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 Weraduwage.
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 Gunasena, 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 Gunesekara, 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 Fairoze, 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	1. Dr. Ajantha Perera 16, Temple Road Rattanapitiy Boralesgamuwa 2. H.D. Oshala Lakmal Anil Herath 22, Wata Mawatha Piliyandala. 3. Dr. Chandima Wijegunawardana 94/6, Woodland Mawatha Kalubowila, Dehiwela 4. Jeran Jegatheesan 155/8, 4th Lane Dolalanda Gardens Thalawathugoda.
	Counsel	Chrishmal Warnasuriya with Priyantha Fernando, Wardani Karunaratne and Arjun Arsecularatne instructed by Mayomi Ranawaka.
S.C.S.D. 14/2020	Petitioner	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	1. Jayantha Dehiattage Attorney-at-Law 2. Migara Doss Attorney-at-Law Both Executive Committee members Of Young Lawyers Association of Sri Lanka, No. 121/1/1. First Floor Hulftsdorp Street Colombo 12.
	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	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	Rushdhie 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 Hadjiar Road Nintavur 18. 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 Weraduwage.
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 Ratnajeevan Herbert Hool No.88, Chemmany 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.Muneer 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
The Bar Association of Sri Lanka
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 Chandrasekeram
No. 62/3, Mayura Place, Colombo 06.

Counsel — Shantha Jayawardane with Kaneel Maddumage, Chamara Nanayakkarawasam, Niranjan 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 Kaneel Maddumage, Chamara Nanayakkarawasam, Niranjan Arulpragasam, Hiranya Damunupola instructed by Manjula Balasooriya.
S.C.S.D. 32/2020	Petitioner	1. Ruwan Laknath Jayakody Arachchige Jayakody No. 19/3Sulaiman Terrace Colombo 05. 2. Kavindya Christopher Thomas No.80, Station Road, Udahamulla Nugegoda. 3. Silvester Mariya Chammika 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 Mohomed instructed by Ms. Ashoka Niwunhella.
S.C.S.D. 34/2020	Petitioner	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	1. Massala Koralalage Jayatissa No. 516, Kawudulla Hingurakgoda. 2. Wijethunga Appuhamyge Herman Kumara No. 10, Malwatta Road, Negombo. 3. Paramananda Kalandarige Chamila Thushari No. 35,/36, Gallawatta, Ekala, Ja-Ela. 4. Juwairiya Mohideen Fareethabath Colombo Road, Palavi, Puttalam. 5. Rajapakse Mudiyanselage Chinthaka Pradeep Rajapakse No. 25/A/11, Rukmalgama, Pannipitiya

6. Fr. Marimuthu Sathiveloo
No. 102/1, Wasala Road, Kotahena,
Colombo 13.

7. Rohan Michael Fernando
No. 24/3, Hotel Road, Mount Lavinia.

Counsel — Shantha 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 Mudiyanselage
Prabodha Chinthaka
No Ranjani
Damanwara, Badulla.

5. Chula Ranjeewa Adhikari
No. 283/1/1, Weda Mawatha
Gorakagas Junction
Wewita, Bandaragama.

6. Teril Manoj Uduwana
No. 211 Uduwana, Homagama.

7. Rathnayake Mudiyanselage Upali
Amarawansha 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. 211 Maithree Mawatha
Vidagama, Bandaragama.

11. Waduge Shammi Chinthaka Fernando
No. 294/A, Katupathgada 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 Kankanamge Upali Ranjan
No. 103V, Sunflower Garden,
Kahathuduwa, Polgasowita.

18. Sardha Kumara Manjula Pathiraja

No. 27/7D, Koholwila Road
Gonawala(WP) Kelaniya.

19. Kalinga Nalaka Priyawansha
No. 117F, Indigasthuduwa,
Meegama, Darga Town.

20. Warnakulasooriya Mahamuge
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 SDSG, Shaheeda Barrie SSC, Dr. Avanti Perera SSC, Suren Gnanaraj 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	Omare 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	Sanjeewa Jayawardena, PC with Ruwantha Cooray, Charitha Rupasinghe, Lakmini Warusawithana, Rukshan Senadheera, Dr. Milhan Mohomed, Ridmi Benaragama, Eranga Thilakaratne, 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	Sanjeewa Jayawardena, PC with Charitha Rupasinghe, Lakmini Warusawithana, Rukshan Senadheera, Dr. Milhan Mohomed,

Ridmi Benaragama, Eranga Thilakaratne,
Gimhani Arthanayake.

Petitioner	Dadallage Titus Padmasiri (S.C.S.D. 28/2020)
Counsel	K.G. Nissanka .
Petitioners	Mahaoya 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 Intervenient Petitioners.

Petitioners in two of theses 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 Intervenient 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.

Intervenient Petitioners (save for one Intervenient 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 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(b) 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 85 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 deposed 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 inconsistent 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 deposed 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 Intervenient 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 immunity 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 Intervenient 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 Liyanage** (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 Intervenient 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 <u>against some other person who does not enjoy immunity from suit</u>; 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 Intervenient 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 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 Bandaranayake** (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 untrammeled nor unrestrained and ought to be exercised with limits.*
>
> *rticle 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, <u>who, in the President's opinion, is most likely to command the confidence of Parliament</u>".* (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 Intervenient 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)

Intervenient 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, denuded 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 Dayananda 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 Bruten 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 Intervenient Petitioners and Petitioners and Intervenient Petitioners who appeared in person and made submissions in this matter.

Jayantha Jayasuriya, PC.
Chief Justice

Buwaneka 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 Sharvananda, CJ. '***In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill'*** **(1987) 2 SLR 312** at pages 329 - 330 (with P. Colin-Thome, 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 busines 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(a) 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 <u>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</u>. 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. Liyanage*** **(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. Karunatilleke*** **[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 Bruten 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 ommissions 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. Legilature 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 judical 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 K. Malalgoda , PC,
Judge of the Supreme Court