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

"TWENTY FIRST AMENDMENT TO THE CONSTITUTION"

S.C.S.D.No. 31/2022	Petitioner	A.D.P.A. Gooneratne, No. 261/10, Quarry Road, Dehiwala.
	Counsel	M. Gunawansa, PC with Isuru Siriwardene, Manishi Angalugaha and Thanuja Karunaratne
S.C.S.D.No. 32/2022	Petitioner	Lt. Col. Anil Sumedha Amarasekara (Rtd), Puselahena Estate, Kindelpitiya, Millewa.
	Counsel	Manohara de Silva, PC with Ms. Kaveesha Gamage.
S.C.S.D.No. 34/2022	Petitioner	Hertha Dissanayakage Jayantha Kulathunga, No. 203/10, Layards Broadway, Colombo 14.
	Counsel	Palitha Kumarasinghe, PC with Saman Galapaththi.
S.C.S.D.No. 36/2022	Petitioner	Ballanthudawa Achchige Nuwan Chamara Indunil, 415/34, Off High Level Road, Gangodawila.
	Counsel	Canishka Witharana
S.C.S.D.No. 37/2022	Petitioner	Gunadasa Suriyaarachchi Amarasekera, 31/14/C 2nd Lane, Koswatte,
	Counsel	Canishka Witharana
		Vs.
		1. Hon. Attorney General Attorney General's Dept. Colombo 12.

2. R.M. Ranjith Madduma Bandara
31/3, Kandawatte Terrace, Nugegoda.

Respondents

Counsel for the State: Ms. Indika Demuni De Silva, PC, SG with Yuresha de Silva, DSG, Dr. Avanthi Perera, DSG, and I. Randeny, SC.

Counsel for the 2nd Respondent: Suren Fernando with S.A. Beling, Khyati Wickramanayake and Sanjit Dias.

Before: Jayantha Jayasuriya, PC, CJ
Janak De Silva, J.
Arjuna Obeyesekere, J.

The Court assembled for hearings at 10.00 a.m. on 26th May 2022, 27th May 2022, 30th May 2022 and 31st May 2022.

A Bill in its long title referred to as "A Bill to amend the Constitution of the Democratic Socialist Republic of Sri Lanka", and in its short title referred to as the "Twenty First Amendment to the Constitution" [the Bill] was published as a Supplement in Part II of the Government Gazette of 6th May 2022. It was presented in Parliament by Hon. R.M. Ranjith Madduma Bandara, Member of Parliament and was placed on the Order Paper of Parliament of 17th May 2022.

Five Petitioners have invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution by filing the above numbered petitions in the Registry of the Supreme Court on 23rd May 2022 and 24th May 2022. Each of the Petitioners have prayed *inter alia* that this Court declare that the Bill in its entirety is in violation of Articles 2, 3, 4, 12(1), 12(2) and 83 of the Constitution and a determination that in addition to being passed with not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour [the special majority], the Bill must be approved by the People at a Referendum. Upon receipt of the said petitions, the Registrar of this Court issued notice on the Attorney General as required by Article 134(1) of the Constitution.

Provisions relating to the amendment of the Constitution

Chapter XII of the Constitution is titled 'Amendment of the Constitution' and consists of Articles 82 – 84. Article 82(1) of the Constitution provides that, "*No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution*." The Bill is therefore complaint with Article 82(1).

While Article 82(5) stipulates that, "*A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon in accordance with the provisions of Article 80 or 79*, Article 83 of the Constitution goes onto provide 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*
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> *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.*"

Thus, while any amendment [which includes repeal, alteration and addition – vide Article 82(7)], or repeal and replacement of the provisions of the Constitution requires to be passed by the special majority of Parliament, any amendment, repeal and replacement of any provisions set out in Article 83 of the Constitution or which is inconsistent with any of the provisions set out in Article 83 of the Constitution require, in addition, the approval by the People at a Referendum.

The Jurisdiction of the Supreme Court

Article 120 of the Constitution stipulates that, "*The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution*:" The proviso to the said Article contains four paragraphs, of which paragraph (a) is relevant to these petitions and reads as follows:

> "*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*;"

The jurisdiction of the Supreme Court when considering a Bill which seeks to amend the Constitution is limited to determining whether such Bill requires approval by the People at a Referendum. Hence, the question before Court is whether the Bill or any part thereof seeks to amend, repeal, replace or is inconsistent with the provisions in Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2), 62(2) or 83 of the Constitution [the entrenched provisions].

The learned Counsel for the proponent of the Bill, Mr. Suren Fernando did sound a word of caution when he submitted that in this exercise, Court must not read-in additional Articles into Article 83 and thereby judicially amend Article 83. This submission was with reference to Article 4, which was the main focus of the arguments of the learned Counsel for the Petitioners.

If this Court answers the above question in the affirmative, the Bill as a whole, or the relevant provisions thereof, as the case may be, will require to be passed by the special majority and needs to be approved by the People at a Referendum by virtue of the provisions of Article 83 if it is to become law.

The power of the Legislature to amend, repeal and replace provisions of the Constitution

Mr. Mayura Gunawansa, PC, submitted that as the provisions of the Bill violate not only the entrenched provisions, but also the Basic Structure of the Constitution, the Bill cannot become law even if the procedure laid down in Article 83 is followed.

This argument has been considered and rejected by this Court on several occasions – vide **Tenth Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1984-1986) Vol. II page 47 at 48], the majority decision in the **Thirteenth Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1987) Vol. III page 21 at 36-37], the **Nineteenth Amendment to the Constitution Bill** (2004) [Decisions of the Supreme Court on Parliamentary Bills (2004-2006) Vol. VIII page 58 at 60] and the **Twentieth Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (2019-2020) Vol. XV page 87 at 100-101].

In the **Thirteenth Amendment to the Constitution Bill** [Supra. at pages 36-37], this Court held as follows:

> *"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, A.I.R. (1973) AND Minerva Mills Ltd., v. Union of India (1980) A.I.R., S.C. 1789. Those decisions of the Supreme Court of India were based on Article 368 of the unamended Indian Constitution which reads as follows:*

"An amendment of this Constitution may be initiated only by the introduction of a Bill for the 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. […]

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."

Article 75 of the Constitution reads as follows:

"*Parliament shall have power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution*:

Provided that Parliament shall not make any law –

(a) suspending the operation of the Constitution or any part thereof, or

(b) repealing the Constitution as a whole unless such law also enacts a new Constitution to replace it."

In the **Nineteenth Amendment to the Constitution Bill** (2002) [Decisions of the Supreme Court on Parliamentary Bills, (1991-2003) Vol. VII page 313 at 328] Court held that clause 6 of the said Bill which sought to make inapplicable the provisions of Article 99(13) to any Member of Parliament who speaks or votes according to his own belief or conscience, "*has the effect of suspending the operation of a part of the Constitution and cannot be validly enacted by Parliament in view of the specific bar contained in Article 75 of the Constitution"*.

We are therefore of the view that Parliament has the legislative power to repeal as well as amend any provision of the Constitution having followed the procedure laid down in Chapter XII, so long as the provisions of paragraphs (a) and (b) of the proviso to Article 75 are not contravened.

There is one other matter that should be referred to at the outset. Clause 43 of the Bill seeks to delete Articles 154F(2) and (3) while Clause 44 seeks to substitute the reference to Article 41A in Article 154R(1)(c) with Article 41B.

These amendments therefore attract the provisions of Article 154G(2) of the Constitution, which reads as follows:

"No Bill for the amendment or repeal of the provisions of this Chapter or the Ninth Schedule shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference, and –

(a) where every such Council agrees to the amendment or repeal, such Bill is passed by a majority of the Members of Parliament present and voting; or

(b) where one or more Councils do not agree to the amendment or repeal such Bill is passed by the special majority required by Article 82."

It is admitted that there has not been compliance with the above requirement for the reason that duly constituted Provincial Councils do not exist at this point in time. In the **Colombo Port City Economic Commission Bill** [S.C.(S.D.) Nos. 04-23/2021, page 23], this Court, having considered the applicability of Article 154G (2) determined as follows:

"It is the view of the Court that the requirement to refer a Bill to every Provincial Council is a procedural step in the legislative process. However, in interpreting this provision (in a situation where a Bill has not been referred to a Provincial Council) it is necessary to consider the application of the maxim 'lex non cogit ad impossibilia' – law does not compel a man to do that which he cannot possibly perform.

Court has previously held in Ananda Dharmadasa and Others v. Ariyaratne Hewage and Others [(2008) 2 SLR 19], that the principle 'lex non cogit ad impossibilia' is applicable in interpreting procedural requirements in the Constitution.

The existence of a Provincial Council constituted in accordance with the law is a pre-requisite to decide whether there is non-compliance with this procedural step in a given situation. It is pertinent to note that at present, none of the Provincial Councils have been constituted in accordance with the law. Therefore, referring a Bill to Provincial Councils at this point of time, for the expression of its views is an act which cannot possibly be performed. Thus, non-compliance with this procedural step which cannot be performed, in the present circumstances, should not adversely impact on the legislative power of Parliament, which is a part of inalienable sovereignty of the People."

In the said circumstances, the necessity to refer the Bill to the Provincial Councils as mandated by Article 154G(2) does not arise.

The amendments proposed by the Bill

The Bill contains fifty-four Clauses, including Clause 1 (short title), Clause 53 (Sinhala text to prevail in the case of inconsistency) and Clause 54 which sets out the transitional provisions. Wherever the proposal is for the introduction of a complete Chapter, all proposed Articles of such Chapter have been listed under one Clause.

Mr. Suren Fernando submitted on behalf of the proponent of the Bill that the primary objective of the Bill is to abolish the 'Executive Presidential system' that is currently in place and replace it with a parliamentary democracy. He submitted further that although described by that name, the form of government under the 1978 Constitution is not a Presidential System, but a Mixed or Semi-Presidential System, where the People elect the President (Executive) and the Parliament (Legislature) and the direction and control of the government is vested with the Cabinet of Ministers.

While submitting that a majority of the clauses of the Bill have been inserted with a view to attaining the said objective and that the provisions of the Bill need to be examined in the light of the parliamentary system that is sought to be established by the Bill, Mr. Fernando submitted that the amendments proposed by the Bill can be broadly categorized as follows:

1) Clauses that relate to the abolition of the Executive Presidential system – Clauses 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 19, 23, 24, 26, 27, 28 and 36.

2) Clauses that relate to the re-introduction of the Constitutional Council and the Independent Commissions– Clauses 14, 16, 17, 18, 29, 31, 32, 33, 34, 35, 37, 38, 40, 41, 44, 45, 46, 47, 48, 49, 50 and 51.

3) Clause 15 that relates to the Cabinet of Ministers.

4) Clauses that do not fall under any of the above – Clauses 20, 21, 22, 25, 30, 39, 42, 43 and 52.

It was common ground among all learned Counsel that the principal purpose of the Bill is to abolish the Executive Presidential system and restore the Westminster system of Government where there shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic and where the Prime Minister shall be the Head of the Cabinet of Ministers, and relegate the present Executive Presidency to that of a largely ceremonial role, similar to what existed under the 1972 Constitution until the Second Amendment to the said Constitution was introduced in October 1977.

Mr. Fernando quite correctly submitted that the function of this Court is only to pronounce on the constitutional question as to whether the approval of the People at a Referendum is mandatory for the enactment of the Bill, and that this Court is not being called upon to pronounce on the political question as to whether consultation with the People may be desirable prior to enacting same.

Evolution of the Westminster System of Government to an Executive Presidency

The main thrust of the submissions of the Petitioners is that the Bill erodes the executive power of the elected President and as such violates Articles 3 and 4 of the Constitution and hence may be enacted only upon approval by the People at a Referendum. The response of Mr. Fernando was that the agency or the instrument for the exercise of the executive power of the People can be changed by amending Article 4 without being approved by the People at a Referendum provided such amendment has no prejudicial impact on the Sovereignty of the People.

In addressing these contrasting but engaging contentions, it is apposite to begin by examining the introduction of the executive presidential system of government into our constitutional framework and the core principles underlying such system. An examination of the clauses of the Bill that allegedly encroach upon them will be considered thereafter.

The 1972 Constitution was based on a Parliamentary system of Government. In terms of Section 5 of the 1972 Constitution, the National State Assembly was the supreme instrument of State power of the Republic and was to exercise the executive power of the People, including the defence of Sri Lanka, through the President and the Cabinet of

Ministers. The Head of State was the President while the Prime Minister was the Head of both the Government and the Cabinet of Ministers.

The change from a Parliamentary system of Government to a hybrid system of Government consisting of an Executive President elected by the People and an elected Parliament was made by the Second Amendment to the 1972 Constitution.

Mr. Fernando submitted that the semi-presidential system of government represented a radical constitutional departure but was established without a Referendum being conducted.

Nevertheless, we note that unlike the 1978 Constitution, the 1972 Constitution did not provide for a Referendum and hence there was no question of seeking approval through a Referendum for the Second Amendment to the 1972 Constitution becoming law.

However, the United National Party manifesto placed before the people at the General Elections held in July, 1977 sought a specific mandate to create an Executive President elected by the people.

The relevant portion read as follows:

> *"We seek your mandate to draft, adopt and operate a new Republican Constitution in order to achieve the goals of a democratic socialist society. We shall include in the Constitution the Basic Principles accepted by the 1975 Party Sessions with reference to religion and language and among them being the guaranteeing to the people their fundamental rights, privileges and freedoms, re-establishing the independence of the press and the judiciary and freeing it from political control and interference. We will ensure in the Constitution that every citizen, whether he belongs to a majority or minority, racial, religious or caste group, enjoys equal and basic human rights and opportunities. The decisions of an All-Party Conference, which will be summoned to consider the problem of non-Sinhala speaking people will be included in the Constitution.*

Executive power will be vested in a President elected from time to time by the people. *This will ensure stability of the executive for a period of years between elections. The Constitution will also preserve the Parliamentary system we are used to, for the Prime Minister will be chosen by the President from the Party that commands the majority in Parliament and other Ministers of the Cabinet will also be elected Members of Parliament."* [Emphasis added]

(Source: *Vision & Reality The 1978 Constitution of Sri Lanka*, Priyanee Wijesekera and Naufel Abdul-Rahman, Stamford Lake Publication, 2014, page 1)

Although People had given the mandate to introduce the hybrid system of Government by voting the United National Party to power at the General Election held in 1977, if the Constitution adopted thereafter specifically requires the People to approve a constitutional amendment to change such hybrid system at a Referendum if such amendments are to become law, mere mandate obtained through the manifesto prior to the adoption of such Constitution cannot override the requirement of the approval at a Referendum stipulated by such Constitution itself.

The Second Amendment to the 1972 Constitution was referred to the Constitutional Court on 14th September 1977 in terms of Section 55(2) of the 1972 Constitution with an endorsement under Section 55(1) by the Cabinet of Ministers that in its view it was urgent in the national interest. Since the Bill was for the amendment of the Constitution, the Constitutional Court held in the **Second Amendment to the Constitution Bill** [Decisions of the Constitutional Court of Sri Lanka, Vol. 5 page 8] that it cannot be certified by the Hon. Speaker under Section 49 of the Constitution without it being passed by a two-thirds at least of the whole number of members of the National State Assembly (including those not present) voting in its favour.

It was passed with the required votes and was certified on 20th October 1977 but came into force on 04th February 1978. The Second Amendment to the 1972 Constitution brought about a fundamental change by mandating that the "*executive power of the People, including the defence of Sri Lanka, shall be exercised by the President*". The resultant position was that the President became the Head of the State, the Head of the

Executive, Head of the Government and Commander-in-Chief of the Armed Forces and, with the National State Assembly, became the "supreme instruments of State power of the Republic".

The Report of the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution leading to the enactment of the 1978 Constitution provided at Appendix II to the Report, a Draft Constitution containing a statement of the principles which should govern the revision of the Constitution. The Report stated that the Draft Constitution incorporates the principles of the Executive Presidential system created by the Second Amendment and makes necessary ancillary and consequential provisions.

The 1978 Constitution was certified into law on 31st August 1978. Article 171 repealed the 1972 Constitution.

Upon an examination of Article 4(b) of the 1978 Constitution it is observed that the words "*of the Republic elected by the People*" has been added to the original formulation in the 1972 Constitution. This brought about the nexus between the mandate received by the United National Party at the General Elections in 1977, creation of an elected executive President by the Second Amendment to the 1972 Constitution and the retention of an elected executive President in the 1978 Constitution.

In the **Seventeenth Amendment to the Constitution** [Decisions of the Supreme Court on Parliamentary Bills (1991 – 2003) Vol. VII, page 213 at 218] it was held that "*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*".

The above statement made by the Court in its determination on the **Seventeenth Amendment to the Constitution** (Supra.) was considered and analysed by this Court in its determination on the **Twentieth Amendment to the Constitution Bill** (2020) (Supra). In the said determination (Supra. at page 105) it was held as follows:

"*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."

Accordingly, we are not inclined to accept the submission that a change to the executive presidential system of government does not require a referendum as it was created without a referendum.

The Report of the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution goes on to state that the reasons for the introduction of the executive Presidential system were fully explained at the time the Second Amendment was introduced. This may well be a reference to the speech made by the then Prime Minister J.R. Jayawardene in the National State Assembly at the Second Reading of the Second Amendment to the 1972 Constitution on 23rd September 1977 where he sought to explain the rationale for the creation of an Executive President as follows:

"In moving the Second Reading I wish to explain to Hon. Members in detail the provisions of this amending Bill. We are not changing the parliamentary system as it

exists under the Republican Constitution, but a fundamental change is being made with regard to who should be the Head of the Executive. One could say that this amendment would make our Constitution a combination of the presidential system and the parliamentary system as we know it in the United Kingdom. Under the Republican Constitution the Head of the Executive is the President, but he has to act on the advice of the Prime Minister. I will cite those sections later. Under the amending provisions the Head of the Executive will be the President but he will be also the Head of the Cabinet of Ministers and the Chief Executive acting on his own advice and not on the advice of the Prime Minister. He will therefore, be the Head of the State and the Head of the Executive.

This change has been advocated by me for almost ten years, long before the United National Party won the last election, because I felt that in a developing country the Executive should be stable and not dependent on the whims and fancies of the House, as happened in the 1960 short Parliament when within a few months we had to have another general election, as happened in December 1964 when the Government of Mrs. Sirimavo Bandaranaike was defeated by one vote, though they had about one and half years more to go.

Under the reformed Constitution the President, we are suggesting, should be in office for a period of six years but not simultaneously with the House because his election may be independent of elections to the House. He will not change with any change in the composition of the House; he will continue for that period of six years and he will be elected by the whole country, not as now nominated by the Prime Minister.

[Parliamentary Debates (Hansard), Volume 23 – No. 9, 23rd September, 1977, 1219]

The sovereignty of the people, as I said, functions in various ways, certainly by the multi-party system of the elections that we have in this country. The sovereignty is divided into three aspects. There is the Executive, the Legislature and the Judiciary. I will not go into the constitutions of the world, but under our Republican Constitution the National State Assembly is the repository of the people's sovereignty. 12 million people cannot sit in the National State Assembly and discuss affairs of state. By the

elections, they vested all their power in the National State Assembly and the National State Assembly vested its executive power in the Prime Minister and the Cabinet, kept to itself the legislative power and exercised the judicial power in the constitution through courts created by the Constitution and by law. That is how the National State Assembly functioned as the repository of the sovereignty of the people, elected by the people from time to time, subject to the people and responsible to the people.

The Executive depended on a majority in this House. The Prime Minister is chosen from the party that enjoys the confidence of the House and the Ministers are chosen from Members in the House. If the majority in the House votes against the Prime Minister and the Cabinet, then the Executive ceases to exist. One can choose another Executive from the same House or go before the people. That is what I am trying to avoid by the amendment, so that the Executive need not depend on the votes in the House though the Prime Minister and the Cabinet may have to go and the President may have to find another Prime Minister and another Cabinet. Let us take the example of 1964 when Mrs. Bandaranaike's Government was defeated by one vote. If that happens now, after this Amendments, the Cabinet and the Prime Minister will have to go, but the President will continue, the Executive will continue. That is the difference that we are making.

[Parliamentary Debates (Hansard), Volume 23 – No. 9, 23rd September, 1977, 1226-1227]

So, firstly, take the question of the elected President. Do you want such a President or not and an elected Executive? We feel very strongly that the Executive should be elected by the People and not selected by the House because firstly there will be stability; secondly, the whole country can express its view as to the Executive which they do not do now. They merely elect Members for each electorate; of course, they may vote for a party, but they elect members for each electorate.

[Parliamentary Debates (Hansard), Volume 23 – No. 9, 23rd September, 1977, 1236]

That is also retained in the amendment. Though you have the Executive, that is the President, chosen by the people and irremovable, though he may have an opposing

party in the House, the Prime Minister and the Cabinet are accountable to the House. You can change them at pleasure, you can turn them out. The President, as today, may order a dissolution, and have a new Parliament, or he may reshuffle the Cabinet, but they must be from Members of this House. That is what is important. They must be legislators and they must enjoy the confidence of the House as they do today. But the President, aloof from all this, is only subject to the People, and once in so many years he must go to the People; he is not subject to the whims and fancies of this House as President but as Head of the Cabinet he must govern with the Cabinet and the Prime Minister responsible to the House and having the confidence of the House. That is the amendment, the new departure we are making from the extant Constitution, from the Constitution of the United Kingdom, from the Constitution of the United States of America, even from the Constitution of France because under the French Constitution the Ministers are not chosen from the legislature but from outside. We say they must be from the legislature because I personally believe that a Minister being in the House, subject to Question time, subject to Adjournment time, subject to control of the House, is one of the essential features of the House being representative of the sovereignty of the people. Of course, in America it has developed in a different way over a period of 150 years, and though Ministers are chosen from outside they are subject to examination by various Standing Committees, by Congressional Committees. But we prefer the House here, as a whole. I am a great believer in this House as an institution, and I want this House to continue with all its strength and power, restrained only by its own decisions. So we are not touching that. There is nothing in our amendments that touches the powers and functions of the House. You will see from the amendments that what I have said pertains to the functions we want this House to perform.

[Parliamentary Debates (Hansard), Volume 23 – No. 9, 23rd September, 1977, 1238-1239]

The Clauses of the Bill relating to the Executive Presidency

The Bill contains five principal Clauses that seek to give effect to the primary objective of the proponent of abolishing the Executive Presidential system of Government that is currently in existence.

The first is Clause 2(a) of the Bill which seeks to amend Article 4(b) of the Constitution by the deletion of the words, '*elected by the People*' and the substitution therefor of the words, '*and the Cabinet of Ministers as provided for in the Constitution.*' If amended, Article 4(b) would read as follows:

> "*The Sovereignty of the People shall be exercised and enjoyed in the following manner:–*
>
> *(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic and the Cabinet of Ministers as provided for in the Constitution*;"

The effect of the above amendment is that the reference as at present in Article 4(b) that the Executive Power of the People is reposed in the President elected by the People, shall now mean that the Executive power of the People is reposed with a President who is not elected by the People and the Cabinet of Ministers, as well.

The second is Clause 3 of the Bill which seeks to amend Article 30(1) as well as Article 30(2) and seeks to introduce two provisos to paragraph (2) and four new paragraphs numbered as paragraphs (3) – (6). The provisos and the proposed paragraphs relate to the election of the President by the Parliament and are consequential to and a reflection of the amendments that are proposed to Articles 30(1) and (2).

Article 30 as it presently stands, reads as follows:

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

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

Pursuant to the amendment that is sought to be made by Clause 3 of the Bill, Article 30(1) and (2) will read as follows:

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

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

The third relates to Article 33 which contains the powers and functions of the President. This Article is sought to be repealed by Clause 5 of the Bill and replaced with a new Article. In doing so, the present Article 33(a) which empowers the President '*to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament*' and Article 33(c) which requires the President to '*ensure the creation of proper conditions for the conduct of free and fair elections, at the request of the Election Commission*' will be removed.

The fourth is Clause 6 which seeks to introduce the following two Articles numbered as Article 33A and Article 33B:

Article 33A - "*The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security*."

Article 33B – "*The President shall always, except as otherwise provided by the Constitution, act on the advice of the Prime Minister*."

It must be noted that the proposed Article 33A is identical to Article 42 of the present Constitution while the proposed Article 33B is identical to Section 27(1) of the 1972 Constitution in so far as the obligation on the part of the President to act on the advice of the Prime Minister. The proposed Article 33B plays a pivotal role in the arguments presented to this Court by all learned Counsel for the Petitioners and the submissions of the learned Solicitor-General and will be discussed later.

The fifth is Clause 15 which seeks to repeal Chapter VIII containing Articles 42 – 53 and substitute therefor, a new Chapter VIII comprising of Articles 42 – 53. The significant deletions/introductions of Clause 15 are as follows:

a) Article 43(2) which provided that the "*President shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers*" has been deleted and replaced with Article 42(3) in terms of which, "*The Prime Minister shall be the Head of the Cabinet of Ministers*."

b) Article 44(2) which provides that "*the President may assign to himself any subject or function and shall remain in charge of any subject or function not assigned to any Minister*" has been deleted.

   The cumulative effect of the above two Clauses therefore is that the President shall no longer be the Head or even a member of the Cabinet of Ministers.

c) Article 43(3) which provides that, "*The President shall appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament*" is sought to be deleted and replaced with Article 42(4) in terms of which "*The President shall appoint as Prime Minister, the Member of Parliament, who commands the confidence of Parliament*." Mr. Manohara De Silva PC submitted that , the discretion that the President had in the appointment of the Prime Minister thus has been removed.

d) Article 44(1) which provided that the President shall, in consultation with the Prime Minister, where he considers such consultation to be necessary, (a) determine the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions to such Ministers; and (b) appoint from among the Members of Parliament, Ministers to be in charge of the Ministries so determined, as well as similar provision contained in Article 45 with regard to Ministers who are not members of the Cabinet, and Article 46 with regard to Deputy Ministers, have been removed. The proposed Article 43 relating to the number of Ministers of the Cabinet of Ministers and Ministries and the assignment of subjects and functions to such Ministers, as well as proposed Articles 44, 45 and 46 relating to the appointment of Cabinet Ministers, Ministers who are not members of the Cabinet and Deputy Ministers and the assignment of subjects, respectively, requires the President to act on the advise of the Prime Minister. This requirement to act on the advise of the Prime Minister has been extended to the appointment of acting Ministers, the Secretary to the Cabinet, Secretary to the Prime Minister and Secretaries to Ministries – vide proposed Articles 49, 50, 51 and 52.

e) Article 47(2) which provides for the removal of the Prime Minister, Cabinet Ministers, Ministers who are not members of the Cabinet and Deputy Ministers has been amended by removing the right of the President to remove the Prime Minister – vide proposed Article 46(2).

The Bill also contains several clauses which are incidental or consequential to the primary objective sought to be achieved by the above five clauses, including the clauses relating to the re-establishment of the Constitutional Council, and the Independent Commissions. The following amendments relate directly to the President.

Clause	Article in the Constitution	Amendment
7	34 – the power of the President to grant a pardon	The concurrence of the Prime Minister and the Leader of the Opposition shall be required prior to granting a pardon.
12	40 – Vacation of Office of the President and electing a President to succeed	Repealed
13	41 – Staff to the President's Office to be appointed in consultation with the Cabinet of Ministers	Maximum number of staff to be decided by the Cabinet of Ministers
19	70(1) proviso (a) restricting the right of the President to dissolve Parliament for a period of 2 ½ years since its first meeting	President shall not dissolve Parliament unless Parliament by resolution passed by not less than one half of the whole number of Members request the President to do so.
21	80 – A Bill passed by Referendum to be endorsed by the President	If the President does not certify the Bill, the Bill shall be deemed to be certified upon the expiry of the said period
22	85 – The President's power to submit a Bill for a Referendum. 85(2) confers upon the President the discretion not to submit a Bill which is not for the amendment or repeal of the Constitution.	If the President fails to submit a Bill passed by the special majority for a Referendum, the Bill shall be deemed to have been submitted to the People. Article 85(2) is therefore deleted

39	129 – The right of the President to invoke the consultative jurisdiction of the Supreme Court	Repealed
43	154F(2) and (3) – The exercise of the Governor's discretion shall be on the direction of the President	Repealed

Sovereignty is in the People

The Preamble to the 1978 Constitution (SVASTI), provides that the People of Sri Lanka, having by their Mandate freely expressed on the 21st of July 1977, had entrusted and empowered their Representatives to draft, adopt and operate a new Republican Constitution in order to achieve the goals of a Democratic Socialist Republic.

The Preamble further states that the freely elected representatives of the People of Sri Lanka, in pursuance of such Mandate and humbly acknowledging their obligations to the People, had thereafter enacted the Constitution as the "Supreme Law" of the Democratic Socialist Republic of Sri Lanka, ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY, FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka.

The origins of the concept of 'Sovereignty is in the People' of Sri Lanka can be found in Section 3 of the 1972 Constitution which has been carried over to Article 3 of the 1978 Constitution which provides that "*In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise*."

Article 4 thereafter proceeds to set out the manner in which the Sovereignty is to be exercised, and reads as follows:

> "*The Sovereignty of the People shall be exercised and enjoyed in the following manner:*
>
> *(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*
>
> *(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*
>
> *(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution or created and established by law, except in regard to matters relating to the privilege and powers of Parliament and of its members, wherein the judicial power of the People may be exercised directly by Parliament according to law;*
>
> *(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and*
>
> *(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."*

The repository of executive power under the 1978 Constitution

The learned Solicitor General submitted that as the Constitution now stands, the President is the fountain from which the Executive power flows and it is the President who is responsible for the distribution of that power in accordance with the provisions of the Constitution. She submitted further that several provisions of the Bill subject the President to a power sharing arrangement, where not only would the President no longer be that fountain, but would make him subordinate to the Prime Minister by causing every act of the President to be carried out upon the binding advice of the Prime Minister – vide Clause 6.

Mr. De Silva, PC submitted that the President is the supreme authority within the Executive organ of government and that even though the Cabinet of Ministers exercises shared Executive power, it derives that power from a President, who is the custodian of that power and has distributed his power to the Cabinet by virtue of him being *inter alia* the Head of the Executive and of the Government (Article 30(2)), Head of the Cabinet and a member of the Cabinet charged with the direction and control of the Government (Articles 43(1) and (2)). As such, he submitted that in the Executive power-distribution mechanism of government which is entrenched as part of the Sovereignty of the People and which functions to date, the President remains a repository of Executive power and maintains a link with the other agent who exercises Executive Power, i.e. the Cabinet of Ministers, by virtue of the President himself, and no other, having delegated such power.

Nevertheless, Mr. Fernando contended that under the 1978 Constitution, the President is not the sole repository of executive power. He relied on the determination of this Court in the **Nineteenth Amendment to the Constitution Bill** (2015) [Decisions of the Supreme Court on Parliamentary Bills (2014-2015) Vol. XII page 26 at 31-32] where after referring to Article 43 of the Constitution, it was held that:

> *"This important Article underscores that the Cabinet collectively is charged with the exercise of Executive power, which is expressed as the direction and control of the Government of the Republic and the collective responsibility of the Cabinet, of which the President is the Head. It establishes conclusively that the President is not the sole*

repository of Executive power under the Constitution. It is the Cabinet of Ministers collectively, and not the President alone, which is charged with the direction and control of Government. Further, this Cabinet is answerable to Parliament.

Therefore the Constitution itself recognizes that Executive Power is exercised by the President and by the Cabinet of Ministers, and that the President shall be responsible to Parliament and the Cabinet of Ministers, collectively responsible and answerable to Parliament with regard to the exercise of such powers. Additionally, certain powers with regard to the Public Service are vested in the Public Service Commission and some in the Cabinet of Ministers (Articles 54 and 55), again showing that executive power is not concentrated in the President. Chapter VII, VIII and IX of the Constitution are titled "The Executive - The President of the Republic", "The Executive - The Cabinet of Ministers" and "The Executive - The Public Service" respectively. [Emphasis added]

Nevertheless, this Court has in several judgments reiterated the fact that under the 1978 Constitution, the executive power of the people is vested in and exercised by a President elected by the people.

In the **Third Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1978 – 1983) Vol. I page 141 at 146], Court held as follows:

"*Article 4(b) envisages the executive power of the People being vested in and exercised* ***only by a President who has been elected by the People. The foundation and justification for the grant of the executive power is election by the People. The election symbolizes the Sovereignty of the People. It is fundamental to the exercise of the Sovereignty of the People that the repository of the executive power should be a person elected by the People.*** *In this respect Article 40(1) which provides for Parliament electing as President one of its members to function as President, on the elected President vacating office prior to the expiration of his term of office is a departure from Article 4(b) and impinges on the Sovereignty of the People. A person elected by Parliament and not by the People has been enabled to exercise the executive power of the People. Since Article 40(1) has been incorporated in the*

Constitution its validity cannot be questioned, but it cannot furnish an argument against any new provision which is consonant with Article 4(b)." [Emphasis added]

In **S.C. Reference No. 2/2003**, involving two questions referred to this Court in terms of Article 129(1) of the Constitution, a five-member bench after examining the relevant provisions of the 1946, 1972 and 1978 Constitutions held that the removal from the 1978 Constitution of the requirement as contained in the 1946 and 1972 Constitutions for the Head of a State to act on the advice of the Cabinet of Ministers or of any Minister consolidates the executive power and the defence of Sri Lanka in the hands of the President as the sole repository of the executive power and defence of Sri Lanka. It was further held that the plenary executive power including the defence of Sri Lanka is vested and reposed in the President of the Republic of Sri Lanka and that the Minister appointed in respect of the subject of defence has to function within the purview of the plenary power thus vested and reposed in the President.

This Court has specifically stated that (at pages 5-6), "*Although it is generally believed that the transition to the Presidential form of Government took place under the 1978 Constitution, Mr. de Silva correctly submitted that the transition was in fact effected by the Second Amendment to the 1972 Constitution certified on 20.10.1977...The amendment albeit brief in its content sliced through the 1972 Constitution and by virtue of Section 19 and the amendments to Section 20 the President became the Head of the State, the Head of the Executive, Head of the Government, Commander in Chief of the armed forces and was empowered to declare war and peace. Significantly,* ***Section 27(1) which required the President to act on the advice of the Prime Minister or a minister assigned by the Prime Minister was repealed thereby elevating the President to be the sole and untrammeled repository of executive power****.*" [Emphasis added]

In **Bandaranaike v. Attorney-General** [(1982) 2 Sri LR 786 at 792] this Court considered the different types of jurisdictions vested in it and held that the descriptions 'determination', 'judgment', 'opinion', 'decision' and 'conclusion' are different labels for the same concept. Therefore, the above opinion of this Court has the effect of a judgment.

Accordingly, under the present Constitution, the President elected by the People is the sole repository of the executive power of the People. Nonetheless, it does not mean that executive power cannot be exercised by any other person or body. It can be, provided that the executive power is distributed to such person or body through the President as **a delegate of the President. So long as the President remains the Head of the Executive, the exercise of his powers remains supreme or sovereign in the executive field and others to whom such power is given must derive the authority from the President.**

The above position has been recognized in **S.C. Reference No. 2/2003** , in the following manner (at pages 8-9):

> "*We have to now consider the role of the Cabinet of Ministers and of an individual Minister in relation to the exercise of executive power and the defence of Sri Lanka. In the preceding account as to the constitutional history of this country it is revealed that under the 1946 and 1972 Constitutions the executive power including the defence of Sri Lanka was exercised by the Cabinet of Ministers headed by the Prime Minister. By the second Amendment to the 1972 Constitution the reference to the Cabinet of Ministers in section 5, which dealt with the exercise of executive power and the defence of Sri Lanka was removed. That removal of the Cabinet of Ministers as a repository of executive power including the defence of Sri Lanka was further entrenched by Article 4(b) of the present Constitution, which links the exercise of such power to the mandate received by the President from the People who are sovereign. On the other hand, the role of the Cabinet of Ministers is functional in nature in relation to the subjects coming within the Government of the Republic. These functions are attended to by the respective Ministers within the purview of the executive power including defence of Sri Lanka which is solely vested in the President elected by the People. The pervasive control of the President in relation to the exercise of such governmental functions by Ministers is exemplified by the following provisions of the Constitution -*
>
> *i) Article 30(1) which provides that the President is the Head of the State, the Head of the Executive and of the Government and the Commander in Chief of the Armed Forces;*

ii) Article 43(2) which provides that the President shall be the Head of the Cabinet of Ministers;

iii) Articles 43(3), 44(1), 33(3), 45 and 46 which empowers the President to appoint the Prime Minister and Ministers, assign subjects and functions to such Ministers, change them from time to time, appoint Ministers not being members of the Cabinet and to appoint Deputy Ministers;

iv) Article 47 which empowers the President to remove the Prime Minister, and Minister or Deputy Minister."

Moreover, in the **Nineteenth Amendment to the Constitution Bill** (2015) [Supra. at pages 32-33] it was held that:

"The People in whom sovereignty is reposed having made the President as the Head of the Executive in terms of Article 30 of the Constitution entrusted in the President, the exercise of the Executive power being ***the custodian*** *of such power. lf the people have conferred such power on the President, it must be either exercised by the President* ***directly or someone who derives authority from the President****. There is no doubt that the Executive powers can be distributed to others via President. However, if there is no link between the President and the person exercising the Executive power, it may amount to a violation of mandate given by the people to the President. If the inalienable sovereignty of the people which they reposed on the President in trust is exercised by any other agency or instrument who do not have any authority from the President then such exercise would necessarily affect the sovereignty of the People…Though Article 4 provides the form and manner of exercise of the sovereignty of the people, the ultimate act or decision of his executive functions must be retained by the President.* ***So long as the President remains the Head of the Executive, the exercise of his powers remain supreme or sovereign in the executive field and others to whom such power is given must derive the authority from the President or exercise the Executive power vested in the President as a delegate of the President***." [Emphasis added]

The statement relied upon by Mr. Fernando in the **Nineteenth Amendment to the Constitution Bill** (2015) [Supra. at page 31] that the President is not the ***sole repository*** of executive power is difficult to reconcile with the unambiguous statement in Article 4(b) of the Constitution that the executive power of the people, including the defence of Sri Lanka shall be exercised by the President elected by the people and the further statement by Court in the same determination referred to earlier. No doubt that the Cabinet of Ministers also exercise executive power. Nonetheless, that is due to their appointment being made by the President and through his status as the Head of the Executive and the Cabinet of Ministers.

We are of the view that under the 1978 Constitution the President elected by the People is the sole repository of the executive power of the people. All other persons and bodies exercising executive power derive their authority through the President. If there is no link between the President and the person exercising the Executive power, it will amount to a violation of the mandate given by the people to the President.

The relationship between Article 3 and Article 4

Accordingly, as Article 4(b) presently stands, the President is the custodian of the Executive power of the People. However, with Clause 2 of the Bill, the executive power of the People will be exercised by the President and the Cabinet of Ministers.

The question for this Court is whether the proposed amendments to the executive power of the elected President, taken together or separately, seek to amend Article 4 or any other Article of the Constitution in a manner that violates the provisions of Article 3 or any other entrenched Article. If this question is answered in the negative, a Referendum is not required and the Bill can be passed with the special majority of Parliament. If the answer is in the affirmative, the Bill would be required to be passed by the special majority of Parliament and approved by the People at a Referendum.

The relationship between Articles 3 and 4 has been considered by this Court in a series of previous determinations.

In the **Third Amendment to the Constitution Bill** [Supra. at page 143] it was specifically held that Article 4 is complementary to Article 3 and therefore should be read together. Furthermore, it was held (at page 147) that the President exercises executive power of the people as a delegate of the People.

Thus, different features of the Sovereignty that is reposed in the people can be delegated by the people to be exercised by an organ of government. Article 4 deals with both the delegation and the exercise of different features of Sovereignty. This delegation is an essential component of Sovereignty as it is impracticable for the people to be exercising any one or more of them. Any change to such delegation which brings in another person or institution, as inferior, coordinate or superior to the existing organ, to exercise that part of Sovereignty must be with the approval of the people as otherwise it infringes Article 3.

In the **Nineteenth Amendment to the Constitution Bill** (2002) [Supra. at page 319] a Divisional Bench of this Court observed as follows:

> "*Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People, to include;*
>
> *(1) the powers of Government;*
> *(2) the fundamental rights; and*
> *(3) the franchise.*
>
> *Fundamental rights and the franchise are exercised and enjoyed directly by the people and the organs of government are required to recognize, respect, secure and advance these rights.*
>
> *The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not*

only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.

Therefore, 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 relevant sub paragraphs would then read as follows:

(a) The legislative power of the People is inalienable and shall be exercised by Parliament;

(b) The executive power of the People is inalienable and shall be exercised by the President; and

(c) The judicial power of the People is inalienable and shall be exercised by Parliament through Courts"

The above position was elaborated further in the **Twentieth Amendment to the Constitution Bill** (2020) [Supra. at page 107], when this Court, having referred to the above paragraph from the **Nineteenth Amendment to the Constitution Bill** (2002) [Supra. at page 319], held as follows:

"*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…

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*".

We see no reason to depart from the legal reasoning set out in the above paragraphs.

Can Article 4(b) be treated as being entrenched?

Article 3 provides that Sovereignty is in the People and that the Sovereignty of the People is inalienable. Mr. Fernando submitted that what is entrenched is therefore the Sovereignty of the People and that Sovereignty cannot be alienated from the People. He submitted that the institutions through which such Sovereignty was to be exercised in trust for the People, have not been entrenched nor have the particular balance of power/ checks and balances included in the Constitution been entrenched, with the result that any variation to the institutions specified in Article 4 will not prejudice and/or adversely impact the Sovereignty of the People.

He however did concede that an amendment which is inconsistent with Article 4 (or any other provision of the Constitution), and also adversely or prejudicially affects the sovereignty of the People or seeks to alienate the sovereignty of the People as a whole, would amount to an inconsistency with Article 3 and thereby require a Referendum. He submitted that previous Determinations which have suggested that a substantial or significant connection to Article 3 is sufficient to hold that Article 3 is affected, do not reflect the correct constitutional position.

The test as identified by Mr. Fernando would then be that the legislature is entitled to amend Article 4 or any article that impacts Article 4 with the special majority in Parliament, but where the amendment is **prejudicial** to the sovereignty of the people, then the Bill needs to be approved by the People at a Referendum as well.

The legal basis to shift the balance of power that currently exists to the Prime Minister and the Cabinet of Ministers without seeking a mandate from the People via a Referendum, was sought to be justified by Mr. Fernando on the findings of the majority decision in the **Thirteenth Amendment to the Constitution Bill** [Supra. at pages 33-34] where it was observed as follows:

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

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

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

We must consider this statement in the context of the issues that arose for consideration by Court in that determination.

The main contention of the petitioners (in the 13th Amendment to the Constitution Bill) was that the new Chapter XVIIA consists of several provisions which are inconsistent with provisions of entrenched Articles 2 and 3 of the Constitution and therefore that Chapter cannot become law unless the number of votes cast in favour thereof amounts to not less

than 2/3 of the whole number of members (including those not present) and is approved by the People at Referendum as mandated by Article 83 of the Constitution.

In examining this argument, the majority held that the test is whether the 13th Amendment to the Constitution impinged on the two essential qualities of a Unitary State, namely (1) the supremacy of the central Parliament and (2) the absence of subsidiary sovereign bodies. It was clarified that this does not mean the absence of subsidiary law-making body, but it does mean that they may exist and can be abolished at the discretion of the central authority.

The majority held that the question is whether the 13th Amendment Bill creates institutions of government which are supreme, independent and not subordinate within their defined spheres. Applying this test, it was held that both in respect of the exercise of its legislative powers and in respect of exercise of executive powers no exclusive or independent power is vested in the Provincial Councils. The Parliament and President have ultimate control over them and remain supreme.

With regard to legislative power, the majority held that Article 154G conserves the Sovereignty of Parliament in the legislative field and that Parliament can amend or repeal, the provisions in the Bill relating to the legislative authority of the Provincial Councils. It was further held that the Provincial Council is dependent on Parliament for its continued existence and validity and for its legislative competence in respect of matters in the Provincial List and in the Concurrent List.

With respect to executive powers, the majority held that in exercising their executive power, the Provincial Councils are subject to the control of the centre and are not sovereign bodies and referred to Article 154C, which provides that the executive power extending to the matters with respect to which a Provincial Council has power to make statutes shall be exercised by the Governor of the Province either directly or through Ministers of the Board of Ministers or through officers subordinate to him in accordance with Article 154F. Accordingly, it was held that the Governor is appointed by the President and holds office in accordance with Article 4(b), which provides that executive power of

the People shall be exercised by the President of the Republic, during the pleasure of the President. The Governor derives his authority from the President and exercises the executive power vested in him as a delegate of the President. It is open to the President therefore by virtue of Article 4(b) of the Constitution to give directions and monitor the Governor's exercise of his executive power vested in him. Under the Constitution the Governor as a representative of the President is required to act in his discretion in accordance with the instructions and directions of the President. Accordingly, it was held that the President remains supreme or sovereign in the executive field and the Provincial Council is only a body subordinate to him.

It is in this context that the majority went on to hold that no division of Sovereignty or of legislative, executive or judicial power has been effected by the 13th Amendment to the Constitution Bill or by the Provincial Councils Bill and that the national government continues to be legally supreme over all other levels or bodies and that the Provincial Councils are merely subordinate bodies.

It is true that the majority thereafter considered the submission of the petitioners that Articles 3 and 4 must be read together. In addressing this submission, the majority stated that Article 4 sets out the agencies or instruments for the exercise of the Sovereignty of the People, referred to in the entrenched Article 3 and that it is always open to **change** the agency or instrument by amending Article 4, provided such amendment has no **prejudicial impact** on the sovereignty of the People. They went on to state that Article 4(a) can be amended to provide for another legislative body consisting of elected representatives, so long as such amendment does not affect Articles 2 and 3 and that an amendment to Article 4(b) can be enacted by providing for the exercise of the executive power of the People by a President and a Vice President elected by the People.

However, it was stated that to the extent that a principle contained in Article 4 is contained or is a necessary corollary or concomitant of Article 3, a constitutional amendment inconsistent with such principle will require a Referendum in terms of Article 83, not because Article 4 is entrenched, but because it may impinge on Article 3. In concluding their findings on the particular submission, the majority stated that (page 34)

"In our view, Article 4 is not independently entrenched but can be amended by a two third majority, since it is only complimentary to Article 3, provided such amendment does not impinge on Article 3. So long as the sovereignty of the People is preserved as required by Article 3, the precise manner of the exercise of the sovereignty and the institution for such exercise are not fundamental. Article 4 does not define or demarcate the sovereignty of the People. It merely provides one form and manner of exercise of that sovereignty. A change in the institution for the exercise of legislative or executive power incidental to that sovereignty cannot ipso facto impinge on that sovereignty."

In this context, it is incumbent on us to determine whether the above portion forms the *ratio decidendi* of the majority determination. In this exercise, it is important to bear in mind the distinction between the *ratio decidendi* and the *obiter dicta* of a judgment.

Rupert Cross in **Precedents in the English Law** (3rd Ed., 1977) offers the following formulations for the two terms:

"*The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury*" (page 76)

"*Obiter dictum is a proposition of law which does not form part of the ratio decidendi*" (page 79)

The statements made by the majority in the 13th Amendment to the Constitution determination on the reading of Articles 3 and 4 and the tests to be employed are *obiter dicta* since they had already determined that no division of sovereignty or of legislative, executive or judicial power is to be made by the 13th Amendment Bill or by the Provincial Councils Bill and that the central government continues to be legally supreme over all other levels or bodies and that the Provincial Councils are merely subordinate bodies. No doubt the statements relied upon by Mr. Fernando were made at the end of the examination of the argument made that Articles 3 and 4 must be read together.

Nevertheless, the majority had by then already decided that the President and Parliament have ultimate control over executive and legislative powers respectively and remain supreme in the respective fields. In other words, the majority had earlier already determined that the provisions of the 13th Amendment Bill did not violate Article 4 of the Constitution. In these circumstances, there was no need to engage upon the additional question of whether Articles 3 and 4 should be read together.

In the **Nineteenth Amendment to the Constitution Bill** (2002) [Supra. at page 319] a seven-member bench of this Court had to fairly and squarely deal with the erosion of the power of dissolution of Parliament which was held to be part of the executive power of the President and a check on the legislature. The Court observed that;

> "*Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People, to include ;*
>
> *(1) the powers of Government;*
> *(2) the fundamental rights; and*
> *(3) the franchise.*
>
> *Fundamental rights and the franchise are exercised and enjoyed directly by the people and the organs of government are required to recognize, respect, secure and advance these rights.*
>
> ***The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power***

"of the People" shall be exercised by Parliament through the Courts. *This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.*

Therefore, 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 relevant sub paragraphs would then read as follows*:*

(a) the legislative power of the People is ***inalienable*** *and shall be exercised by Parliament;*

(b) the executive power of the People is ***inalienable*** *and shall be exercised by the President; and*

(c) The judicial power of the People is ***inalienable*** *and shall be exercised by Parliament through Courts.*

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."

Hence it was held that the transfer of a power which is attributed by the Constitution to one organ of the government to another; or the relinquishment or removal of such power, would be an alienation of Sovereignty inconsistent with Article 3 read with Article 4 of the Constitution.

This formulation has thereafter been adopted in several decisions.

In the **Twentieth Amendment to the Constitution Bill** (2020) [Supra. at page 107], this Court held as follows:

> "*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."*

Accordingly, it is our view that the proper tests to be adopted in determining whether a violation of Article 4 leads to a violation of Article 3 are as follows:

1. Different features of the Sovereignty that is reposed in the People can be delegated by the People to be exercised by an organ of government. Delegation by the People of the Sovereignty reposed in them is part of their Sovereignty identified in Article 3. Article 4 deals with both the delegation and the exercise of different features of Sovereignty. In terms of Article 4(b), the People have delegated their executive power to the President elected by them. Any change to such delegation which brings in another person or institution to exercise the executive power of the People must be with the approval of the People as otherwise it infringes Article 3. **(Delegation Test)**

2. 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. **(Alienation Test)**

Although the two tests may on the face of it appear to be the same, there is a difference between them. For example, if the only amendment sought to be done by the Bill is to amend Article 4(b) of the Constitution and specify that the executive power of the People is to be exercised by the President elected by the People and the Cabinet of Ministers,

applying the delegation test, it will amount to a violation of Article 3 although the alienation test may not be satisfied.

Applying the test identified in (1) above, we hold that Clause 2(a) of the Bill which seeks to amend Article 4(b) of the Constitution is inconsistent with Article 3 read together with Article 4(b) of the Constitution, as it seeks to vest executive power of the People on the Cabinet of Ministers along with the President, and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

The requirement that the President shall act all times on the advise of the Prime Minister

As observed earlier, Clause 6 (proposed Article 33B) provides that, "*The President shall always, except as otherwise provided by the Constitution, act on the advice of the Prime Minister*." Thus, even though the Bill maintains the status of the President as the 'Head of the Executive', the effect of Clause 6 and the addition of the words, "*who shall act in accordance with the Constitution*" in Clause 3(a) (Article 30(1)) makes it binding on the President to act on the advise of the Prime Minister at all times, including the situations provided for in Clause 15. Clause 6 plays a significant role in the shift towards a Westminster style of Government, and its effect pervades across all powers conferred on the President. The fact that this requirement extends to matters of defence and national security was made clear when, in response to a question by this Court, Mr. Fernando stated that in view of Clause 6 (proposed Article 33B), the President would be bound to act on the advice of the Prime Minister even with regard to declaring war and peace as provided for in the Constitution and the exercise of powers under the Public Security Ordinance. The proposed Article 33B effectively removes the Executive Power from the President and whenever he has to exercise Executive Power he can do so only on the advice of the Prime Minister. These provisions cumulatively impinges on the executive power of the President in a manner that directly violates Article 3 read with Article 4.

It is in these circumstances that the learned Solicitor General submitted that whatever the powers that remains vested with the President, as the Head of the Executive is, in effect, transferred to the Prime Minister, giving rise to a situation whereby the President would no longer retain the power to have the 'ultimate act' or 'decision', and making the President at all times subordinate to that of an omnipotent Prime Minister. Furthermore, she submitted that the caveat in the proposed Article 33B – *except as otherwise provided by the Constitution* – has no value as the Constitution does not have any situations where the caveat may be applied. The cumulative effect of these provisions is the relinquishment by the President of the executive powers hitherto vested in him by the People.

In the **Nineteenth Amendment to the Constitution** (2015) [Supra. at page 34] this Court, having considered a provision identical to the proposed Article 42(3) as well as provisions which empowered the Prime Minister to determine the number of Ministers, Ministries, assignment of subjects etc. held as follows:

> *"In the absence of any delegated authority from the President, if the Prime Minister seeks to exercise the powers referred to in the aforesaid Clause, then the Prime Minister would be exercising such powers which are reposed by the People to be exercised by the Executive, namely, the President and not by the Prime Minister. In reality, the Executive power would be exercised by the Prime Minister from below and does not in fact constitute a power coming from the above, from the President. In the words of Wanasundera, J. as stated in Re the Thirteenth Amendment to the Constitution at page 359 "If the Executive power of the People can be renounced in this manner, serious questions regarding the proper administration of the country could arise. At the bare minimum, legislation permitting such renunciation must have the approval of the People at a Referendum […]*
>
> *… The President cannot relinquish his Executive power and permit it to be exercised by another body or person without his express permission or delegated authority […] Thus, permitting the Prime Minister to exercise Executive power in relation to the six paragraphs referred to above had to be struck down as being in excess of authority and violative of Article 3."*

It was accordingly submitted by the learned Solicitor General that a Bill which has the effect of alienating People's Sovereignty could be construed as violating Article 3.

The meaning that could be attached to the word, 'alienation' was considered in the **Nineteenth Amendment of the Constitution Bill** (2002) [Supra. at pages 319-320] where a Divisional Bench of this Court held as follows:

> "*The meaning of the word "alienate", as a legal term, is to transfer anything from one who has it for the time being to another, or to relinquish or remove anything from where it already lies. Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution in one organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution. It necessarily follows that the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained.*
>
> *This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another.*"

Relying on the above, the learned Solicitor General submitted further that any amendment that causes the transfer or relinquishment or removal of the powers contained in Article 4 of the Constitution and would affect the balance of power between the three organs of government, has a prejudicial impact on the sovereignty of the People

as enshrined in Article 3 of the Constitution, and therefore requires to be approved by the People at a Referendum.

Mr. De Silva PC submitted that the amendment proposed by Clause 2 to Article 4(b) expressly recognizes that the President "shares" the Executive power of the People with the Cabinet of Ministers, with the inference being that the President and the Cabinet are co-ordinate agents of Executive power. He went on to submit that when read together with the amendments proposed by Clause 3(a) to Article 30, Clause 15 to Article 43(2) and the pivotal Clause 6 (proposed Article 33B) which makes it mandatory for the President to act at all times on the advise of the Prime Minister, and in the absence of a link between the President and the Cabinet, the President's position vis-à-vis the Cabinet of Ministers will be that of a subordinate as opposed to an equal partner in the sphere of the Executive, resulting in an erosion of the Executive power of the People currently conferred on the President. It was the submission of Mr. De Silva, PC that whether as a co-ordinate or, worse still, a subordinate sharer of the Executive power of the People, both are contrary to the Sovereignty of the People.

It is in the above factual background that we must consider the application of the second test referred to above – i.e. does the Bill seek to alienate the executive powers of the President?

The starting point is Clause 6 (proposed Article 33B), which makes it mandatory for the President to act at all times on the advice of the Prime Minister. Even taken alone, what this innocuous looking provision does in reality is to chain the President down to a situation where he cannot exercise any power under any law including the Constitution unless he obtains the advice of the Prime Minister, and thereafter act on such advice. Failure to do so would result in the President violating the Constitution. This provision amounts to relinquishment and surrender of the executive powers of the President in its purest form and amounts to an alienation of the executive powers of the President, which violates Article 4(b) and impinges upon Article 3.

The provisions of the Bill do not stop at that. As discussed earlier, in terms of Clause 2(a) of the Bill, the President is only one of the bodies who can exercise executive power. Along with *inter alia* the loss of his status as the Head of Government and the Head of the Cabinet of Ministers [Clauses 3(a) and Clause 15], the inability to determine the number of Ministries, Ministers etc. and the assignment of subjects and functions to such Ministries, [Clause 15], the inability to remove the Prime Minister [Clause 15], the inability to dissolve Parliament unless upon a resolution of Parliament [Clause 19] and the removal of the power to give general directions to a Governor of a Province [Clause 43], it is clear that executive powers of the President presently contained in the Constitution have either been alienated or completely removed.

The fact that the President contemplated in the Bill is completely beholden to the Prime Minister and Parliament is reflected in Clause 10 of the Bill which repeals the procedure laid down in Article 38(2) for the removal of the President. As it stands now, the removal of the President can be put in motion only upon a resolution to such effect signed by not less than two thirds of the whole number of Members of Parliament alleging specific acts of misconduct specified in the said Article, followed by an inquiry and a finding by the Supreme Court that in its opinion the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President is guilty of any of the other allegations contained in such resolution, and finally with a resolution being passed by not less than two thirds of the whole number of Members (including those not present) voting in its favour. These safeguards are proposed to be removed and Parliament can remove the President by a resolution of no confidence being passed by not less than one half of the whole number of Members of Parliament (including those not present) voting in its favour.

There is another aspect that must be considered. The word “Sovereignty” when used in Article 3 has a meaning that could only be appreciated through a reading of Article 4. The word “Sovereignty” as employed in Article 3 is not exhaustive, and includes the powers of government, fundamental rights and franchise. The phrase “powers of government” are revealed to be the legislative power, executive power and judicial power as elaborated in Article 4(a), (b) and (c). Thus, when Article 3 refers to Sovereignty, such

reference is predicated upon the assumption of there being a separation of powers as provided in Article 4. It is evident that Article 3 contemplates the separation of powers and appropriate checks and balances when it uses the term "Sovereignty" and it is in this context that this Court in the **19th Amendment to the Constitution Bill** (2002) [Supra.] referred to the balance between the arms of government. Thus, any amendment to the Constitution that disrupts the balance or separation of power would violate Sovereignty as envisaged in Article 3.

At present, the People of the Republic have, by exercising their sovereignty, approved the setting up of a particular system of government, where the powers and functions of one branch of government are carefully balanced against the others. This is a delicate balance, and the machinery of government is calibrated to the extent that its parts are not to be moved about without the knowledge and consent of its masters, the People.

This does not mean that this Court has any preference towards a Presidential system of governance or Parliamentary system of governance. That is a matter for the People on whom sovereignty is reposed. It only means that the People of this country have under the 1978 Constitution envisaged a system of governance where the President is the sole repository of Executive power and which is premised upon the separation of powers with appropriate checks and balances. Every amendment to the 1978 Constitution must therefore be carefully examined to determine the impact it will have upon the balance of power and whether the amendment sought to be made results in an alienation of power hitherto exercised by one arm of government. It is the People who will have to determine if they wish to transition to a Westminster system, and it is not open to one arm of government to arrogate to some of its members the powers of another arm of government.

Moreover, the application of the alienation test confers upon the People, on whom Sovereignty is reposed, the right to decide whether or not such alienation is to be approved or rejected, at that particular point of time. This means, it is the People who would decide on this.

If Mr. Fernando's argument that the organs of government exercising the respective powers in Article 4 can be changed without the need for a Referendum were to be accepted, it would lead to a dismantling of the checks and balances in the Constitution and the separation of powers on which the Constitution is founded without the approval of the People. For example, an amendment can be made to Article 4(a) to enable the President elected by the People to exercise legislative power with Parliament in addition to the executive power reposed on him. We do not think that the Constitution as it stands today permits such an interpretation.

It would perhaps be relevant to note that when provisions identical to Clauses 2, 3, 5, 13 and 15 were sought to be introduced by the **Twentieth Amendment to the Constitution Bill** (2018) [Decisions of the Supreme Court on Parliamentary Bills (2018) Vol. XIV page 67 at 81].this Court determined the said provisions were a *"removal or reduction of executive power of the People that would be exercised by the President of the Republic elected by the People"* and would *"directly violate Article 3"*.

Accordingly, upon an examination of Clauses 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 23, 24, 26, 27, 28 and 36 of the Bill, we hold that they amount to an alienation of the executive power of the President and therefore are inconsistent with Article 3 read together with Article 4(b) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

Clauses of the Bill that impacts on the Franchise of the People

As provided in Article 3, Sovereignty is in the People and is inalienable. Sovereignty includes the powers of Government, fundamental rights and the franchise. While the powers of Government are exercised by the People through specific organs of government referred to in Articles 4(a), 4(b) and 4(c), and in particular the executive power of the People is exercised by a President **elected by the** People, franchise under Article 4(e) is exercised by the People at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen.

There are nine clauses in the Bill that seeks to amend the provisions relating to the franchise of the People, as laid down in Article 4(e).

The first is **Clause 2** of the Bill, which seeks to amend:

(a) Article 4(b) by deleting the words "***elected by the People***" and substitution therefor of the words "*and the Cabinet of Ministers as provided for in the Constitution*";

(b) Article 4(e) by deleting the words "*President of the Republic and of*".

The second is **Clause 3** of the Bill, which seeks to amend Article 30(2), firstly by replacing the '*President elected by the People*' with a '*President elected by Parliament*', and thereafter by adding four new paragraphs numbered as (3), (4), (5) and (6) to Article 30 setting out the qualifications that are required of a person who shall be elected by Parliament as President and the manner in which the President shall be elected by Members of Parliament.

This is followed by **Clause 4** which seeks to delete Article 31 of the Constitution relating to the election of the President by the People.

As pointed out by this Court in **SC Reference No. 2/2003** (at page 7):

> *"The words "**elected by the People**" are the only words added to the original formulation in Section 5(c) of the Second Amendment to the 1972 Constitution. These words are significant and add an extra dimension to the executive power including the defence of Sri Lanka which is reposed in and exercised by the President, vis., the mandate directly received from the People in the exercise of their franchise at the election of the President. This is distinct from the mandate received by the members of Parliament who exercise the legislative power of the People in terms of Article 4(a)."* [Emphasis added]

The other six clauses are consequential to the above three clauses and can be summarized as follows:

Clause	Article in the Constitution	Amendment
23	88 – The right to be an elector at the election of the President	Deletion of the words, 'of the President and'
24	89 – Disqualifications that prevents a person from being an elector at an election of the President	Deletion of the references to 'the election of the President'
26	92(c) – Disqualification of those who have been twice elected to the Office of President by the People''.	Addition of the words 'and / or by Parliament' at the end of Article 92(c)
27	93 – Election of the President and Members of Parliament shall be free, equal and by secret ballot	Deletion of the words of the President of the Republic and'.
28	94 – Provisions relating to the election of the President by the People	Deletion of the entire Article
36	111C – Disqualification of persons who interfere with the Judiciary from being an elector *at any election of the President of the Republic*"	Deletion of the words, '*at any election of the President of the Republic*"'

In the **<u>Provincial Councils Election (Special Provisions) Bill</u>** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII 135 at page 141] it was observed that, "*the franchise is not restricted to merely voting at elections; it includes standing for elections, and, indeed, the entire election process from nomination to poll."*

In the **Seventeenth Amendment to the Constitution Bill** [Supra. at pages 216-217], while observing that franchise includes two elements, namely the right to vote and the right to stand for election, this Court went onto state as follows:

> *"The submission is that franchise which forms part of the sovereignty of the People is exercised in accordance with Article 4 of the Constitution. Article 4 (a) and (e) are in point and refer to the legislative power of the People being exercised by a Parliament "consisting of elected representatives of the People",(4(a)), and that the "franchise shall be exercisable at the election … of the members of Parliament… by every citizen who has attained the age of 18 years and who being qualified to be elected as hereinafter provided, has his name entered in the register of electors"(4(e)).*
>
> *Thus, it is seen that in relation to the question at issue franchise which forms part of the sovereignty of the People has two elements, firstly that Parliament should consist of elected representatives of the People. Secondly, that any citizen who have attained the age of 18 years, qualified to be an elector having his name entered in the register of electors shall exercise franchise at an election of Members of Parliament*"

In the **Twentieth Amendment to the Constitution Bill** (2017) [Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, page 126 at 136] this Court held that, "*Right to vote is recognised as a fundamental right and denial or restriction of exercising the franchise amounts not only to violation of Article 10 and 14(1) of the Constitution but also attracts Article 3 of the Constitution."*

Our attention was also drawn to the **Twentieth Amendment to the Constitution Bill** (2018), which sought to remove the right of the people to exercise their franchise at the Presidential election by amending the same Articles of the Constitution that are sought to be amended in the Bill currently before us, where this Court, having considered the applicable provisions of the Constitution held that the Bill will have to be passed by a special majority and approved by the People at a Referendum for the following reasons:

"*Therefore, it is seen that if the election of the President of the Republic by the People (Presidential Election) is abolished, the franchise of the people that would be exercised by the People at the said election would be removed. Therefore, removal of the franchise of the people that would be exercised by the People at an election to elect the President of the Republic would violate Article 4(e) of the Constitution. […] (pp. 73-74)*

The proposed 20th Amendment Bill removes the franchise of the People that would be exercised at a Presidential Election. Therefore it violates the principle enshrined in Article 3 of the Constitution that the 'Sovereignty is inalienable'. Thus, Clauses in the Bill relating to removal of the franchise of the People that would be exercised at a Presidential Election would directly violate Article 3 of the Constitution. If a Clause of a Bill directly violates Article 3 of the Constitution, it has to be approved by the People at a Referendum."(pp. 80)

We have earlier pointed out that the franchise that would be exercised at a Presidential Election, a Parliamentary Election, a Referendum is a part of Sovereignty. The proposed Bill seeks to remove this franchise in so far as a Presidential Election is concerned. Therefore the Clauses of the Bill relating to the removal of this franchise would directly violate Sovereignty. Therefore these Clauses would directly violate Article 3 of the Constitution. [pp. 78]"

Clauses 2, 3 and 4 of the Bill seeks to take away the right of the People to have a President elected by the People, the right of the People to vote at an Election to elect a President, the right of a citizen to stand for election as President and thereby impinges upon the Sovereignty of the People and are inconsistent with Article 3 read together with Article 4(e) of the Constitution. Hence these Clauses may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

Clause 14 of the Bill - Constitutional Council

Clause 14 of the Bill seeks to repeal Chapter VIIA of the Constitution which contains provisions for the appointment of a Parliamentary Council and the substitution thereof, of a new Chapter VIIA titled 'Constitutional Council' containing Articles 41A – 41L.

The first initiative towards the establishment of a Constitutional Council and several independent commissions was made in 2001. As pointed out by this Court in the **Seventeenth Amendment to the Constitution Bill** [Supra.]:

> "*The Bill taken in its entirety has the objective of altering the legal regime for the appointment, regulation of service and disciplinary control of Public Officers forming part of the Executive, including Police Officers, Judges and Judicial Officers and of certain Commissions that wield governmental power. It places a restriction on the discretion now vested in the President and the Cabinet of Ministers in relation to these matters and subjects the exercise of that discretion to the recommendation or approval of the new body to be established, known as the 'The Constitutional Council'. In that respect the provisions relating to the establishment and functions of the Constitutional Council is the core of the Seventeenth Amendment. These provisions are contained as noted above in the new Chapter VIIA with Articles 41A to 41H. The Council is essentially a body that comes within the aegis of Parliament with the Speaker as its Chairman and nine members…*[pp. 250]
>
> *The power of making appointments to the respective Commissions and the appointment of the officers referred to in Article 41B of the Bill is now exercised by the President. In relation to the Public Service the power is vested in terms of Article 55(1) of the Constitution in the Cabinet of Ministers, which too is headed by the President. As noted above the amendment seeks to subject the exercise of this discretion to recommendations and approval of the Constitutional Council."* [pp. 251]

This Court thereafter posed the following two questions:

1) Whether the amendment amounts to an erosion of the executive power of the President and is thereby inconsistent with the provisions of Article 3 read with Article 4(b) of the Constitution.

2) Whether the subjection of the discretion of the President to the recommendation and approval of the Constitutional Council as envisaged by the Bill would amount to an effective removal of the President's executive power in this respect.

Having taken into consideration *inter alia the* following matters, namely:

1) The President being empowered to appoint one member to the Constitutional Council, and the presence of the said member constituting the link between the President and the Constitutional Council;

2) The President being the appointing authority of the six nominees of the Prime Minister and the Leader of the Opposition,

It was held by this Court that:

1) The said matters "*taken together, in our view support the inference that the amendment does not remove the executive power of the President in relation to the subjects coming within the purview of the Bill*;

2) *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*."

Provisions relating to the re-establishment of the Constitutional Council in 2015 was considered by this Court in the **Nineteenth Amendment to the Constitution Bill** (2015)[Supra.]. Having noted that as in 2001, the President was entitled to have his nominee as well as appoint five others nominated by the Prime Minister and the Leader

of the Opposition, and taking into consideration the above findings in the **Seventeenth Amendment to the Constitution Bill** [Supra.], this Court observed as follows:

> "*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. When Sub Clause 41B, is considered the President continues to be empowered to make the appointments of Chairmen and members of the Independent Commissions. However, such appointments are to be made on a recommendation of the Constitutional Council on which a duty is cast to recommend fit and proper persons to such offices. Similarly in terms of Sub Clause 41C the President makes the appointments to key offices including the Judges of Superior Courts. However, prior to the appointments his recommendations would have to be approved by the Constitutional Council*. [pp. 36]"

The proposed Article 41A(1) in Clause 14 of the Bill sets out the composition of the Constitutional Council, which comprises of the Speaker, Prime Minister, Leader of the Opposition and six nominated persons. However, unlike in 2001 and 2015, the membership of the Council does not comprise of a nominee of the President. Furthermore, as provided by the proposed Article 41A(6), where the President fails to appoint those persons nominated by the Prime Minister, the Leader of the Opposition and other political parties within fourteen days of being informed, such persons shall be deemed to have been appointed as members of the Council.

Mr. De Silva, PC submitted that the basis of the determination of this Court in the **Seventeenth Amendment to the Constitution Bill** [Supra.] was *inter alia* the presence of the President's nominee on the Council, thereby establishing a link between the Executive President and the Constitutional Council to whom executive powers had been delegated. He submitted further that in the absence of such a nominee, Clause 14 is violative of Article 4(b) and Article 3. He further submitted that the discretion that the President has

of appointing the six nominated members has been removed in view of the deeming provision, and that this too results in an erosion of the executive power of the President.

Mr. Fernando submitted that the rationale for not providing for a nominee of the President in the membership of the Council was in view of the shifting of the Presidential system to a Parliamentary system. He submitted that in any event, the necessity for the President to have a nominee does not arise in view of the fact that the appointment of the six nominated members is still vested with the President.

However, in this regard, we observe that in terms of the proposed Article 41A(5), the persons to be **appointed** to the Constitutional Council must be persons of eminence and integrity who have distinguished themselves in public or professional life. While the proposed amendment maintains the power of the President to make appointments to the Constitutional Council, only the power to make such **nominations** is given to the Prime Minister, Leader of the Opposition and other Political parties represented in Parliament. Accordingly, the constitutional duty of ensuing that the persons appointed as members of the Constitutional Council fulfill the eligibility criteria enumerated in the Constitution is vested on the President. In these circumstances, the deeming provisions violate the executive power of the President and therefore is inconsistent with Article 3 read together with Article 4(b) of the Constitution and may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83. However, the necessity for a Referendum will cease if the deeming provision in the proposed Article 41A(6) is removed.

We are further of the view that as long as the Executive power of the People is exercised by the President and the President remains the Head of the Executive, and in view of the role played by the Constitutional Council as identified by this Court in the **Seventeenth Amendment to the Constitution Bill** [Supra. at page 249], there must be a link between the President and the Council, which is fulfilled by the President having a nominee on the Council. Thus, we are of the view that Clause 14 of the Bill as it presently stands is inconsistent with Article 3 read together with Article 4(b) of the Constitution and may be enacted only by the special majority required by Article 84(2) and upon being approved

by the People at a Referendum by virtue of Article 83. However, the necessity for a Referendum will cease if the proposed Article 41A(1) provides for the President to appoint one person as a member of the Council as his nominee.

Clause 19 – Article 70(1) proviso (a)

Clause 19 of the Bill seeks to effect two amendments to Article 70(1) of the Constitution. The first is the repeal and replacement of paragraph (a) of the proviso thereto. The second is the repeal of paragraph (c) of the said proviso. The latter provision as it stands now, prevents the President from dissolving Parliament after the Speaker has entertained a resolution for the impeachment of the President as provided in Article 38(2). This provision is sought to be repealed in view of the repeal of Article 38(2) proposed by Clause 10, and is therefore consequential in nature.

Proviso (a) to Article 70(1) has been sought to be amended on three previous occasions. While the first attempt in 2002 was unsuccessful – vide the 19th Amendment to the Constitution Bill (2002) – the said provision was amended in 2015 – vide the 19th Amendment to the Constitution Bill (2015) – and in 2020 – vide the 20th Amendment to the Constitution Bill (2020).

Article 70(1) as it stood originally in the 1978 Constitution reads as follows:

> "*The President may, from time to time, by Proclamation summon, prorogue and dissolve Parliament:*
>
> *Provided that –*
>
> *(a) subject to the provisions of subparagraph (d), 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 General Election, unless Parliament by resolution requests the President to dissolve Parliament*;"

The amendment introduced through the 19th Amendment to the Constitution (2015) reads as follows:

> "*The President may by Proclamation, summon, prorogue and dissolve Parliament:*
>
> *Provided that the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, unless Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour*"

Thus, the period of one year as it stood originally was extended to a period of four and half years. It is apparent from a reading of the determination of this Court in the **19th Amendment to the Constitution Bill** (2015) that the amendment of the said proviso had not been challenged before this Court.

The 20th Amendment to the Constitution introduced in 2020 sought once again to amend proviso (a) to Article 70(1) by reverting to the provision as it stood in 1978 [vide Clause 14 of the 20th Amendment to the Constitution Bill]. During the course of the challenge to that Bill, the Attorney General had informed Court that an amendment would be moved at the Committee Stage whereby the period within which the President could dissolve Parliament would be increased to two and half years, or in other words, the period of four and half years as it stood then, would be reduced to two and half years. This Court in the **Twentieth Amendment to the Constitution Bill** [Supra. at page 129] having considered the following passage in the **19th Amendment to the Constitution Bill** (2002)[Supra. at page 323] held that Clause 14 as proposed to be amended at Committee Stage does not cause an erosion of the Sovereignty or alienation of Sovereignty of the People:

> *"Article 70(1)(a) is intended to provide for such a situation in terms of which during the first year after a General Election held pursuant to a dissolution of Parliament by the President, Parliament could be dissolved only if there is a resolution requesting such dissolution. Thus, in effect during this period the matter of deciding on the dissolution of Parliament become a responsibility shared by the President with*

Parliament. There is no alienation of the power of dissolution attributed to the President. Any extension of this period of one year may be seen as a reduction or as contended by Mr. H.L. De Silva an erosion of that power. However, we are of the view that on an examination of the relevant provisions in the different contexts in which they have to operate, that every extension of 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 especially 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 a alienation, relinquishment or removal of the executive power attributed to the President."

Proviso (a) of Article 70(1), as amended by the 20th Amendment to the Constitution, currently reads as follows:

"*The President may, from time to time, by Proclamation summon, prorogue and dissolve Parliament:*

Provided that –

(a) subject to the provisions of sub-paragraph (d), the President shall not dissolve Parliament until the expiration of a period of not less than two years and six months from the date appointed for its first meeting, unless Parliament by resolution requests the President to dissolve Parliament;"

This brings us to Clause 19 of the present Bill, which has proposed that the above proviso be replaced with the following:

> "*Provided that*
>
> *(a) the President shall not dissolve Parliament unless Parliament by resolution, passed by not less than one half of the whole number of Members of Parliament (including those not present) voting in its favour, requests the President to do so*."

The effect of the amendment is to remove in its entirety the power of the President to dissolve Parliament in the absence of a resolution passed by not less than one half of the whole number of Members requesting the President to do so. The premature dissolution of Parliament is therefore left entirely to the will of the Parliament.

A clause similar to Clause 19 was sought to be introduced in 2002 through clauses 4 and 5 of the 19th Amendment to the Constitution Bill, where the power of the President to dissolve Parliament after the expiration of one year from the date of the general election was *inter alia* sought to be restricted by stipulating that a dissolution shall not be done except on a resolution of Parliament to that effect. This Court, having considered the said clauses, held as follows – vide **19th Amendment to the Constitution Bill** (2002) [Supra. at pages 321-322]:

> "*It is clear that according to the framework of our Constitution, the power of dissolution of Parliament is attributed to the President, as a check to sustain and preserve the balance of power that is struck by the Constitution. This power attributed to the President in broad terms in Article 70(1) is subject in its exercise to specifically defined situations as set out in provisos (a) to (c) referred to above. Even in these situations, the final say in the matter of dissolution remains with the President. The only instance in which dissolution is mandatory, is contained in proviso (d), terms of which, if the Appropriation Bill (the Budget) has been rejected by Parliament and the President has not dissolved Parliament, when the next Appropriation Bill is also rejected, the President shall dissolve Parliament. This is a situation of a total breakdown of the government machinery, there being no money*

voted by Parliament for the government to function. In such an event dissolution is essential and the Constitution removes the discretion lying in the President by requiring a dissolution. As the Constitution now stands this is the only instance where Parliament could enforce a dissolution by the President and that too the oblique means of rejecting the Appropriation Bill twice. This demonstrates the manner in which the Constitution has carefully delineated the power of dissolution of Parliament. The People in whom sovereignty is reposed have entrusted the organs of government, being the custodians the exercise of the power, as delineated in the Constitution. It is in this context that we arrived at the conclusion that any transfer, relinquishment or removal of a power attributed to an organ of government would be inconsistent with Article 3 read with Article 4 of the Constitution. The amendments contained in Clauses 4 and 5 of the Bill vest the Parliament with the power, to finally decide on the matter of dissolution by passing resolution to that effect in the manner provided in the respective sub-clauses set out above."

Responding to an amendment proposed by the Hon. Attorney General to the said clauses, it was held as follows [pages 322 and 323]:

"We would now consider the amendment suggested by the Attorney-General according to which the proposed Article 70A (1) (a) is replaced with a provision stating that after the lapse of one year from a General Election, the President shall not dissolve Parliament unless upon a resolution passed by not less than one-half of the whole number of members of Parliament, including those not present. It has to be noted that this amendment does not address the inconsistency with Articles 3 and 4, dealt with in the preceding sections of this determination. We have stated clearly, on the basis of a comprehensive process of reasoning, that the dissolution of Parliament is a component of the executive power of the People, attributed to the President, to be exercised in trust for the People and that it cannot be alienated in the sense of being transferred, relinquished or removed from where it lies in terms of Article 70 (1) of the Constitution. Therefore, the amendments contained in clauses 4 and 5 of the Bill, even as further amended, as suggested by the Attorney-General, constitute in our view such an alienation of executive power, inconsistent with Article 3 read with Article 4 of the Constitution and require to be passed by the special

majority required under Article 84 (2) and approved by the People at a Referendum, by virtue of the provisions of Article 83."

The above reasoning would apply with equal force to Clause 19, which, as noted earlier, removes in its entirety the power of the President to dissolve Parliament in the absence of a resolution by one-half of the whole number of Members requesting the President to do so. We are therefore of the view that Clause 19 of the Bill is inconsistent with Article 3 read together with Article 4(b) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

Clause 30(a) of the Bill – Article 99(13)

Clause 30(a) of the Bill seeks to amend Article 99(13) of the Constitution. The proposed amendment seeks to limit the jurisdiction of Court to the legality of the expulsion on the merits and excludes an examination into the procedure adopted.

The position as at present is that a Member of Parliament who ceases, by resignation, expulsion or otherwise, to be a member of a recognized political party or independent group on whose nomination paper his name appeared at the time of his becoming such Member of Parliament, his seat becomes vacant upon the expiration of a period of one month from the date of his ceasing to be such member. The Proviso to Article 99(13)(a) permits the Member of Parliament to challenge the validity of his expulsion before the Supreme Court.

In **Tilak Karunaratne v. Sirimavo Bandaranaike and Others** [(1993) 2 Sri LR 90] Court examined the scope of the jurisdiction exercised by the Supreme Court in this situation. Dheeraratne J. (at page 102) held as follows:

"The nature of the jurisdiction conferred on the Supreme Court in terms of the proviso to Article 99 (13) (a) is indeed unique in character; it calls for a determination that expulsion of a Member of Parliament from a recognized political party on whose nomination paper his name appeared at the time of his becoming such Member of

*Parliament, was valid or invalid. If the expulsion is determined to be valid, the seat of the Member of Parliament becomes vacant. It is this seriousness of the consequence of expulsion which has prompted the framers of the Constitution to invest that unique original jurisdiction in the highest court of the Island, so that a Member of Parliament may be amply shielded from being expelled from his own party unlawfully and/or capriciously. It is not disputed that this court's jurisdiction includes, an investigation into the requisite competence of the expelling authorit ; an investigation as to whether the expelling authority followed the procedure, if any, which was mandatory in nature**; an investigation as to whether there was breach of principles of natural justice in the decision making process**; and an investigation as to whether in the event of grounds of expulsion being specified by, way of charges at a domestic inquiry, the member was expelled on some other grounds which were not so specified."*[Emphasis added]

In fact, previously Fernando J. in **Gamini Dissanayake (Petitioner in SC 4/91) v. M.C.M.Kaleel and Others** [(1993) 2 Sri LR 135] had held, in his dissenting judgment, that the although the jurisdiction of Court is original, it covers both an examination of the decision-making process and a consideration of the merits. A five-member bench of this Court in **Ameer Ali and Others v. Sri Lanka Muslim Congress and Others** [(2006) 1 Sri LR 189] cited with approval the decision in **Tilak Karunaratne v. Sirimavo Bandaranaike and Others** (Supra) and held that in exercising this jurisdiction, this Court has to examine the requisite competence of the expelling authority and the nature of the decision making process including that of the "domestic inquiry" to be satisfied as to its bona fides and the compliance with the principles of natural justice.

Hence, there can be no doubt, that the jurisdiction of Court in examining the expulsion of a Member of Parliament covers an examination as to whether the rules of natural justice was followed before the expulsion.

In this regard it is also pertinent to examine the manner in which courts have interpreted ouster clauses in different legislation.

In **Gooneratne and Others v. Chandrananda De Silva, Commissioner of Elections** [(1987) 2 Sri LR 165] the Supreme Court considered the scope of the words "*shall be final and shall not be called in question in any court*" and held that it has no effect in excluding judicial review on the basis of ultra vires.

In **Atapattu and Others v. Peoples Bank and Others** [(1997) 1 Sri LR 208] the Supreme Court held that in interpreting ouster clauses dealing with the jurisdiction of Courts, presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it.

These authorities fortify the position that enhancing the jurisdiction of Court is an important aspect of the protection of the Rule of Law which is a fundamental principle of our Constitution.

As pointed out earlier, the franchise is not restricted to merely voting at elections, it includes standing for election and indeed the entire election process from nomination to poll. [**Provincial Councils Elections (Special Provisions) Bill** [Supra.], **Seventeenth Amendment to the Constitution Bill** [Supra.].

We are of the view that the franchise in Article 3 of the Constitution extends beyond the poll and provides a protection to the Members elected through the exercise of franchise against arbitrary expulsion and/or expulsion through illegal and or unlawful means since the voter's preferred candidate is removed from his seat in Parliament and replaced by a candidate who at the original election failed to obtain the adequate preferential votes to gain election to Parliament.

In the **Eighteenth Amendment to the Constitution Bill (2002) [**Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII page 303 at 306] it was held that:

> *"The effect of the amendment in Clause 4 is to introduce a different class of people whose actions are not subject to judicial review. There is no justification for such immunity to be granted, which is contrary to Article 12(1) of the Constitution and the basic principles of Rule of Law.*

The concept of judicial review of administrative action, being a predominant feature of Constitutional jurisprudence, prevents total immunity being to anybody, created under the Constitution as such restriction of judicial scrutiny, would impair the very foundation of the Constitution and the Rule of Law. The total immunity contemplated by the amendment, taking away the judicial review of the actions of the Constitutional Council out of the fundamental rights jurisdiction, in effect would alienate the judicial power from the people in contravention of Articles 3 and 4 of the Constitution. It is to be noted that Article 3 of the Constitution specifically refers to the following:

(A) The sovereignty is in the people and that it is inalienable; and

(B) *The sovereignty includes the powers of Government, fundamental rights and the franchise"*

Hence, it is important that the validity of such expulsion must stand the scrutiny of the full judicial power of the People which Court exercises as envisaged in Article 4(c) of the Constitution. As Clause 30(a) of the Bill seeks to limit the judicial power of the People, it is inconsistent with Article 3 read together with Articles 4(c) and 4(e) of the Constitution and may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

Clause 39 of the Bill – Consultative Jurisdiction

This Clause seeks to repeal Articles 129(1) and (4) of the Constitution which deal with the Consultative Jurisdiction of the Supreme Court.

The relevant Articles read as follows:

"(1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may,

after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.

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

Mr. Fernando submitted that the power sought to be exercised by court in terms of Article 129 of the Constitution is not an exercise of the Judicial power of the People, in so far as court would not be adjudicating on any dispute or petition brought before it but would only be advising the President with regard to the general interpretation of facts or law.

It was further submitted that it is in fact important for the independence of the Judiciary and for the enhancement of the Judicial power of the People that the Judiciary does not in practice, and is not seen to have advised the executive, in private proceedings**,** on an interpretation of the law or particular facts as set out in Article 129 (1) and Article 129 (4) of the Constitution.

Mr. Fernando contended that Article 129 (1) and Article 129 (4) in fact further impinge on the Judicial power of the People set out in Article 4 of the constitution in so far as, an opinion in terms of Article 129 (1), once given would compromise Courts' ability to uphold the Principles of Natural Justice and to afford a fair hearing to any party that wishes to subsequently challenge any act or omission based on the laws or facts set out therein. He went on to submit that in terms of the existing legal structure the President is able to seek the advice of the Attorney General on any legal or factual situation as required and there is no need for the President to seek the opinion of this Court on the interpretation of facts or law, behind closed doors and that Clause 39 of the Bill does not reduce the judicial power of the People as contended by the Petitioners, but in fact enhances it and as such is not unconstitutional and does not require a referendum in terms of Article 83 of the Constitution.

At the outset in must be pointed out that this provision is not peculiar to our Constitution. Article 143(1) of the Constitution of India is identical to Article 129(1) of the Constitution except the time frame referred to in our Constitution.

In ***M P Jain Indian Constitutional Law*** [Justice Jasti Chelameswar and Justice Dama Seshadri Naidu, 8th Edition, page 277] it is stated that the advisory opinion of Court has the advantage of providing guidance to the government on questions of its legal powers and may promptly remove any cloud of uncertainty in the public mind, regarding the validity of any legislation or governmental action. It is further stated that to depend solely on a real controversy for deciding a constitutional issue means that the court's jurisdiction depends on the whims of private litigants, and vital questions of constitutional law may remain clouded and unanswered by the highest Court for long till a suitable case arises and reaches the Court.

In conclusion it is said that all these arguments for and against advisory opinions however lead to one conclusion: it is advisable that the highest Court has advisory jurisdiction but it should be invoked only sparingly and not frequently and only in such cases where factual situations are ripe, or where legal issues are capable of being formulated precisely and can be considered by the Court without much of a factual data, and political questions should not be referred to the Court for advice.

The approach of the Indian Supreme Court has been that it is not bound to express an opinion in every case referred by the President in terms of Article 143(1) of the Indian Constitution. In ***Special Reference No.1 of 2012*** [(2012) 9 S.C.R. 311] D.K. Jain, J. held that *"upon receipt of a reference under Article 143(1), the function of this Court is to consider the reference; the question(s) on which the President has made the reference, on the facts as stated in the reference and report to the President its opinion thereon. He went on to hold that nevertheless, the usage of the word "may" in the latter part of Article 143(1) implies that this Court is not bound to render advisory opinion in every reference and may refuse to express its opinion for strong, compelling and good reasons*."

The consultative jurisdiction of the Supreme Court is recognized in Article 118 of the Constitution which enumerates the different types of jurisdictions vested in the Supreme Court. Articles 119 to 136 deal with the manner of their exercise by court.

Contrary to what Mr. Fernando submitted, the opinion rendered by court in the exercise of the consultative jurisdiction is not equivalent to an opinion rendered by the Hon. Attorney-General. It is an advisory opinion given in the exercise of the consultative jurisdiction of this court.

In **Bandaranaike v. Attorney-General** [Supra.] it was held that Article 132(4) provides that "*the Judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority*." And that in the scheme of the chapter, it is quite clear that the provisions of Article 132(4) apply equally to the "*determination*" referred to in Articles 121, 122, 123, 125 and 126 and the *"Judgment*" referred to in Article 127 , "*opinion*" referred to in Article 129(1) and "*determination"* under 129(2) and again to the "*determination*" under Article 130, all made by the Supreme Court in the exercise of its several jurisdictions. Furthermore, it was held that the descriptions '*determination*', '*judgment',* '*opinion*', '*decision*', *'conclusion'* are different labels for the same concept.

Hence the People have in the exercise of their sovereignty delegated to the Supreme Court, as part of their judicial power, the power to provide advisory opinion to the President. Any abridgment of it infringes upon the judicial power of the people and their sovereignty.

Accordingly, Clause 39 of the Bill in so far as it seeks to repeal Article 129(1) of the Constitution is inconsistent with Article 3 read together with Article 4(c) of the Constitution and may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

Mr. Fernando was vocal in his criticism of Article 129(4) of the Constitution as it allegedly allows the President to obtain the advisory opinion of the Supreme Court behind closed doors. In that context, the proposed amendment to repeal Article 129(4) has much merit and is not inconsistent with the Constitution.

Clause 43 of the Bill - Removal of Executive power in relation to the Province

Article 154B (1) and (2) of the Constitution reads as follows:

> "*(1) There shall be a Governor for each Province for which a Provincial Council has been established in accordance with Article 154A.*
>
> *(2) The Governor shall be appointed by the President by warrant under his hand and shall hold office, in accordance with Article 4(b), during the pleasure of the President."*

Articles 154F(1), (2) and (3) reads as follows:

> "(1) *There shall be a Board of Ministers with the Chief Minister at the head and not more than four other Ministers to aid and advise the Governor of a Province in the exercise of his functions. The Governor shall, in the exercise of his functions, act in accordance with such advice, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion*.
>
> (2) *If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question in any Court on the ground that he ought or ought not have acted on his discretion. The exercise of the Governor's discretion shall be on the President's directions*.
>
> (3) *The question whether any, and if so what, advice was tendered by the Ministers to the Governor shall not be, inquired into in any Court*."

Clause 43 of the Bill seeks to repeal Articles 154F(2) and (3).

The nexus between the President and the Governor was explained in the following manner in the majority determination of this Court in the **Thirteenth Amendment to the Constitution Bill** [Supra. at pages 31-32]:

> **"***With respect to executive powers an examination of the relevant provisions of the Bill underscores the fact that in exercising their executive power, the Provincial Councils are subject to the control of the centre and are not sovereign bodies.*
>
> *Article 154 C provides that the executive power extending to the matters with respect to which a Provincial Council has power to make statutes shall be exercised by the Governor of the Province either directly or through Ministers of the Board of Ministers or through officers subordinate to him in accordance with Article 154F.*
>
> *Article 154F states that the Governor shall, in the exercise of his functions, act in accordance with such advice, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion.*
>
> *The Governor is appointed by the President and holds office in accordance with Article 4(b), which provides that the executive power of the People shall be exercised by the President of the Republic, during the pleasure of the President (Article 154B(2)). The Governor derives his authority from the President and exercises the executive power vested in him as a delegate of the President. It is open to the President therefore by virtue of Article 4(b) of the Constitution to give directions and monitor the Governor's exercise of this executive power vested in him. Although, he is required by Article 154F(1) to exercise his functions in accordance with the advice of the Board of Ministers, this is subject to the qualification "except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion. Under the Constitution the Governor as a representative of the President is required to act in his discretion in accordance with the instructions and directions of the President. Article 154F(2) mandates that the Governor's discretion shall be on the President's directions and that the decision of the Governor as to what is in his*

discretion shall be final and not be called in question in any court on the ground than he ought or ought not to have acted on his discretion. ***So long as the President retains the power to give directions to the Governor regarding the exercise of his executive functions and the Governor is bound by such directions*** *superseding the advice of the Board of Ministers and where the failure of the Governor or Provincial Council to comply with or give effect to any directions given to the Governor or such Council by the President under Chapter XVII of the Constitution will entitle the President to hold that a situation has arisen in which the administration of the Province cannot be carried on in accordance with the provisions of the Constitution and take over the functions and powers of the Provincial Council (Article 154K and 154L) there can be no gain saying the fact that the President remains supreme or sovereign in the executive field and the Provincial Council is only a body subordinate to him*" [Emphasis added]

Mr. Fernando drew our attention to Article 154J of the Constitution which enables the President to give directions to a Governor as to the manner in which the executive power exercisable by the Governor is to be exercised once a proclamation has been made under the Public Security Ordinance and Article 154K which empowers the President to hold that a situation has arisen in which the administration of the Province cannot be carried on in accordance with the provisions of the Constitution due to the failure on the part of the Governor or any Provincial Council to comply with, or give effect to any directions given to such Governor or such Council under Chapter XVIIA of the Constitution, which remains intact.

Nevertheless, we observe that the said Articles deal with specific situations whereas in terms of Article 154F(2), the President is empowered to give directions to the Governor in all situations where the exercise of his discretion is permitted. One of the main reasons for the majority in the **Thirteenth Amendment to the Constitution Bill** determination to conclude that the executive power of the people remains with the Centre through the President is the pervasive control he exercises over the executive functions of the Governor as identified above. If Article 154F(2) is repealed as envisaged by Clause 43 of the Bill, the power of the President to give directions to the Governor regarding the

exercise of his executive functions is completely removed thereby removing the very foundation of the conclusion of the majority in the Thirteenth Amendment to the Constitution Bill. The Governor will then have to act on the advice of the Board of Ministers in terms of Article 154F(1) which is retained. The result is that the executive power of the People is alienated in so far as the Provincial Councils are concerned to the Board of Ministers. Therefore Clause 43 of the Bill is inconsistent with Articles 2 and 3 read together with Article 4(b) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

Clause 51 of the Bill - National Security Council

Clause 51 of the Bill seeks *inter alia* to introduce Chapter XIX-C titled National Security Council of which the Prime Minister is to be the Chairperson. Parliament is to, by law, to provide its powers and functions. The President is not a member of the National Security Council.

In **S.C. Reference No. 2/2003**, it was held that the plenary executive power including the defence of Sri Lanka is vested and reposed in the President of the Republic of Sri Lanka and that the Minister appointed in respect of the subject of defence has to function within the purview of the plenary power thus vested and reposed in the President.

Clause 2 of the Bill seeks to amend Article 4(b) of the Constitution to provide that the executive power of the people, including the defence of Sri Lanka will be exercised by the President and the Cabinet of Ministers as provided for in the Constitution. Thus, the constitutional responsibility on the part of the President for the defence of Sri Lanka continues even after the proposed amendment albeit as a shared responsibility with the Cabinet of Ministers.

Moreover, the Bill does not seek to remove the role of the President as the Head of the State or the Commander-in-Chief of the Armed Forces as spelt out in Article 30(2) of the Constitution. It is this dual role along with the specific responsibility entrusted to the President by Article 4(b) for the defence of Sri Lanka that plays a significant role in

ensuring the inviolability of the provisions in Articles 1 and 2 of the Constitution and safeguards the independence and territorial integrity of Sri Lanka. Therefore, the principles contained in Article 30(2) in relation to the head of the State and the Commander-in-Chief is a necessary concomitant or corollary of Articles 1 and 2 of the Constitution.

Hence as long as the President continues to exercise executive power including the defence of Sri Lanka and remains as the Head of the State and the Commander-in-Chief of the Armed Forces, he must be the head of the proposed National Security Council. In the absence of such provisions, the proposed Articles 156J (1) and (2) violates Articles 1, 2 and 3 read together with Article 4(b) of the Constitution and may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83. However, such inconsistency would cease if the proposed Article 156J(1) and 156J(2) are amended to change the composition of the proposed National Security Council and make the President the Chairperson of the proposed Council.

SUMMARY OF THE DETERMINATION

1. Clauses 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 23, 24, 26, 27, 28 and 36 of the Bill contain provisions inconsistent with Article 3 read together with Article 4(b) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

2. Clauses 2, 3 and 4 of the Bill are inconsistent with Article 3 read together with Article 4(e) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

3. Clause 14 of the Bill as it presently stands is inconsistent with Article 3 read together with Article 4(b) and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83. However, the necessity for a Referendum will cease if the proposed Article 41A(1) provides for the President to appoint one person as a member of the Council as his nominee and if the proposed Article 41A(6) is suitably amended to remove the deeming provision set out therein.

4. Clause 19 of the Bill is inconsistent with Article 3 read together with Article 4(b) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

5. Clause 30(a) of the Bill seeks to limit the judicial power of the People, and therefore is inconsistent with Articles 3 read together with Articles 4(c) and 4(e) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

6. Clause 39 of the Bill in so far as it seeks to repeal Article 129(1) of the Constitution is inconsistent with Article 3 read together with Article 4(c) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

7. Clause 43 of the Bill is inconsistent with Articles 2 and 3 read together with Article 4(b) of the Constitution and as such may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83.

8. Clause 51 of the Bill seeks *inter alia* to introduce Chapter XIX-C titled National Security Council of which the Prime Minister is to be the Chairperson. The proposed Articles 156J (1) and 156J(2) are inconsistent with Articles 1, 2 and 3 read together with Article 4(b) of the Constitution and as such may be enacted only by

the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83. However, such inconsistency would cease if the proposed Articles 156J(1) and 156J(2) are amended to change the composition of the proposed National Security Council and make the President the Chairperson of the proposed Council.

We place on record our appreciation of the assistance given by the learned Solicitor-General who represented the Hon. Attorney-General, all learned President's Counsel and Counsel who appeared for the Petitioners, and the learned Counsel for the proponent of the Bill.

JAYANTHA JAYASURIYA, PC
CHIEF JUSTICE

JANAK DE SILVA, J
JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J
JUDGE OF THE SUPREME COURT