IN RE THE NINETEENTH AMENDMENT TO THE CONSTITUTION

SUPREME COURT
S. N. SILVA, CJ.,
WADUGODAPITIYA, J.,
BANDARANAYAKE, J.,
ISMAIL, J.,
EDUSSURIYA, J.,
YAPA, J. AND
J. A. N. DE SILVA, J.
SD NOS. 11, 13, 15; 16-21; 25-28; 30-35 AND 37-40 OF 2002
1ST AND 3RD OCTOBER 2002

Constitution – 19th Amendment to the Constitution – Petitions under Articles 121 (1)/123 of the Constitution – Amendments to Articles 43 (1), 49 and 70 – Legislative power of Parliament – Articles 3, 4, 75, 83 (a), 84 (2) and 99 (13) (a) of the Constitution – Sovereignty of the people – Separation of powers – Erosion of executive power of the people exercised by the President – Rule of Law.

A Bill titled "the Nineteenth Amendment to the Constitution" was placed on the Order Paper of Parliament for 19. 09. 2002. The above-numbered petitions were presented invoking the jurisdiction of the Supreme Court in terms of Article 121 (1) for a determination in terms of Article 123 of the Constitution, in respect of the Bill.

The Bill deals broadly with four matters :

(1) The central provisions are contained in Clauses 4 and 5 for amending Article 70 of the Constitution relating to dissolution of Parliament. The amendments drastically remove the President's discretion in the matter, especially where the President is not a member of the Governing Party in Parliament. The erosion of the President's power is even more severe after the lapse of one year referred to in Article 70 (1).

(2) An amendment to Article 43 (3) of the Constitution relating to the President's discretion to appoint a Prime Minister, in view of the

provisions of Clause 5 which, *inter alia*, makes it mandatory to appoint a Prime Minister nominated by a resolution of Parliament – Clauses 2 and 3 (1).

(3) An amendment to Article 49 of the Constitution relating to the dissolution of the Cabinet of Ministers and the appointment of new Ministers by the President in view of the proposed new Article 70A (1) (*b*) which compels the President to dissolve Parliament upon a resolution of no confidence or to appoint a new Prime Minister as may be named in the resolution. – Clause 3 (2).

(4) A new provision which permits members of Parliament to vote on any amendment contained in the Bill according to their conscience and yet be immuned from disciplinary action by the Party or by the Group to which such member belongs, as provided by Article 99 (13) (*a*) of the Constitution – Clause 6.

Held:

(1) Clauses 4, 5, 2 and 3 of the Bill have to be examined –

(*a*) In the light of Article 3 of the Constitution which provides – "In the Republic of Sri Lanka sovereignty, is in the people and is inalienable. Sovereighty includes powers of government, fundamental rights and the franchise.".

(*b*) In the light of Article 4 which is linked to Article 3 and which sets out, *inter alia,* the manner in which sovereignty of the people should be exercised by the legislative, executive and judicial organs of the Government; and

(*c*) In the light of the balance of power that has been struck in the Constitution and in the context of the separation of powers as contained particularly in Article 4.

(2) The organs of Government referred to in Article 4 must exercise their power only in trust for the people.

(3) The transfer of a power which is attributed by the Constitution to one organ of Government to another or the relinquishment or removal of such power

would be an alienation of soverlignty inconsistent with Article 3 read with Article 4 of the Constitution.

(4) Disssolution of Parliament is a component of executive power of the People to be exercised by the President for the People. 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. The final say even in situations referred to in Article 70 (*a*) to (*c*) remains with the President. Therefore, the amendments contained in Clauses 4 and 5 of the Bill constitute 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.

(5) Clauses 2 and 3 (1) of the Bill relate to the dissolution of Parliament and the amendments provided by Clauses 4 and 5 which, *inter alia*, require the President to dissolve Parliament and appoint a Prime Minister nominated by Parliament. Hence, those Clauses attract the determination stated above based on inconsistency with Article 4 (*b*) and require the approval of the People at a Referendum.

(6) Clause 3 (2) which would require the President to dissolve Parliament on a resolution of no confidence (*vide* Article 70 A (1) (*b*)) results in the dissolution of Parliament itself upon such resolution. Hence, it is an alienation of the legislative power of the people inconsistent with Article 3 read with Article 4 (*a*). As such Clause 3 (2) requires to be passed by the special majority specified in Article 84 (2) and approved by the people at a Referendum by virtue of Article 83.

(7) Clause 6 has the effect of partly suspending Article 99 (13) (*c*) of the Constitution. It also has implications on franchise defined in Article 4 (*c*) and judicial power under Article 4 (*c*). That Clause cannot be validly enacted by Parliament in view of the specific bar contained in Article 75 of the Constitution.

(8) If Clauses 4 and 5 of the Bill are removed and replaced with a clear amendment to proviso (*a*) or Article 70 (1) whereby the period of the year referred to therein is extended to a period not exceeding three years that would not amount to an alienation of executive power of the President. The inconsistency with Article 3 read with Article 4 (*b*) would thereby cease.

The substituted clause may be passed by the special majority under Article 84 (2) and does not require the approval of the People at a Referendum.

1. *Visuvalingam v. Liyanage* (1983) 1 Sri LR 236.
2. *Premachandra v. Jayewickrema* (1994) 2 Sri LR 90.
3. *Gupta and Others v. Union of India* (1982) AIR (SC) 197.

PETITIONS challenging the "Nineteenth Amendment to the Constitution" under Article 121 (1) for a determination under Article 123 of the Constitution.

Counsel for petitioners :

SD No. 11/2002	–	*Batty Weerakoone*
SD No. 13/2002	–	*Sarath Weragoda* (in person)
SD No. 15/2002	–	*D. P. Mendis*, PC with *Nadeera Gunawardena* and *Keerthi Segara*
SD No. 16/2002	–	*S. S. Sahabandu*, PC with *Keerthi Segara, Situge* and *S. D. Yogendra*
SD No. 17/2002	–	*A. A. De Silva*, PC with *A. W. Yusuf, Prasanna Obeysekera* and *Chaminda Weerakkody*
SD No. 18/2002	–	*R. I. Obeysekera*, PC with *A. W. Yusuf, P. Liyanaarachhci, Chaminda Weerakkody* and *Piyal Ranatunga*
SD No. 19/2002	–	*B. Jayamanna* with *Swinitha Gunaratne*
SD No. 20/2002	–	*L. V. P. Wettasinghe* with *Swinitha Gunaratne*
SD No. 21/2002	–	*M. A. Sumanthiran* with *V. Corea* and *Renuka Senanayake*
SD No. 25/2002	–	*Anil Obeysekera*, PC with *Palitha de Silva* and *Bandula Wellala*
SD No. 26/2002	–	*E. P. Wickremasekera (in person)*
SD No. 27/2002	–	*A. A. de Silva*, PC with *Piyatissa Abeykoon* and *Kanishka Witharana*
SD No. 28/2002	–	*Manohara de Silva*
SD No. 30/2002	–	*Wijedasa Rajapakse*, PC with *Kapila Liyanagamage* and *Ranjith Meegaswatta*
SD No. 31/2002	–	*Neville Jayawardene* with *P. D. R. S. Panditharatne*
SD No. 32/2002	–	*H. L. de Silva*, PC with *Nigel Hatch*
SD No. 33/2002	–	*R. K. W. Goonesekera* with *Gaston Jayakody*
SD No. 34/2002	–	*Dr. Jayampathy Wickremaratne* with *Gaston Jayakody*
SD No. 35/2002	–	*Dr. Jayampathy Wickremaratne* with *Gaston Jayakody*
SD No. 37/2002	–	*A. R. I. Athurupana* with *R. Edirimanne*
SD No. 38/2002	–	*A. W. Yusuf* with *Piyal Ranatunga*
SD No. 39/2002	–	*A. A. de Silva*, PC with *P. Abeykoon* and *Kanishka Witharana*
SD No. 40/2002	–	Petitioner absent and unrepresented

Counsel for the State :

K. C. Kamalasabayson, PC Attorney-General with *S. Marsoof,* PC Additional Solicitor-General, *Uditha Egalahewa,* State Counsel and *Harsha Fernando,* State Counsel.

Intervenient :

Shibly Aziz, PC with *L. C. Seneviratne,* PC, *Daya Pelpola, S. G. Mohideen, Ronald Perera, Chandimal Mendis* and *Rohana Deshapriya.*

Cur. adv. vult.

October 01 and 03, 2002

A Bill bearing the title "19th Amendment to the Constitution", 01
was placed on the Order Paper of Parliament for 19. 09. 2002. Twenty-four petitions, numbered as above have been presented invoking the jurisdiction of this court in terms of Article 121 (1) for a determination in terms of Article 123 of the Constitution, in respect of the Bill.

Upon receipt of the petitions the Court issued notice on the Attorney-General as required by Article 134 (1) of the Constitution.

The petitioners or Counsel representing them, the Intervenient petitioner and the Attorney-General were heard before this Bench at 10
the sittings held on 01. 10. 2002 and 03. 10. 2002.

The proposed 19th Amendment to the Constitution as contained in the Bill deals with broadly four matters :

(1) the appointment of the Prime Minister, an amendment to Article 43 (1) of the Constitution, as contained in clause 2;

(2) the dissolution of the Cabinet of Ministers, an amendment to Article 49 as contained in clause 2;

(3) the dissolution of Parliament, an amendment to Article 70 as contained in clauses 4 and 5

(4) the conferment of an immunity from disciplinary action that may be taken against Members of Parliament by recognized political parties or independent groups in respect of speaking, voting, or abstaining from voting on any amendment to the Constitution contained in the Bill, as set out in clause 6 of the Bill.

Since the Bill taken as a whole hinges on the provisions contained in clauses 4 and 5 with regard to the dissolution of Parliament we would consider this matter first.

DISSOLUTION OF PARLIAMENT

The provisions presently in the Constitution regarding dissolution of Parliament are contained in Article 70 (1). The main paragraph in Article 70 (1) reads as follows :

> "The President may, from time to time, by Proclamation Summon, Prorogue and Dissolve Parliament."

The broad power thus attributed in the President is subject to certain limitations and clarifications as are specified in provisos (*a*) to (*d*) of the sub article. The contents of these provisos may be summarized as follows :

(*a*) where 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 one year from the date of such election unless Parliament by resolution requests the President to do so.

(*b*) the President shall not dissolve Parliament on the rejection of the statement of government policy at the commencement of the first session of Parliament after a General Election.

(*c*) restriction on the power of dissolution where a motion for the impeachment of the President has been entertained by the Speaker.

(*d*) where the President has not dissolved Parliament upon the rejection of the Appropriation Bill, Parliament shall be dissolved if the next Appropriation Bill is rejected.

It is seen that provisos (*a*), (*b*) and (*c*) are specifc restrictions on the power of dissolution, whereas proviso (*d*) is mandatory and requires dissolution.

THE CONTENTS OF THE BILL WITH REGARD TO THE DISSOLUTION OF PARLIAMENT

The amendments in the Bill in this regard are contained in clauses 4 and 5. Clause 4 repeals proviso (*a*) of Article 70 (1), referred to above and substitutes a new proviso with two sub paragraphs. As noted, proviso (*a*) is a restriction on the powers of the President to dissolve Parliament within one year after a General Election, that had been held consequent upon a dissolution of Parliament by the President. The effect of the amendment is two-fold :

(1) the proviso will apply irrespective of the circumstance that caused the General Election. That is, whether it resulted from

a dissolution by the President or by the expiration of the term of Parliament being 6 years, as contained in Article 62 (2).

(2) the residuary power which in terms of the present proviso (*a*) lies in the President not to dissolve, even where the Parliament by resolution requests the same, is removed and it becomes mandatory on the President to dissolve within 4 days of the resolution being communicated by the Speaker, However, the period of 1 year from the General Election during which the proviso will apply, remains.

Clause 56 seeks to add a new provision as Article 70A immediately after Article 70. The new Article will have four sub articles, the provisions of which can be grouped as follows :

(1) Article 70A (1) (*a*) which deals with a situation "where the majority of the Members of Parliament belong to a recognized political party or parties or an independent group or groups of which the President is not a member". In such event after the expiration of one year from the General Election the President shall not dissolve Parliament unless upon a request by Parliament supported by a resolution passed by not less than two-thirds of the whole number of members, including those not present.

(2) Articles 70A (1) (*b*) and 70A (2) are linked. Paragraph (*b*) provides that where the Parliament passes a resolution that the Government no longer enjoys the confidence of the Parliament, the President shall dissolve Parliament. However, as stated in paragraph (2), if such a resolution identifies a Member of Parliament who enjoys the confidence of Parliament and the resolution is passed by not less than one-half of the whole number of members (including those not present) the President shall not dissolve Parliament but shall appoint such person as Prime Minister.

(3) Articles 70A (3) and (4) are consequential provisions the contents of which need not be referred to for the purpose of this determination.

Considering the somewhat diffused picture that comes to mind when the amendment is read into the existing provision, we would summarize the situation that will emerge as follows :

(1) the main provision in Article 70 (1) referred to above, which broadly attributes the power of dissolution of Parliament to the President, remains :

(2) the substituted proviso (*a*) which applies in relation to the first year after the General Election remains. The discretion that now lies with the President not to dissolve even if the Parliament requests such dissolution is removed and such dissolution is mandatory on the part of the President.

(3) There is a bifurcation in the provisions that will apply in respect of the period after the lapse of 1 year from the date of the General Election. These provisions are :

(*a*) Where the majority of the Members of Parliament belong to a recognized political party or independent group or groups of which the President is not a member, the power of dissolution is totally removed from the President and can be exercised by the President only upon a resolution passed by not less than two-thirds of the whole number of members (including those not present) request such dissolution.

(*b*) If the President is a member of the majority party or group in Parliament, the power of dissolution will remain as it presently stands, subject to the provisions in Articles 70A (1) (*b*) and (2) referred to above.

THE GROUNDS OF CHALLENGE

The petitioners challenge the provisions contained in clauses 4 and 5 on the basis that they constitute an erosion of the executive power of the President, which is inconsistent with Article 3 read with Article 4 (*b*) of the Constitution and urge that the inconsistency is aggravated by the criterion upon which the power of the President in this regard is reduced to nothing, *viz* the absence of membership in a particular political party or a group.

ANALYSIS OF THE GROUND OF CHALLENGE AS TO CLAUSES 4 AND 5

The Court has to consider whether the said clauses require to be passed by the special majority provided in Article 84 (2) and approved by the People at a Referendum by virtue of the provisions of Article 83. The petitioners contend as noted above that these provisions require to be approved at a Referendum in terms of Article 83 (*a*), as they are inconsistent with Article 3 read with Article 4 (*b*) of the Constitution. Since extensive references were made to Articles 3 and 4 of the Constitution, we reproduce the respective Article in full.

(3) "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."

(4) 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 privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

(*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.".

These Articles relate to the sovereignty of the People and the exercise of that sovereignty. Mr. H. L. de Silva, PC, submitted and correctly so, that the two Constitutions of Sri Lanka of 1972 and 1978 are unique in proclaiming that sovereignty is in the People and specifically elaborating the content of such sovereignty, whilst in most Constitutions the term "sovereignty" is used only as descriptive of the power of the State, similar to Article I, which states that – *"Sri Lanka (Ceylon) is a Free, Sovereign, Independent, and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka".* This submission was further developed by Mr. Batty Weerakone from the perspective of political theory and he submitted that in terms of Articles 3 and 4, sovereignty is transmuted from a "grim reality" to something that is "tangible" or "palpable", without being elusive or visionary.

It was the common submission of counsel for the petitioners that sovereignty conceptualized in Article 3 is given a practical dimension in Article 4. Although Mr. Shibly Aziz, PC, counsel for the intervenient petitioner sought in a brief argument to delink the two Articles, the Attorney-General submitted that they are linked together and should be read together. Indeed, the Attorney-General's submission has been the constant trend of decisions of this Court that date back to the year 1980. Whilst the previous decisions relate to alleged instances of the erosion of judicial power, fundamental rights / franchise or devolution of power to subordinate (or as alleged, coordinate bodies), we are presently confronted with an alleged erosion which involves the Legislative organ of Government and the Executive organ of Government. Hence, it is necessary to examine the concept of the sovereignty of the People and the working thereof, as set out in Articles 3 and 4 from a slightly different perspective.

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 Articles 4 (*a*), (*b*) and (*c*) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (*a*), (*b*) and (*c*) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by

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

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. 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. The dissolution of Parliament and impeachment of the President are some of these powers which constitute the checks incorporated in our Constitution. Interestingly, these powers are found in chapters that contain provisions relating to the particular organ of government subject to the check. Thus, provision for impeachment of the President is found in Article 38 (2) containted in Chapter VII titled "The Executive, President of the Republic". Similarly, the dissolution of Parliament is found in Article 70 (1), which is contained in Chapter XI titled, "The Legislature, Procedure and Powers.".

Mr. H. L. de Silva, PC, submitted forcefully that they are "weapons" placed in the hands of each organ of government. Such a description may be proper in the context of a general study of Constitutional Law, but would be totally inappropriate to our Constitutional setting, where sovereignty as pointed out above, continues to be reposed in the People and organs of government are only custodians for the time being, that exercise the power for the People. Sovereignty is thus a continuing reality reposed in the People.

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

The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the "trust" that is implicit in the conferment of power has been stated as follows :

> "Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended." (*Administrative Law* 8th ed. 2000 – H. W. R. Wade and C. F. Forsyth, p. 356).

It has been firmly stated in several judgments of this Court that the 'rule of law' is the basis of our Constitution (*Visuvalingam v. Liyanage*,[1] *Premachandra v. Jayawickrema*.[2]

A. V. Dicey in "*Law of the Constitution*" postulates that 'rule of law' which forms a fundamental principle of the Constitution has three meanings, one of which is described as follows :

"It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone . . ."

The Attorney-General has appropriately cited the dictum of Bhagawati, J. (later, Chief Justice of India) in the case of *Gupta and Others v. Union of India*[3] – where he observed :

"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective."

To sum up the analysis of the balance of power and the checks contained in the Constitution to sustain such balance, we would state that the power of dissolution of Parliament and the process of impeachment being some of the checks put in place, should be exercised, where necessary, in trust for the People only to preserve the sovereignty of the People. and to make it meaningful, effective and beneficial to the People. Any exercise of such power (constituting a check), that may stem from partisan objectives would be a violation of the rule of law and has to be kept within its limits in the manner stated by Bhagawati, J. There should be no bar to such a process to uphold the Constitution.

Our conclusion on the matters considered above can be stated as follows :

(1) The powers of government are included in the sovereignty of the People as proclaimed in Article 3 of the Constitution.

(2) These powers of government continue to be reposed in the People and they are separated and attributed to the three organs of government; the Executive, the Legislature and the Judiciary, being the custodians who exercise such powers in trust for the People.

(3) The powers attributed to the respective organs of government include powers that operate as checks in relation to other organs that have been put in place to maintain and sustain the balance of power that has been struck in the Constitution, which power should be exercised only in trust for the People.

(4) The exercise of the sovereignty of the People can only be perceived in the context of the separation of powers as contained in Article 4 and other connected provisions of the Constitution, by the respective organs of government.

(5) The transfer of a power which is attributed by the Constitution to one organ of 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.

CONCLUSIONS APPLIED TO THE PROVISIONS OF THE BILL

Conclusions arrived at in the foregoing analysis have now to be applied to the provisions of the Bill, the constitutionality of which should be examined in the light of the ground of challenge.

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

in these situations, the final say in the matter of dissolution remains with the President. The only instance in which dissolution is mandatory, is contained in proviso (*d*), in terms of which, if the Appropriation Bill (the Budget) has been rejected by Parliament and the President has not dissolved Parliament, when the next Appropriation Bill is also rejected, the President shall dissolve Parliament. This is a situation of a total breakdown of the government machinery, there being no money voted by Parliament for the government to function. In such an event dissolution is essential and the Constitution removes the discretion lying in the President by requiring a dissolution. As the Constitution now stands this is the only instance where Parliament could enforce a dissolution by the President and that too through the oblique means of rejecting the Appropriation Bill twice. This demonstrates the manner in which the Constitution has carefully delineated the power of dissolution of Parliament. The People in whom sovereignty is reposed have entrusted the organs of government, being the custodians of the exercise of the power, as delineated in the Constitution. It is in this context that we arrived at the conclusion that any transfer, relinquishment or removal of a power attributed to an organ of government would be inconsistent with Article 3 read with Article 4 of the Constitution. 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 resolutions to that effect in the manner provided in the respective sub clauses set out above. The residuary discretion that is now attributed to the President (except in Article 70 (1) (*d*) – Appropriation Bill being rejected for the second time) – is removed and it becomes mandatory on the part of the President to dissolve Parliament within four days of the receipt of the communication of the Speaker notifying such resolution.

The provision which attracted most of the submissions of the petitioners who opposed the Bill, is the proposed Article 70A (1) (*a*) referred to above, which totally removes the power of the President to dissolve Parliament, if the majority of the members of Parliament belong to a political party or independent group of which the President

is not a member. In such event the President shall not dissolve Parliament unless upon a resolution passed by Parliament by a two-thirds majority. Significantly, there were no submissions in support of this provision. Article 4 (*b*) of the Constitution provides that the executive power of the People shall be exercised by the President of the Republic, elected by People. Thus, upon election the incumbent becomes the "President of the Republic", who in terms of Article 30 (1) is "the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces." The power attributed to such an office cannot possibly be different, dependent on the absence of membership of a political party or group. The Constitution conceives of a President, who is the "Head of the State", and who would stand above party politics. This provision moves in the opposite direction. There may be practical considerations that led to this provision being conceived, of which we cannot be unmindful. However, the Constitution is the "Supreme Law" of Sri Lanka and should not be seen only from the perspective of such considerations that arise in the moment, but as a body of law, which we could uphold according to the oath that we have taken. It is unnecessary to dwell on this matter any further since the Attorney-General in his written submission tendered after the hearing in Court was concluded, suggested an amendment to this provision deleting the portions that include references to the absence of membership in a political party or group and the requirement for the resolution to be passed by a two-thirds majority.

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.

Article 123 (2) (*c*), empowers this Court when making a determination in the manner set out above, to specify the nature of the amendments that would make the provisions in question cease to be inconsistent with the Constitution. Whilst the hearing was in progress, the Court, from time to time, posed questions to learned Counsel to evoke a response on possible amendments. When questioned about an increase of the period of one year from a General Election during which the President shall not dissolve Parliament unless upon a resolution to that effect passed by Parliament. Mr. H. L. de Silva, PC, firmly submitted that even the slightest increase of that period would be an erosion of the executive power and be inconsistent with Article 3 read with Article 4 (*b*). Questions were posed on the basis of similar provisions in other Constitutions, being mindful at all times of the diversity in the particular structure of such Constitutions. More specifically, attention of Counsel was drawn to the 1996 Constitution of the Republic of South Africa, which has a fixed term for the duration of the National Assembly without a broad power of dissolution, as contained in Article 70 (1) of our Constitution but includes a provision for dissolution after three years if there is a resolution to that effect, supported by a majority of the Members of the Assembly. This is one of the more recent Constitutions, put in place after an extensive process of consultation and which contributed to the trasformation of a conflict ridden country to a unified Nation. However, we noted that

Counsel were slow to respond to these questions. We are mindful of the position that they have to be guided by instructions received from the persons whom they represent. The lines of division were manifestly sharp and the arguments were addressed from polarized perspectives. It is our view that an amendment of the Constitution cannot be looked at in this manner. Dr. Wickremaratne in a submission, replete with facts and instances, cited previous amendments to the Constitution that were alleged to have been done with partisan objectives. These related to a period where the political party in power had a two-thirds majority in Parliament. He may be correct in the sharp criticisms made of such instances. However, partisanship of one side cannot be pitted against partisanship of the other. In the process of enacting law, especially in amending or reforming the Constitution, sharp edges of the divide should be blunted and we have to seek common ground, bearing uppermost in mind the interests of the People who are sovereign.

It is obvious that the proposed amendment has been conceived due to certain difficulties that are envisaged. Although, those who framed the Constitution are presumed to have looked to the future, it may be that they did not fully visualize the stress on the machinery of State that would build up, when there is a divergence in policies between the President who exercises executive power on a mandate of the People, and the majority in the Parliament exercising legislative power also on a mandate 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 resoultion requesting such dissolution. Thus, in effect during this period the matter of deciding on the dissolution of Parliament becomes a responsibility shared by the President with Parliament. There is no alienation of the power of dissolution attributed to the President. Any extension of this period of one year may be seen as a reduction or as contended by Mr. H. L. de Silva an erosion of that power. However, we are of the view that on an examination of the relevant provisions

in the different contexts in which they have to operate, that every extension of such period would not amount to an alienation, relinquishment or removal of that power. That would depend on the period for which it is extended. If the period is too long, it may be contended that thereby the power of dissolution attributed to the President to operate as a check to sustain the balance of power, as noted above, is by a side wind, as it were, denuded of its efficacy. 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 an alienation, relinquishment or removal of the executive power attributed to the President. The inconsistency with Article 3 read with Article 4 (*b*) would thereby cease. The substituted clause should be passed by the special majority provided in Article 84 (2) and not require approval by the People at a Referendum.

We would now move to the other clauses of the Bill that will be dealt with in the light of the conclusions stated above.

CLAUSES 2 AND 3 (1) OF THE BILL

These provisions relate to the dissolution of Parliament and the amendments contained in Clauses 4 and 5. They attract the determination stated above, based on the incomsistency with Article 3 read with Article 4 (*b*) and require the approval by the People at a Referendum. This inconsistency would cease, if these provisions are removed and replaced with an amendment to proviso (*a*) of Article 70 (1), as stated above.

CLAUSE 3 (2) OF THE BILL

This provision contains an amendment to Article 49 (2) of the Constitution which sets out certain situations in which, "the Cabinet of Ministers shall stand dissolved". The sub-article now specifies three such situations, *viz.* where the Parliament :

(i) rejects the Statement of Government Policy, or
(ii) rejects the Appropriation Bill, or
(iii) passes a vote of no confidence in the Government.

The amendment removes situation (iii). Taken by itself, this amendment would not make any sense whatever. It appears that this amendment has to be read in the light of the proposed Article 70A (1) (*b*) which states that, where Parliament passes a resolution declaring that the Government no longer enjoys the confidence of Parliament the President shall, dissolve Parliament. The resulting position is that where Parliament passes a motion of no confidence in the Government, instead of the Cabinet standing dissolved, as presently provided, the Parliament itself which passed the motion will be dissolved. As submitted by Dr. Wickremaratne, PC, the resulting position is illogical and arbitrary. In the context of the framework of the Constitution dealt with above, the matter is more serious. Article 43 (1) of the Constitution states as follows :

> 43 (1) "There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament."

This is a check put in place by the Constitution relevant to the executive organ of government, whereby it is made collectively responsible and answerable to Parliament. The check is enforced, *inter alia,* by the provision in Article 49 (2), which empowers the Parliament to pass a vote of no confidence in the Government, resulting in the dissolution of the Cabinet of Ministers. We are of the view on the

application of the reasons set out in the preceding sections of this determination with regard to the exercise of the sovereignty of the People relevant to executive power, that this amendment would amount to an alienation, relinquishment or removal of the legislative power of the People. The amendment as contained in Clause 3 (2) would then be inconsistent with Article 3 read with Article 4 (*a*) of the Constitution and require to be passed by the special majority provided in Article 84 (2) and approved by the People at a Referendum.

CLAUSE 6 OF THE BILL

In view of the nature of the submissions and the amendment suggested by the Attorney-General, we reproduce this clause in full :

6. "A Member of Parliament who speaks or votes or abstains from voting on any amendment to the Constitution contained herein, according to his own belief or conscience or free will, shall not be expelled or suspended from membership or be subjected to any disciplinary action by the recognized political party or the independent group as the case may be on whose relevant nomination paper his name appeared at the time of his becoming such Member of Parliament for having so spoken or voted or abstained from voting, and the provisions of sub-paragraph (*a*) paragraph (13) of Article 99 shall not apply to such member and the seat of such Member in Parliament shall not thereby become vacant."

All Counsel and petitioners in person, made submissions regarding this Clause. The grounds of objection can be summarized as follows :

(i) That the clause does not satisfy the requirements of Article 82 (1) of the Constitution. This Article which states that any amendment of the Constitution must be express, requires that a Bill for the amendment of any provision of the Constitution

shall not 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 . . . " It was submitted that the provision of the Constitution sought to be amended is not expressly stated.

(ii) That the clause is outside the legislative power of Parliament in view of Article 75 of the Constitution which empowers Parliament to make laws but lays down a specific limitation to that power in the following terms :

"Provided that Parliament shall not make any law –

(*a*) suspending the operation of the Constitution or any part thereof . . ."

It was submitted that this clause has the effect of suspending the operation of Article 99 (13) (*a*), being a part of the Constitution.

(iii) That the clause erodes the franchise, which forms part of the sovereignty of the People. It was submitted that the People exercised the franchise at the election of the Members of Parliament, by casting a vote for a recognized political party or an independent group and preference votes were cast to particular candidates, on the premise that they would be subject to disciplinary control by the party or group and in the event of expulsion, be replaced by another candidate. This submission was further developed in relation to Members of Parliament elected on the "National List", as provided in Article 99A. It was further submitted that the franchise has a continuing effect, *inter alia,* through Article 99 (13) (*b*) (which provides for the candidate securing the next highest number of preferences to be declared, without a fresh recourse to the electorate) and that clause is thereby an erosion of the franchise, forming part of the sovereignty of the People

and is inconsistent with Article 3 read with Article 4 (*e*) of the Constitution, as would require the approval by the People at a Referendum.

(iv) That the clause denies to Members of Parliament equality before the law and the equal protection of the law being the fundamental right to equality guaranteed by Article 12 (1) of the Constitution. It was submitted that this clause which confers an immunity from disciplinary action that may be taken by a political party or group, only in the instance specified in the clause, is a denial of the right to equality which is thereby an erosion of a fundamental right, forming part of the sovereignty of the People inconsistent with Article 3 read with Article 4 (*d*) of the Constitution as would require the approval by the People at a Referendum.

We would deal with grounds (1) and (2) which are connected in certain respects. Article 82 (1), referred to in ground (1), requires that any Bill for the amendment of any provision of the Constitution should expressly specify the provision of the Constitution if that is sought to be 'repealed, altered or added and the consequential amendments, if any'. This manifests a cardinal rule that applies to the interpretation of a Constitution, that there can be no implied amendment of any provision of the Constitution. The Attorney-General submitted that in view of the reference to the particular provisions of Article 99 (13) (*a*), the clause should be considered as an 'addition' to that Article and be read as a 'proviso'. In view of ground (2), which goes to the root of the matter, we do not have to deal with this aspect further.

Mr. R. K. W. Goonesekera who made submissions on this ground of challenge, submitted that provisos (*a*) and (*b*) to Article 75 contain specific limitations on the legislative power of Parliament. Proviso (*a*) cited above, contains a bar on the making of any law, which suspends

the operation of the Constitution or any part thereof. That clause 6 in effect suspends the operation of Article 99 (13) (*a*) in the situation specifed in the clause which therefore cannot be validly included in the Bill. It was further submitted that the Court should in such event, give effect to the provisions of Article 75 by declaring that the particular clause has not been validly included in the Bill. Since it is outside the legislative power of Parliament no further question arises as to compliance with the requirement for the clause to be passed by the special majority or be approved by the People at a Referendum that constitutes stages of a process of making law.

The submission in our view raises a very important question of Constitutional Law and of the legislative power of Parliament. In terms of the Preamble, the Constitution has been adopted and enacted as the Supreme Law of the Democratic Socialist Republic of Sri Lanka. All State authority flows from the Constitution, which establishes the organs of government; declares their powers and duties; proclaims the sovereignty of the People, which is inalienable; declares and specifies the fundamental rights and the franchise that form part of the sovereignty of the People. It necessarily follows that the Constitution should apply equally in all situations that come within the purview of its provisions. It is in this context that a strict bar has been put in place in Article 75 on the suspension of the operation of the Constitution or any part thereof. We have to give effect to this provision according to the solemn declaration made in terms of the Fourth Schedule to the Constitution, to "uphold and defend the Constitution".

There are two principal questions that arise in considering the objection that has been raised. They are :

(i) whether the provisions of clause 6 have the effect of suspending the operation of Article 99 (13) (*a*) as contended by Counsel, and

(ii) whether Article 99 (13) (*a*) could be considered as being a part of the Constitution, so as to attract the bar in Article 75 (*a*). 690

We would now examine the first question stated above –

The phrase, "suspending the operation", would in its plain meaning encompass, a situation in which the clause contained in the Bill has the effect of keeping the relevant provision of the Constitution in an inoperative state for a time. The test would be to place clause 6 and Article 99 (13) (*a*), side by side, and ascertain whether they could apply equally to a given situation which comes within their purview. Article 99 (13) (*a*) recognizes the right of a political party or of an independent group to expel a member, who is a Member of Parliament; the consequence of such expulsion being the loss of the seat of 700 such Member of Parliament; the review of the validity of such expulsion by this Court; and the process by which the vacant seat is filled. It is manifest that clause 6 strikes at the very root of the process set out in Article 99 (13) (*a*) in stating that a Member of Parliament "shall not be expelled or suspended from membership or subject to any disciplinary action by the recognized political party . . ." If clause 6 is enacted in this form, being the later in point of time, it would have the effect of overriding the provisions in Article 99 (13) (*a*) and keep those provisions inoperative in respect of the instance specified in the clause. Hence, we are of the view that clause 6 has the effect of 710 suspending the operation of Article 99 (13) (*a*). We have to state that the question would have been different, if clause 6 was sought to be enacted as an amendment to Article 99 (13) (*a*) as contended by the Attorney-General. In such event the clause would have to be of general application and not limited to a single instance. The grounds of objection (iii) and (iv) stated above would then have to be considered in relation to such amendment.

We now move to the second question stated above whether, Article 99 (13) (*a*) the operation of which is sought to be suspended could be considered as being a part of the Constitution so as to attract Article 75.

The Constitution is divided in Chapters, Articles, Sub-Articles, Schedules and so on. It is significant that Article 75 does not refer to any of these divisions, but refers to a "part" of the Constitution. This is an indication that we have to look to the functional aspect of the provision that is being suspended and ascertain whether such provision is necessary for the working of the Constitution. To ascertain this matter we have to examine the provisions from three perspectives, *viz* :

(i) the content of the provision;
(ii) the context in which the provision is included;
(iii) the implications of the provision.

As regards (i) we have in the preceding paragraph set out the content of Article 99 (13) (*a*) by separately identifying its component elements.

As regards (ii) we note that Article 99 (13) (*a*) is found in the Chapter titled "The Franchise and Elections" and significantly that the Article itself deals with proportional representation, being a novel feature in the present Constitution.

As regards (iii), we note that Article 99 (13) (*a*) has implications on the exercise of the franchise as set out in relation to ground (iii) of the objections referred to above and the exercise of judicial power. The clause has the effect of distorting the former and removing the latter. On the basis of the foregoing analysis, we have no difficulty in concluding that Article 99 (13) (*a*) is a part necessary for the working of the Constitution.

Accordingly, we hold that clause 6 of the Bill has the effect of suspending the operation of a part of the Constitution and cannot be validly enacted by Parliament.

Therefore, clause 6 has to be deleted from the Bill. 750

After the hearing was concluded, the Attorney-General tendered a further written submission requesting us to consider the amendment of clause 6 by the deletion of the words, ". . . and the provisions of sub-paragraph (*a*) of paragraph 13 of Article 99 shall not apply to such member; and the seat of such Member in Parliament shall not thereby become vacant.".

It appears that this amendment has been suggested to overcome the objection referred to above, based on the suspension of Article 99 (13) (*a*). However, we note that the main portion of clause 6 yet remains in terms of which it is specifically provided that a member 760 "shall not be expelled or suspended from membership or be subject to any disciplinary action by the recognized political party . . .". So long as that portion remains the consequences that would otherwise flow in terms of Article 99 (13) (*a*) would remain inoperative. Therefore, the proposed amendment seeks to achieve by *indirect* means what cannot be done directly.

The objection referred to above would be applicable in its entirety even if the clause is amended as suggested by the Attorney-General.

SUMMARY OF DETERMINATION

(1) Clause 6 of the Bill has the effect of suspending the operation 770 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.

(2) Clauses 2, 3, 4 and 5 contain provisions inconsistent with Article 3 read together with relevant provisions of Article 4 and as such have to be passed by a special majority required under the provisions of Article 84 (2) and approved by the People at a Referendum.

(3) The inconsistency with Article 3 read with the relevant provisions of Article 4 would cease if clauses 2, 3, 4 and 780
5 are deleted and substituted with an appropriate amendment to proviso (*a*) to Article 70 (1) of the Constitution by removing the period of one year in the proviso and substituting that with a period not exceeding three years.

SARATH N. SILVA, CJ.

S. W. B. WADUGODAPITIYA, J.

DR. SHIRANI A. BANDARANAYAKE, J.

A. ISMAIL, J.

P. EDUSSURIYA, J.

H. S. YAPA, J.

J. A. N. DE SILVA, J.

Nineteenth Amendment to the Constitution unconstitutional and requires to be passed by the special majority and approved by the people at a referendum subject to item 3 of the determination.