill.

It recognised two other features in the new electoral system proposed to be introduced by the Bill namely,

"voters would, in terms of the Amendment have a choice of electing candidates to represent their respective electorate, being a choice not provided as the law stands and which is necessary if Franchise is to have its true meaning"

and

"the names of the candidate nominated for election under the District PR system and the National PR system would be known to the voters at the time of election and could be taken into account when they exercise their franchise". (supra at 218)

Therefore, it was the cumulative effect of all these factors that led the Court to its' final determination.

Above factors show that the opportunity available to the voter through the 'preferential vote' was not fully taken away in the new system introduced by the Amendment that was under consideration. Hence, there was no complete reversal of the enhancement of franchise granted through the preferential vote in introducing the mixed electoral system by the Amendment, which the Court, determined that it did not alienate the franchise of the People.

In our view, it is in this context, that the above stated observation of this Court in SC SD No 8/2000, (supra) should be considered.

Petitioners contended that the manner in which a prior amendment was adopted should not have any influence when the Constitutionality of the Bill is considered. It is the effect that the Bill would have on the Constitution as it stands at the time the amendment is proposed, that has to be examined in determining whether the Bill should be presented before the People at a Referendum as provided under Article 83 of the Constitution. They contended that the question the Court should consider is whether any of the provisions in the Bill are inconsistent with the Articles 1, 2, 3, 6, 7, 8, 9 and 10 of the Constitution.

It is pertinent to observe that under the Constitution, situations where the need for a Bill to be approved by the People at a Referendum, if such Bill is to become law are enumerated in Article 83. No other Bill needs to be approved by People at a Referendum even if it is an amendment to

the Constitution. In such situations the only requirement is for such Bill to be approved by the special majority in Parliament, if they are not inconsistent with Article 83 of the Constitution. Under sub Articles (a) and (b) of Article 83, two situations are identified as the situations that warrant the approval of the People at a Referendum. They are namely,

- a) A Bill for repeal and replacement of any of the Articles enumerated therein:
- or
- b) A Bill, which is inconsistent with any of the Articles, enumerated therein.

It is also pertinent to note that entrenched Articles include Article 3 - the Sovereignty of the People. A Bill to amend the Constitution that is consistent with the entrenched Articles or which enhances the Sovereignty of the People does not require the approval by People at a Referendum. In such instances passage of the Bill with approval by the special majority in Parliament would suffice. However, any subsequent amendment that would impact adversely on such enhancement or the reversal of such enhancement, which creates a prejudicial effect on the Sovereignty of the People, such subsequent Bill would need the approval of the People at a Referendum, irrespective of the fact that the earlier Bill had become law with the special majority, only.

Therefore, the need to obtain the approval by the People at a Referendum will have to be decided based on the consistency or inconsistency of the Bill with the entrenched provisions and not based on the manner in which the provisions that are proposed to be repealed or amended, had been enacted.

It was further contended that the changes that are introduced by the Twentieth Amendment Bill, would restore provisions that were there prior to the Nineteenth Amendment and some of them did in fact exist from 1978. Therefore it was contended that those provisions had survived the test of time and therefore restoring the *status quo ante* should not require the approval by People at a Referendum as the 1978 Constitution was enacted only with the special majority in Parliament.

In this context it is pertinent to note that the 1978 Constitution was enacted after repealing the 1972 Constitution. The 1972 Constitution did not contain any provision requiring the approval of the People at a Referendum, when passing a Bill, if they were inconsistent with any provisions in

the Constitution. Therefore the fact that certain provisions existed in the 1978 Constitution *per se* cannot negate the effect of Article 83 of the Constitution. As correctly submitted by the Attorney-General when considering the Constitutionality of a Bill in the context of Article 83, what should be considered is the provisions in the Constitution as at the time the Bill is proposed to be submitted and the impact the Bill would have on those provisions. It is also pertinent to observe that Article 80(3) of the Constitution precludes any Court making any determination on the validity of a law, after the President's or Speaker's Certificate is endorsed on the Bill.

Therefore, the object and purpose and the effect of the Bill namely that restoration of *status quo ante* 19th Amendment *per se* does not take away the jurisdiction of the Court to examine whether any of the Clauses in the Bill attract Article 83 of the Constitution.

As the main issues that have to be determined in these proceedings include Sovereignty of the People, Powers of Government and checks and balance between organs of government, it is pertinent to set out important principles on these areas developed through jurisprudence of this Court.

In R.Sampanthan et al v Attorney General et al, [SC FR 351/2018, minutes of the Supreme Court dated 13-12-2018] cited with approval the following decisions of the Supreme Court:

*"In the Determination by this Court **IN RE THE NINETEENTH AMENDMENT TO THE CONSTITUTION**, [SC SD 04/2015 at p.6-7] Sripavan CJ held "Article 42 states "The President shall be responsible to Parliament for the due exercise, performance and discharge of powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security." Thus the President's responsibility to Parliament for the exercise of Executive power is established. Because the Constitution must be read as a whole, Article 4(h) must also be read in light of Article 42. Clearly the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance.*

*It has also been frequently recognised by this Court, that our Constitution enshrines the doctrine of separation of powers. In this regard, S. N. Silva CJ held, **IN RE THE NINETEENTH AMENDMENT TO THE CONSTITUTION** [2002 3 SLR 83 at p. 98] "...This balance of power between the three organs of government, as in the case of other*

Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another”

*In **JATHIKA SEVAKA SANGAMAYA vs. SRI LANKA HADABIMA AUTHORITY***

[SC Appeal 13/2015 decided on 16th December 2015] Priyantha Jayawardena, PC J. stated. —The doctrine of separation of powers is based on the concept that concentration of the powers of Government in one body will lead to erosion of political freedom and liberty and abuse of power. Therefore, powers of Government are kept separated to prevent the erosion of political freedom and liberty and abuse of power. This will lead to controlling of one another. There are three distinct functions involved in a Government of a State, namely legislative, the executive and the judicial functions. Those three branches of Government are composed of different powers and function as three separate organs of Government. Those three organs are constitutionally of equal status and also independent from one another. One organ should not control or interfere with the powers and functions of another branch of Government and should not be in a position to dominate the others and each branch operates as a check on the others. This is accomplished through a system of “checks and balances”, where each branch is given certain powers so as to check and balance the other branches... The doctrine of separation of powers is enshrined in Article 4 read with Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka.”

The aforesaid principles describe the nature of the State, powers of government and checks and balances between organs of State.

The scope and the interrelationship of Articles 3 and 4 of the Constitution had been analysed and discussed by this Court in, numerous judgments. It is pertinent to note that it is only Article 3 that is entrenched under Article 83 and, Article 4 merely provides form and manner of exercise of Sovereignty enshrined in Article 3. However, the importance of reading both Articles 3 and 4 together, has been emphasized by this Court, on the basis that they are linked together. In **Nineteenth Amendment to the Constitution**, [SD 11/2002, Decisions of the Supreme Court on Parliamentary Bills, (1991-2003) Vol. VII page 313 at 319] Supreme Court held;

"the statement in Article 3 that Sovereignty is in the people and is "inalienable" being an essential element which pertains to the Sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4.....The meaning of the word "alienate" as a legal term, is to transfer anything from one who has it for the time being to another, or to relinquish or remove anything from where it already lies"

The Supreme Court in **Nineteenth Amendment to the Constitution Bill**, [SC SD 04/2015, Decisions of the Supreme Court on Parliamentary Bills, (2014-2015) Vol. XII page 26 at page 31], while recognizing:

"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".

accepted with approval, the conclusion of the Supreme Court in **Nineteenth Amendment to the Constitution** [Decisions of the Supreme Court on Parliamentary Bills, (1991-2003) Vol. VII page 313] that;

"the transfer, relinquishment or removal of a power attributed to one organ of Government to another organ or body would be inconsistent with Article 3 read with Article 4 of the Constitution". (supra at 33)

It was further held that Article 4 provides form and manner of the exercise of Sovereignty (supra at 33).

Therefore, when the Court examines a matter in the context of infringement of Sovereignty recognised in Article 3, invariably the Court will have to examine whether there is any prejudicial impact on any of the different facets of Sovereignty as described in Article 3, of which the form and manner of exercise of such Sovereignty is elaborated in Article 4 of the Constitution. Hence in such an instance a Bill containing such provision which has a prejudicial effect on Sovereignty of the people amounting to the alienation of such Sovereignty, needs to be approved by the people in addition to it being passed in parliament by the special majority, if the Bill to become law, as provided under Article 83 of the Constitution.

Clause 3 (Duties of the President)

This Clause repeals and replaces Article 33. Through this amendment Duties of the President as specified in sub Article (1) of Article 33 are removed. Petitioners contended that the removal of the Constitutionally mandated duties infringe on Articles 1 and 3 of the Constitution. The Attorney General contended that Article 33(1) reiterates duties of the President that are set out in the other parts of the Constitution. Therefore, Article 33(1) duplicates and removal has no adverse impact. It is contended that Article 33(1)(a) and 33(1)(b) contains a restatement of duties that are enumerated in several other Articles in the Constitution. In the course of the submissions of the Attorney General, Court's attention was drawn to many provisions in chapter VI of the Constitution, which sets out Directive Principles of State Policy and Fundamental Duties, and the forms of the oaths the President has to subscribe to when assuming duties.

It is pertinent to note that within the existing Constitutional framework, the President exercises executive powers as part of the Sovereignty of People. As this Court in **Nineteenth Amendment to the Constitution Bill**, [SC SD 11/2002, Decisions of the Supreme Court on Parliamentary Bills, (1991-2003) Vol. VII page 313] held that, it is the People's inalienable executive power that is exercised by the President. Further, such executive power is a part of the powers of Government recognised in Article 3 of the Constitution. In numerous occasions this Court had held that the powers of government that are deposited on persons through different branches of Government are held in trust for and on behalf of the People. Therefore, it is of paramount importance to demarcate the exact parameters within which such powers should be exercised. In this context it is further important to note that the Supreme Court recognizes the principle -

"that our Law does not recognise that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power". (Seven Judge Bench decision in **R.Sampanthan et al v Attorney General et al**, SC FR 351/2018, minutes of the Supreme Court dated 13-12-2018).

In this context, setting out the duties of the President, who exercises People's inalienable executive power in trust for the People, strengthens the Sovereignty of People. We observe that it is desirable to list them under a single heading in the Constitution rather than leaving for the people to figure them out by going through the entire Constitution. However, Court's jurisdiction at this point is not to address issues in the context of desirability but in the context of inconsistency with Article 83.

In the case of **Attorney-General v Sumathipala** [2006 (2) SLR 126 at 143] the Supreme Court cited with approval statement made by Viscount Simonds in the case of **Magor and St. Mellons RDC v Newport Corporation** 1952 AC 189;

"a judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the judge thinks is desirable in the interest of justice. Therefore, the role of the judge is to give effect to the expressed intention of Parliament as it is the bounded duty of any court and the function of every judge to do justice within the stipulated parameters".

Article 33(1)(d) recognizes the President's duty to ensure the creation of proper conditions for the conduct of free and fair elections and referenda, on the advise of the Election Commission. Imposing such duty strengthens franchise, which is a part of the inalienable Sovereignty of the People. The Supreme Court had held that franchise is not confined to the act of poll but includes free and fair elections. This duty is not listed in any other place in the Constitution. Clause 3 in the present form removes this duty also from Article 33.

Clause 3 in its' present form is incousistent with Article 3 read with Article 4 of the Constitution and therefore needs to be approved by people at a Referendum.

However one of the amendments proposed to Clause 3 through the committee stage amendments is to insert the following:

"(c) to ensure the creation of proper conditions for the conduct of free and fair elections, at the request of Election Commission".

Therefore, the inconsistency in Clause 3 of the Bill would cease if Clause 3 is amended in accordance with the proposed Committee Stage amendment and thereafter could be passed with the special majority in Parliament.

Clause 5 (Immunity of the President)

Clause 5 of the Bill repeals Article 35 of the Constitution and replaces with a new Article numbered 35. Proposed Article 35(1) recognizes immunity of the President from suit. Proposed

Article 35(3) identifies four different instances where the immunity recognised in proposed Article 35(1) would not be applicable. They include a situation that does not exist among the current provisos to the immunity of the President. That is namely, any proceedings in relation to any subject or function assigned to or remaining in his charge under Article 44 of the Constitution.

This change attracts judicial review in respect of the President's exercise of executive powers in his capacity as a Minister of the Cabinet of Ministers, by any competent court. This change to the existing provision enhances People's judicial power and also places an effective check and balance on President's exercise of People's executive powers. Hence Clause 5 in this context enhances Sovereignty of the People and could become law with the special majority in Parliament.

In fact, this change should be considered in the context of Clause 7 of the Bill. Section 44(2) of Clause 7 of the Bill empowers the President to assign to himself any subject or function, a power that is not deposited on the President under the present Constitution. The said change that has been proposed through Clause 7 also enhances the exercise of People's executive power and hence does not warrant the approval of the People at a Referendum.

However, another change introduced by Clause 5 is the removal of the specific constitutional provision that recognised People's right to invoke Supreme Court jurisdiction in relation to any alleged infringement or an imminent infringement resulting from the acts of the President.

The 19th Amendment to the Constitution took away the immunity that was hitherto conferred on the President, to an extent, and his acts *qua* President were made amenable to the fundamental rights jurisdiction under Article 126 of the Constitution, provided that the action is instituted against the Attorney General. In so doing, however, the 19th Amendment did not 'alienate' the executive power of the President because 'immunity' is a privilege conferred on the President and not a 'power' which he is permitted to exercise. Therefore, in a plain sense, subjecting the President's act to the People's fundamental rights would not amount to an alienation or transfer of executive power.

Article 35(1) of the Constitution reads as follows:

"While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity"

"Provided that nothing in this paragraph shall be read and construed as restricting the Right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity".

However section 35 of Clause 5 of the Bill does not contain such a proviso to the President's immunity.

Petitioners contended that the denial of the opportunity for the People to invoke jurisdiction of the Supreme Court on any alleged violation of a Fundamental Right due to an act of the President, infringes the Sovereignty of the People and therefore is inconsistent with Articles 3 and 4 of the Constitution.

To the contrary, the Attorney-General and the Interventient Petitioners contended that Clause 5 does not infringe the Sovereignty of the people. They contended that the protection provided to the President through immunity from suit did exist from 1978 and hence the effect of Clause 5 is the restoration of the *status quo ante*, only.

In other words, the Attorney General and the intervenient petitioners pointed out that Clause 5 of the bill is a reincarnation of the Article 35 as it existed under the original constitution.

However, it is conceded among all parties that up until now, Article 35 was never subjected to scrutiny of Court by way of constitutional review. The pronouncements by the Courts and the limited inroads made to inumunity were made in a context where Article 35 was already a part of the 1978 Constitution. This is historic in a sense, for more than forty years later, the Court is called upon to examine its compatibility with People's Sovereignty.

What in fact did take place [consequent to the 19th Amendment to the Constitution] was an expansion of People's fundamental rights under Article 3 and 17 of the Constitution. People

blurred the artificial line that hitherto remained between executive acts and presidential executive acts. Furthermore, the expansion was significantly wider, in that, the 19th Amendment not only abridged Presidential immunity from suit, it extended justiciability to *“in respect of anything done or omitted to be done by the President, in his official capacity.”* The 19th Amendment to the Constitution employed very specific language when retaining immunity. It saved from review only Article 33(2)(g). But in removing immunity it did not cross-refer to Article 33. The resulting position is that it entrenched and enhanced the often unpronounced and a nuanced right which the People have conferred on themselves under the Constitution—which is the right to redress violation of their fundamental rights by executive and administrative action. This right, couched in Article 17 read together with Articles 3 and 126, is unrestricted in its operation. Article 15 read with Article 4(d) which introduces restriction for ‘exercise and operation’ of certain fundamental rights, explicitly omits any reference to Article 17. This necessarily means People’s entitlement to remedy under Article 17 is absolute and is a direct expression of People’s fundamental rights under Article 3 of the Constitution.

The Attorney-General and on behalf of the Intervening Petitioners it was contended however, that the Constitution mandates a specific process to address concerns of any situation arising due to President’s intentional violation of the Constitution – the impeachment process.

However, the existence of such alternative remedies and other political deterrents do not assuage immunity’s inherent incompatibility with People’s right to remedy. Impeachment establishes a process by which the President shall be removed from office only in certain well-defined recognized grounds. This is quite distinct from the fundamental rights jurisdiction which provides People with a prompt remedy to redress individual injuries they may suffer at the hands of the executive. Immunity from suit will most certainly leave the ordinary citizen and future generations without an adequate remedy, regardless of the substantiality of their claims.

It is further contended that the Supreme Court through its jurisprudence has recognised the distinction between the “doer” and the “act” in the context of the President’s immunity and had held that the immunity protects the “doer” only but not the “act”. [Visuvalingam v Llyamage (1983) 1 SLR 203, Karunatilaka v Dayananda Dissanayake (No. 1) (1999) 1 SLR 157, Victor

Ivan v Hon Sarath N Silva (2001) 1 SLR 309, **M.N.D.Perera v Balapatabendi Secretary to the President and others**, (2005) 1 SLR 185]. It was therefore contended, that the removal of the provision that specifically removed President's immunity in relation to Supreme Court's Fundamental Rights jurisdiction does not infringe People's Sovereignty.

However, it is our view that the principle enunciated in the decisions of the Supreme Court that 'immunity shields only the doer, and not the act' should not detract our obligation to examine in fresh the tenability of absolute immunity within the Constitutional scheme. These pronouncements were progressive, yet inconsistent. They have not resulted in an entrenched judicial practice of reviewing the 'acts' of the President qua President notwithstanding immunity. Neither are they hard law. They maybe distinguished, overruled and may even fall into disuse. Clause 5 on the other hand, if and when it is enacted into law will acquire a stoic existence. Once a part of the Constitution, it cannot be ignored. As stated at the start of this analysis, the Constitutionality of the clause before us must be adjudged having regard to People's Sovereignty and in a manner that would guarantee not only to present society but "succeeding generations of the People of "Sri Lanka" the rights and freedoms they are entitled to. Therefore, the fact that even under the original Article 35, the Court had sporadically made inroads into absolute immunity does not provide a basis to hold that Clause 5 of the Bill will not attract Article 3 of the Constitution. It does not stand to reason that this Court should desist from considering the constitutionality of a clause in its full breadth merely because there exists a substantial portion of jurisprudence on the same point.

In any event, the precise scope of Justice Mark Fernando's observation [in **Karunatilaka v Dayananda Dissanayake** (No 1)] is much narrower than claimed by the Intervient Petitioners. It helps to reproduce the observation in verbatim to understand its weight viz a viz Article 35 as it existed then;

"I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. [...] Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial

review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct.” (emphasis added) (supra at 177)

Thus, as per the jurisprudence of this Court, the principle “immunity shields the doer and not the act” as commendable as it is, could obviate the barrier of immunity only when there is “some other person who does not enjoy immunity from suit” performing a separate act further to the President’s act. Jurisprudence of this Court mandates that it is only if these factors coincide, could the judiciary make way to review the propriety of an act/ direction by the President. The divisional bench of this Court in **Victor Ivan v Sarath N. Silva** (supra) having traced the line of authorities discussing the length and breadth of immunity, summarized the exact scope of the reviewability of the President’s acts in the context of immunity;

“This case confirms the proposition that the President’s acts cannot be challenged in a Court of law in proceedings against the President. However, where some other official performs an executive or administrative act violative of any person’s fundamental rights, and in order to justify his own conduct, relies on an act done by the President, then, such act of such officer, together with its parent act are reviewable in appropriate judicial proceedings. [...] Justice Fernando takes the matter beyond doubt when he clearly states that for such a challenge to succeed, there must be some other officer who has himself performed some executive or administrative act which is violative of someone’s fundamental rights, and that, in order to justify his own conduct in the doing of such impugned act, the officer in question falls back and relies on the act of the President. It is only in such circumstances that the parent act of the President may be subjected to judicial review ” (emphasis added) (supra at 324-325)

Even in **Visuvalingam v Liyanage**, (supra) Justice Sharvananda’s observation was to the same effect;

“Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President cannot be summoned to Court to justify his action. But that is a far cry from saying that the

President's acts cannot be examined by a Court of Law. Though the President is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden" (emphasis added) (supra at 240-241)

Therefore, the principle that immunity only shields the doer and not the act could only do so much to bring the President's acts *qua* President to justiciability. The resulting inference is that where there is no other official relying on the President's act, an entire section of 'acts' themselves will not be subject to review. In fact, in *Silva v Bandaranaike*, [(1997) 1 SLR 92 at 99], the Supreme Court dismissed the Petitioners application without granting leave to proceed. In the said case Perera J observed:

"We are of the view, therefore, that having regard to Article 35 of the Constitution, an act or omission of the President is not justiciable in a Court of law, more-so where the said act or omission is being questioned in proceedings where the President is not a party and in law could not have been made a party. There is no doubt that the averments in the petitions flow from the act of appointment made by the President. It is only the President who could furnish details relating to the said appointment. Where the Constitution specifically prohibits the institution of proceedings against the President, a challenge to the appointment cannot be isolated from the President in proceedings against the 1st respondent (the person appointed) where the basis of the appointment which is a matter which in terms of the Constitution falls within the purview of the President. Such matter cannot be canvassed in any Court. Accordingly, we are of the view that this application cannot be entertained by this Court and must be dismissed in limine." (emphasis added).

This illustrates the concerns raised — that where there is no intermediary relying on the President's action, the Court would be precluded from examining the *vires* or the lawfulness of the powers, prior to the Nineteenth Amendment to the Constitution. In such circumstances, not only the immunity shields the 'doer', it very well shields the 'act' itself. Further, the Court

cannot review *in vacuo*. There must be a person who is subject to the jurisdiction of the Court, who has relied on a direction/ exercise of power by the President. If not, the exercise before the Court would only be academic, incapable of enforcement, and consequently, of redress.

It was also contended that there are other situations in the Constitution where immunity from suit had been granted.

Inalienable Sovereignty of the People as recognised in Article 3 of the Constitution includes Fundamental Rights. Furthermore Article 4 of the Constitution sets out the manner in which People could exercise and enjoy Sovereignty.

Article 4(d) reads as:

“the fundamental rights which are by the Constitution declared and recognised shall be respected, secured and advanced by all the organs of the government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided”;

Article 4 (d), in our view, places a heavy burden on all organs of the government to respect, secure and advance the fundamental rights guaranteed by the Constitution, and furthermore not to “abridge, restrict or deny”. In *Visuvalingam v Liyanage*, (supra) the Court observed that non-justiciability of executive action cuts across the very ideals enshrined in the Preamble to the Constitution. It was held:

“Actions of the executive are not above the law and can certainly be questioned in a Court of Law. Rule of Law will be found wanting in its completeness if the Deputy Solicitor General's contention in its wide dimension is to be accepted. Such an argument cuts across the ideals of the Constitution as reflected in its preamble. An intention to make acts of the President non-justiciable cannot be attributed to the makers of the Constitution.” (emphasis added) (supra at 240)

At least on one prior occasion, [Eighteenth Amendment to the Constitution, SC SD 12/2002] this Court when confronted with the constitutionality of absolute immunity, categorically stated;

“By the envisaged 18th amendment, the Constitutional Council is clothed with unlimited and unfettered immunity on their decisions, recommendations and approvals. If such immunity is given to the Constitutional Council, it would in effect be elevated to a body that is not subject to law, which is inconsistent with the Rule of Law. The Rule of Law, means briefly the exclusion of the existence of arbitrariness and maintaining equality before the Law (A. V. Dicey - Law of the Constitution, pg. 120). Hitherto, without exception, executive and administrative action have been subjected to the jurisdiction enshrined in Article 126 of the Constitution. The total immunity expected in terms of the proposed amendment to the Constitution would effectively shut out the justiciability of actions of the Constitutional Council in the exercise of the fundamental rights jurisdiction by the Supreme Court.” (emphasis added) [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII page 303 at 305-306]

Thus, it is seen that our Constitution which is founded on rule of law does not tolerate non-justiciability. It is premised on the very basic tenet that every injury must be remedied. If the avenue for redress is to be taken away, that is a matter that directly impinges on the “fundamental rights” of the People as found in Article 3 of the Constitution.

While Article 17 in Chapter III of the Constitution recognizes the right of every person to apply to the Supreme Court in respect of the infringement or imminent infringement of a fundamental right by executive or administrative action, Article 126 (1) of the Constitution recognizes the Supreme Court’s jurisdiction to determine any question relating to infringement or imminent infringement of Fundamental Rights due to executive or administrative action.

Through this scheme in the Constitution, People’s Sovereignty in enjoying and the exercise of Fundamental Rights and the exercise of judicial power in situations of the infringement of such Rights is protected and enhanced. Judicial power of the people is exercised by Parliament through courts.

Submissions were made by the Attorney-General that immunity is essential for the efficient and unimpeded discharge of functions. However, these submissions failed to establish a cogent and rational nexus between non-justiciability of President’s act and the effective discharge of functions and duties.

Clause 5 of the Bill, removes the right of any person to invoke jurisdiction of the Supreme Court, in relation to any alleged infringement of a Fundamental Right due to the conduct of the President. The alternative processes referred to by the Attorney-General and the Intervient Petitioners in their submissions in our view do not provide the nature of protection guaranteed to the People through the existing provisions in the Constitution.

Therefore the removal of the existing right guaranteed through the Constitution to the People to invoke the jurisdiction of the Supreme Court under Article 126 in relation to acts of the President is inconsistent with Articles 3 and 4 of the Constitution. Hence we determine that Clause 5 in its current form require the approval of the People at a Referendum.

However this inconsistency would cease, if Clause 5 is suitably amended and, make provision for the People to invoke jurisdiction of the Supreme Court under Article 126; in instances where there is an alleged violation or an alleged imminent violation of a Fundamental Right, due to an act of the President.

Clause 6 (Parliamentary Council)

Clause 6 repeals Chapter VIIA of the Constitution, and replaces it with a new Chapter VIIA. Chapter VIIA of the Constitution comprises of Articles 41A, 41B, 41C, 41D, 41E, 41F, 41G, 41H and 41I. They relate mainly to the constitution of the Constitutional Council, its role in certain appointments made by the President and ancillary matters. The effect of Clause 6 is introducing a new institution named Parliamentary Council. The composition of the proposed Parliamentary Council, confines to legislators. The main change that is introduced through this Clause is the role the Council plays in certain appointments. Power of appointment to all specified institutions including the Chief Justice, other judges of the Supreme Court, the Attorney General, members of the Judicial Service Commission remains with the President. However, the proposed Council has no power to grant any approvals to such appointments. The President is obliged only to seek observations from the Council, prior to making such appointments.

Petitioners contended that the removal of the need for a prior approval of an independent body in relation to the aforementioned appointments adversely affects checks and balances on the exercise of executive power by the President as well as the independence of the judiciary, which is an intelligible heritage as stipulated in the preamble to the Constitution. Hence they contended Clause 6 infringe the Sovereignty of the People. Chapter VIIA was initially introduced into the Constitution through the Seventeenth Amendment, in 2001. However thereafter in the year 2010, provisions relating to the Constitutional Council were repealed and replaced with provisions establishing the "Parliamentary Council". Thereafter in 2015, through another Constitutional amendment the Parliamentary Council was replaced with the re-establishment of the Constitutional Council.

This Court in its determination in **Seventeenth Amendment to the Constitution** [SC Determination Number 6/2001, *Decisions of the Supreme Court on Parliamentary Bills, (1991-2003)* Vol. VII page 249 at 253] having considered the need of prior approval of the Constitutional Council in relation to certain appointments made by the President held:

"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".

In 2015, when the Constitutional Council was re-established through the Nineteenth Amendment to the Constitution, the Supreme Court in "**Nineteenth Amendment to the Constitution Bill**" [SC SD 04-2015, *Decisions of the Supreme Court on Parliamentary Bills, (2014-2015)* Vol. XII page 26 at page 36] held:

"the purpose and object of the Constitutional Council is to impose safeguards in respect of the exercising of the President's discretion, and to ensure the propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions. It sets out a framework within which the President will exercise his duties pertaining to appointments"

In the year 2010, through the Eighteenth Amendment to the Constitution, provisions relating to the Constitutional Council were repealed and replaced with provisions to constitute a body called Parliamentary Council. The main change that took place at that stage was confining the role of the Parliamentary Council to provide their observations prior to the appointments made by the President to the prescribed positions.

When the Supreme Court made its determination in relation to the **Eighteenth Amendment Bill** the Court considered two decisions of the Supreme Court, which dealt with the exercise of executive powers in relation to the appointments to the judiciary. [SC SD 1/2010, Decisions of the Supreme Court on Parliamentary Bills, (2010-2012) Vol. X page 5 at 10-11]

In **Premachandra v Jayawickrama** [(1994) 2 SLR 90] the Supreme Court had held;

"There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted".

In further examining the scope of the power vested on the President to make appointments to the judiciary, in **Silva v Bandaramayake** (supra), Court held;

"The President in exercising the power conferred by Article 107 of the Constitution has a sole discretion. The power is discretionary and not absolute. It is neither untrammelled nor unrestrained and ought to be exercised with limits.

Article 107 does not expressly specify any qualifications or restrictions. However in exercising the power to make appointments to the Supreme Court there should be co-operation between the Executive and the judiciary, in order to fulfill the object of Article 107".

Having considered the aforementioned views of the same Court, the Supreme Court, in **"Eighteenth Amendment to the Constitution"**, [SC SD 1/2010, Decisions of the Supreme Court on Parliamentary Bills, (2010-2012) Vol. X page 5 at page 11] held;

"On a consideration of the totality of the provision dealing with the establishment of the Parliamentary Council, it is abundantly clear for the reasons aforesaid that the proposed amendment is only a process of redefining the restrictions that was placed on the President by the Constitutional Council under the 17th Amendment in the exercise of the Executive power vested in the President, which is inalienable".

When all these decisions of the Court are examined and considered in the context of Sovereignty of the people, redefining of safe guards on President's power on appointments does not extend to an extent that the change alienates the Sovereignty of the People.

It is also pertinent to observe that Article 35 of the Constitution guarantees Peoples right to invoke the jurisdiction of the Supreme Court in instances where the conduct of the President has infringed their Fundamental Rights. In this determination we have already expressed our view on the need to retain such right in the interest of protecting and preserving the Sovereignty of the People. Therefore, within this Constitutional structure, we do not observe any inconsistency of Clause 6 of the Bill with any of the Articles referred to in Article 83. Therefore, Clause 6 can be passed with two-thirds majority in Parliament.

In view of our determination on Clause 6, we do not intend making any further determinations on other Clauses through which consequential changes are introduced in relation to the Constitutional Council's role in appointments

Clause 7 (The Executive)

Clause 7 of the Bill repeals the entirety of Chapter VIII of the Constitution and substitutes a new Chapter titled 'The Executive'. The said Chapter contains provisions, *inter alia*, on the appointment and removal of the Prime Minister, Ministers of the Cabinet of Ministers, Ministers who are not members of the Cabinet of Ministers, and Deputy Ministers. Further, the proposed amendment enables the President to hold Ministries.

The Petitioners contended that after the Constitution was amended by the Nineteenth Amendment even though the President was empowered to appoint the Prime Minister, he cannot be removed from office by the President. In this regard the attention of court was drawn to Article 46(2) of the Constitution.

Article 46(2) of the Constitution states:

"(2) The Prime Minister shall continue to hold office throughout the period during which the Cabinet of Ministers continues to function under the provisions of the Constitution unless he -

(a) resigns his office by a writing under his hand addressed to the President; or

(b) ceases to be a Member of Parliament".

The proposed section 47 in Clause 7 of the Bill confers on the President the power to remove the Prime Minister from office, which as the Attorney-General submitted is a restoration of the provisions of the 1978 Constitution.

Article 42 of the present Constitution states:

"(1) There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic.

(2) The Cabinet of Ministers shall be collectively responsible and answerable to Parliament.

(3) The President shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers.

(4) The President shall appoint as Prime Minister the Member of Parliament, who, in the President's opinion, is most likely to command the confidence of Parliament". (emphasis added)

Accordingly, under Article 42(4) of the Constitution, the President is conferred with the power to appoint as Prime Minister who in the President's opinion is "most likely to command the confidence of Parliament".

Further, in respect of the appointment of Ministers, Article 43 of the Constitution states:

"(1) The President shall, in consultation with the Prime Minister, where he considers such consultation to be necessary, determine the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions to such Ministers.

(2) The President shall, on the advice of the Prime Minister, appoint from among Members of Parliament, Ministers, to be in charge of the Ministries so determined.

(3) The President may at any time change the assignment of subjects and functions and the composition of the Cabinet of Ministers. Such changes shall not affect the continuity of the Cabinet of Ministers and the continuity of its responsibility to Parliament "
(emphasis added)

In view of the aforementioned Articles, it is evident that even under the present Constitution, even though the President is required to appoint Ministers on the advice of the Prime Minister, change of the assignment of subjects and functions of the Ministers and change of the composition of the Cabinet of Ministers, can be made by the President.

The proposed section 43(3) in Clause 7 of the Bill corresponds with Article 42(4) under the present Constitution. Accordingly, the Prime Minister will be appointed by the President "**who in the President's opinion, is likely to command the confidence of Parliament**".

In view of the fact that the President who holds People's executive power in trust of the People, is the Head of the Cabinet of Ministers and the appointing authority of the Prime Minister, we are of the view that empowering the President to remove the Prime Minister and appoint a new Prime Minister who in his opinion commands the confidence of Parliament, does not infringe the Sovereignty of the People. Therefore, section 47 of Clause 7 does not infringe Sovereignty of the People.

We are further of the view of that none of the other sections in Clause 7 of the Bill are inconsistent with Article 83 of the Constitution.

Therefore, Clause 7 of the Bill can be passed by the special majority in Parliament in terms of Article 82(5) of the Constitution and does not require the approval of the People at a Referendum.

Clauses 15, 27 and 28 (Publication of bills and Urgent Bills)

Clause 15 of the Bill amends Article 78 of the Constitution. Clause 15(2) inserts a new paragraph that reads as:

"Any amendment proposed to a Bill in Parliament shall not deviate from the merits and principles of such Bill".

None of the Petitioners raised any concerns on this provision. We observe that this new provision is progressive and enhances the People's legislative power by placing a check on Parliament that exercises legislative power in trust for the People. However, perusal of the proposed Committee Stage amendments tendered to Court by the Attorney-General, we observe that the aforementioned salutary provision in the Bill is proposed to be removed.

Clause 15(1) of the Bill repeals paragraph (1) of Article 78 and replaces with a provision that had reduced the time period between the date of publication of a Bill in the Gazette and placing it on the Order Paper. The present time period of fourteen days has been reduced to seven days.

Petitioners contended that such limitation curtails People's right to bring in an effective challenge before Court. Therefore they contended that it affects People's judicial power as well as people's legislative power.

We are not inclined to accept this view. The proposed change does not deny the opportunity to invoke the jurisdiction of Court and challenge any Bill; but warrants efficient and expeditious response from any person who wishes to invoke the jurisdiction of Court.

Clause 27 of the Bill, inserts a new Article numbered 122 immediately after Article 121 of the Constitution. Section 122 of Clause 27 is described as "Special Exercise of constitutional jurisdiction in respect of urgent Bills". Through this provision when the Cabinet of Ministers is of the view that a particular Bill is urgent in the national interest and makes an endorsement to

that effect the President shall require the special determination of the Supreme Court on the consistency or inconsistency of any provisions of the Bill by a reference addressed to the Chief Justice. The Supreme Court should make its determination in twenty-four hours or such longer period not exceeding three days as the President may specify.

Petitioners contended that this Clause affects People's judicial power as well as legislative power. Restrictive time period set out not only hinders but also unfairly curtails the exercise of judicial power. Furthermore they claim that placing the discretion on the Executive in deciding the time period within which the determination should be made encroaches into the judicial power of Courts who exercises People's judicial power.

In this regard it is pertinent to observe that Subsection (3) of Section 122 in Clause 27 of the Bill excludes Bills for the amendment, repeal and replacement, alteration or addition of any provision of the Constitution or any Bill for the repeal and replacement of the Constitution.

Further, it is pertinent to observe that Clause 28 of the Bill amends Article 123 of the Constitution by the insertion of a new paragraph. The said paragraph provides:

"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".

Therefore, clause 27 and clause 28 taken together, address the concerns on the availability of the limited time within which the Court should make its determination. The required nature of the determination is thereby limited to the expression of "entertaining a doubt" rather than a specific determination on the Constitutionality of the Bill or of its' any provision.

It is also pertinent to observe that Article 129(1) of the Constitution empowers the President to refer a question to the Supreme Court to obtain its opinion within a time specified by the President.

Therefore, empowering the Executive to set a time period within which a Court should provide its determination *per se* does not infringe the Sovereignty of the People.

We further observe that this Clause does not exclude or prohibit an interested party intervening in proceedings relating to a hearing on such Bill. This clause further makes it mandatory, that such Bill be submitted to judicial review through the prescribed process.

When all these factors are taken into account, we are of the view that Clauses 15, 27 and 28 are not inconsistent with any of the Articles referred to in Article 83 and therefore they can be passed with the special majority.

Clause 16 (Defeated Bills)

Clause 16 of the Bill amends Article 85 by inserting a new sub article numbered (2). This amendment empowers the President to submit to people by Referendum any Bill that had been rejected by Parliament. Petitioners contended that this provision erodes the legislative power of Parliament and President is bestowed with legislative power.

In this context it is pertinent to note that it is the People's legislative power that is exercised by Parliament. Referendum is an accepted process within the Constitutional framework where People are provided with the opportunity to exercise their legislative power directly by them. Furthermore, under this provision no Bill which is either inconsistent with any provision of the Constitution or for the repeal or amendment of any provision of the Constitution can be placed before the People. It is also important to note that the President only has the right to place the Bill before the people and it is the decision of the People that would matter in the Bill becoming the law.

We hold that clause 16 is not inconsistent with any of the Articles referred to in Article 83 and therefore can be passed with the special majority.

Clause 14 (Dissolution of Parliament)

This Clause repeals paragraph (1) of Article 70 and replaces with a new paragraph. According to Article 70 (1) of the Constitution the President's power to dissolve the Parliament is restricted. According to the said paragraph the President could dissolve Parliament only after four and half years from the date of its first meeting, unless the Parliament passes a resolution by not less than two thirds of its members and requests the President to dissolve. Clause 14 changes this position by providing;

"when a general election has been held consequent upon a dissolution of Parliament by the President, the President shall not thereafter dissolve Parliament until the expiration of a period of one year from the date of such dissolution, unless Parliament by resolution requests the President to dissolve Parliament".

Petitioners contended that the change affects the legislative power of the People, due to the drastic reduction of the time period within which the President could dissolve Parliament and thereby substantially reducing the life of a Parliament. Further they contend that the Clause as it stands empowers the President to dissolve Parliament at any time and even the one-year's restriction will apply, only if the General Election was triggered due to the dissolution of the previous Parliament by the President. Petitioners contended that this clause prejudicially affect the separation of powers, negates Parliament's ability to act as a check on President and affect the franchise of the People. Therefore they claim that Clause 14 infringes the Sovereignty of the People.

However, the Attorney-General and the Intervient Petitioners contended that the Clause restores a legitimate Right of the Executive as well as remedy the adverse effect caused on 'checks and balances' between the legislative and executive branches of Government, due to the Nineteenth Amendment. They claim that the dissolution of Parliament will allow the people to exercise their franchise. Therefore, the use of such power does not infringe on People's Sovereignty.

The Supreme Court in its determination in **Nineteenth Amendment to the Constitution** [SC SD 11/2002, Decisions of the Supreme Court on Parliamentary Bills, (1991-2003) Vol. VII page 313 at 320] held;

"the dissolution of Parliament and Impeachment of the President are some of these powers which constitute the checks incorporated in our Constitution".

Furthermore the Court proceeded to conclude;

"the power of dissolution of Parliament and the process of impeachment being some of the checks put in place should be exercised, where necessary, in trust for the People only

to preserve the Sovereignty of the People and to make it meaningful, effective and beneficial to people". (supra at 321)

Interventient Petitioners contended that the restriction imposed on the President by the 19th Amendment on the Dissolution of Parliament amounts almost to the complete alienation of a legitimate power of the Executive. They contended that Clause 14 effectively addresses this concern.

The Attorney-General, further contended that *"the check placed in the hands of the President vis-à-vis the Legislature has become meaningless and this was evident from the facts which gave rise to SC (F/R) 351/2018 [Dissolution Case]. It is for this reason that it had been sought to revert to the original text of Article 70(1)"*.

In examining this issue this Court has to consider whether the introduction of Clause 14 causes any erosion on the Sovereignty or alienation of Sovereignty of the People. As described above, the power to dissolve the Parliament is a legitimate right of the executive and operates as an effective check and balance between the two organs of the Government. A fair balancing of competing interests is of prime importance to ensure that the exercise of this Right would not infringe the Sovereignty of the People.

In this context, the Supreme Court in **Nineteenth Amendment to the Constitution** (supra at 323-324) observed;

"We are of the view that on an examination of the relevant provisions in the different contexts in which they have to operate, that every extension of such period would not amount to an alienation, relinquishment or removal of that power. That would depend on the period for which it is extended. If the period is too long, it may be contended that thereby the power of dissolution attributed to the President to operate as a check to sustain the balance of power as noted above, is by a side wind, as it were, demuded of its efficacy. But, if we strike middle ground, the balance of power itself being the overall objective would be strengthened specially in a situation of a divergence of policy, noted above. We are of the view that if Clauses 4 and 5 of the Bill, dealt with in the preceding portion of this determination are removed and replaced with a clear amendment to proviso (a) of Article 70(1) whereby the period of one year referred to therein is extended

to a period to be specified not exceeding three years (being one half of the period of Parliament as stated in Article 62(2)), that would not amount to an alienation, relinquishment or removal of the executive power attributed to the President”.

We observe, that the following Committee Stage amendment is proposed to this Clause, as submitted by the Attorney-General.

Clause 14 - delete line 29 and substitute the following -

“period of two years and six months from the date of such General”.

Taking into consideration the Determination of this Court in **Nineteenth Amendment to the Constitution** (supra) we are of the view, such an amendment to Clause 14, sufficiently addresses concerns on this Clause in the context of Sovereignty.

Therefore, Clause 14 in its' present form is inconsistent with Article 3 read with Article 4 of the Constitution and is requires to be approved by the People at a Referendum.

However, this inconsistency would cease with the adoption of the proposed committee stage amendment and could be passed with the special majority in Parliament.

Clause 17(4) (Dual Citizenship)

Clause 17 amends sub-paragraph (d) of paragraph (1) of Article 91 of the Constitution. Sub Clause (4) of Clause 17 repeals item (xiii) of Article 91(1)(d). Article 91 sets out the disqualifications for election as a Member of Parliament and according to Article 91(d) (xiii) being a citizen of Sri Lanka who is also a citizen of any other country is recognised as one such disqualification.

Petitioners contended that the removal of this disqualification by Clause 17(4) infringes Articles 1 and 3 of the Constitution. They contended persons who hold a dual citizenship has split loyalties. When they pledge allegiance to two sovereign nations, their capacity to take decisions with the sole idea of protecting and preserving the Sovereignty of one country would be compromised; specially, in situations of conflict of interests between the two countries. Such situations can always arise in many areas of concern including, commerce, trade, defence and in

addition on bi-lateral and multi-lateral relations when both countries become relevant parties. Therefore, they contended that this Clause is inconsistent with Articles 1 and 3 of the Constitution.

The Attorney-General contended that the removal of the restriction on dual citizens to stand for elections enhances People's franchise. It is contended that decisions of the Supreme Court fortifies this proposition. Reliance is made on views expressed by this Court in several of its judgments. In *Mediwaka and others v Dayamanda Dissanayake and others* [(2001) 1 SLR 177 at 211] the Court had held;

"The citizen's right to vote includes the right to freely choose his representatives, through a genuine election which guarantees the free expression of the will of the electors: not just his own".

In SC SD No 8/2000. (**Determination on Seventeenth Amendment to the Constitution Bill**) [Decisions of the Supreme Court on Parliamentary Bills (1999-2003) Vol. VII, page 213 at 218] the Court observed;

"They are, firstly the voters would in terms of the Amendment have a choice of electing candidates to represent their respective electorate, being choice not provided as the law stands and which is necessary if franchise is to have its true meaning as provided in Article 3 read as 4(a) and (e) of the Constitution".

The Attorney-General further contended that even a dual citizen has the right to be treated equally and enjoys all the rights of a person who is a citizen of Sri Lanka, only. He further claimed, that Article 26(2) and (3) prohibit making any distinction on the manner on which the citizenship was acquired. Citizens by descent and citizens by registration will have same rights. It was further contended that under the provisions of the Citizenship Act it is only a person who had had been a citizen of Sri Lanka who could gain the dual citizenship. It is his contention that the Petitioners claim of "split loyalties" and "conflicts of interests" are mere surmise and conjecture.

We considered all these submissions in relation to the Clause under consideration and are of the view that a decision on the inconsistency or consistency with a Constitutional provision cannot

be based on surmise and conjecture. When we exercise jurisdiction in relation to an amendment to the Constitution, it does not extend to consider desirability of a provision or to delve into policy matters. Sole consideration would be the Constitutionality of the provision.

This Court in the Special Determination in the Bill titled “Welfare Relief Benefits” [SC SD 7/2002, Decisions of the Supreme Court on Parliamentary Bills (1999-2003) Vol. VII, page 281 at 282] observed;

“it is not within the jurisdiction of the Court to speculate as to what would happen in the implementation of the scheme. The provisions of the Bill should be examined objectively to ascertain whether there are sufficient safeguards to prevent discrimination....”

It is our view that Clause 17(4) is not inconsistent with any Article referred to in Article 83 of the Constitution. Hence Clause 17(4) can be passed with the special majority in Parliament.

Clause 20(3) (Guidelines on Media)

This Clause amends Article 104B of the Constitution. This Article sets out the powers, functions and duties of the Election Commission. Article 104B(5) reads as follows:

“(5) (a) The Commission shall have the power to issue from time to time, in respect of the holding of any election or the conduct of a Referendum, such guidelines as the Commission may consider appropriate, to any broadcasting or telecasting operator or any proprietor or publisher of a newspaper, as the case may be, as the Commission may consider necessary to ensure a free and fair election.

(b) It shall be the duty of the Chairman of the Sri Lanka Broadcasting Corporation, the Chairman of the Sri Lanka Rupavahini Corporation and the Chairman of the Independent Television Network and the Chief Executive Officer of every other broadcasting or telecasting enterprise owned or controlled by the State to take all necessary steps to ensure compliance with such guidelines as are issued to them under sub-paragraph (a).”

Clause 20(3) amends Article 104B (5)(b) to read as:

"It shall be the duty of any broadcasting or telecasting operator or any proprietor or publisher of a news paper, as the case may be, to take all necessary steps to ensure compliance with any guidelines as are issued to them under paragraph (a)".

Petitioners contended that extending the responsibility to institutions other than State media to comply with guidelines issued by the Election Commission prejudicially affects the freedom of thought. Therefore it is claimed, that this Clause is inconsistent with Article 10 and hence requires the approval by People at a Referendum. Further they claim, maintaining a distinction between the State and private media is justified as State media is fed through public funds. It was further submitted that the Supreme Court in **Nineteenth Amendment to the Constitution Bill** [SC SD 4/2015, Decisions of the Supreme Court on Parliamentary Bills (2014-2015) Vol. XII, page 26] had decided that empowering the election commission to take over the management of a broadcasting authority, if such authority had contravened any guidelines issued by the Election Commission contravenes Article 3 of the Constitution.

To the contrary, the Attorney-General submitted that the proposed change through Clause 20(3) would ensure that all media whether, State or private owned would have the duty to act responsibly with the common object of facilitating a free and fair election. It is further contended that this Clause removes the discrimination between the State media and private media in the context of the duty to ensure a free and fair elections. He further claims, that the airwaves and / frequencies both private and State media use is regarded as public property.

There is no doubt on the importance of protecting People's freedom of thought. The importance is so apparent that Article 10 is entrenched. In **Joseph Perera alias Bruteu Perera v The Attorney-General and others** [(1992) 1 SLR 199 at 223], the Supreme Court observed;

"Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It includes the expression of one's ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes freedom of the press and propagation of ideas; this freedom is ensured by the freedom of circulation"

Importance of a free media cannot be determined based on the source of funding to the institution. The need for a free media goes beyond a distinction between private and State media.

However, the issue before us in these proceedings is whether placing a duty on all media institutions to act in accordance with the guidelines issued by the Election Commission during an election period would infringe Article 10 for the reason, such duty should not have been imposed on private media as no public funds are used to finance those entities. Such a distinction between State and private media in the context of the duty to follow guidelines issued to media institutions to facilitate a free and fair election is not a classification based on intelligible criteria.

The core issue that was considered by the Supreme Court in **Nineteenth Amendment Bill** (*Supra*) was the impact of the power bestowed on the Election Commission to appoint a competent authority to control a private media institution. In that context the Supreme Court held;

"The State taking over its own media institutions may be permitted, but if it extend to private media institutions, providing balanced and multi perspective news and views the same will be most prejudicial. Furthermore, this provision does not set out the qualification and / or the post that a person holds in order to be appointed as a Competent Authority and this too will severely impinge upon the rights of citizens and also rights and interests of the media institutions who may well be supervised and effectually managed by persons not eligible or suitable for same" (*supra* page 37)

The issue before this Court on Clause 20(3) can easily be distinguished.

Guidelines contemplated to be issued under Clause 20(3) will not be focusing on any one particular media institution but will be on all media institutions. The duty remains on the institutions to respect and adhere to such guidelines that are applicable on equal basis to all media institutions.

Hence we do not see any inconsistency in Clause 20(3) with any of the Articles referred to in Article 83 of the Constitution. Hence Clause 20(3) can be passed with the special majority in Parliament.

Clause 22 (Failure to comply with guidelines of the Election Commission)

Clause 22 repeals Article 104GG of the Constitution.

Article 104GG reads as follows:

**104GG. (1) Any public officer, any employee of any public corporation, business or other undertaking vested in the Government under any other written law and any company registered or deemed to be registered under the Companies Act, No. 7 of 2007, in which the Government or any public corporation or local authority holds fifty per centum or more of the shares of that company, who -*

- (a) refuses or fails without a reasonable cause to co-operate with the Commission, to secure the enforcement of any law relating to the holding of an election or the conduct of a Referendum, or*
- (b) fails without a reasonable cause to comply with any directions or guidelines issued by the Commission under sub-paragraph (a) of paragraph (4) or sub-paragraph (a) of paragraph (5), respectively, of Article 104B,*

shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

(2) Every High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1)“

The Petitioners contended that the repeal of the aforementioned provision is inconsistent with Articles 3 and 4 of the Constitution as it has a prejudicial effect on franchise of the People. They further contended that, franchise is neither restricted nor limited to the act of poll. Franchise includes free and fair elections too.

We observe, that the Election Commission has the duty and obligation to conduct free and fair elections. Article 104B of the Constitution empowers the Election Commission to secure the enforcement of all laws relating to holding of an election or a referenda. Further the Commission

is empowered to issue guidelines and directions on matters relating to holding of elections to ensure a free and fair election.

The Attorney-General contended that the repeal of Article 104GG does not have a prejudicial effect on franchise as specific legislation that governs conduct of elections criminalize illegal acts and corrupt practices.

It is pertinent to observe that the statutory scheme mandated through the Constitution strengthens and enhances franchise of the People. Prosecution of persons who fail to comply with such directions and guidelines issued by the Commission necessarily will have a greater impact on the compliance with such directions and guidelines, which in turn would enhance the conduct of free and fair elections.

Provisions in the Election laws do not directly focus on such failures. Therefore the repeal of Article 140GG has a prejudicial effect on the franchise.

Hence we are of the view that Clause 22 is inconsistent with Articles 3 read with Article 4 of the Constitution. Therefore, Clause 22 requires the approval of the people at a referendum.

Clauses 31, 32-39 and 40 (Auditor-General)

Clause 31 repeals paragraph (1) of Article 153 of the Constitution. Article 153(1) *inter alia* provides that the person who holds the post of Auditor General should be a 'qualified auditor'. However, the new paragraph introduced through Clause 31 does not set out the qualifications one should possess to be appointed the Auditor-General.

Clauses 32-39 of the Bill repeal Articles 153A, 153B, 153C, 153D, 153E, 153F, 153G and 153H of the Constitution. These Articles deal with the constitution of the Audit Services Commission, its powers, functions and related matters.

Clause 40 repeals sub article (1) of Article 154 and substitutes a new Sub-Article. Article 154(1) of the Constitution sets out the Duties and functions of the Auditor-General. It lists out the institutions that should be audited by him. They include the office of the secretary of the President, office of the secretary of the Prime Minister and companies registered or deemed to be registered under the Companies Act, No 7 of 2007 in which the Government or a Public corporation or local authority hold fifty per centum or more of the shares. However, the new provision introduced through Clause 40 of the Bill does not include the last mentioned three institutions among the list of institutions that has to be audited by the Auditor General.

Petitioners contended that due to the aforementioned changes that would be affected by Clauses 31 to 40 of the Bill, effective discharge of the duties of the Auditor-General is adversely affected and impeded. They contended that such situation creates a prejudicial effect on the Parliament's control over public finance. They further contended that it is essential that a qualified auditor to hold the office of Auditor General, to ensure effective discharge of the duties of the office of Auditor-General. It is their contention that the exclusion of the three institutions mentioned hereinbefore from the purview of the Auditor-General's powers impede the Parliament's control over public finance as recognised under Article 148 of the Constitution.

In this context it is pertinent to observe that the proposed committee stage amendment recognizes that the Auditor General should be a 'qualified auditor'.

Proposed committee stage amendment reads as follows:

31 – (1) delete lines 6 and 7 and substitute the following –

"(1) There shall be an Auditor General who shall be a qualified Auditor and who shall, subject to the provisions of Article 41A, be appointed by the President. The Auditor-General"

(2) delete line 14 and substitute the following –

"the President may, subject to the provisions of Article 41A, appoint a qualified auditor to act in"

We have considered submissions of all parties in relation to Clause 31 and are of the view that Clause 31 is not inconsistent with any of the Articles referred to in Article 83 of the Constitution. Therefore Clause 31 can be passed with the special majority in Parliament.

Clauses 32-39 repeal provisions relating to the Audit Service Commission. Article 153C vests the Audit Service Commission with the power of appointment, promotion, transfer, disciplinary control and dismissal of the members belonging to the Sri Lanka State Audit Service. Through the changes proposed in Clauses 32-39, the Audit Service Commission would cease to exist and the members of the Sri Lanka Audit Service would come under the purview of the Public Service Commission. We are of the view that such change does not infringe the Sovereignty of People.

Therefore, Clauses 32, 33, 34, 35, 36, 37, 38 and 39 of the Bill are not inconsistent with any of the Articles referred to in Article 83 of the Constitution and therefore can be passed with the special majority, in Parliament.

It is pertinent to note that the Supreme Court, in its determination in **Appropriation Bill**, [SC SD 3 & 4 of 2008. Decisions of the Supreme Court on Parliamentary Bills, (2007-2009) Vol. IX page 44 at 45], having re-iterated the manner in which the Sovereignty of the People and its exercise should be interpreted, recognised, that the legislative power of the people includes the *"full control over public finance"*. (emphasis added)

It was further held:

"One important check on the exercise of executive power is that finance required for such exercise remains within the full control of Parliament - the legislature. There are three vital components of such control in terms of the Constitution viz:

- (i) Control of the sources of finance ie. imposition of taxes, levies, rates and the like and the creation of any debt of the Republic;*

- (ii) *Control by way of allocation of public finance to the respective departments and agencies of Government and setting of limits of such expenditure.*
- (iii) *Control by way of continuous audit and check as to due diligence in performance in relation to (i) and (ii)*

Since such control is exercised by parliament in trust for people. we are of the opinion that the process should be transparent and in the public domain, so that people who remain Sovereign are informed as to the manner of control is exercised."

This Court in its determination in **Divineguma Bill** [SC SD 04/2012 to SC SD 14/2012, Decisions of the Supreme Court on Parliamentary Bills, (2010-2012), Vol. X page 87 at 105] held;

"Articles 148 and 150 of the Constitution deal with Public Finance which is part of the sovereignty of the People that is entrenched in Article 3 of the Constitution".

Therefore bringing in institutions that receives allocation of public funds, within the purview of the Auditor General is an integral aspect of People's Sovereignty. The change effected through Clause 40 by excluding Office of the Secretary of the President, Office of the Secretary of the Prime Minister and companies registered or deemed to be registered under the Companies Act, No 7 of 2007 in which the Government or a Public corporation or local authority hold fifty per centum or more of the shares, from the control and supervision of the Auditor-General causes an adverse impact of the People's legislative power of control of public finance.

In this context, it is pertinent to observe that the proposed Committee Stage amendment to Clause 40 remedies the above-mentioned adverse impact on legislative power of the People, partially.

It proposes to bring in the office of the Secretary to the President and the office of the Secretary to the Prime Minister within the purview of the Auditor General. However it does not bring in companies registered or deemed to be registered under the Companies Act, No 7 of 2007 in which the Government or a Public corporation or local authority hold fifty per centum or more of the shares.

In the course of the submissions of the Petitioners, it was contended that substantial amounts of public funds have been invested in such Companies and placing them out from the purview of the Auditor-General could cause serious repercussions on the efficient use of such funds. It is submitted that there are more than one hundred and twenty such Companies in existence and in some of such companies more than sixty percent of shares are held by a public corporation. Auditor General's report relating to some such Companies revealed grave financial losses recorded. Therefore, placing such companies under the purview of the Auditor General and followed by inquiries at Parliamentary Committees strengthens legislative role of controlling public funds.

The Attorney-General submitted that the mere absence of reference to any class of institutions in Article 154 *per se* does not preclude the Auditor-General exercising his powers and carrying out audit of such institutions. He contended that section 55 of the National Audit Act, No 19 of 2018 defines what an "auditee entity" is and any entity listed there in does fall within the purview of the Auditor-General. Item (m) in the definition of "auditee entity" refers to "any company registered or deemed to be registered under the Companies Act, No 7 of 2007 in which the Government or a Public Corporation or local authority holds *fifty per centum* or more of the shares of that company". Furthermore, the Presidential Secretariat and Office of the Secretary to the Prime Minister are also among the 'auditee entitees' as defined in section 55 of the National Audit Act.

We observe that section 2 of the National Audit Act sets out the applicable law pertaining to audits. Section 2 reads as follows:

"The provisions enshrined in Articles 153,of the Constitution, the provisions of this Act and any other written law, as may be applicable, shall apply to audits of auditee entities and matters connected therewith".

Therefore, when examining the duties, powers and functions of the Auditor-General, Constitutional provisions cannot be read in isolation but should be considered in conjunction with the National Audit Act and any other applicable written law.

When all these factors are taken into account along with the relevant Constitutional provisions and the provisions of the National Audit Act, we are of the view that Clause 40 of the Bill is not inconsistent with any of the Articles referred to in Article 83 of the Constitution and hence can be passed with the special majority in Parliament.

Other Clauses

We have considered other Clauses in the Bill that are not mentioned hereinbefore, and are of the view that none of them are inconsistent with any of the Articles referred to in Article 83.

For the reasons herein before stated we are of the view that the Bill titled "Twentieth Amendment to the Constitution" –

- a) Complies with the provisions of Article 82(1) of the Constitution;
 - b) Requires to be passed by a special majority specified in Article 82(5) of the Constitution;
 - c) Clauses 3, 5, 14 and 22, in their present form are inconsistent with Article 3 read with Article 4 of the Constitution and therefore require approval by the People at a Referendum by virtue of the provisions of Article 83. However, such inconsistency in Clauses 3 and 14 would cease by amending in accordance with the proposed Committee Stage amendments and consequently would not require approval by the People at a Referendum;
- and,
- d) such inconsistency in Clause 5 would cease, if Clause 5 is suitably amended as specified in this determination hereinbefore at the Committee Stage and consequently, would not require approval by the people at a Referendum.

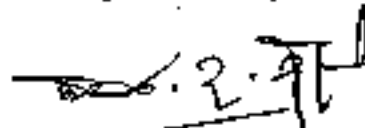
We wish to place on record our deep appreciation of the assistance given by the Attorney-General, learned Counsel who appeared for the Petitioners and Interventient Petitioners and Petitioners and Interventient Petitioners who appeared in person and made submissions in this matter.



Jayantha Jayasuriya, PC.
Chief Justice



Buvaneka Aluwihare, PC.
Judge of the Supreme Court



Sisira J. de Abrew
Judge of the Supreme Court



Vijith K. Malalgoda, PC,
Judge of the Supreme Court

Priyantha Jayawardena, PC, J.

I agree with the conclusions of His Lordship, the Chief Justice and my brother judges B.P. Aluwihare, PC, J., Sisira J. de Abrew, J., and Vijith K. Malalgoda, PC, J. that Clauses 3, 6, 7, 14, 15, 16, 17(4), 20(3), 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Bill can be passed by a special majority required under Article 82(5) of the Constitution without seeking the approval of the People at a Referendum by virtue of the provisions in Article 83 of the Constitution.

However, I regret that I am unable to agree with the reasoning and conclusion on Clause 5 of the Bill.

I would like to add a few additional matters in respect of the submissions made with regard to the "Structure of the Constitution". Further, my Determination in respect of Clause 5 of the Bill is stated herewith.

Structure of the Constitution

The petitioner submitted that the instant Bill in its entirety has no force in law as it "destroys" the basic structure of the Constitution and as such, not even the People at a Referendum can approve it. It was further submitted that only a Constituent Assembly with a mandate to formulate a new Constitution could engage in such a pursuit. Accordingly, it was submitted that the Bill should be struck down.

In this regard, it is useful to examine the constitutional history of Sri Lanka. Prior to gaining independence from the British, Ceylon was governed under the Donoughmore Constitution of 1931. Since gaining independence, Sri Lanka has had three Constitutions: the Soulbury Constitution of 1947, the 1972 Constitution and the 1978 Constitution.

The Soulbury Constitution of 1947 was based on the Westminster system of government with the Governor-General as the Head of the State.

The first autochthonous Constitution of 1972 was enacted and adopted by a Constituent Assembly of the People of Sri Lanka.

The Preamble of the 1972 Constitution stated:

"We the People of Sri Lanka being resolved in the exercise of our freedom and independence as a nation to give to ourselves a constitution which will declare Sri Lanka a free sovereign and independent republic pledged to realize the objectives of a Socialist Democracy including the Fundamental Rights and Freedoms of all citizens and which will become the fundamental law of Sri Lanka deriving its power and authority solely from the people do on this the tenth day of the waxing moon in the month of Vesak in the year two thousand five hundred and fifteen of the Buddhist era that is Monday the twenty-

second day of May one thousand nine hundred and seventy-two acting through the Constituent Assembly established by us hereby adopt, enact and give to ourselves this Constitution
 [Emphasis Added]

Accordingly, the said Constitution declared Sri Lanka as a Free, Sovereign and Independent Republic.

Under the said 1972 Constitution, the doctrine of Parliamentary Supremacy was introduced and executive power was vested with the President who was appointed by the Prime Minister. The President was the Head of the State, Head of the Executive and the Commander-in Chief of the Armed Forces.

Article 4 of the said Constitution stated “[t]he Sovereignty of the People is exercised through a National State Assembly of elected representatives of the People.” Article 5 of the said Constitution stated that the National State Assembly is the supreme instrument of State power of the Republic which exercised the legislative, executive and the judicial power of the people. Thus, the said Constitution was based on the doctrine of Parliamentary Supremacy.

Article 44 of the 1972 Constitution stated:

“The legislative power of the National State Assembly is supreme and includes the power—

- (a) to repeal or amend the Constitution in whole or in any part; and*
- (b) to enact a new Constitution to replace the Constitution.*

Provided that such power shall not include the power

- (i) to suspend the operation of the Constitution or any part thereof; and*
- (ii) to repeal the Constitution as a whole without enacting a new Constitution to replace it”.*

The procedure stipulated in the aforementioned Article was followed to adopt and enact the 1978 Constitution. The 1978 Constitution changed the Parliamentary system of the 1972 Constitution and introduced a hybrid system consisting of the features of the Presidential and Westminster

systems. Further, the Sovereignty conferred on the National State Assembly under the 1972 Constitution was transferred to the People of Sri Lanka by the 1978 Constitution.

The drafters of the 1978 Constitution in their wisdom had deliberated that political stability and strong leadership could only be ensured by a strong executive, freed from the whims and fancies of Parliament. Thus, the original Constitution of 1978 reposed considerable executive power with the President including the power to dissolve Parliament a year after Parliament was elected, and to appoint or remove the Prime Minister and the Cabinet of Ministers. Further, it afforded immunity to the President from civil and criminal proceedings for any act or omission done in his official or private capacity during the tenure of his office.

Article 75 of the 1978 Constitution states:

"Parliament shall have power to make laws, including laws having retrospective effect and repealing or amending any provisions of the Constitution, or adding any provisions 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,"* [Emphasis added]

In view of the abovementioned Article, it is within the power of the legislature to repeal or amend provisions of the Constitution or add any provisions to the Constitution.

The Clauses in the Twentieth Amendment Bill could be categorized into the following parts:

- (a) Clauses that repeal the amendments introduced by the Nineteenth Amendment to the Constitution.
- (b) Clauses that restore the provisions of the original 1978 Constitution, and
- (c) Clauses that introduce new Articles to the Constitution.

The preamble to the 1978 Constitution, which stipulates its origin, scope, purpose and underlying philosophy, reads as follows:

"The PEOPLE OF SRI LANKA having, by their Mandate freely expressed and granted on the Sixth day of the waxing moon in the month of Adhi Nikini in the year Two Thousand Five Hundred and Twenty one of the Buddhist Era (being Thursday the Twenty first day of the month of July in the year One Thousand Nine Hundred and Seventy seven), entrusted to and empowered their Representatives elected on that day to draft, adopt and operate a new Republican Constitution in order to achieve the goals of a DEMOCRATIC SOCIALIST REPUBLIC, and having solemnly resolved by the grant of such Mandate and the confidence reposed in their said Representatives who were elected by an overwhelming majority, to constitute SRI LANKA into a DEMOCRATIC SOCIALIST REPUBLIC whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY and 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 and of all the People of the World, who come to share with those generations the effort of working for the creation and preservation of a JUST AND FREE SOCIETY" (Emphasis Added)

Accordingly, in addition to immutable republican principles of representative democracy, principles such as freedom, equality, justice, fundamental rights and the independence of the judiciary have also been encompassed by the basic structure of the Constitution as the "intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka".

Thus, in view of the fact that the Bill seeks to restore certain Articles in the original 1978 Constitution by repealing most of the Amendments that were made by the Nineteenth Amendment, the said principles of representative democracy, freedom, equality, justice, fundamental rights and the independence of the judiciary that were encapsulated by the provisions of the original Constitution are restored.

The structure of the 1978 Constitution seeks to achieve the objectives stipulated in the Preamble to the Constitution within a unitary State, and is based on the principles of Sovereignty of the People, Separation of Powers, Checks and Balances, and the Rule of Law. A careful

consideration of the Bill shows that the said structure is not proposed to be changed or altered by the said Bill.

The petitioner submitted that the basic structure of the Constitution cannot be changed even with the approval of the People at a Referendum. It was further submitted that only a Constituent Assembly with a mandate to formulate a new Constitution could change the basic structure of the Constitution.

A similar argument was considered by Sharvavanda, C.J. '*In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill*' (1987) 2 SLR 312 at pages 329 - 330 (with P. Colin-Thorne, J., A. Athukorale, J. and Thambiah, J. agreeing) who observed:

"It was submitted that the Bill seeks to amend the basic structure of the Constitution. The basis of the submission was that the clauses 4 and 7 of the 13th Constitutional Amendment Bill seek to establish a Constitutional structure which is Federal or quasi-Federal and these provisions take away the unitarianism enshrined in Article 2. In our considered view, there is no foundation for the contention that the basic features of the Constitution have been altered or destroyed by the proposed amendments. The Constitution will survive without any loss of identity despite the amendment. The basic structure or framework of the Constitution will continue intact in its integrity. The unitary state will not be converted into a Federal or quasi-Federal State. We have already examined the question whether the amendment in anyway affects entrenched Article 2 which stipulates a unitary State and after an analysis of the relevant provisions of the amending Bill have come to the conclusion that the unitary nature of the State is in no way affected by the proposed amendments and that no new sovereign legislative body, executive or judiciary is established by the amendment. The contra submission made by the petitioners is based on the misconception that devolution is a divisive force rather than an integrative force.

*It was contended that the scope of amendment contemplated by Article 82 and 83 is limited and that there are certain basic principles or features of the Constitution which can in no event be altered even by compliance with Article 83. Reliance was placed for this proposition on the decisions of the Supreme Court of India in *Kesavananda v. State of Kerala*. AIR 1973, SC 1461 and *Minerva Mills Ltd., v. Union of India* AIR 1980, SC*

1789. Those decisions of the Supreme Court of India were based on Article 368 of the unamended Indian Constitution which reads as follows:

"An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament."

The said section 368 carried no definition of "amendment" nor did it indicate its scope. It was in this context that the Supreme Court in the Kesavananda case, reached the conclusion by a narrow majority of seven to six that the power of amendment under Article 368 is subject to implied limitation and Parliament cannot amend those provisions of the Constitution which affect the basic structure or framework of the Constitution. The argument of the majority was on the following line:

"The word amendment postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment the old Constitution cannot be destroyed, and done away with it is retained though in the amended form. The words amendment of the Constitution with all their wide sweep and amplitude cannot have the effect of destroying and abrogating the basic structure or framework of the Constitution" per Khanna, J.,

But both our Constitutions of 1972 and 1978 specifically provide for the amendment or repeal of any provision of the Constitution or for the repeal of the entire Constitution-Vide Article 51 of the 1972 Constitution and Article 82 of the 1978 Constitution. In fact, Article 82(7) of the 1978 Constitution states "in this chapter" Amendment "includes repeal, alteration and addition." In view of this exhaustive explanation that amendment embraces repeal, in our Constitution we are of the view that it would not be proper to be guided by concepts of 'Amendment' found in the Indian judgments which had not to consider statutory definition of the word 'Amendment.' Fundamental principles or basic features of the Constitution have to be found in some provision or provisions of the Constitution and if the Constitution contemplates the repeal of any provision or provisions of the entire Constitution, there is no basis for the contention that some provisions which reflects fundamental principles or incorporate basic features are immune from amendment.

Accordingly, we do not agree with the contention that some provisions of the Constitution are unamendable."

Further, in the Special Determination of the Bill titled the '*Tenth Amendment to the Constitution Bill*', S.C. No. 3/86 (*Special*), this court observed:

"Mr. Goonasekera submitted, firstly that on the basis of the rulings, of the Indian Supreme Court which discusses the power of amendment under the Indian Constitution we should hold that an amendment of this nature is impermissible because it would alter the fundamental structure of the Constitution, and secondly that at the least, this is an amendment that falls within the ambit of Article 83 of the Constitution read with Article 3 and would require a Referendum of the People in addition to the two-thirds majority of Parliament.

The first ground need not detain us because it is based wholly on the Indian case law and the Indian Constitution. The Indian Constitutional provisions are not comparable and it is not prudent to resort to outside authorities when our proper business is to ascertain what our own constitutional provisions intend. The second ground however is not without merit " [Emphasis Added]

Further, in the Special Determination of the Bill titled the '*Nineteenth Amendment to the Constitution Bill*', S.C. (S.D.) No. 32/2004, this court observed:

"[...] The people through elected representatives in Parliament and by themselves directly at a referendum have the power to amend the Constitution. To say otherwise would be to negate the sovereignty of the people and their legislative power as set out in Articles 3 and 4(u) of the Constitution.

It was contended that this Bill seeks to amend the basic structure of the Constitution and goes far beyond the legislative competence of Parliament [...]

[...] On the contrary Article 82 of our Constitution provides that 'Amendment' includes repeal, alteration and addition. [...] Basic features of the Constitution are to be found in some provisions of the Constitution and if the Constitution contemplates the repeal of any

provision of the Constitution, there is no basis for the contention that some provisions which incorporate basic features are immune from amendment".

In view of the above, the argument of the petitioners that the basic structure of the Constitution cannot be changed is not sustained.

Accordingly, I determine that the Bill can be passed under and in terms of the procedure stipulated in the Constitution.

Clause 5 of the Bill

Clause 5 of the Bill, *inter alia*, repeals Article 35 of the Constitution and restores the provision that prevailed prior to the Nineteenth Amendment to the Constitution on the immunity of the President from suit during the tenure of his office.

At the commencement of the hearing, the Attorney-General submitted that several amendments would be made to the Bill at the Committee Stage and the proposed amendments were tendered to court. The following transitional provision is one such amendment that would be made to the proposed Clause 57 of the Bill at the Committee Stage -

"(8) All applications instituted under Article 126 against the Attorney-General in respect of anything done or omitted to be done by the President in his official capacity and pending on the day immediately preceding the date of commencement of this Act shall be continued and disposed of accordingly."

The Counsel for the petitioners contended that Article 4(d) of the Constitution states that Fundamental Rights of the People which are declared and recognized shall be respected, secured and advanced by all the organs of Government. Further, it was contended that the proposed Clause 5 of the Bill confers immunity on the President, and thus, removes the ability of the People to hold the President accountable for any infringement of Fundamental Rights by invoking the jurisdiction of the Supreme Court in terms of Articles 17 and 126 of the Constitution.

Accordingly, it was submitted that the right to invoke the jurisdiction of the Supreme Court under Article 17 read with Article 126 is eroded by the introduction of the said Clause. Further, it was submitted that for the aforementioned reasons, the Bill is inconsistent with Article 3 read with Article 4 of the Constitution as it has a prejudicial impact on the sovereignty of the People. Thus, it needs the approval of the People at a Referendum.

The circumstances that constitute a prejudicial impact on the sovereignty of the People have been considered by this court in several cases.

In Re the Nineteenth Amendment of the Constitution [2002] 3 SLR 85 at page 97, it was observed:

"The meaning of the word "alienate", as a legal term, is to transfer anything from one who has it for the time being to another, or to relinquish or remove anything from where it already lies. Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution in one organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution. It necessarily follows that the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained.

This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another [...]"

[Emphasis Added]

Thus, the proposed amendment to Article 35 of the Constitution would be examined to consider whether it would have a prejudicial impact on the sovereignty of the People.

Immunity of the President from suit, which Clause 5 of the Bill seeks to restore, is a recognized concept in Constitutional Law. In Sri Lanka, the said immunity was afforded under the 1972 Constitution even to the President who was not appointed directly by the People.

It is evident that the framers of the 1978 Constitution had deliberately conferred immunity from suit to each branch of government as a constitutional safeguard to ensure the smooth functioning of the governance of the country without any hindrances. Accordingly, the legislature and the judiciary have been afforded immunity from judicial review. Similarly, the President, who is exercising the executive power of the People, including the defence of the country, was granted limited immunity from suit as it was of paramount importance for the national security of the State.

The underlying rationale for the requirement of immunity of the President from suit was discussed in the case of *Mallikarachchi v Attorney-General* [1985] 1 SLR 74 at page 78, where it was held:

"Such a provision as Article 35 (1) is not something unique to the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978. There was a similar provision in the Article 23 (1) of the Constitution of Sri Lanka of 1972. The corresponding provision in the Indian Constitution is Article 361. The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary court of law.

It is very necessary that when the Executive Head of the State is vested with paramount power and duties, he should be given immunity in the discharge of his functions."

[Emphasis Added]

Further, in the United States, the importance of presidential immunity was discussed in *Nixon v Fitzgerald*, 457 U.S. 731 (1982), on the basis of the following two arguments:

- (a) the President cannot make important and discretionary decisions if he is in constant fear of civil liability, and
- (b) diverting the President's time and attention with a private civil suit affects the functioning of the entire federal government, thereby abrogating the separation of powers mandated by the Constitution.

At pages 751-753, it was held:

"Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. [...] a President must concern himself with matters likely to "arouse the most intense feelings." [...] it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."

The proposed Article 35 in Clause 5 of the Bill states:

"35. (1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such

person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.

(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General."

A careful consideration of the said Clause shows that the immunity afforded to the President is not a blanket immunity. The limited immunity proposed to be bestowed on the person holding the office of the President is limited to the period that he holds office. Thus, after the expiry of his term of office, a President is liable to civil suit and/or criminal proceedings for the acts or omissions done during his tenure as President.

A similar view was held by Shiranee Thilakawardane, J. in *Sugathapala Mendis and Another v Chandrika Kumaratunga and Others* (2008) 2 SLR 339 where at page 380, citing the case of *Senerath v Kumaratunga* (2007) 1 SLR 59, it was held:

"I am in full agreement with the spirit of His Lordship's characterisation of the 1st respondent's responsibility. The expectation of the 1st respondent as a custodian of executive power places upon the 1st respondent a burden of the highest level to act in a way that evinces propriety of all her actions. Furthermore, although no attempt was made by the 1st respondent to argue such point, we take opportunity to emphatically note that the constitutional immunity preventing actions being instituted against an incumbent President cannot indefinitely shield those who serve as President from punishment for violations made while in office, and as such, should not be a motivating factor for Presidents - present and future, - to engage in corrupt practices or in abuse of their

legitimate powers. That the President, like all other members of the citizenry, is subject to the Rule of Law, and consequently subject to the jurisdiction of the courts, is made crystal clear by a plain reading of the Constitution, a point conclusively established in Karunathilaka v Dissanayake [1999] 1 Sri LR 157 by Justice Fernando”
[Emphasis Added]

The proposed Article 35(3) does not provide immunity to the President in respect of matters pertaining to the exercise of the consultative jurisdiction of the Supreme Court, the validity of a referendum, the validity of the election of the President, or in relation to the election of a Member of Parliament.

Further, the said Clause in the Bill makes provision to institute proceedings against the Attorney-General in relation to the exercise of power pertaining to subjects or functions assigned to the President as a Minister or any subjects that may remain in his charge. Such a provision is not found in Article 35 of the present Constitution. Thus, the proposed Article 35(3) in Clause 5 of the Bill makes provision for judicial review of the decisions of the President when he exercises power as a Minister.

A close examination of Clause 5 shows that it only seeks to restore the immunity that was given to the President prior to the Nineteenth Amendment to the Constitution. As such, it is pertinent to consider the jurisprudence in respect of the immunity of the President prior to the enactment of the Nineteenth Amendment.

This court has consistently held that the immunity from suit afforded to the President prior to the Nineteenth amendment is not a complete ouster of the jurisdiction of the Supreme Court. The extent of the immunity afforded to the President under Article 35 of the Constitution has been discussed in several cases.

In *Visuvalingam v. Lyanage (No.1)* [1983] 1 SLR 203 at page 240, it was held:

“[...]an intention to make acts of the President non-justiciable cannot be attributed to the makers of the Constitution. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The

President cannot be summoned to Court to justify his action. But that is a far cry from saying that the President's acts cannot be examined by a Court of Law."

In *Karunatilake v. Dayananda Dissanayake* [1991] 1 SLR 157 at page 177, Mark Fernando, J held:

"I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office, it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act.... It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or respondent who relies on an act done by the President, in order to justify his own conduct... It is the Respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President."

The Supreme Court in *Senasinghe v. Karunatileke* [2003] 1 SLR 172 at page 186 held:

"[...] this Court has reviewed the acts [...] of the President (Wickremabandu v Herath, ; Karunathilaka v Dissanayake) despite Article 35 which only provides a shield of personal immunity from proceedings in courts and tribunals, leaving the impugned acts themselves open to judicial review."

In *M.N.D. Perera v Balapatabendi Secretary to the President and others* [2005] 1 SLR 185 at page 193, it was held:

*"Article 35 of the Constitution provides only for the personal immunity of the President from proceedings in any Court of Law and that too only during his or her tenure of office. The President cannot be summoned to Court to justify his or her action. But nothing prevents a Court of Law from examining the President's acts. Justice Sharvananda (as he then was) said as follows in the case of *Visualingam v Liyanage* Full Bench consisting of 9 Judges held: "Actions of the executive are not above the law and can certainly be questioned in a Court of Law. Though the President is immune from proceedings in*

Court a party who invokes the acts of the President' in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden"

Further, in the Special Determination of the Bill titled *In Re the Eighteenth Amendment to the Constitution*, [2002] 3 SLR 71, in which it was proposed to confer total immunity on the Constitutional Council, this court determined at page 78 as follows:

"[...] The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. Even the immunity given to the President under Article 35, has been limited in relation to Court proceedings specified in Article 35(3). Moreover, the Supreme Court has entertained and decided the question in relation to Emergency Regulations made by the President [Joseph Perera v. Attorney General (1992) SLR page 199] and Presidential appointment [Silva v. Bandaranayake (1997) 1 SLR page 92]."

Thus, in the said Determination, the Supreme Court held that a provision affording *blanket immunity* to the Constitutional Council would require the approval of the People at a Referendum by virtue of provisions in Article 83 of the Constitution on the basis that awarding such blanket immunity would create a different class of people whose decisions are not subject to judicial review. Further, the said Determination expressly distinguished the immunity afforded to the President by Article 35 of the Constitution from such blanket immunity as the immunity under Article 35 is not a complete ouster of judicial power.

Further, in the case of *Joseph Perera Alias Brutten Perera v. The Attorney-General and Others* [1992] 1 SLR 195, the petitioners contended that they are not bound in law to comply with the provisions of Regulation 28 as it was *ultra vires* the regulation-making power of the President under section 5 of the Public Security Ordinance as amended by Law No.06 of 1978 read with Article 155(2) of the Constitution. Sharvananda, CJ held that Regulation 28 violates Article 12 of the Constitution, stating at page 214:

"The President's legislative power of making Emergency Regulations is not unlimited. It is not competent for the President to restrict via Emergency Regulations the exercise and

operation of the fundamental rights of the citizen beyond that warranted by Article 15(1-8) of the Constitution.”

Moreover, in *Silva v. Bandaranayake* [1997] 1 SLR 92, the Supreme Court considered the merits of an application filed under Article 126 of the Constitution challenging the appointment of a Supreme Court Judge by the President, notwithstanding the immunity afforded to the President under Article 35 of the Constitution.

Accordingly, the immunity from suit conferred on the President does not encompass blanket immunity for the acts or omissions of the President when discharging official functions. As discussed above, the courts have substantively examined the acts of the President challenged on other grounds, in addition to the grounds specified in Article 35(3) of the Constitution.

Thus, amending the Constitution by Clause 5 of the Bill does not change the aforementioned judicial review of the actions of the President. The Amendment will only restore the immunity to the President whilst in office and not for his actions.

In view of the above, the petitioners' contention, that the immunity from suit proposed to be granted to the President by Article 35 in Clause 5 of the Bill erodes the judicial power of the people, is without merit, as the acts or omissions of the President will be subjected to the jurisdiction of the Supreme Court and any other court, notwithstanding the enactment of Clause 5 of the Bill.

As discussed earlier, what needs to be examined is whether there is a restriction or erosion of the judicial power of the People enshrined in Article 3 read with Article 4 of the Constitution. The aforementioned jurisprudence on the interpretation of Article 35 of the Constitution prior to the Nineteenth Amendment shows that immunity has not been afforded to the acts or omissions of the President. More importantly, the power of judicial review over the acts of the President has not been ousted by the proposed amendment. It only defers the institution of litigation against the alleged illegal and/or unconstitutional acts of the President.

In any event, the Fundamental Rights jurisdiction even under Article 126 of the Constitution, as amended by the Nineteenth Amendment to the Constitution, only refers to executive and

administrative acts. Thus, the other two branches of government, i.e. Legislature and Judiciary, have complete immunity from the Fundamental Rights jurisdiction.

Further, the one-month time limit stipulated in Article 126(2) of the Constitution is deferred by section 13 of the Human Rights Commission Act, No. 21 of 1996 which provides that the period of time where an inquiry is pending before the Human Rights Commission shall not be taken into account in computing the one-month time limit prescribed in Article 126(2) of the Constitution. Thus, a mere impact on the Fundamental Rights jurisdiction of the Supreme Court alone does not impinge on the sovereignty of the People.

Hence, the immunity from suit sought to be granted to the President by Clause 5 of the Bill by restoring the provision of the Constitution prior to the Nineteenth Amendment does not cause an alienation of judicial power as the said Clause does not result in transferring, relinquishing or ousting the judicial power. Particularly, in view of the following proposed sub-Article of the Bill, which states:

"(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law".

Enacting legislation to adversely affect the pending cases in court violates Article 3 read with Article 4 of Constitution. However, the transitional provision suggested by the Attorney General allows the court to hear and determine pending applications filed under Article 126 of the Constitution. Accordingly, the transitional provision suggested by the Attorney General takes away the inconsistency in Clause 5 of the Bill.

It is pertinent to note that the Constitution has been structured to provide immunity to the President from suit during his tenure, subject to the views I have expressed before, in view of the nature of the duties that the President is required to perform as the Head of the State, Head of the Government and of the Executive, and the Commander-in-Chief of the Armed Forces.


Accordingly, I determine that Clause 5 of the Bill does not require the approval of the People at a Referendum.

The other provisions of the Bill were examined in the light of the submissions made by the Attorney-General, other Counsel for the parties and the petitioners who appeared in person, and I determine as follows:

(a) Clauses 3, 5, 6, 7, 14, 15, 16, 17(4), 20(3), 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Bill do not require the approval of the People at a Referendum, and

(b) Clause 22 is inconsistent with Article 3 read Article 4 of the Constitution. Therefore, the said Clause 22 of the Bill requires approval by the People at a Referendum by virtue of the provisions in Article 83 of the Constitution.

I wish to place on record my appreciation of the assistance given by the Attorney-General, the other Counsel and the citizens who made submissions in this matter.



Judge of the Supreme Court

DETERMINATION OF THE COURT

This Court by majority decision determines that the Bill titled "Twentieth Amendment to the Constitution" –

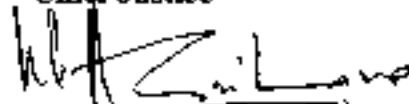
- a) Complies with the provisions of Article 82(1) of the Constitution;
- b) Requires to be passed by a special majority specified in Article 82(5) of the Constitution;
- c) Clauses 3, 5, 14 and 22, in their present form are inconsistent with Article 3 read with Article 4 of the Constitution and therefore require approval by the People at a Referendum by virtue of the provisions of Article 83. However, such inconsistency in Clauses 3 and 14 would cease by amending in accordance with the proposed Committee Stage amendments and consequently would not require approval by the People at a Referendum;

and,

- d) such inconsistency in Clause 5 would cease, if Clause 5 is suitably amended as specified in this determination hereinbefore at the Committee Stage and consequently, would not require approval by the people at a Referendum.

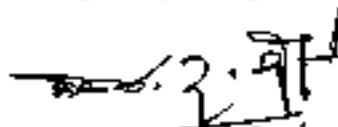


Jayantha Jayasuriya, PC.
Chief Justice



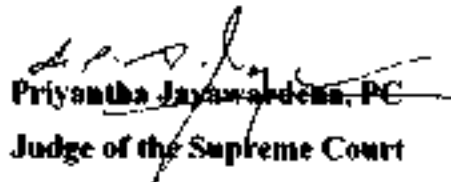
Buwaneka Aluwihare, PC.

Judge of the Supreme Court



Sisira J. de Abrew

Judge of the Supreme Court



Priyantha Jayawardena, PC

Judge of the Supreme Court



Vijith H. Malalgoda, PC

Judge of the Supreme Court

Annexure

Committee Stage Amendments to the 20th Amendment

L.D.- O 7/2020

TWENTIETH AMENDMENT TO THE CONSTITUTION BILL

Amendments to be moved at the Committee Stage of the Bill

Page 1, Clause 3 - (1) immediately after line 22, insert the following-

“(c) to ensure the creation of proper conditions for the conduct of free and fair elections, at the request of the Election Commission”;

- (2) delete line 23 and substitute the following-

“(d) to receive and recognize and to appoint”;

Page 2 - (3) delete line 1 and substitute the following-

“(e) to appoint as President’s Counsel,”;

- (4) delete line 10 and substitute the following-

“(f) to keep the Public Seal of the Republic,”;

- (5) delete line 15 and substitute the following-

“and other Judges of the Supreme Court, the President and other Judges of the Court of Appeal and”;

- (6) delete lines 22 and 23 and substitute the following-

“(g) to declare war and peace; and

(h) to do all such acts and things, not being”;

Page 3, Clause 5 - (1) delete line 5 and substitute the following-

"by him either in his official or private capacity:

Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity:

Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under paragraph (g) of Article 33.";

- (2) delete lines 16 and 17 and substitute the following-

"exercise of any power pertaining to any subject or function assigned to the President or remaining";

- (3) delete line 25 and substitute the following-

"relating to the election of a Member of Parliament:";

Page 5, Clause 6 - (1) immediately after line 23, insert the following-

"5. The Inspector-General of Police.";

Page 6 - (2) delete lines 10 and 11 and substitute the following-

"have failed to nominate the persons who shall be their nominees in the Council, the Speaker shall nominate";

Page 7 - (3) delete lines 15 and 16 and substitute the following-

"Opposition respectively, may during such tenure at the request of the Prime Minister or the Leader of the

Opposition, as the case may be, be removed by the President for the reasons assigned therefor or in the event of an".

Page 8

- (4) delete line 9 and substitute the following-

"person in relation thereto. The President may take";

- (5) delete lines 21 to 23 (both inclusive) and substitute the following-

"(11)(a) The Speaker shall be the Chairman of the Council.

(b) The procedure to be followed in obtaining the observations of the Council shall be as determined by the Speaker.

(12) The Council shall perform and discharge such other duties and functions as may be imposed or assigned to the Council by the Constitution, or by any other written law.";

Page 10, Clause 7

- (1) delete line 30 and substitute the following-

"(4) Any Minister of the Cabinet of Ministers";

Page 11

- (2) delete line 31 and substitute the following-

"47. (1) The total number of-

(a) Ministers of the Cabinet of Ministers shall not exceed thirty; and

(b) Ministers who are not members of the Cabinet of Ministers and Deputy Ministers shall not, in the aggregate, exceed forty.

(2) The Prime Minister, a Minister of the";

- (3) delete the marginal note and substitute the following-

“Tenure of office of the Prime Minister and Ministers and Deputy Ministers and the limitation of number of Ministers and Deputy Ministers.”;

Page 12

- (4) immediately after line 5, insert the following-

“(3) Notwithstanding anything contained in paragraph (1) of this Article, where the recognized political party or the independent group which obtains highest number of seats in Parliament forms a National Government, the number of Ministers in the Cabinet of Ministers, the number of Ministers who are not Cabinet of Ministers and the number of Deputy Ministers shall be determined by Parliament.

(4) For the purpose of paragraph (3), “National Government” means, a Government formed by the recognized political party or the independent group which obtains the highest number of seats in Parliament together with the other recognized political parties or the independent groups.”;

Page 14

- (5) delete line 11 and substitute the following-

“51. (1) (a) There shall be a Secretary to the Prime Minister who shall be appointed by the President.

(b) The Secretary to the Prime Minister shall have charge of the Office of the Prime Minister and shall perform and discharge the duties and functions of his office, subject to the directions of the Prime Minister.

(2) There shall be a Secretary to the Cabinet”;

- (6) delete the marginal note and substitute the following-

“Secretary to the
Prime Minister
and Secretary to
the Cabinet of
Ministers.”;

Page 16

- (7) delete line 11 and substitute the following-

“the affirmations set out in the Fourth Schedule and
Seventh Schedule.”;

Page 16, Clause 8

- (1) delete lines 20 and 21 and substitute the following-

“not less than five members and not more than nine
members appointed by the President, subject to the
provisions of Article 41A, of whom not less than three”;

Page 17

- (2) delete line 3 and substitute the following-

“period, subject to the provisions of Article 41A, appoint”;

Page 17, Clause 9

- delete lines 4 to 7 (both inclusive);

Page 17, Clause 10

- delete lines 8 to 11 (both inclusive);

Page 17, Clause 11

- delete lines 12 to 16 (both inclusive) and substitute the following-

“Amendment
of Article 61D
of the
Constitution

11. Article 61D of the Constitution is
hereby amended by the substitution, for
the words “the affirmation set out in the
Fourth Schedule to the Constitution.”, of
the words “the affirmations set out in the

Fourth and Seventh Schedules to the
Constitution.”;

Page 17, Clause 12 - delete line 23 and substitute the following-

“(b) subject to the provisions of Article 41A, the Attorney-
General and the Inspector-General of Police.”;

Page 18, Clause 13 - delete line 7 and substitute the following-

“Parliament who shall, subject to the provisions of Article
41A, be appointed by the”;

Page 18, Clause 14 - delete lines 25 to 30 (both inclusive) and substitute the
following-

“the President shall not dissolve Parliament until the
expiration of a period of not less than two years and
six months from the date appointed for its first
meeting, unless Parliament by resolution”;

Page 20, Clause 17 - (1) delete lines 27 to 30 (both inclusive) and substitute the
following-

“(1) by the repeal of items (iv), (iva), (v), (va) and (vb) of
that sup-paragraph and the substitution therefor of
the following items-

“(iv) a member of any Commission referred to
in Schedule I to Article 41A,

(v) a member of a Provincial Public Service
Commission,

(va) the Commissioner-General of Elections.”;

Page 21 - (2) delete lines 1 to 14 (both inclusive) and substitute the
following-

“(2) by the repeal of item (xiii) of that sub-paragraph.”;

Page 21, Clause 19 - (1) delete lines 25 and 26 and substitute the following-

“Commission”) consisting of five members appointed by the President subject to the provisions of Article 41A, from amongst”;

- (2) delete line 29 and substitute the following-

“administration or education. One of the members so appointed shall be a retired officer of the Department of Elections or Election Commission, who has held office as a Deputy Commissioner of Elections or above. The President”;

Page 22

- (3) delete line 7 and substitute the following-

“exceeding two months and may, subject to the provisions of Article 41A, appoint a”;

Page 23, Clause 21 - (1) delete lines 16 and 17 and substitute the following-

“amended as follows-

(1) by the repeal of paragraph (1) of that Article and the substitution therefor, of the following paragraph-“;

- (2) immediately after line 21, insert the following-

“(2) by the repeal of sub-paragraph (c) of paragraph (7) of that Article and the substitution therefor, of the following sub-paragraph-

“(c) on his attaining the age of sixty years;”;

Page 23, Clause 22 - delete lines 22 and 23;

Page 23, Clause 23 - delete line 30 and substitute the following-

“by the President subject to the provisions of Article 41A,
by Warrant under his hand.”;

Page 24, Clause 24 - (1) delete line 8 and substitute the following-

“the President shall, subject to the provisions of Article
41A, appoint another Judge of the”;

(2) delete line 18 and substitute the following-

“cause, the President may, subject to the provisions of
Article 41A, appoint another Judge”;

Page 24, Clause 25 - delete lines 22 to 30 (both inclusive) and substitute the following-

“Amendment of Article 111D of the Constitution is hereby amended in paragraph (1) of that Article, by the substitution for the words “appointed by the President, subject to the approval of the Constitutional Council.”, of the words and figures “appointed by the President subject to the provisions of Article 41A.”;

Page 25, Clause 26 - delete line 5 and substitute the following-

“of the Commission leave from his duties and may,
subject to the provisions of Article 41A,”;

Page 25, Clause 27 - delete line 17 and substitute the following-

“interest of national security or for the purpose of any

matter relating to disaster management, and bears an endorsement to”;

Page 27, Clause 31 - (1) delete lines 6 and 7 and substitute the following-

“(1) There shall be an Auditor-General who shall be a qualified Auditor and who shall, subject to the provisions of Article 41A, be appointed by the President. The Auditor-General”;

(2) delete line 14 and substitute the following-

“the President may, subject to the provisions of Article 41A, appoint a qualified auditor to act in”;

Page 28, Clause 40 - (1) delete lines 10 to 27 (both inclusive) and substitute the following -

“in paragraph (1) of that Article, by the substitution for all the words and figures from “the Offices of the Cabinet of Ministers,” to the end of that paragraph, of the words and figures “the Office of the Secretary to the Cabinet of Ministers, the Offices of the Ministers appointed under Article 44 or 45, the Judicial Service Commission, the Parliamentary Council, the Commissions referred to in Schedule I to Article 41A, the Provincial Public Service Commissions, the Parliamentary Commissioner for Administration, the Secretary-General of Parliament, local authorities, public corporations, business and other undertakings vested in the Government under any written law and companies registered or deemed to be registered under the Companies Act, No. 7 of 2007 in which the Government or a public corporation or local authority holds fifty *per centum* or more of the shares of that company, including the accounts thereof.”;

Page 29 - (2) delete lines 1 to 17 (both inclusive);

Page 29, Clause 41 - delete line 23 and substitute the following-

“President, subject to the provisions of Article 41A, to represent the three major”;

Page 30, Clause 42 - delete lines 4 and 5 and substitute the following: -

“not less than five members and not more than seven members appointed by the President subject to the provisions of Article 41A. The”;

Page 30, Clause 43 - delete lines 27 and 28 and substitute the following: -

“Amendment of 43. Article 155B of the Constitution
Article 155B of is hereby amended as follows-
the Constitution

- (1) in paragraph (1) of that Article, by the substitution for the words “shall be four members”, of the words “shall be five members”;
- (2) by the repeal of paragraph (5) of that Article.”;

Page 31, Clause 45 - delete lines 2 to 8 (both inclusive) and substitute the following-

“in paragraph (1) of that Article, by the substitution for all the words from “directly or indirectly” to the words “shall be guilty”, of the words “directly or indirectly by himself or by or with any other person, in any manner whatsoever influences or attempts to influence or interferes with any decision of the Commission or a Committee or to”;

Page 32, Clause 53 - (1) delete line 20 and substitute the following-

“for Administration shall, subject to the provisions of Article 41A, be appointed”;

- (2) delete line 1 and substitute the following-

“President shall, subject to the provisions of Article 41A, appoint a person to act”;

- Page 33, Clause 56 - delete lines 14 to 31 (both inclusive) and substitute the following-

- “(b) the Prime Minister;
- (c) the Speaker;
- (d) a Minister appointed under Articles 44 or 45;
- (e) a Deputy Minister appointed under Article 46;**
- (f) a Member of Parliament;
- (g) a member of the Parliamentary Council;
- (h) a member of the Judicial Service Commission;
- (i) a member of any Commission referred to in Article 41A;
- (j) the Commissioner-General of Elections;
- (k) the officers appointed to the Election Commission, by the Election Commission;
- (l) the Secretary-General of Parliament;
- (m) a member of the staff of the Secretary-General of Parliament;
- (n) a member of the University Grants Commission;
- (o) a member of the Official Languages Commission;

(p) the Auditor-General;

(q) the Parliamentary Commissioner for Administration (Ombudsman).””;

Page 35, Clause 57 - (1) delete lines 1 to 8 (both inclusive);

Page 36 - (2) delete lines 4 to 15 (both inclusive);

New clauses:

Page 21 - immediately after line 17, insert the following-

“Amendment of Article 95 of the Constitution

19. Article 95 of the Constitution is hereby amended in paragraph (2) of that Article, by the substitution for the words and figure “paragraph (1) of this Article, appoint”, of the words and figures “paragraph (1) of this Article and subject to the provisions of Article 41A, appoint”;

Page 25 - immediately after line 11, insert the following-

“Amendment of Article 119 of the Constitution

27. Article 119 of the Constitution is hereby amended in paragraph (1) of that Article, by the substitution for the words “not more than ten other Judges”, of the words “not more than sixteen other Judges”.”;

Page 26 - (1) immediately after line 30, insert the following-

“Amendment of Article 128 of the Constitution

30. Article 128 of the Constitution is hereby amended, by the addition, immediately after paragraph (4) of that Article, of the following new paragraph-

“(5) Any application for leave to appeal or special leave

... appeal made to the Supreme Court under this Article may be granted or refused as the case may be, by not less than two Judges of the Supreme Court.”;

- (2) immediately after line 33, insert the following-

“Amendment of Article 137 of the Constitution 31. Article 137 of the Constitution is hereby amended by the substitution, for the words “not more than eleven other Judges” of the words “not more than nineteen other Judges”.”;

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- immediately after line 5, insert the following-

“Avoidance of doubt 58. For the avoidance of doubt, it is hereby declared that where there is a requirement in any written law to obtain the recommendation or approval of the Constitutional Council, the reference to the Constitutional Council shall be read and construed as a reference to the Parliamentary Council.”.

