IN RE THE THIRTEENTH AMENDMENT TO THE CONSTITUTION AND THE PROVINCIAL COUNCILS BILL

SUPREME COURT.
S. SHARVANANDA, C.J., R. S. WANASUNDERA, J.,
P. COLIN-THOMÉ, J., K. A. P. RANASINGHE, J.,
E. A. D. ATUKORALE, J., H. D. TAMBIAH, J.,
L. H. DE ALWIS, J., O. S. M. SENEVIRATNE, J.,
AND H. A. G. DE SILVA, J.,
S. C. 7/87 (Spl) TO S.C. 48/87 (Spl).
S.D. No. 1/87 & S.D. No. 2/87
OCTOBER 22, 23, 26, 27, 28, 29 AND 30, 1987.

Thirteenth Amendment to the Constitution–Provincial Councils Bill–Presidential Reference–Articles 18, 76, 83, 120, 121, and 138 of the Constitution–Referendum–Chapter XVIIA, Articles 154A to T.

The President referred two Bills entitled "Thirteenth Amendment to the Constitution–A Bill to amend the Constitution of the Democratic Socialist Republic of Sri Lanka" and "Provincial Councils Bill" to the Supreme Court under Article 121 of the Constitution.

The Thirteenth Amendment sought to amend the provisions in the Constitution relating to language (Article 18), jurisdiction of the Court of Appeal by addition of jurisdiction to review orders of the High Court made in its new appellate jurisdiction (Article 138 (1) and by the addition of a new Chapter XVIIA and Articles 154A to 154T relating to the executive, administrative and legislative powers of Provincial Councils and the power of amendment, overriding or repealing them vested in Parliament.

Determination: (Per Sharvananda, C.J., Colin-Thome', J., Atukorale, J. and Tambiah, J.)

Neither the Provincial Councils Bill nor any provisions of the Thirteenth Amendment to the Constitution requires approval by the People at a Referendum by virtue of the provisions of Article 83. Once the Bill is passed by a 2/3 majority and the Constitution amended accordingly the Provincial Councils Bill will not be inconsistent with the so amended Constitution.

The Unitary character of the State of which the characteristics are the supremacy of the central Parliament and the absence of subsidiary sovereign bodies remains unaffected. The Provincial Councils do not exercise sovereign legislative power and are only subsidiary bodies exercising limited legislative power subordinate to that of Parliament. Parliament has not there by abdicated or in any manner alienated its legislative power. Delegated legislation is legal and permitted and does not involve any abandonment or abdication of legislative power in favour of any newly created legislative authority.

The concept of devolution is used to mean the delegation of Central Government power without the relinquishment of supremacy. Devolution may be legislative or administrative or both and should be distinguished from decentralisation. The scheme of devolution set out in the Bills does not erode the sovereigity of the People and does not require the approval of the People at a Referendum.

Ranasinghe,J. agreed with the above determination but held that the provisions of clauses 154 (2) (*b*) and (3) (*b*) of the Bill to amend the Constitution (Thirteenth Amendment) require approval by the People at a Referendum.

Wanasundera, J., L. H. de Alwis, J., Seneviratne, J. and H. A. G. de Silva, J., dissented and determined that both Bills in their totality required the approval of the people at a Referendum.

REFERENCE by H.E. the President to the Supreme Court for its determination. Petitions filed under Article 121 of the Constitution.

R. K. W. Goonesekera with *Somasara Dassanayake, Gomin Dayasiri* and *Nimal S. de Silva* for petitioner in S.C.7/87 (Spl) and S.C. 8/87 (spl).

H. Bandula Kariyawasam petitioner in person in S.C. 9/87 (Spl) and S.C. 10/87 (Spl).

Prins Gunasekera with *K. Abeypala* and *W. Kulatunga* for petitioner in S.C. 11/87 (Spl) and S.C. 12/87 (Spl).

P. A. D. Samarasekera, P.C. with *G. L. Geethananda* and *A. L. M. de Silva* for petitioner in S.C. 13/87 (Spl).

A. C. Gooneratne, Q.C., with *A. K. Premadasa, P.C., Nevil Jacolyn Seneviratne, S. Semasinghe, D. S. Wijesinghe, N. S. A. Goonatilleke, D. P. Mendis, K. Jayasekera, K. S. Tillekeratne, J. Salvatura, Mrs. S. Jayalath, C. Ladduwahetty instructed by* S. D. S. Somaratne for petitioner in S.C. 14/87 (Spl).

Eric Amerasinghe, P.C., with *N. S. A. Goonatilleke, D. P. Mendis, M. B. Peramune* and *Miss D. Guniyangoda* for petitioner in S.C. 15/87 (Spl).

A. C. Gooneratne Q.C., with *R. K. W. Goonesekera, Pani Ilangakon* and *Chandrani Jayawardena* for petitioner in S.C. 16/87 (Spl).

Gamini Iriyagolle with *N. S. A. Goonetileke, C. Amerasinghe, D. P. Mendis, M. W. Amarasinghe, P. E. W. Gunadasa, V. S. Goonewardena, W. Dayaratne, W. B. Ekanayake, W. N. Abeyratne, Mrs. Sunitha Gunaratne, Miss. R. Jayalath, Shantha Senadheera* and *Raja Madanayake* for petitioner in S.C. 17/87 (Spl), S.C. 18/87 (Spl), S.C. 19/87 (Spl) and S.C. 20/87 (Spl).

Dharmapala Seneviratne petitioner in person in S.C. 21/87 (Spl).

A. A. de Silva with *G. A. Fonseka, K. Ratnapala Peris, Raja Mudannayake, Jeyaraj Fernandopulle, S. Medahinna, Mahinda Wickremaratne* instructed by *Charita Lankapura* for petitioners in S.C. 22/87 (Spl) and S.C. 23/87 (Spl).

Gamini Iriyagolle with *C. Amerasinghe, W. Dayaratne, C. Padmasekera, K. K. R. Peiris, Janaka de Silva, Raja Mudannayake, D. Galappathi* and *Wilfred Perera* for petitioners in S.C. 24/87 (Spl) and S.C. 25/87 (Spl).

Anil Silva with *N. R. Ranamukarachchi, Shanta Senadheera, Janaka de Silva, Charita Lankapura, Bernard Hettiarachchi,* and *D. Galappathi* for petitioners in S.C. 26/87 (Spl) and S.C. 27/87 (Spl).

Sarath Wijesinghe with *D. S. Rupasinghe* and *U. A. Premasundara* instructed by *Wijesinghe Associates* for petitioners in S.C. 28/87 (Spl), S.C. 29/87 (Spl), 45/87, 46/87 (Spl).

E. D. Wickramanayake with *Anil Obeysekera, Gomin Dayasiri, M. W. Amarasinghe, Freddie Abeyratne, Nimal Siripala de Silva, A. A. M. Marleen, U. L. M. Farook, Amir Sheiff* and *Javid Yusuf* for petitioners in S.C. 30/87 (Spl) and S.C. 31/87 (Spl).

Eric Amerasinghe P.C. with *N. S. A. Gunatilleke, D. P. Mendis, P. E. V. Gunadasa, M. B. Peramuna* and *Miss D. Guniyangoda* for petitioner in S.C. 32/87 (Spl).

Mark Fernando P.C. with *Abdul Rahuman* and *Miss D. Goonetilleke* for petitioner (under Rule 63 (iii) of S.C. Rules 1978) in S.C. 33/87 (Spl), and S.C. 34/87 (Spl).

S. J. Kadirgamar Q.C. with *S.C. Crossette Tambiah, Desmond Fernando, Suriya Wickremasinghe, S. H. M. Reeza, Suren Peiris* and *N. Murugesu* for petitioner (under Rule 63 (iii) of S.C. Rules 1978) in S.C. 35/87 (Spl).

G. F. Sethukavaler, P.C. with *Desmond Fernando, Suriya Wickremasinghe, K. Kanag Iswaran, K. Neelakandan, S. Mahenthiran, Suren Peiris* and *A. A. M. Illiyas* for petitioner (under Rule 63 (iii) of S.C. Rules 1978) in S.C. 36/87 (Spl).

L. O. H. Wanigasekera petitioner in person in S.C. 37/87 (Spl).

S. K. Sangakkara petitioner in person in S.C. 38/87 (Spl).

R. B. Seneviratne for petitioner in S.C. 39/87 (Spl).

K. M. P. Rajaratne with *Kacohana Abeypala* and *P. Dissanayake* for petitioners in S.C. 40/87 (Spl) and S.C. 41/87 (Spl).

Gamini Irriyagolle with *C.S. Hettihewa, Nihal Senaratne, M. W. Seneviratne* instructed by *Ranjith Panamulla* for petitioner in S.C. 42/87 (Spl).

Nimal Sennayake P.C. with *Sarath Wijesinghe, Miss S. M. Senaratne, Mrs. A. B. Dissanayake, Saliya Mathew, Miss Lalitha Senaratne, L. M. Samarasinghe* and *D. S. Rupasinghe* for petitioner in S.C. 43/87 (Spl).

Nimal Senanayake P.C. with *Kithsiri Gunaratne, Sanath Jayatilleke, Sarath Wijesinghe, Arunatilleke de Silva, Miss A. D. Thelespha* and *D. S. Rupasinghe* for petitioner in S.C. 44/87 (Spl).

M. M. Aponso petitioner in person in S.C. 47/87 (Spl) and S.C 48/87 (Spl).

Dr. H. W. Jayewardena Q.C. with *L. C. Seneviratne P.C. Faisz Mustapha* and *Miss T. Keenawinna* for H. E. the President in S.C. No. 1/87.

K. N. Choksy P.C. with *Faisz Mustapha* for H. E. the President in S.C. No. 2/87.

Shiva Pasupathi P.C., Attorney-General with *K. M. M. B. Kulatunge P.C., Solicitor-General, M. S. Aziz, D. S. G.* and *Ananda Kasturiarachchi S.C.* as *amicus curiae.*

Cur.adv.vult.

November 6, 1987

Determination per

SHARVANANDA, C.J., P. COLIN-THOMÉ, J., ATUKORALE, J. AND TAMBIAH, J.

Two Bills entitled "Thirteenth Amendment to the Constitution–A Bill to amend the Constitution of the Democratic Socialist Republic of Sri Lanka" and "Provincial Councils Bill" respectively were placed on the order paper of Parliament and presented to Parliament by the Honourable Minister of Public Administration and Minister of Plantation Industries on 9th October, 1987. The Constitutional jurisdiction vested in this Court by Article 120 of the Constitution to determine the question whether the Bills or any provision thereof are inconsistent with the Constitution has been invoked by the several petitioners in the above applications and by His Excellency the President by a written reference under Article 121.

Clause 2 of the Bill to amend the Constitution states that Article 18 of the Constitution of the Democratic Socialist Republic of Sri Lanka is hereby amended *inter alia* as follows:

"(*b*) by the addition immediately after paragraph 1 of that Article of the following paragraphs:

(2) Tamil shall also be an official language;

(3) English shall also be the link language;

(4) Parliament shall by law provide for the implementation of the provisions of this Chapter."

Clause 3 of the Bill to amend the Constitution further states that Article 138 of the said Constitution is hereby amended in paragraph (1) of that Article as follows:

"(*a*) by the substitution, for the words 'committed by any court of First Instance' of the words 'committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance'; and

(*b*) by the substitution, for the words 'of which such Court of First Instance' of the words 'of which such High Court, Court of First Instance'."

Clause 4 of the Bill to amend the Constitution adds a new Chapter and Articles and inserts same after Article 154 and states that the same shall have effect as Chapter XVIIA and Articles 154A to 154T of the Constitution.

The Provincial Councils Bill seeks to provide for the procedure to be followed in Provincial Councils, a few matters relating to Provincial Public Service and for matters connected therewith or incidental thereto.

As the questions involved in the Reference and Petitions were in the opinion of the Chief Justice of general and public importance, the Chief Justice in the exercise of his powers under Article 132(3) of the Constitution, directed that the Reference and Petitions be heard by a Full Bench consisting of all the Judges of the Supreme Court.

We took up all the References and the Petitions in connection with the two Bills together for hearing. The Attorney-General and other Counsel mentioned above appeared and assisted us in the consideration of the above Reference and Petitions.

The Petitioners in Applications 7/87–32/87 and 37/87–47/87 contended that the Proposed Bills are inconsistent with–

(*a*) The Constitution as a whole,

(*b*) The Sovereignty of the People as guaranteed by Articles 3 and 4 of the Constitution, and

(*c*) The Unitary State postulated by Article 2 of the Constitution; and

(*d*) that the Bills were inconsistent with Article 9 of the Constitution and hence required the approval by the People at a Referendum.

(*e*) that the Bill to amend the Constitution – the Thirteenth Amendment to the Constitution, seeks to amend Article 83 of the Constitution, by adding the provisions of Article 153G (2)(*b*) and Article 153G (3)(*b*) to the entrenched provisions specified in Article 83 of the Constitution;

That the said Bills contain provisions that cannot be enacted except by following the procedure laid down in Article 83 of the Constitution, that is to say, by 2/3 of the Members of Parliament voting in favour of them and the approval of the People being given at a Referendum, while other provisions relate to the basic structure or framework of the Constitution and are not amendable.

The *determination* of four Judges of this court viz: Chief Justice, Justice P. Colin Thome, Justice E. A. D. Atukorale and Justice H. D. Tambiah, is that for the reasons set out below neither the Bill nor any provision of the Thirteenth Amendment to the Constitution – a Bill to amend the Constitution of the Democratic Socialist Republic of Sri Lanka, requires approval by the People at a Referendum by virtue of the provisions of Article 83; and that once the said Bill is passed and the Constitution amended accordingly, the Provincial Councils Bill will not be inconsistent with the so amended Constitution.

The *determination* of Justice K. A. P. Ranasinghe is that the provisions of clause 154G(2)(*b*) and 3(*b*) of the "Bill to amend the Constitution of Sri Lanka (Thirteenth Amendment to the Constitution)" require approval by the People at a Referendum by virtue of the provisions of Article 83. He agrees with the view that no provision of the aforesaid Bill the Thirteenth Amendment to the Constitution is inconsistent with any of the provisions of Articles 2, 3, 4 or 9 of the Constitution. He states that the constitutionality of the provisions of the Provincial Councils Bill will depend upon the aforesaid amendment to the Constitution becoming law, as set out by him, in terms of Article 83 of the Constitution.

The *determination* of the other four Judges viz: Justice R. S. Wanasundera, Justice L. H. de Alwis, Justice O. S. M. Seneviratne and Justice H. A. G. de Silva is that, the provisions of the Thirteenth

Amendment to the Constitution require the approval by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

A technical objection was taken by some of the Petitioners that the Bill for the 13th Amendment to the Constitution does not conform to Article 82(1) of the Constitution and that hence it is not a proper Bill that can be taken up for consideration by this court under Article 120 of the Constitution. It was said that the Bill was not for the amendment of any Provisions of the Constitution, as a whole chapter, namely Chapter XVIIA consisting of a number of new provisions coupled with a Ninth Schedule with appendices and lists is sought to be added and consequential amendments have not been expressly specified in the Bill, in terms of Article 82(1).

We do not see any substance in this objection. No consequential amendment of the provisions of the Constitution is involved by the addition of Chapter XVIIA. Article 82(7) states that an amendment includes, repeal, alteration and addition. The new Chapter XVIIA is an addition to the provisions of the Constitution and therefore constitutes an amendment. It deals with a new subject matter and no consequential amendment is involved. In our view the Bill is in no way defective. The Bill has been properly placed on the Order Paper of Parliament and this court can exercise its jurisdiction under Article 120 of the Constitution in respect of that Bill. In any event, the question whether a Bill does comply with the requirements of Article 82(1) is a matter for the Speaker of Parliament.

The main contentions of the petitioners were that the new Chapter XVIIA consists of several provisions which are inconsistent with the 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.

Article 2 states that the Republic of Sri Lanka is a Unitary State.

It was submitted that clause 4 of the 13th Amendment Bill which contains Chapter XVIIA seeks to establish a constitutional structure which is Federal or quasi-Federal and hence that clause is inconsistent with Article 2.

The term "unitary" in Article 2 is used in contradistinction to the term "Federal" which means an association of semi-autonomous units with a distribution of sovereign powers between the units and the centre. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that the sovereignty is undivided–in other words, that the powers of the central government are unrestricted. The two essential qualities of a Unitary State are (1) the supremacy of the central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the absence of subsidiary law-making bodies, but it does mean that they may exist and can be abolished at the discretion of the central authority. It does, therefore, mean that by no stretch of meaning of words can those subsidiary bodies be called subsidiary sovereign bodies and finally, it means that there is no possibility of the central and the other authorities coming into conflicts with which the central government, has not the legal power to cope. Thus, it is fundamental to a Unitary State that there should be–

1. Supremacy of the central Parliament,

2. The absence of subsidiary sovereign bodies.

On the other hand, in a Federal State the field of government is divided between the Federal and State governments which are not subordinate one to another, but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle. The Federal government is sovereign in some matters and the State governments are sovereign in others. Each within its own spheres exercise its powers without control from the other and neither is subordinate to the other. It is this feature which distinguishes a Federal from a unitary Constitution; in the latter sovereignty rests only with the central government.

Dr. Wheare in his Book "Modern Constitutions" brings out the distinction at page 19 –

> "....in a Federal Constitition the powers of government are divided between a government for the whole country and governments for parts of the country in such a way that each government is legally independent within its own sphere. The government for the whole country has its own area of powers and it exercises them without

any control from the governments of the constituent parts of the country, and these latter in their turn exercise their powers without being controlled by the Central Government. In particular the legislature of the whole country has limited powers and the legislatures of the State or Provinces have limited powers. Neither is subordinate to the other. Both are co-ordinate. In a unitary Constitution, on the other hand, the legislature of the whole country is the Supreme Law-making body in the country. It may permit other legislatures to exist and to exercise their powers, but it has the right, in law, to overrule them; they are subordinate to it."

The question that arises is whether the 13th Amendment Bill under consideration creates institutions of government which are supreme, independent and not subordinate within their defined spheres. Application of this test demonstrates 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.

In regard to legislative power, although there is a sphere of competence defined by the two Bills both in respect of matters set out in the Provincial list and in respect of matters set out in the concurrent list within which a Provincial Council can enact statutes, this legislative competence is not exclusive in character and is subordinate to that of Central Parliament which in terms of Article 154G(2) and 154G(3) can, by following the procedure set out therein, override the Provincial Councils. Article 154G conserves the sovereignty of Parliament in the legislative field. Parliament can amend or repeal, the provisions in the Bill relating to the legislative authority of the Provincial Councils. The Provincial Council is dependent for its continued existence and validity and for its legislative competence in respect of matters in the Provincial list and in the concurrent list on Parliament. It was submitted by the Petitioners that Articles 154G(2) and (3) restrict the legislative powers of Parliament in respect of matters in the Provincial Council list and the concurrent list.

In our view Articles 154G (2) and (3) do not limit the sovereign power of Parliament. They only impose procedural restraints.

The Privy Council in *Bribery Commissioner vs. Ranasinghe,* 66 N.L.R. 73 at page 83 has relevantly observed –

> "A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority e.g. when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a 2/3 majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself, which can always, whenever it chooses, pass the amendment with the requisite majority."

No abridgment of legislative sovereignty is involved when rules prescribe as to how legislative authority can be exercised. Article 154G(2) and (3) merely set out the manner and form for the exercise of its legislative power by Parliament to repeal or amend the provisions of Chap. XVIIA and the Ninth schedule or to legislate in respect of any matter included in the Provincial Council List.

A legislature can provide not merely that a constitutional amendment shall follow certain procedure (such as receiving the assent of a special majority) or be approved by a majority of the electors at a Referendum but also that any Act repealing or amending the Act so providing shall follow the "same manner and form".

Rules which prescribe the manner and form for the exercise of legislative power by Parliament do not impinge on or derogate from the sovereignty of Parliament. *Attorney-General for New South Wales v. Trethowan* [1932] A.C. 526; *Harris v. Ministry of Interior,* (1952) 2 S.A.L.R. 428, "*Harris* case established the principle that Parliament may be sovereign and yet be subject to the manner and form for the legally effective expression of its will" (Colin Turpin in British Government and the Constitution (1986) at 37).

Thus Parliament can in the exercise of its powers conferred on it by the Constitution override the Provincial Council. This shows that no question of legislative competition can arise in the scheme contained in the Bills.

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 154C 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 derived 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 that 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 gainsaying the fact that the President remains supreme or sovereign in the executive field and the Provincial Council is only a body subordinate to him.

The Bills do not effect any change in the structure of the Courts or judicial power of the People. The Supreme Court and the Court of Appeal continue to exercise unimpaired the several jurisdictions vested in them by the Constitution. There is only one Supreme Court and one Court of Appeal for the whole Island, unlike in a Federal State. The 13th Amendment Bill only seeks to give jurisdictions in respect of writs of Habeas Corpus in respect of persons illegally detained within the Province and Writs of Certiorari, Mandamus and Prohibition against any person exercising within the Province any power under any law or statute made by the Provincial Council in respect of any matter in the Provincial Council list and appellate jurisdiction in respect of convictions and sentences by Magistrate's Courts and Primary Courts within the Province to the High Court of the Province, without prejudice to the executing jurisdiction of the Court of Appeal. Vesting of this additional jurisdiction in the High Court of each Province only brings justice nearer home to the citizen and reduces delay and cost of litigation. The power of appointment of Judges of the High Court remains with the President and the power of nominating them to the several High Courts remains with the Chief Justice. The appointment, transfer, dismissal continue to be vested in the Judicial Service Commission. Thus, the centre continues to be supreme in the judicial area and the Provincial Council has no control over the judiciary functioning in the Province.

In our view no division of sovereignty or of legislative, executive or judicial power has been effected by the 13th Amendment Bill or by the Provincial Council Bill. The national government continues to be legally supreme over all other levels or bodies. The Provincial Councils are merely subordinate bodies. Parliament has not parted with its supremacy or its powers to the Provincial Councils.

In our view, the Republic of Sri Lanka will continue to be a Unitary State and the Bills in no way affect its unitariness.

The Petitioners further alleged that the sovereignty of the people, enshrined in Article 3 of the Constitution is infringed by the provisions of the two Bills.

Article 3 states:–

'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.'

This Article is an entrenched Article.

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.

The 13th amendment provides for Provincial Councils having certain legislative power in respect of matters enumerated in the Provincial Council list and concurrent list, lists I and III in Ninth Schedule. We have on an examination of the relevant provisions of the 13th Amendment Bill, set out our reasons for taking the view that the Provincial Councils do not exercise sovereign legislative power and are only subsidiary bodies, exercising limited legislative power, subordinate to that of Parliament. Parliament has not thereby abdicated or in any manner alienated its legislative power. It was contended by the Petitioners that even that small measure of subsidiary legislative power vested in the Provincial Councils is forbidden by Article 76(1) of the Constitution. It was stressed that the article prohibits Parliament setting up any authority with any legislative power. However Article 76(3) provides that–

> "It shall not be a contravention of the provisions of paragraph (1) of this article for Parliament to make any law containing any provision empowering any person or body to make subordinate legislation for prescribed purposes."

Hence delegated legislation is legal and permitted and does not involve any abandonment or abdication of legislative power in favour of any newly created legislative authority. No new legislative body armed with general legislative authority is created when a new body is empowered to make subordinate legislation. Since the contemplated Provincial Councils in our view do not perform any sovereign legislative function but are only empowered to enact legislation, subordinate in

character, Parliament in creating them is not establishing another legislative body rival to it in any respect. Parliament can pass legislation in the prescribed form and manner superseding the Provincial Council legislation or even repealing the provisions creating them.

In our view, even if it be said that by the Bill, Parliament is seeking to set up Provincial Councils with legislative power in derogation of Article 76(1), since Article 4 is not an entrenched provision, the Bill can be passed by a two-third majority without a Referendum. The Bill does not in any way affect the sovereignty of the People. Instead of the legislative and executive power of the People being concentrated in the hands of Parliament and President it is sought to be diversified in terms of the Directive Principles of State Policies found in Article 27(4) of the Constitution. This article provides that:

"The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government."

Article 27(1) states that—

"the Directive Principles of State Policies contained herein, shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society."

True the Principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government. The Directive Principles require to be implemented by legislation. In our view, the two Bills represent steps in the direction of implementing the programme envisaged by the Constitution-makers to build a social and democratic society.

Healthy democracy must develop and adopt itself to changing circumstances. The activities of central government now include substantial powers and functions that should be exercised at a level closer to the People. Article 27(4) has in mind the aspirations of the local people to participate in the governance of their regions. The Bills

envisage a handing-over of responsibility for the domestic affairs of each province, within the framework of a united Sri Lanka. They give new scope for meeting the particular needs and desires of the people for each province. Decentralisation is a useful means of ensuring that administration in the provinces is founded on an understanding of the needs and wishes of the respective provinces. The creation of elected and administrative institutions with respect to each province–that is what devolution means–gives shape to the devolutionary principle.

The concept of devolution is used to mean the delegation of central government powers without the relinquishment of supremacy. Devolution may be legislative or administrative or both. It should be distinguished from 'decentralisation' which is a method whereby some central government powers of decision-making are exercised by officials of the central government located in various regions. "Devolution of parts of the United Kingdom would not affect the unity of the United Kingdom or the power of Parliament to legislate (even on devolved matters) for all or any part of the United Kingdom, or to repeal or amend the devolutionary arrangements themselves." Hood Philips – Constitutional and Administrative Law 6th Ed. at page 716. Where legislative powers are devolved it would be possible to restrict the use of those powers by making use of Parliament's paramount power to legislate for the region. In Northern Ireland the principle of devolution had been put into practice.

The 13th Amendment Bill defines those areas of activity where decisions affect primarily persons living in the province. It does not devolve powers over activities which affect people elsewhere or the well-being of Sri Lanka generally. The powers that are conferred on the Provincial Councils are not at the expense of the benefits which flow from political and economic unity of Sri Lanka. Political unity means that Parliament, representing all the people, must remain sovereign over their affairs; and that the government of the day must bear the main responsibility to Parliament for protecting and furthering the interests of all. Economic unity means that the Government must manage the nation's external economic relations with other countries. The Government must be able to control national taxation, total public expenditure and the supply of money and credit and the Government must also keep the task of devising national policies to benefit particular parts of the country and of distributing resources among them according to relative need. Resources are distributed not

according to where they come from but according to where they are needed. This applies between geographical areas just as much as between individuals. Article 154R (5) mandates the Finance Commission to formulate principles with the objective of achieving balanced regional development in the country. The President is directed to cause every recommendation made by the Finance Commission to be laid before Parliament and to notify Parliament as to the action taken.

In our view, the provisions of the Bills ensure that devolution does not damage the basic unity of Sri Lanka. The scale and character of the devolved responsibilities will enable the People of the several provinces to participate in the national life and government. The general effect of the new arrangement will be to place under provincial democratic supervision a wide range of services run in the respective provinces for the said provinces, without affecting the sovereign powers of Parliament and the Central Executive.

In our view the scheme of devolution set out in the Bills does not erode the sovereignty of the People and does not require the approval of the People at a Referendum.

It was submitted that the Bills seek to amend the basic structure of the Constitution. The basis of the submission was that the clauses 4 and 7 of the 13th Constitutional Amendment Bill seek to establish a Constitutional structure which is Federal or quasi-Federal and these Provisions take away the unitarianism enshrined in Article 2. In our considered view, there is no foundation for the contention that the basic features of the Constitution have been altered or destroyed by the proposed amendments. The Constitution will survive without any loss of identity despite the amendment. The basic structure or framework of the Constitution will continue intact in its integrity. The unitary state will not be converted into a Federal or quasi-Federal State. We have already examined the question whether the amendment in any way affects entrenched Article 2 which stipulates a unitary State and after an analysis of the relevant provisions of the amending Bill have come to the conclusion that the unitary nature of the State is in no way affected by the proposed amendments and that no new sovereign legislative body, executive, or judiciary is established by the amendment. The contra submission made by the petitioners is based on the misconception that devolution is a divisive force rather than an integrative force.

It was contended that the scope of amendment contemplated by Article 82 and 83 is limited and that there are certain basic principles or features of the Constitution which can in no event be altered even by compliance with Article 83. Reliance was placed for this proposition on the decisions of the Supreme Court of India in *Kesavananda v. State of Kerala,* AIR 1973 SC 1461 and *Minerva Mills Ltd., v. Union of India* AIR 1980, SC 1789. Those decisions of the Supreme Court of India were based on Article 368 of the unamended Indian Constitution which reads as follows:

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

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

> "The word amendment postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment the old Constitution cannot be destroyed, and done away with; it is retained though in the amended form. The words 'amendment of the Constitution with all their wide sweep and amplitude cannot have the effect of destroying and abrogating the basic structure or frame work of the Constitution" per Khanna, J.,

But both our Constitutions of 1972 and 1978 specifically provide for the amendment or repeal of any provision of the Constitution or for the repeal of the entire Constitution–Vide Article 51 of the 1972 Constitution and Article 82 of the 1978 Constitution. In fact, Article 82(7) of the 1978 Constitution states "In this chapter "Amendment" includes repeal, alteration and addition." In view of this exhaustive explanation that amendment embraces repeal, in our Constitution, we are of the view that it would not be proper to be guided by concepts of 'Amendment' found in the Indian judgments which had not to consider statutory definition of the word 'Amendment.' Fundamental principles or basic features of the Constitution have to be found in some provision or provisions of the Constitution and if the Constitution contemplates the repeal of any provision or provisions of the entire

Constitution, there is no basis for the contention that some provisions which reflects fundamental principles or incorporate basic features are immune from amendment. Accordingly, we do not agree with the contention that some provisions of the Constitution are unamendable.

It was submitted that the proposed Article 154G(2) and (3) add to the entrenched provisions contained in Article 83 and hence involve an amendment of Article 83 of the Constitution. There is no express amendment of Article 83. But it was contended that by providing in the proposed articles 154G(2) and (3) that approval of the People at a Referendum is necessary for amendment or repeal of the provisions of Chapter XVIIA or for passing a Bill in respect of any matter set out in the Provincial Council list, one is adding to the list of Articles enumerated in Article 83 which postulates a Referendum for their amendment or repeal, one is thereby amending Article 83 of the Constitution. In our view Article 83 had to be entrenched, otherwise, by the simple process of amending Article 83 by a two-third majority, the entrenchment of the several articles specified in it, could be frustrated. The draftsman would otherwise have had to specify separately in each case that the article is entrenched in the manner set out in Article 83. The draftsman instead of doing that, had short-circuited by specifying all the Articles subject to the specific amendatory process in Article 83 and providing that Article 83 is entrenched. The rationale for entrenching Article 83 was to ensure the entrenchment of the articles specified therein. If the draftsman had not followed the short cut set out in Articles 83, but had set down each such article and followed each one with the entrenching clause, this argument that article 83 stands amended consequent to Article 154G(2) and (3) would have exfacie been untenable. The argument that Article 83 is impliedly amended consequent to Article 154G(2) and (3) would have no basis.

In our view Article 82 is in no way added to or its scope enlarged by Article 154G(2) and (3). The latter Articles involve no amendment of Article 83 and are independent of Article 83 and of the Articles specified therein. The draftsman has separately provided for the amendatory process of Article 154 G(2) and (3) and had not expressly amended Article 83 by adding to the Articles specified therein.The draftsman has not thereby impliedly amended Article 83. In our view the additional instances of entrenchment contemplated by Article 152 G(2) and (3) do not therefore infringe Article 83.

The rationale of Referendum is the acknowledgement of the sovereignty of the People. Referendum is a method by which the wishes of the People may be expressed with regard to the proposed legislation. The proposed Article 154G (2) and (3) by stipulating a Referendum affirm the sovereignty of the People. It will be a sterile exercise to ask the People whether they are sovereign – that is the purpose which a Referendum to discover whether a Referendum to amend Article 154G (2) and (3) is required, would serve. Here the draftsman has pre-empted the People by offering that Referendum on a platter. Consideration of the purpose of an enactment is always a legitimate part of the process of interpretation. The nature and purpose of Article 83 repel the suggestion that the proposed articles 154G (2) and (3) amend Article 83 of the Constitution.

Mr. Eric Amerasinghe contended that there is no provision in the Bills to challenge the vires or validity of "statute" enacted by a Provincial Council. He submitted that while Article 121 provides an opportunity to a citizen to test the validity of a Bill before it become law, enacted by Parliament, there is no corresponding provision in the Bills for any citizen to invoke the jurisdiction of the Supreme Court to determine any question as to whether any "Statute" or any provision thereof, prior to it being enacted into a 'statute' by a Provincial Council, is inconsistent with the Constitution. He argued that in that respect, a statute has an advantage over and is more elevated than a Parliamentary Bill. His submission overlooks Article 80(3) of the Constitution, which provides that 'Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such Act on any ground whatsoever." This sub-article gives the seal of finality to a law passed by Parliament. Such a law cannot be challenged on any ground whatsoever even if it conflicts with the provisions of the Constitution, even if it is not competent for Parliament to enact it by a simple majority or two third majority. On the other hand a statute passed by a Provincial Council does not enjoy any such immunity. It does not have the attribute of finality and is always subject to review by court. The validity of a 'statute' can always be canvassed in a court of law, even years after its passage. If it is ultra vires for a Provincial Council, to enact such a statute, it is a nullity and is void ab initio. A 'statute' unlike a law which is proprio vigore valid, does not acquire such validity on its enactment.

That is why there is no Article corresponding to Article 121, in respect of a Provincial Bill before it is enacted into a statute. In our view, President Counsel's submission lacks merit and cannot be sustained.

It was submitted by Counsel for the Y.M.B.A. that the Bills affect the entrenched Article 9 which provides that the Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana while assuring to all religions the rights granted by Articles 10 and 14(e). An analysis of the provisions of the Bill shows that the capacity of the Republic to perform its obligations under Article 9 remains unimpaired and that there is no ground for any reasonable apprehension as entertained by Counsel that the Provinces will be or able to obstruct such performance. Counsel based his apprehension on the inclusion of the subject ancient and historical monuments other than those declared by or under law made by Parliament to be of national importance, in the Provincial list. It is to be noted that the Reserved List reserves for the State 'National Archives, Archaeological activities and sites and antiquities declared by or under any law made by Parliament to be of national importance – This would include ancient and historical monuments and records and archaeological sites and remains declared by or under law made by Parliament to be of national importance. It is further to be noted that all subjects and functions not specified in the Provincial list or concurrent list come within the Reserved List and that all residuary powers are vested in the State. In the background of the above provisions in the Bills, the fear expressed by Counsel is groundless. In our view, the Provincial Councils can place no impediment in the way of the State giving Buddhism the foremost place and protecting and fostering the Buddha Sasana in terms of Article 9 of the Constitution.

There was a lot of argument about the meaning and significance of the preamble to clause 4 viz:

"The provisions of this chapter shall not.........
The provisions of such other law shall mutatis mutandis apply.

In our view, this preamble generates uncertainities and confusion and serves no useful purpose. We suggest deletion of the preamble.

WANASUNDERA, J.

These two Bills titled "Thirteenth Amendment to the Constitution" and "The Provincial Councils Bill" have been on the Order Paper of Parliament and our jurisdiction, in terms of Article 121 (1) has been invoked by the President on a written reference addressed to the Chief Justice, and by numerous petitioners.

In regard to the Bill described in the long title as "Thirteenth Amendment, to 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 Provincial Councils Bill is interconnected with and consequential to the above proposed Thirteenth Amendment to the Constitution. It is not described in its long title as being for the amendment of any provision of the Constitution. Since the constitutionality of this Bill too is challenged in terms of the constitutional provisions, we would have to determine whether any provision of the Bill too requires to be passed with the special majority required by Article 84, or whether any provision of such Bill requires the approval by the People at a Referendum by virtue of the provisions of Article 83, or whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82.

Before proceeding further, I thought that I should mention a matter relating to this judgment by way of explanation rather than in extenuation. We can all agree with counsel who described this case as the most critical, the most important and the most far-reaching that had ever arisen in the history of our courts.

Our Constitution enjoins that our determination should be communicated to the President and the Speaker within three weeks of the making of the reference or the filing of the petition. Of these three weeks, time was given to all the parties who are before us–49 petitions, some challenging the Bill, others supporting– to file their written submissions. Hearings began in open court on the 22nd of October and concluded on the 30th. We were, therefore, left with only six days to come to a conclusion, draft the order, and have it typed and ready for transmission. The petitioners themselves were barely able to open their case and develop it to their satisfaction.

In our ordinary day to day work, in cases of no great importance, we are accustomed to take five to six weeks after the conclusion of the hearings to deliver our judgment. In a case of this magnitude and importance, the time allotted seems therefore totally inadequate to attend to it as we would wish.

While I had no great diffuculty in understanding the written and oral submissions and coming to a conclusion—of which I entertain no doubts whatsoever—a longer time both for argument and decision would, I am sure, have helped to produce a judgment containing a better analysis, a better arrangement and a better phrasing, and supported by a greater volume of material and authorities. However, as stated earlier, I am fully satisfied that the conclusions I have arrived at are right and just in spite of constraints mentioned above. I regret only that I have been able to deal with the salient points and the brief time did not permit me to deal with a number of others of lesser importance which in normal course, would have been embodied in this determination.

I wish also to place on record our indebtedness to all counsel, both senior and junior like Anil de Silva, and the public spirited petitioners who appeared in person, for their great assistance in this most difficult task. Without this valuable help it would have been no mean feat to have dealt with this matter on our own.

The main thrust of the attack on the Thirteenth Amendment is on the basis that it affects and seeks to alter the basic or fundamental structure of the Constitution, both in respect of its express provisions and those that are implied. Accordingly it would be best if we first examine and analyse the provisions of the Constitution and thereafter match the provisions of the impugned Bills with the constitutional provisions and find out in what manner and to what extent (if any) the Bills are inconsistent with the Constitution.

Our Constitution contemplates three or even four types of situations in which the "constitutional" and legislative power of the State can be exercised. First, the exericise of legislative power in the making of ordinary legislation, that is by a simple majority. Second, the exercise of "the constituent" power for amendments of the Constitution in situations other than those mentioned in Article 83, that is, by a two-thirds or special majority. Third, the situations dealt with in Article

83 which require, in addition to the two-thirds majority, a Referendum. There could in theory be a fourth category even outside the amending provisions to which some reference will be made later.

It would be sufficient if I straightaway deal with the third category. Article 83 states that–

(*a*) Article 1, 2, 3, 6, 7, 8, 9, 10, 11 and 83, and

(*b*) Article 30(2) and Article 62(2)

of the Constitution can only be amended by the special majority of 2/3 and the approval by the People at a Referendum.

Even a cursory glance would show that the above entrenched provisions constitute the heart or the core of the Constitution. Article 1 declares Sri Lanka to be a Free, Sovereign, Independent and Democratic Socialist Republic. Article 2 declares that the Republic of Sri Lanka is a Unitary State. Article 3 declares that the Sovereignty of Sri Lanka is in the People and is inalienable and that this Sovereignty includes the powers of government, fundamental rights and the franchise. Article 4, although not mentioned specifically in Article 83, is consequential to and an elaboration of article 3 and spells out the concept of Sovereignty of the People and how it should be exercised. There is in Article 4 the laying down of the structure of Government in the form of the three great departments of Government, namely, the Legislature, the Executive, and the Judiciary. Article 4 spells out also the earlier reference in Article 3 both to fundamental rights and the franchise.

In spite of what Mr. Mark Fernando said, it must be emphasised that our Constitution, like the U.S. Constitution and unlike the Indian or the U.K. Constitutions, vests Sovereignty in the People and the organs of Government hold a mandate and are agents of the People. In our Constitution the People have given themselves a Constitution and it is unthinkable therefore as a general proposition that this Sovereignty, which means the Sovereignty of the country and its unitary nature, the democratic form of government, their right of franchise, their fundamental rights, and the judicial power protecting them, can be amended without the consent of the People. The requirement that in certain matters the approval of the People at a Referendum would be necessary for the amendment of the Constitution provides the protection for those rights.

Interpreting the corresponding amending provisions (Article 368) of the Indian Constitution, the Indian Supreme Court has come to a similar conclusion. The effect of the rulings in *Golak Nath's Case*, AIR 1961 SC 1643; *Kesavanda Bahrati's Case* (Fundamental Rights case), AIR 1973 SC 1461; and *Mrs. Indira Gandhi's Case* (Election case), AIR 1975 SC 2299, is to the effect that the amending power contained in Article of 368 does not extend to altering the basic structure or framework of the Constitution.

In *Kesavananda's Case* the Supreme Court sought to explain and illustrate what they thought were the amendments or features that would constitute the basic structure of the Constitution. Sikri, C.J., referred to:

(1) the supremacy of the Constituion;
(2) the republican and democratic form of Government;
(3) the secular character of the Constitution;
(4) the separation of powers; and
(5) the federal character of the Constitution.

Shelat J. Grover J. added:

(6) the mandate to build a welfare state contained in the Directive Principles; and
(7) the integrity of the nation.

Milkerje and Hedge JJ. thought it included–

(8) the sovereignty of India;
(9) the unity of the country; and
(10) the essential features of the individual freedoms.

Jaganmohan Reddy J. included–

(11) parliamentary democracy; and
(12) the three organs of State.

On comparison one cannot but regard the sections enumerated in Article 83(*a*) and (*b*) of our Constitution as also entrenching the basic features of our Constitution. They include, if not all the matters enumerated in the Indian decision, at least nearly all of them. But that is not all.

It is sometimes contended that Article 4 is not an entrenched provision. It is certainly not one of the Articles specified in the entrenching Article 83. Are there other Articles either because they are inextricably connected with the specified Articles, or because they themselves must be considered as being basic to the structure of the Constitution that are equally entrenched? These are the questions posed in this case, some of which are undoubtedly covered by previous rulings given by this court.

A few examples should clear up this issue. The office of President is not mentioned in Articles 1, 2 or 3. It is mentioned in Article 4 (*b*). Could it be said that the office of President is not entrenched? The office of President is the chosen mode for the Executive power of the People and is a fundamental feature of the Constitution. There is internal material corroborating this. Article 83, the entrenching Article, specifically refers to Article 30 (2). Article 30 (2) deals with the election and term of office of the President. Such an entrenching provision postulates the existence of the office of President. This is precisely what is set out in Article 4 (*b*).

Likewise the Legislature is not specifically mentioned in the entrenching Article. Here again the Legislature is part of the basic structure of the Constitution and is the chosen instrument for the exercise of the Legislative power of the People. Even the exercise of the Executive power is made dependent on it. Article 83(*b*), the entrenching Article, however mentions Article 62(2). This Article prescribes the length of the life of Parliament, namely, six years and no more. This presupposes parliamentary rule. The necessity for the Referendum in 1983 was to by-pass this provision by adopting the alternate procedure of Referendum. Both procedures involved going before the People.

Then there is the Judicial power. It is nowhere mentioned specifically in Articles 1, 2, 3, or 83. But can it be seriously argued that the Judicial power is not a basic feature of the Constitution? A system of courts with the Supreme Court at the apex, the Court of Appeal and other courts and tribunals are absolutely necessary for the proper functioning of the Constitution and for the due administration of justice. The Judicial power however is mentioned in Article 4 (*c*), but one has to look even beyond it to other provisions to ascertain its true nature and content. For example, the provisions relating to the

independence of the judiciary, the subject's right to challenge proposed legislation, his right to vindicate his fundamental rights and to have his disputes litigated in the courts are essential features of this power.

As a matter of fact it is known why the reference to Article 4 which was in the orginal draft was removed from Article 83. The concept of fundamental rights, the franchise etc., have extensive features and implications. Some of those features are absolutely essential for the right, but others may well be regarded as being inessential. There was a justifiable fear among those who framed the Constitution that such an inclusion could lead to problems, particularly as regards the amendment of the inessential provisions. But really those fears were groundless. Courts have had long experience and are frequently called upon in matters before them to decide such issues and of drawing the line between what may be considered essential and what are inessential, and as to when a *difference in quality* may amount to a difference in kind.

This court has in fact ruled in a series of cases that Article 4 had to be read along with Article 3. Vide our rulings in SD.5/78, Sd.4/80, SD.5/80, SD.1/82, SD,2/83, SD.1/84. I think it is too late in the day to argue that this is not so and even Mr. Fernando was not able to distinguish these cases. The question as to the extent of the application of Article 4 however could be raised still in any particular matter. It is not only Article 4 that we have often linked with Article 3, but by the same token our rulings would cover any Article in the Constitution which the court considers as being linked with any of the entrenched Articles so as to constitute a basic feature of the Constitution.

There are sufficient guidelines in the wording of the Constitution itself to assist a court in this task. The Preamble to the Constitution declares the representatives of the People were elected–

> "to constitute SRI LANKA into a DEMOCRATIC SOCIALIST REPUBLIC, whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY, and assuring to all peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well being of succeeding generations of the People of SRI LANKA and of all the people of the World, who come to share with those generations the effort of working for the creation and preservation of a JUST AND FREE SOCIETY."

Again, I said earlier Article 4 spells out the concept in Article 3. The Sovereignty of the People is organised into the three great departments of Government–namely, the Legislature, the Executive, and the Judiciary. Fundamental Rights is again referred to in Article 4. (*d*), but its substantive provisions lie elsewhere. The franchise is also referred to in Article 4 (*e*), but there are numerous provisions elsewhere relating to the franchise.

Faced with the similar issue, the Indian courts have taken the view that to determine whether or not a particular provision is linked with one specifically mentioned and goes to constitute the basic structure of the Constitution, it would be necessary to examine such provision in the scheme of the Constitution, its object and purpose, and the consequence of its repeal or amendment on the integrity of the Constitution.

Applying this test in regard to fundamental rights, could we say that a free and democratic government can function if the fundamental rights of freedom of speech and expression, the freedom of association, equality before the law, and the freedom from unlawful arrest and detention are taken away? In this connection it should be noted that fundamental rights and the franchise are specifically mentioned in Article 3 without any limitation. The specific mention in Articles 83 of Article 10 and 11 relating to freedom of conscience and freedom from torture is explicable on the basis that they are considered absolute rights which cannot be restricted even in the interests of national security. The protection was carried over specifically to Article 83. This does not mean that the other fundamental rights are excluded. However they would have to be examined individually and included only if they are considered by court as being essential features of the Constitution and not inessential and peripheral features.

Our Constitution is an adaptation of the Presidential type of Government incorporating the Westminster model of the Cabinet system and parliamentarialism of which we have had long experience. We have superimposed on the Westminster type of Constitution an elected Executive President who holds office for a continuous period of six years immune to changes in the Cabinet or the voting in Parliament. This is to ensure the stability of the Government. But unlike the Westminster type of Constitutions or even the Indian Constitution, our republican Constitution, as stated earlier,

is a creation of the People in whom Sovereignty is vested. This Sovereignty is exercised by the three organs of State, including the President in the name of the People on their mandate and as their agent. The President and the Legislature must therefore hold that power and exercise it strictly in accordance with the provisions of the Constitution. Article 4, which spells out the Sovereignty of the People, is worded as follows:

"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 selected 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 recognised, 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."

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. Article 4 (*b*) states that the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President. As Head of State, he is vested with both ceremonial and executive functions. In addition, as the Head of the Executive and of the Government, he combines certain active functions of office. He is also actively involved in the Parliamentary process. Article 42 makes the President responsible to Parliament for the discharge of his duties.

Further, the Constitution in Chapter VIII requires that "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." (Article 43 (1)). Article 43 (2) states that "the President shall be a member of the Cabinet of Ministers, and shall be the Head of the Cabinet of Minsters." In this regard the President has the power of the Prime Minister under a Westminster type of Constitution. He appoints both the Prime Minister and the other Ministers. He assigns subjects and functions. The President can assign to himself any subject or function and remain in charge of any subject or function not assigned.

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

Turning to the Legislative power of the People, the Constitution has prescribed that it should be exercised by a Parliament consisting of elected representatives of the People. It should be noted that Parliament itself is an agent of the People. When questions on fundamental matters such as the Sovereignty, the extent of legislative power, the power of amendment etc. arise, there has been a divergence in approach among judges of countries having the U. K. type of Constitution as against the American type of Constitution. The governing factor in this issue appears to be the identification of the source of the Sovereign power of the State. Where the mandate theory or the principle of agency applies, courts have tended to limit the powers and jurisdiction of the organs of government and deny them plenary powers unlike in the other type of case. It is interesting to find that Indian judges and lawyers have often indiscriminately relied on decisions from both jurisdictions without having regard to this significant difference in fundamental principles in the two types of Constitutions. For example, Seervai in his work "Constitutional law of India" (3rd Edn.) at page 1849 makes the following observation:–

16 "Equally, the theory that the legislature is a delegate of the people has no application to our Constitution. No such theory applied to the legislatures under the G. I. Act, 35, and the basic distribution of legislative powers between Parliament and the State legislatures has been taken over by our Constitution from the G. I. Act, 35, with alterations not material to the present argument. In any event, as we have seen, the doctrine of agency can have no application to the members of a legislature. It is not surprising, therefore, that our Constitution contains no provision corresponding to the 10th Amendment to the U. S. Constitution. Therefore, a resort to American decisions is not helpful because they are based on postulates which are inapplicable to, and are repudiated by, our Constitution."

The provisions in our law relating to the content and limitations of the Legislative power of the People is contained in Articles 75 and 76 of the Constitution. Article 75 appears at first blush to be plenary. It vests in Parliament the power to make laws including retrospective legislation. It empowers the repealing or amending of any law including those of the Constitution or adding any provision thereto.

An examination of the proviso to Article 75 and Article 76 will at once show that there is an inherent limitation on this power and the power is not plenary. In this connection I mean Article 76 (1) and the

proviso to Article 75. These limitations are not merely a procedural bar to legislation, but they appear to denude Parliament of legislative power and make this a field which Parliament is incompetent and incapable of entering. This does not appear to be the only limitation on the legislative power of Parliament. Vide also the provisions of Articles 26. (4), 36. (2) and 93. If this view is correct, this would mean that whatever be the extent of the amending power, the relevant parts of Articles 75 and 76 cannot be amended or repealed under the amending power.

Now Article 76. (1) states that Parliament shall not abdicate or *in any manner* alienate its legislative power and shall not set up any authority with any legislative powers. In legal parlance "alienate" means any type of dealing or disposal. In the present context it necessarily means the transfer of its legislative power whether whole or partial in any manner. It cannot mean anything else. The only exception to this is the power given to the President to make emergency legislation, which is itself made subject to sufficient control and supervision of the Legislature. While this exception allows regulations having the force of law to be made, it is a power strictly and continuously controlled and monitored by Parliament and which Parliament can recall at will. It is also necessitated by the highest interest, namely for the protection of the State in a time of emergency. Article 76 (3) states that the making of subordinate legislation would not be a contravention of the provisions of Article 76 (1) relating to the abdication and alienation of the legislative power.

The terminology describing such subordinate legislation is immaterial. They are called by various names such as regulations, by-laws, orders, statutes, etc., but the one characteristic about them is that they are not and cannot be primary legislation, which only Parliament can enact. They cannot over-ride primary legislation, but they can be over-ridden by such legislation. If the impugned proposed legislation is in reality of the character of subordinate legislation, then this case would present no problems for us.

It is submitted by the propounders of the Bill that the Statutes made by the Provincial Councils are in fact subordinate legislation, but Mr. Fernando said that they are of a higher quality than by-laws. But what is strange is that at the same time they submit that all those provisions that give a parity to such Statutes with laws passed by Parliament and the entrenchment of such law-making power are consistent with that position.

The view that Statutes made by Provincial Councils constitute subordinate legislation relies mainly, if not solely, on U.K. authorities. Therefore, it is necessary to compare the legal position in Sri Lanka with those of U.K. and other relevant countries to see the validity of that argument.

In regard to the "delegation" of legislative power, the U.S. has adopted one approach and the U.K. and the Dominions another. The U.S. view is founded on the theory of mandate which also applies to us and of the separation of powers. The position in the U.K. and Dominions is wholly different. While at times the U.S. courts struck down all delegations of legislative power, the current view is that delegation would be permissible where policies and standards have been indicated by the Legislature. The U.S. courts are still inclined to strike down delegations which are found to be "uncanalised, uncontrolled and vagrant".

In India, in some of the earlier cases, the Supreme Court inclined towards the principles laid down in the American cases that delegation legislative power was impermissible. In *re Delhi Laws Act,* A.I.R. 1951 S.C. 332, the Supreme Court held that the essential powers of legislation cannot be delegated. Both in the above case and in *Rajanarainsingh v. Chairman, Patna Administration Committee,* (1955) 1 S.C.R. 290, the Supreme Court has held that the legislature cannot delegate to another authority the declaration of policy and the laying down of standards or the power to repeal legislation. These features are considered essential characteristics of legislative powers and are non delegable. There has been however a slight shift in view in recent times as shown in later decisions such as *S. B. Dayal VUP,* A.I.R. 1972 S.C. 1168, and *N. K. Papiah v. Excise Commissioner,* A.I.R. 1975 S.C. 1007. In the latter case, in adopting a little more liberal stand, the court placed particular stress on the provisions for effective Parliamentary control including the power of repeal, which was provided for in the impunged legislation. Commenting on this trend, Seervai in his latest edition at page 880 says:

> "With *Papiah's Case,* the return of the Supreme Court to the Privy Council view is complete for it adopts the view forcibly expressed in *Hodge v. R.* that a legislature entrusting important regulations to agents does not efface itself or abdicate its legislative power. *The legislature retains its power intact,* and can, *whenever it pleases,* destroy the agency it has created and set up another, or take the matter directly into its own hands by exercising its undoubted power to repeal, amend or vary a statute."

If we are to apply the principles applicable in the U.K. or even as laid down in a modified way by the Indian Supreme Court–these decisions being clearly applicable to our situation–then even with reference to Lists Nos. I and III, any legislation made by a Provincial Council could be struck down for lack of policy and guidelines. The submission that this result is avoided by reason of Parliament retaining the power to legislate on National Policy is misconceived. The fact is that 37 items with their sub-divisions have been allocated to Provincial Councils to legislate without providing any guidelines of policy.

Mr. Fernando relied on the first heading in List II–"National Policy on all subjects and functions" and said that Parliament has reserved to itself the right to lay down National Policy on any matter. This, he says, meets the charge that the delegated items in the Provincial List contain no guidelines. At one stage there was a discussion as to whether the matter referred to above is an item or a heading.

First let it be understood clearly that this item–assuming it is such–permits only laying down National Policy and not legislating on the subject concerned as such. It is very difficult to contemplate how effective this provision would be in practice.

Let us take an example. There is item 29.1 relating to theatres, dramatic performances, exhibition of films and public performances. Suppose the Provincial Council makes a law which is unpalatable to the Government and the Government wants to lay down a policy on the matter. Suppose such a policy statement is enacted. What is the effect of it? Since Article 154G (6) would not apply to such a case–it applies only to the Concurrent List–the policy enactment would have no effect. It would be so in every case.

Further, I do not think that a declaration of policy after the Provincial Council had enacted a Provincial statute can go to cure the illegality of the delegated law which was permissible at the time of enactment.

In the U.K., which enjoys the supremacy of Parliament, the courts allow what is described as "conditional legislation". One of the leading cases enunciating this principle is *Rex v. Burah,* [1878] 3 A.C. 829. In this case the Governor-General, in the exercise of powers vested in him by section 8, Garo Mills Act (which had been duly passed by the Governor-General in Council), extended the Act to another district.

When action was taken under the extended law, it was challenged as *ultra vires* and as an improper delegation of legislative power. The Privy Council held–

(1) that the Act had been passed in the due and ordinary course of legislation.

(2) the Indian Legislator which passed the Act had plenary powers and was in no sense an agent or delegate of the Imperial Parliament.

(3) In enacting that Act "the proper legislature has exercised its judgment as to place, person, laws, powers and the result of that judgment has been to legislate conditionally as to all those things. The conditions having been fulfilled, the legislation is now complete."

But that is the furthest the U.K. courts have gone. *In re the initiative and Referendum Act,* [1919] A.C.935, an Act contained machinery for making laws. It provided, inter alia, that alternate to the normal procedure where the Lt.–Governor enacted legislation, a law can be submitted to the voters and it would come into operation on their approval. The Privy Council held that this machinery was in effect the setting up of a different legislative apparatus than that provided by the Constitution. In distinguishing this case from a case of delegation, the Privy Council observed:

"It was argued. . . that a Legislature committing important regulations to agents or delegates effaced itself. That is not so. It retains its powers intact and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands."

Hodge v. Rex, [1883] 9 A.C.117;
Cobb v. Kropp, [1967] 1 A.C.141.

Those who support the Bills have relied heavily on the U.K. law and U.K. precedents. They however have little relevance to our situation. Shukla, a well known writer on the Indian Constitution, in his work has contrasted the U.K. and the Indian positions in this regard. About the U.K. he states at page 456–

"In England, on the other hand, there is no written Constitution circumscribing the powers of Parliament, which in the eyes of law is sovereign. 'The British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute

power untrammelled by any written instrument obedience to which may be compelled by some judicial body.' Parliament may accordingly delegate to any extent its powers of law-making to an outside authority. As a matter of law, Parliament may surrender all its power in favour of another body as it actually did in 1807 when the English and Scottish Parliament passed Acts of Union providing for the coming into existence of a new body, Parliament of Great Britain. The limits of delegated legislation in the English Constitution, if there are to be any, must, therefore, remain a question of policy and not a justiciable issue for the courts."

This is sufficient to dispose of the Attorney-General's arguments where he relied strongly on developments in the U.K., particularly Scotland and Wales. He particularly stressed the case of Northern Ireland and its Act of 1920 which, as far as I am aware, has hardly ever figured in formulating these Bills.

Even if *Hodge's Case* applies to our situation, could it seriously be said that in relation to Provincial Councils, Parliament has retained its powers intact and "whenever it please" it can withdraw the delegated power? Factually speaking even the President has said recently that under the proportionate representation scheme, no political party would be able to secure anything more than a bare majority in the future.

What is described as conditional or contingent legislation is included in the category of subordinate legislation. Conditional or contingent legislation is described as "a statute that provides control but specifies that it is to come into effect only when a given administrative authority finds the existence of conditions defined in the statute". This is best illustrated in the case of *Field v. Clark*, 143 U.S.649, where the President was authorised by proclamation to suspend the operation of an Act duly passed by Congress which permitted free introduction into the U.S. of certain products upon his finding that the duties imposed upon the products of the U.S. were reciprocally unequal and unreasonable. The Supreme Court held the Proclamation valid on the ground that the President was the mere agent of Congress to ascertain and declare the contingency upon which the will of Congress

was to act was not legislative in character. It quoted with approval of the following dicta in *Looke's Appeal*, 72 Pa. 491, which the Court said enunciated the correct principle:

"The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law intends to make its own action depend."

There appears to be a clear distinction between conditional legislation and "delegation". Explaining this difference in terminology, Seervai at page 1848 says:

"Counsel and judges in the courts below had spoken of the powers so conferred, as involving a 'delegation' of legislative power; counsel arguing before the Privy Council had spoken likewise. The Privy Council however consistently upheld these powers as 'conditional' legislation or spoke of the delegation of 'so-called legislative powers'. Kania C. J. strongly emphasized this fact to show that the Privy Council did not uphold the 'delegation' of legislative power. It is difficult to believe that judges and counsel spoke one language and the Privy Council spoke another. It is submitted that the explanation lies in the fact that the word 'delegation' has more than one meaning, and the Privy Council did not indicate the sense in which it used the word 'delegation'. However, in *R. v. Sibnath Banerji* Lord Thankerton, in another context, defined the word 'delegation' in the strict sense of the word, and that definition explains why the Privy Council consistently spoke of 'conditional' and not 'delegated' legislation. He said:

'Their Lordships would also add, on this contention, that sub-s. (5) of s. 2 (of the Defence of India Act, 1939) provides a means of delegation *in the strict sense of the word, namely a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter,* whereas under s. 49, sub-s. (1), of the (G.I.) Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name'"

This would explain why the word "delegate" in the collation of words "may not abdicate, delegate or in any manner alienate" in Article 45.(1) of the 1972 Republican Constitution was not retained in Article

6(1) of the present Constitution. Mr. Fernando and Dr. Jayewardene argued that the deletion of the word "delegate" has now resulted in confining the prohibition to abdication and alienation only. On the contrary the presence of the word "delegate" would have given room to counsel to argue that even the stricter type of delegation was permissible, and I think it was rightly removed in the present context.

Finally on this matter it is necessary to dispose of another of Mr. Fernando's submissions. Mr. Fernando submitted that the Bill does not contain an unlawful delegation of legislative power to Provincial Councils and the provisions in the Bill are consistent with Article 76(3). It was based on an argument that took us back in constitutional history to the Republican Constitution of 1972 and even to the Soulbury Constitution.

It was his contention that the present Democratic Socialist Constitution is a direct successor and heir of the previous Socialist Democratic Constitution of 1972. That the legislative power Parliament enjoys now is identical with that of the previous Constitutions, because the present Constitution was enacted under the amending provisions of the previous Constitutions. He also said that the legislative powers of the two legislations were the same and there is no room for a concept of "constituent" power to be brought in when interpreting the new Constitution.

If I remember right, Mr. Fernando even said that a "legislative judgment" would be permissible under these provisions. Such an interpretation would be reactionary and would mean going back not merely two decades to a Constitution which this country rejected but to the precolonial days and to the sixteenth century to which he had gone in search of authority.

Although the present Constitution was enacted taking advantage of a procedure in the 1972 Constitution, which was specifically repealed, the present Constitution is a new one and has brought about radical changes. It is unnecessary to enumerate the great improvements that have been introduced, but one fact that needs emphasis is that the present Constitution is intended to be firmly rooted in the will of the People and the power of the organs of Government flow from the People and the organs are agents of the People and hold their mandate. In the written submissions this position has been conceded. See also the resounding and unequivocal delclaration of the Preamble.

Another erroneous view stemming from this is his contention that fetters on the amending power of Parliament are found in federal constitutions and not in unitary ones. If he is having in mind the U.K. "Constitution" as compared with the Indian Constitution, such a difference could be found. But the difference does not lie in one being unitary and the other federal, but in one being rigid and the other flexible. The English cases interpreting the written Constitutions of Dominions and States show that this is the governing factor and not the one suggested by Mr. Fernando.

Mr. Fernando has supported his submissions by decisions of the old Constitutional Court interpreting the 1972 Constitution. They could have no application to the problem before us, and further I have shown earlier why the word "delegate" was omitted from the present Constitution in Article 76.

I have also shown earlier that the bringing into operation by a subordinate authority of a law made by the proper legislature in prescribing a date for the cessation of operation does not involve the exercise of legislative power. It only involves the determination of a fact or state of things upon which the law will come into operation or cease. This is the true effect of the provisions of clauses (*a*) and (*b*) of Article 76. These powers are subordinate in nature and cannot be used as examples of the true legislative power which has been delegated to the State.

This seems also to be a convenient place to deal with a connected submission made by Mr. Fernando. He stated with particular reference to the provisions of Article 154G(2) and (3) that once the legislative power is referred back to the People—the source—there could be no invalidity because it would really be an enlargement and the strengthening of the People's power. I have said earlier that this is fallacious and arises from a failure to understand the basic principles that underlie constituent and legislative powers and the power of amendment, the limitations of manner and form in a Constitution that has rigidity.

Now I come back to Article 76. It enjoins that Parliament shall not make any law in respect of the following:—

(1) Abdication of its legislative power;

(2) In any manner alienate its legislative power;

(3) Set up any authority with any legislative power.

Having regard to the wording of Article 76(1)–and there is a similar concept elsewhere (vide proviso to Article 75)–it is possible to argue, (and it was touched upon but not developed), that these provisos go to the very competence of Parliament. It is a limitation on the legislative power marking out its range and extent. If this position is correct, no legislation even by a two-thirds majority and a Referendum can cure this lack of capacity.

This seems also a convenient point to deal with another submission that was mentioned in the course of the hearing, namely, that since Article 4(*a*) states that the legislative power of the People shall be exercised by the Legislature and the People and any law that would provide for a Referendum would not violate the constitutional provisions, since Sovereignty is in the People and an appeal to the People can never derogate from that Sovereignty. As it was said in the course of the argument, the People as a rabble cannot exercise the legislative power of the People. It must be the People at a Referendum following the proper constitutional procedure. Such a Referendum must arise from a situation where the constitutional procedures have been faithfully followed and not in spite of them. Where there are violations of the Constitution, it is no argument to say that all that would be covered by reason of a provision for a Referendum. Such a misconception is due to the failure to distinguish clearly between the original constitutional power, the amending power and the power of ordinary legislation, and the form and manner of exercising legislative power. In a rigid Constitution the composition of Parliament and the procedures must be distinguished from the area power. "The law existing for the time being is supreme when it prescribes the condition which must be fulfilled to make a law. But on the question what may be done by a law so made, Parliament is supreme over the law."

It is amply shown in the present case that Provincial Councils–

(*a*) makes statutes which enjoy at the least parity with laws made by Parliament;

(*b*) can enact statutes that can suspend and render inoperative laws made by Parliament;

(*c*) have plenary power to make statutes in respect of the items in List in respect of matters in the Provincial List;

(*d*) have a Concurrent List with Parliament and are placed on terms of equality; and that

(*e*) the Thirteenth Amendment which provides for this arrangement and the Lists distributing the legislative power is sought to be entrenched; and that

(*f*) Parliament has disabled itself by placing fetters upon itself in the exercise of legislative power and in particular has provided the need for a two-thirds majority and a Referendum to enact legislation.

Regarding the last item, I wish to state that what Parliament has sought to do is place the legislative powers of Provincial Councils as far beyond its reach as possible. While a Provincial Council with a simple majority can legislate on those matters, Parliament which originally had this power of legislation and which it could have done by a bare majority has now prescribed not merely the need for a two-thirds majority but the addition of a Referendum too. This is undoubtedly a renunciation and alienation of its plenary powers over legislation. This indicates that the new legislative structure is placed on a par with the most basic features of the Constitution.

In Article 76 (1) the injunction is "in any manner alienate". Both a temporary alienation and a permanent alienation fall within this prohibition. So does an alienation of a part or the whole. On this analysis one could not but come to the conclusion that what is sought to be granted to a Provincial Council is not the type of conditional legislation mentioned in Article 76 (3) (*a*) or (*b*), but full-blooded legislative power.

Applying the ordinary principles of interpretation, if any, "delegated" legislation is not saved by the exceptions in subsections (2) and (3) of Article 76, such exercise of legislative power has necessarily to fall within the prohibition contained in Article 76(1). Such an exercise of legislative power is impermissible in the face of Article 76(1) and would be void.

Next the judicial power of the State may be considered. Although it is not specifically mentioned in Article 3, it is one of the powers of Government and spelled out in Article 4(*c*). Justice and the Independence of the Judiciary are also mentioned in the Preamble as the intangible heritage that has helped the creation and preservation of a just and free society. We have, as stated earlier, in previous determinations held that any interference with the judical power would require the special procedure required by Article 83 and involve the approval of the People at a Referendum.

The other feature of government that requires mentioning here that would require the special procedure set out in Article 83 is any interference with the franchise. Vide SD. 5/80 where we held that a Bill that affected the franchise cannot be passed without approval by the People at a Referendum.

The Indian Constitution provides for a federal structure with a strong centre. The Indian proposals acceded to by us clearly indicate a shift in views, no doubt under pressure tilting the scales in favour of the Tamil demands for autonomy. In fact some of those proposals go beyond what is found in the Indian Constitution and is intended to give even a greater autonomy to the Provincial Council than that obtaining to the States in India. All the proposals of the Indian Government go to reinforce the position of Provincial Councils, extend its powers and entrench its legal structure. With this background indicating the strong pressures for taking the federal Indian Constitution as a model, let me now proceed to an examination of the Thirteenth Amendment and where necessary the Provincial Councils Bill which is supplementary to it.

Dr. Jayewardene who appeared for His Excellency supporting the Bill traced with his usual thoroughness the historical background regarding the evolution of the present Provincial and adiminstrative units from the time of the cession of the Kandyan Kingdom. He also brought to our notice material from the late colonial period showing suggestions and even agitation for regional administration. In 1926 Mr. S. W. R. D. Bandaranaike, at the beginning of his political career, had advocated a system of federation for administrative purposes. The Kandyans had suggested three regional units in which, as my brother observed, the Muslim community had been overlooked.

It would appear that with the dawn of independence the thinking of the politicians underwent radical change. When faced with the task of winning elections and running a government, and with realities and practical problems, it is natural that nearly all of them had to adapt themselves to the changing situations in the interests of the country and for their own political survival and future. So we see many of them going back on their views on many important issues, some completely reversing the opinions they had held earlier.

I do not think that we could attribute any great importance to any particular statement or to any particular individual in this regard. But that material is helpful as indicating a line of development making for

greater decentralising of the administration which has found expression in Article 27(4) of the Directive Principles of State Policy in Chapter VI of the present Constitution.

Dr. Jayewardene developed another line of argument which was most interesting and sought to blend it with the above. The provision in the Directive Principles, he said, goes back to a similar provision in the 1972 Republican Constitution which was based on Marxist thinking. The decentralisation of administration and the granting of regional autonomy is a phenomenon of Marxist States. He referred to the Constitutions of the Peoples Republic of China, Mongolia and Rumania to illustrate this. Dr. Jayewardene submitted that this was the genesis of the Bills and made no reference to the Accord, which incidentally is referred to in the Provincial Councils Bill.

Dr. Jayewardene next went on to examine item by item in List No. 1, which is the Provincial Council List. He submitted that there is nothing of any national importance included in that list but they all related to matters of a regional nature, properly entrusted to a regional authority.

While I can agree with Dr. Jayewardene with regard to most of those items, there are a few which do not appear to fit into the pattern outlined by him. Further, the list cannot be considered in isolation without having regard to a number of other features in the Bill which affect the Constitution on basic matters. I have dealt with most of these matters elsewhere. Briefly the position to be that, in spite of all the good intentions of the Government we have to decide the legal question as to the extent of the powers, both legal and executive, which have been devolved on Provincial Councils and whether that has the effect of making them so autonomous as to derogate from the unitary character of our Constitution. All those matters are dealt with in the rest of my order.

But, before I proceed, a few words may be said about the Directive Principles of State Policy, relied on by Dr. Jayewardene, Mr. Fernando and Mr. Choksy.

Much stress was laid on the Directive Principles of State Policy in Chapter VI by most counsel supporting the Bill. They rely in particular on Article 27(4), which states that–

> "The State shall strengthen and broaden the democratic structure of Government and the Democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government."

It may be observed that this refers to the decentralisation of the administration. It does not mean the decentralisation of power or the government. It cannot possibly be interpreted to derogate from other provisions of the Constitution. In fact Article 29 makes this clear. These rights are not justiciable and confer no rights or impose no obligations. Besides, some of these provisions overlap and even contradict each other - Vide Article 29(3).

While the Indian Courts have leaned on these principles to resolve matters of doubt, I do not think that they should have any controlling effect on any provision of the Constitution. These Directive Principles are really ethical or moral principles to guide the State. If any kind of legal importance is to be given to them, this would make the constitution unworkable. Seervai on a critical analysis of the Chapter on Directive Principles and the Indian case law confirms this view. Vide Seervai, pp.1577-1695.

Mr. Goonesekera in his reply stated that the emphasis and reliance placed on Article 27(4) is unjustified because the actual reason for these Bills lies elsewhere and is clearly mentioned in the Bills themselves. They have little connection with Article 27(4).

A considerable portion of time was spent in the arguments in unravelling the somewhat unusual two sentences that are at the head of the new Chapter XVIIA. It was in the absence of an appropriate term called for convenience, the Preamble. It is not numbered. Mr. Mark Fernando who supported the Bills conceded that it seeks to give precedence to this new Chapter over all the other provisions of the constitution except the entrenched Articles. He also submitted that this is a pure and simple interpretation Article and pointed to other articles such as Article 82(6), 84(3) and 26(6) to show that such a provision is consistent with the constitutional provisions.

After the ingenuity of counsel was exercised on this provision, it appears to emerge that this provision is both contradictory and misconceived. By seeking to give it a preferred status it contravenes the guarantees and protections given in the Constitution. It is stated to be subject to the Constitution but is meant to override the very constitutional provisions. It contravenes the provisions of Article 83. This Provision is not a defining or exclusion Article like the Articles relied on in support of it, but an interpretative Article. Here the Legislature has indicated to court how a conflict of law, namely contradictory provisions of the Constitutions should be decided. This is an exercise of judicial power. Its purpose seems to be to avoid the Bill going before the People at a Referendum for approval. How misconceived the provision is, can be seen by the fact that such a provision can never properly appear in a Bill because we are empowered in the exercise of our constitutional power to decide this very question. The question cannot be foreclosed without repealing our judicial power.

This unnumbered Article which begins Chapter XVIIA recites the Article mentioned in Article 83. But Supreme Court decisions and determinations have interpreted some of these provisions so as to include certain other provisions and features of the Constitution, for example the Judicial power is not mentioned in the above specified Articles. There are also, as indicated earlier, a number of other features and concepts that go to ensure the Sovereignty of the People. There is the Cabinet system of Government, the question of the content and limits of the legislative power and the power of delegation. None of these Articles and features would be included on an ordinary and literal reading of the above amending provision. But according to the interpretation placed on the relevant provisions by the Supreme Court, Articles 1, 2 and 3 would incorporate by inference all these features.

In view of the above circumstances, a literal reading of the words of the opening paragraph "but save as aforesaid nothing contained in the Constitution or any other law in force on the date on which this Chapter comes into force shall be interpreted as derogating from the provisions of this Chapter" do not reflect the legal position accurately. It is a misleading statement. On a literal reading and without reference to the Supreme Court decisions, one can come to the conclusion that the constitutional provisions and features of a fundamental nature

which are linked to those Articles though not specifically mentioned are being sought to be amended without adopting the special procedure indicated in Article 83. If the literal meaning has to be given to this clause, then this would amount to an amendment or repeal of a provision relating to the Sovereignty of the People and would require the approval of the People at a Referendum. Further, if the paragraph is intended to preclude the exercise in interpretation which is solely vested in the Supreme Court, this involves also an unlawful interference with the judicial power.

Article 15A provides for the establishment of Provincial Councils consisting of elected members for the nine Provinces specified in the Eighth Schedule. Sub-section (3) of Article 154A enables Parliament by law to provide for two or three adjoining Provinces to form one administrative unit with one elected Provincial Council. This is connected to section 37 of the Provincial Councils Bill and would be dealt with later.

Each Provincial Council is an administrative unit duplicating more or less a Cabinet system of Government – a Provincial Council and a Governor as its head. These provisions follow close the pattern and provisions of the Indian Constitution in its relation to the States except for a few variations.

We may properly begin with the Governor. Article 154B states that he 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. This is not an appointment but a de-routing or relinquishing of the Executive power committed to the President and is illegal. The Governor has the usual powers of summoning, proroguing and dissolving the Provincial Council as in a Westminster type of Constitution.

The Governor's Executive power is co-extensive and coterminous in breadth with the law-making power of the Council–Article 54C. This Provision is not a defining or exclusion Article like the Articles the area of the concurrent powers. He has to act on the advice of the Board of Ministers except in relation to his limited discretionary powers. The Board of Ministers is headed by a Chief Minister and consists of not more than four other Ministers, all of whom are appointed by the Governor on the advice of the Chief Minister. Article

154C states that the Executive power of the Governor shall be exercised "either directly or through Ministers of the Board of Ministers or through officers subordinate to him in accordance with Article 154F."

It is evident from the brief provisions relating to the Governor that he is an officer to whom the Executive power of the People is purported to be directly delegated. I use the word "directly" also in another sense, for if it is considered as an appointment by the President, this delegation has by-passed the existing Cabinet machinery. If the Cabinet system is fundamental to our system of government, then this delegation and relationship between the President and the Governor both ways is wholly illegal. It violates a basic feature of our Constitution, namely, government with the aid of the Cabinet and Parliament. Such a fundamental change can only be effected by a Bill passed in terms of Article 83 with the approval of the People at a Referendum. Again, Article 154H (4) which vests the President with a discretion in deciding whether or not to refer a question of the validity of a Statute of the Provincial Council to the Supreme Court is the vesting of a discretion regarding the exercise of judicial power. It is in effect an exercise of judicial power by an executive officer. This also makes the Bill inconsistent with the Constitution, requiring that it be passed in terms of Article 83. If, as indicated earlier, the procedure indicated in Article 154H (4) is the only permitted procedure for challenging the validity of a Statute, then the position can be much worse, because the entire constitutional jurisdiction of the Supreme Court has been repealed.

It is also possible to regard the purported delegation of power by the President to the governor to be illusory and spurious. The President exercises the Executive powers of the State as an agent or trustee of the People. Although he is permitted to delegate it to the Cabinet and subordinate public officers, I do not think he is authorised to alienate or abandon or renounce it. In reality this is what is sought to be done in this case. The Governor to whom the Executive power in the Province in delegated is an appointee of the President and can really exercise on his own behalf or on behalf of the President only the discretionary powers vested in him and not the larger powers purported to be vested in him.

In regard to the substantive Executive powers falling to the lot of the governor, these constitute decisions of the Board of Ministers which he is bound in law to accept and sanction. He has no choice and is given no discretion in the matter. The Chief Minister and the other Ministers are no doubt also appointed by him and even in this instance Article 154F(4) shows that where the party system operates and a party obtains a majority in the Provincial Council elections, the governor has no option but to appoint the leader of that political party as the Chief Minister and his nominees as the other Ministers. These appointments are in fact non-governmental appointments and the Governor merely sanctions what the law has provided for. The Legislature cannot exercise the Executive power either. So in reality, the substantive Executive power exercised in a Provincial Council emanates and is created from below and does not in fact constitute a devolution of power coming from above, from the President. The executive power relating to a Provincial Council is therefore broken at a dividing point, one purporting to devolve from the President and the other arising from the elected members of the Provincial Council. The effect of this is that such executive power vested in the President is relinquished and a complex arrangement devised to cover up and cloud the real nature of the transaction. 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 a renunciation must have the approval of the People at a Referendum. Mr. Gunasekera presented his argument on somewhat the same lines, but preferred to describe it as a sharing of the Executive power, with a non-governmental authority which is contrary to the Constitution.

A provincial Council consists of a specified number of elected members. There is special provision for an existing member of Parliament of an electorate falling within the area of a provincial Council to participate and vote at a meeting on a resolution of the Provincial Council. Such a provision affects both the franchise and the equality provision doubly so if the Northern and Eastern Provinces become one unit.

A Provincial Council is vested with Legislative power. It is empowered to enact statutes applicable to the province with respect to specified matters. These are set out in List No. I—the Provincial Council List set out in the Ninth Schedule Article 154G.(1).

Article 154G (7) states that a Provincial Council shall have no power to make statutes on any matter set out in List II called the Reserved List. This list was embodied in consequence of the proposal contained in the Draft Framework of Accord and Understanding initiated on 30.08.1985 and repeated later on 23rd September 1986 "that for the removal of doubts, the subjects and functions that would be exclusively reserved for Parliament are specified in Annexure II". So, in effect, we are left with two exclusive lists and a third Concurrent List.

List No. III is called the Concurrent List. Article 154G.(5)(*a*) states that Parliament can make laws with respect to matters in this list "after such consultation with all Provincial Councils as Parliament may consider appropriate in the circumstances of each case". Similarly, Article 154G (5)(*b*) states that a Provincial Council can make law in respect of such matters "after such consultation with Parliament as it may consider appropriate in the circumstances of each case". It is difficult to understand what is meant by "consultation with Parliament". It can only mean a resolution of Parliament by a majority vote in the result the powers of Parliament can be eroded and such powers given to a Provincial Council on a mere majority vote. The wording of the two Articles is identical in substance and quality and gives a parity to the two authorities as regards law-making power and places a fetter on Parliament's plenary power of Legislature, because this is a condition precedent to the exercise of legislative powers.

It has been sought to entrench this division of legislative power and to give it permanancy and put it beyond constitutional amendment by requiring the rigid procedure of a Referendum. Here too would be observed the fettering of the plenary law-making powers of Parliament, the adoption of a procedure involving the consent of persons and authorities outside Parliament before passing a law. But more significant is the requirement for a Referendum.

Article 154G.(2) states that a Bill for the amendment or repeal of the Thirteenth Amendment or the Ninth Schedule cannot be passed unless–

(*a*) it is referred by the President before it is placed on the Order Paper of Parliament to every Provincial Council,

(*b*) every Provincial Council agrees to the amendment or repeal.

Where one or more Provincial Councils do not agree, it has to be passed by a two-thirds majority and approved by the People at a Referendum.

Article 154G(3) contains a similar provision prohibiting Parliament from passing any Bill in respect of any matter set out in the Provincial Councils List. Here too, if any one Provincial Council disagrees, it will have to be passed by a two-thirds majority and approved by the People at a Referendum.

Mr. Mark Fernando and Mr. Crossette Thambiah tried to make out that the vice, if any, in this provision is the requirement of a Referendum. It was also suggested that such a requirement was legally valid, because it was within the competence of Parliament. They gave the example that a Bill enacted by a special majority of 2/3 could entrench itself further with a requirement that it could only be amended by a 3/4 or 5/6 majority. If such a thing is possible, then the result would be to alter the particular structure of the Constitution now existing, which the People have given to the country. It is the People who can re-structure the Constitution, not one organ of the State like the Legislature. The Legislature can only amend the Constitution according to the terms of the Constitution and since such an exercise involves the amending power, it cannot be done in the manner suggested.

To illustrate this further, can a Bill which is passed by only a two-thirds majority (and where the background material shows that every effort has been made to refrain from having it passed by way of a Referendum) prescribe that it can be amended or repealed by a procedure of greater rigidity, namely, by way of Referendum. In simple terms, can a Bill, for example passed as ordinary legislation by a bare majority, prescribe that it could be repealed or amended only by a two-thirds majority? Surely not. If it were otherwise, this would mean that the structure of the amending power and the legislative power now existing (which are part and parcel of the basic structure of the Constitution and upon which a number of provisions, both of fundamental nature and otherwise, have been framed) would undergo immediate transformation, radically altering the structure and nature of the present Constitution. It is also indeed strange to find that at the same time a few provisions of this Thirteenth Amendment, which is sought to be entrenched, are permitted to be amended or affected by ordinary legislation enacted by Parliament or even by Order of the President. Vide List No. I and Schedules.

But the most important objection to the provisions of Article 154G (2) and (3) is the attempt to add it to the provisions of the entrenching Article 83. As Mr. Goonesekera and Mr. Iriyagolle submitted, the argument that this cannot be done except by a two-thirds majority and with the approval of the People at a Referendum is unanswerable.

With the division of the Legislative power, it is natural that provision would have to be made for resolving conflicts between statutes made by a Provincial Council within its domain and laws whether already existing or subsequently made by Parliament. The problem becomes one of great delicacy when this overlapping takes place in regard to matters in the Concurrent List. We find the following provisions for the resolution of such conflicts:–

Article 154G (6).–This is a general provision and the effect of this is that a Provincial Council must confine itself to matters in its list and if it were to make a statute which is inconsistent with a law otherwise made in accordance with the Provisions of the Thirteenth Amendment, i.e. List III, the Provisions of the law would prevail.

Article 154G (8).–This deals with a conflict between a Statute of a Provincial Council and an existing law in regard to a matter on the Provincial Council List. This subsection states that that law will "so long only as that Statute is in force remain suspended and be inoperative within that Province".

Article 154G (9).–Similarly, this deals with a conflict between a Statute made by a Provincial Council and an existing law in regard to a matter on the Concurrent List. This provision states: "that law shall, unless Parliament by Resolution decides to the contrary, remain suspended and be inoperative within that Province ....."

There appears, however, to be no provision for the case of a conflict between a Provincial Statute made under List I being inconsistent with a law newly enacted by Parliament under its powers re List II. It would be noted that Article 154G (6) applies only to the conflicts with the Concurrent List.

These provisions give an insight into the nature and quality of the legislation made by Provincial Councils. Could there be any doubt that Statutes made by Provincial Councils have the dignity and quality of

primary legislation. There is no way to regard them as subordinate legislation. There are a number of other provisions in this Thirteenth Amendment corroborating this view. Vide Articles 154G (4), 154L (*b*), 154M and 154S.

I do not think that it can be seriously contended that the provisions of Article 154G (10) negative this. This subsection is worded as follows:-

> "(10) Nothing in this Article shall be read or construed as derogating from the powers confined in Parliament by the Constitution to make laws in accordance with the provisions of the Constitution (inclusive of this Chapter) with respect to any matter for the whole of Sri Lanka or any part thereof."

If it were not for the words bracketed, this provision could have, to a great extent, preserved the plenary legislative power of Parliament. The bracketed words however make it clear that the legislative power has now to be exercised, having regard to and in the manner now provided by the Thirteenth Amendment. This would be strictly on the basis of the Lists. The ultimate effect of this provision is to confirm the division of the legislative power and at the most emphasise the island-wide legislative powers of Parliament in respect of other matters, e. g. Vide Article 154G (11), 154L. Vide List II item "All Subjects and Functions not specified in List I or List III including .....", which means that any subject or function not specified in the list would be considered as a power of the Central Parliament.

There could be discrimination in regard to the franchise, where only some members of Parliament may be granted the right of participating and voting at meetings of the Provincial Councils. The right and privilege of some members of Parliament are devalued as against other members by reason of two or three Provinces (especially in the case of the interim arrangement for the North and East) being constituted into one administrative unit. The right of the franchise means the right to exercise that right on terms of equality with others and that right of equality must be carried over also to those members of Parliament so elected. In the result, one voter or member of Parliament is afforded a greater right than another. Clearly in the instance mentioned, the two situations are not identical and equal. Both the franchise and the essential fundamental right–the right of equality–have been contravened. An amendment of this nature can only be passed by a two-thirds majority and the approval of the People at a Referendum.

Article 9 states that–

"The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana while assuring to all religions the rights granted by Articles 10 and 14(1) (*e*)

This entrenched Article enjoins the State to
(*a*) give to Buddhism the foremost place;
(*b*) to protect, and
(*c*) foster the Buddha Sasana;
(*d*) assure to all other religions the rights
contained in Articles 10 and 14. (1)(*e*).

The expression "Buddha Sasana" was advisedly substituted for the word "Buddhism" which was used in the corresponding Article of the 1972 Republican Constitution. The new expression is a compendious term encompassing all ancient, historic and sacred objects and places which have from ancient times been or are associated with the religious practices and worship of Sinhala Buddhists. This court has in an earlier case expressed such a general opinion. There is no dispute that the 276 places and sites shown in the Archaeological Map produced are of this category, except that Dr. Jayewardene said that a few of them could be non-religious sites and others may be in private hands.

It has been submitted by a number of Buddhist institutions and persons that the result of this legislation would be to place such holy places, too numerous to mention, under the control of the Provincial Councils. Apprehension is felt about the fate of these places in the Provincial Council intended for the Northern and Eastern Provinces.

In the written submissions filed by the Y.M.B.A., it has stated (para.9)–

". . . that during the period of nearly two decades immediately preceding this date there has been a studied and sedulous campaign by anti-Sinhala elements to obliterate all traces of places of ancient Buddhist worship in these two provinces."

There is documentation provided in respect of two such places. In the Report of the Presidential Commission, chaired by retired Chief Justice M. C. Sansoni, this complaint was inquired into and it had occasion to observe that (page 293)–

"The widespread damage done to temples and sacred places during the disturbances and for some time prior to 1977 has revealed the need for early action to be taken by the Police and all the appropriate Government authorities to prevent a grave situation arising. It has been shown that complaints made to the authorities over the damage done to Bo-trees at Trincomalee and Kilivedy went unheeded until those trees were completely destroyed. It is to the credit of the adherents of Buddhism that they exercised restraint in the face of grave provocation."

In the Provincial Councils List No. 1, item 25:2 is as follows:–

"Ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance."

The Reserved or the Central List No. II contains the following entry:–

"National Archives, Archaeological Activities and Sites and Antiquities declared by or under any law made by Parliament to be of National importance."

This would include–

"ancient and historical monuments and records and archaeological sites and remains declared by or under law made by Parliament to be of national importance."

We also see the following entry in the Concurrent List No. III:–

"Archaeological sites and remains, other than those declared by or under any law made by Parliament to be of national importance."

It is apparent that there is considerable overlapping in these items, and what counsel said that the Lists will prove to be a lawyer's paradise, is born out when we look at examples such as this. Mr. Mark Fernando conceded that these provisions need clarification to allay the fears of the Sinhala Buddhists. Dr. Jayewardene also conceded the responsibility and the duty of the State under Article 9 in this regard which he submitted remain unaffected.

Be that as it may, upon the enactment of this legislation, Provincial Councils – we are concerned particularly with those in the Northern and Eastern Provinces – would be empowered to legislate in respect of those shrines. These lists are entrenched. Up to now Parliament has not declared any one or more of these places to be of national importance. There is no indication that this is being done and even if so, which of those shrines and how many would come under such protection.

What is before us now is the existence of a power in a Provincial Council to make statutes for those shrines and places of worship. When such statutes are enacted, they would suspend and make inoperative existing law–Article 154G(8). Also it could lead to a contradiction in the application of the Provisions of Article 154G(3) and Article 154G(7). If Parliament thereafter seeks to legislate in respect of the above item, the provisions of Article 154F(3) make either the consent of all the Provincial Councils or a Referendum imperative. Thus for all practical purposes, these places would be at the mercy of Provincial Council legislation.

The result of these provisions is, if not a temporary abdication or alienation of its legislative power, almost a permanent one. In another connection I have referred to the fettering of Parliament's power of legislation even in respect of what it always freely had, with no corresponding restraints on the power of Provincial Councils, but actually enhancing their powers.

So far I have dealt with one aspect of the power of the Republic, namely the Legislative power. What of the Executive power? As stated earlier, the Executive power exercisable by a Provincial Council is coterminous with its powers to make statutes and this could include items in List III too. The guarantee contained in Article 9 is given by the Republic of Sri Lanka. Mr. Iriyagolle submitted, as an additional argument on Article 9, that when the power of the Republic is dispersed among eight or nine near autonomous Provincial Councils, the Republic would be in no effective position to enforce its guarantee. This would apply to the exercise of all Executive power.

A further argument was addressed to us with reference to Article 2. Article 2 states that "the Republic of Sri Lanka is a unitary State". It was submitted that there is a contravention of this Article, and since it is one of the entrenched Articles, the Bill has to be passed with the consent of the People at a Referendum.

We have earlier dealt with the violation of certain other entrenched Articles or Article considered to be entrenched. The intention, purpose and the effect of some of the Articles in the Thirteenth Amendment is to create or facilitate the creation of a separate entity of administration and government in the Northern and Eastern provinces as one unit. While the present submission is supported by those factors, it is not necessarily dependent on it. It requires separate consideration on its own merits.

The Provisions so far examined reveal–

(*a*) the conferment of real legislative power on Provincial Councils;

(*b*) Statutes made by Provincial Councils are given pre-eminence if not parity with laws made by Parliament;

(*c*) the taking away of Parliament's right to legislate on certain fields;

(*d*) the fettering of the legislative power of Parliament;

(*e*) the attempt to entrench the provisions of the Thirteenth Amendment;

(*f*) the abandonment or renunciation of the Executive power in respect of the Provinces or the sharing of it with unauthorised authorities who would administer such Provinces;

(*g*) the by-passing of the Cabinet system of Government which is "charged with the direction and control of the Government of the Republic".

The following are considered to be factors of the federal principle:–

(*a*) The existence of "a federal situation", i.e. a secessionist movement;

(*b*) The presence of easily definable geographical units definable by physical features, or in terms of racial, linguistic or cultural factors.

(*c*) The existence of two systems of government.

(*d*) The distribution of the powers of government usually in the classic mode of Lists.

(*e*) Rigidity in the constitutional structure with limitations on amendment.

(*f*) An authority to decide questions of respective competency between the Centre and the periphery. This role is traditionally by the highest courts which claim an independent position.

From the two foregoing paragraphs it would be observed that nearly all these features can be said to be present in the present case. Since there is a factual aspect to this submission, it is necessary to refer briefly to items (*a*) and (*b*) of the preceding paragraph in a little more detail.

As far as the modern period is concerned, the demands of the Tamil people for self determination and a separate state can be traced officially to the Trincomalee Resolution of April 1957 of the so-called Federal Party, whose real name is the Ceylon Tamil State Party which is an exact translation of its Tamil name Illankai Tamil Arasu Kadchi. This Resolution which was termed the First Resolution ran as follows:–

> "Inasmuch as it is the inalienable right of every nation to enjoy full political freedom without which its spiritual, cultural and moral stature must degenerate and inasmuch as the Tamil Speaking People in Ceylon constitute a nation distinct from that of the Sinhalese by every fundamental test of nationhood firstly that of a separate historical part in this Island at least as ancient and as glorious as that of the Sinhalese, secondly by the fact of their being a linguistic entity different from that of the Sinhalese, with an unsurpassed classical heritage and a modern development of language which makes Tamil fully adequate for all present day needs and finally by reason of their traditional habitation of definite areas which constitute one-third of this island, the first National Convention of the I.T.A.K. demands for the Tamil Speaking Nation their inalienable right to political autonomy and calls for a plebiscite to determine the boundaries of the linguistic states in consonance with the fundamental and unchallengeable principle of self-determination."

The claim for the Northern and Eastern Provinces considered as the "traditional homeland" (for which there is little evidence–vide the historical material mentioned in petition No. 19/87 and the Map prepared by the Department of Archaeology annexed to petition No. 8/87), the so-called settlement of Sinhalese in the colonisation schemes under the major irrigation works, and the government policy on education have been the source of grievance of the Tamil people.

Political claims and demands led to political agitation and finally to terrorism and an armed secessionist movement. The Government, as we know, has made every reasonable effort to solve it politically and

not to find a military solution. It is unnecessary to go through all the various stages of negotiations which have taken place in recent years. I shall confine myself to what is only relevant for this determination.

As early as September 1985 the mechanism of Provincial Councils had been proposed. In the Draft Framework of terms of Accord and Understanding of 30.08.85, it was stated that–

> "5. A Bill for the amendment of the Constitution to enable the creation of Provincial Councils and the devolution of powers on them shall be enacted by Parliament by a 2/3 majority. Thereafter Parliament will pass an Act directly conferring on the Provincial Councils the requisite legislative powers. Such power shall not be revoked or altered in any manner except by an Act of Parliament passed by a two-thirds majority after consultation with the Provincial Council or the Councils concerned."

The next development was further talks held between the Sri Lankan Government and an Indian delegation led by Hon. P. Chidanbaram, Minister of State, in July 1986. Based on those talks a detailed Note containing observations on the proposals of the Sri Lanka Government as the Framework was sent to the Indian Government. The following three paragraphs of the Note are relevant for the purpose of this determination:–

> "1. A Provincial Council shall be established in each Province. Law-making and Executive (including Financial) powers shall be devolved upon the Provincial Councils by suitable constitutional amendments, without resort to a referendum. After further discussions subjects broadly corresponding to the proposals contained in Annexe 1 to the Draft Framework of Accord and Undertaking of 30.08.85, and the entries in List II and List III of the Seventh Schedule of the Indian Constitution shall be devolved upon Provincial Councils.
>
> 2. In the Northern Province and in the Eastern Province the Provincial Councils shall be deemed to be constituted immediately after the constitutional amendments come into force........
>
> 7. Any amendments to the constitutional provisions or any other laws providing for devolution of legislative and executive (including financial) powers shall require a 2/3 majority as provided in the present Constitution. Any further safeguards for example a further requirement of a referendum may also be discussed."

In a preamble to this Note it was agreed that suitable constitutional and legal arrangements would be made for those two Provinces to act in co-ordination. In consequence of these talks a constitutional amendment took shape and form and three lists –

(1) The Reserved List (List II);

(2) The Provincial List (List I); and

(3) The Concurrent List (List III)

too were formulated.

The next stage of the discussions were the Bangalore discussions between our President Jayewardene and Prime Minister Rajiv Gandhi in November 1986. The Agreement between them recognised that the "Northern and Eastern Provinces have been areas of historical habitation of Sri Lankan Tamil speaking peoples who have at all times hitherto lived together in the territory with other ethnic groups." According to these discussions Sri Lanka agreed that these two Provinces should form one administrative unit for an interim period and that its continuance should depend on a Referendum and it was also agreed that the Governor shall have the same powers as the Governor of a State in India. It was also proposed to the Sri Lanka Government that the Governor should only act on the advice of the Board of Ministers and should explore the possibility of further curtailing the Governor's discretionary powers. The Indian side also proposed that provision be made on the lines of Article 249 of the Indian Constitution on the question of Parliament's power to legislate on matters in the Provincial list and, likewise, that Article 254 of the Indian Constitution be adopted in regard to the Provincial Council's power to make a law before or after a parliamentary law in respect of a matter in the Concurrent List. The Sri Lanka Government's observations on the Working Paper on Bangalore Discussion dated 26th November 1986 show that the suggestions made by the Indian Government were substantially adopted.

On the 29th July 1987 an Accord was signed by our President J. R. Jayewardene and the Indian Prime Minister Rajiv Gandhi in Colombo. The First part of this Accord re-affirmed what was agreed at Bangalore that the Northern and Eastern Provinces have been areas of historical habitation of Sri Lanka Tamil Speaking people who at all times hitherto lived together in the territory with other ethnic groups. It also provided for these two Provinces to form one administrative unit for an interim

period and for elections to the Provincial Council to be held before 31st December 1987. The Second Part was the Annexure to the Agreement. It provided, inter alia, for a Indian Peace Keeping Contingent and for Indian observers at the Provincial Council Elections and a Referendum to be held in the Eastern Province to determine whether the Northern and Eastern Provinces should continue as one administrative unit. The legislation now tabled in Parliament is in terms of this Accord. Of course, an attempt is now being made to take shelter under Article 27 (4).

With this background, let me once again comment on the Bills. Article 154A(3) makes provision for Parliament to make law for two or three adjoining Provinces to form one administrative unit. The two Provinces would form one Provincial Council. Such law would also provide the manner for determining whether such provinces should continue to be administered as one adminstrative unit or whether such Province should constitute a separate administrative unit.

The law to be made by Parliament is the Provincial Councils Bill before us. This must be viewed as an ordinary piece of legislation and it cannot be dignified to the status of a constitutional amendment. This legislation depends on the Thirteenth Amendment for its validity and existence. If the Thirteenth Amendment is invalid, as I have earlier held, this law too falls with the Thirteenth Amendment. Section 37 with the marginal comment "Interim provision" states that the President may by Proclamation declare that any two or three adjoining Provinces shall form one adminstrative unit with one Provincial Council.

Although it has been submitted that section 37(1) does not refer specifically to the Northern and Eastern Provinces, having regard to the historical background, the contents of the recent negotiations show, without a shadow of doubt that this was designed specifically with the problem of the Northern and Eastern Provinces in mind. If any corroboration is needed, we see a specific reference to these two provinces in section 37(1)(b) and section 37(3). These provisions refer to 29th July 1987, the date of the Accord. It deals with the surrender of arms, weapons and military equipment, held by the terrorist militants whose objective was "the establishment of a separate State". There are many other areas in the country where there is unrest, but those are not mentioned. This provision is a

condition precedent to the action that was contemplated in the negotiations, namely, the linking of the Northern and Eastern Provinces.

Section 37 vests an absolute power in the President. After the linkage is forged, there is some provision for delinking. By subsection (2) of section 37, the President can by order require a poll to be held on a day to be fixed before the 31st day of December 1988, to enable the electors to decide whether or not the linkage should continue. The discretion for holding the poll is also discretionary, for the President is empowered to postpone it, even indefinitely. In the case of the North and the East, the poll would be confined only to the Eastern Province. This indicates the true nature of the matter.

It has been urged that this creation of one administrative unit where two or three existed before, without reference to the People, has devalued the franchise and is also contrary to the equality provision of fundamental rights. It was submitted that, having regard to the whole background, what has been done is in the nature of a final settlement because the interim measures will facilitate the creation of a separate unit. What we see before us is a device to grant autonomy to a significant portion of Sri Lanka and leave it in the hands of the Tamils, to the exclusion of Sinhalese and the Muslim who are also long time residents there and who are equally entitled to their rights. It has been submitted that the two provinces concerned constitute nearly 30% of the land area of Sri Lanka, 60% of its coast line, and it is being handed over to one ethnic community who constitute only 12.6% of the population. In substance and truth, it is urged that the severing of the Northern and Eastern territory from the rest of Sri Lanka is a violation of the rights of all peoples of this country, as it does violence to the unitary character of the State, its territorial integrity which are part of the Sovereignty and basic features of the Constitution.

Seerali refers to another significant factor in determining whether a Constitution is unitary or federal. He says–

> "........it is not enough to say that in law a Constitution is federal, we must inquire further and find out whether the Constitution works as a federal government. For the law of the Constitution is one thing; the practice is another. The mere presence of unitary features in a Constitution which may make a Constitution quasi-federal in law does not prevent the Constitution from being predominently federal in practice."

This matter can be viewed both from a legal and also from a more factual point. In terms of general principles and concepts, the difference between a Unitary State and a Federal State needs a brief discussion. Wheare, one of the well-known writers on this topic, takes the United States as a model of a federal Constitution. He states that a Federal Constitution establishes an association of States so organised that powers are divided between a general government which is independent of the governments of the associated states and on the other hand State governments which in certain matters are in their turn independent of the general government. The test he adopts is the existence of distinct and co-ordinate governments.

This of course is the traditional method of approaching this matter. In recent times there have been great political changes after the dissolution of the British Empire. There have been developments and experiments in the form of the constitutional structures of many States. The cases of Nigeria and India were mentioned in the course of the arguments.

Seervai, whose views are entitled to respect, is of the view that the Indian Constitution is federal in nature but with strong centralising features. Nearly all the other leading text writers on the Indian Constitution share this view. The Indian Supreme Court has, in the past, been inclined to stress the unitary features of the Constitution rather than the federal aspect. Probably the political atmosphere and background in which the Constitution had worked until the time of the Janata Government, would have been conducive to such a view. In *Rajasthan v. Union* A.I.R. 1977 S.C. 1361, Chief Justice Beg said–

> "In a sense therefore the Indian Union is federal. But the extent of federation in it is largely watered down by the need of progress and development or a country which has to be nationally integrated, politically and economically co-ordinated, and socially, intellectually and spiritually uplifted."

In *Kesavananda's Case (supra)*, however, many judges included the federal nature of the Constitution as one of its basic features.

Seervai in his work, after a closely reasoned analysis of the Indian Supreme Court judgments and the relevant constitutional provisions, concludes (page 168):

> "......the view expressed in Supreme Court judgments that the principle of Federalism has been watered down in our Constitution is not supported by an examination of its provisions when compared with corresponding provisions in admittedly federal Constitutions. For the reasons given above, the federal principle is dominant in our Constitution."

Elaborating on this, Seervai says (page 150):

> "In order to be called federal, it is not necessary that a Constitution should adopt the federal principle completely. It is enough if the federal principle is the predominent principle in the Constitution."

It is therefore clear that there can be no standard form or blueprint for a Federal State. It can take many forms depending on the particular needs of each country, and can range from a nominal association of virtually free and independent States with minor constraints to a real distribution of power between centre and the States, but with centralised features.

The introduction of centralising features does not derogate from the federal principle. The Indian Constitution has strong centralising features.

Let me now examine the provisions of the Thirteenth Amendment, compared with the provisions of the Indian Constitution.

The appointment and powers of the Governor: Unlike in the Indian constitution the governor can be removed on a resolution of two-thirds of the members of the Provincial Council. Again, as regards the Governor's powers, like in India the Provincial Council Governor has no discretion but to act in accordance with the advice of the Chief Minister. In *Ram Jawaga Kapoor v. Punjab* A.I.R. 1955 S.C. 549, the Supreme Court said:

> "... the Governor ..... occupies the position of the Head of the Executive in the State but it is virtually the Council of Ministers in each state that carries on the Executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England. The Council of Ministers consisting as it does, of the members of the Legislature is, like the British Cabinet 'a hyphen which joins a buckle which fastens the legislative part of the State to the executive part'."

The discretionary powers vested in the Governor are insignificant in relation to the day to day exercise of the executive powers of the State.

In regard to the assent to legislation: Compared with the Indian provision the Governor and the Central Government has hardly any control over Provincial legislation. In India, the Constitution empowers the Governor to veto a Bill or to reserve it for the President's consideration where apparently he too can veto it. There is no such provision with us. The Governor at his discretion may in some instances reserve it for reference to the President. The net result is that the President can refer it to the Supreme Court for determination of its constitutional validity. There is therefore virtually total absence of control over Provincial legislation.

Again the corresponding Indian provision relating to public security or internal disturbance and armed rebellion gives much greater central control to the Indian Government than to ours.

The Indian Constitution provides for the Central Government to legislate on matters in the State List in the national interest. We have no such provision.

The provision for the Central Government to take over on the failure of the administrative machinery in a Province is almost identical with the provision obtaining in India. It seems that the Proclamation made under the Indian law can prevail for a longer period than one made under our law.

Article 154N which enables the President to give directions to the Governor in case of financial instability is of similar nature.

Seervai also states that the allocation of the residuary power of legislation to the Central Government and the exercise of Sovereignty in regard to external and foreign matters is irrelevant for the purpose of determining the federal nature of a Constitution.

It should also be mentioned that in India, unlike in our Bill, on the conflict of a valid Federal law and a valid State law, the federal law prevails, Article 154G (8) and (9) shows that the position of the Centre is much weaker here than in India.

It is also sometimes contended that only unimportant and subordinate matters have been assigned to the States. In this connection it would be noted that our List I is modelled on the Indian list and is similar to it. Seervai, dealing with the same argument, says (page 168):

> "The view that unimportant matters were assigned to the State cannot be sustained in face of the very important subjects assigned to the States in List II, and the same applies to taxing powers of the State, which are made mutually exclusive of the taxing powers of the Union so that ordinarily the States have independent sources of revenue of their own."

In terms of the provisions in the Thirteenth Amendment and the Appendix dealing with law and order, it would however be observed that the entire maintenance of law and order and Police powers of the province is in the Chief Minister and the Board of Ministers. This would include both criminal and certain aspects of the civil law, such as rights in immovable property, regulation of religious associations, housing, agricultural matters, education.

Our earlier discussions of the principles relating to this topic shows that there is a wide spectrum between an absolute unitary state and a complete federation. Between these two extremes there are number of intermediate positions. There could theoretically be a mid-point where the two types of characteristics blend in equal proportions. On an analysis of our provisions, it is apparent that the balance is in favour of the regional unit and the extent of central control is insufficient to alter the picture. These provisions place the Constitution at a point closer to a federal state. This has been the declared object of the Sri Lankan Tamils (of late with South Indian assistance) for the last forty years. In any event this is a departure to a great extent from the situation of the unitary state contemplated in the Constitution.

On my analysis of the legal provisions I find that the Bills give the Tamil people of the Northern and Eastern provinces sufficient autonomy to be masters of their own destiny. The provisions are flexible and extensive enough to be worked to that end. It is a fact that the single Provincial Council for the North and East would be dominated by Tamils with a overwhelming Tamil speaking majority. It would be controlled and administered by Tamils who had for nearly a half century claimed this territory as their traditional homeland and

resented a Sinhala presence. They have subscribed to a two nation theory and not to an ideal of a Sri Lankan nationality. The regional machinery in respect of Police and Public Order, Land and Land Settlement, Education, Rehabilitation, Agriculture and Agrarian Services, to name a few, give the ruling authorities ample powers if they wish of making life difficult for the Sinhalese or evicting them outright. These are not fanciful fears, but they are real and the Peace Accord nor the assurances given have had any effect on this anti-Sinhala policy of the Tamil ruling groups.

In the forefront of the case of the Buddhist and Sinhala organisations, reliance is placed on a statement by His Excellency the President. It Is a matter which I cannot avoid dealing with. This statement, I may say, has not been produced as a criticism of the President, but as corroboration of their case that the joinder of the Northern and Eastern Provinces and the official recognition of the traditional homelands of the Tamils will toll the death knell of the Sinhala people in those Provinces. There is an undertone of this fear in all the petitions opposing the Bills.

It is always open to a statesman or politician to change his views and opinions. This he must do when the interests of the country or party demand it. This is not the issue here. Neither is the wisdom nor otherwise of the Accord a matter for us. The only issue is whether the Bills must go before the People for a Referendum for enactment.

The speech quoted in the petitions constitute the Address the President made on the solemn occasion of the opening of Parliament. In the speech made by His Excellency on that occasion, he said:

> "There are certain principles which we cannot depart from arriving at a solution. We cannot barter away the unity of Sri Lanka, its democratic institutions, the right of every citizen in this country whatever his race, religion, or caste to consider the whole Island as his Homeland enjoying equal rights, constitutionally, politically, socially, in education and employment are equally inviolable."

The documents tabled by him in the course of his address also indicated the views and policies of the Government on this matter:

> "At present the Sri Lanka Tamils are in a minority in the eastern Province while the Sinhalese and the Muslims together constitute nearly sixty per cent of the population. Since the Sri Lanka Tamils

constitute more than ninety per cent of the population in the Northern Province, the object of the amalgamation of the North and the East is clear–*the Sri Lanka Tamils will after amalgamation become the majority group in the combined unit of administration.* Once the amalgamation is achieved the concept of 'the traditional homeland of the Tamils' which has been a corner-stone of agitation in the post-independence period will be revived as this is the only ground on which the T.U.L.F. denies the legitimate rights of the Sinhala people to become settlers in the Northern and Eastern Provinces. Nor does the traditional homelands theory recognise any rights for the Muslims either except as an attenuated minority in the amalgamated territory. So on the one hand while professing to urge the case for all Tamil speaking people, in fact the T.U.L.F. is covertly seeking to secure the extensive areas for development, especially under the accelerated Mahaweli Programme, for exploitation by the Sri Lanka Tamils alone. This in short is the duplicitous motivation behind the demand for amalgamation."

Again–

"Quite candidly, the Sinhala people do not regard the demand for the amalgamation of the Nothern and Eastern Provinces as a bona fide claim but as one motivated by an ulterior purpose, namely, as a first step towards the creation of a separate state comprising these two Provinces. The recent outrages by Tamil terrorists against the Sinhala civilian population settled in the North and East, killing vast numbers of them, ravaging their homesteads and making thousands of them refugees in their own land has only made their apprehensions seem more real than ever before"

and finally

"Even the most naive of people could not expect a single Sinhalese to go back to the North and/or East if the maintenance of law and order within those areas becomes the exclusive preserve of the political leaders and patrons of the very terrorists who chased them out. Could one, for instance, expect the survivors of Namalwatta to go back to their village if the leader of the Tamil Terrorist gang that murdered their families is the A.S.P. of the area? Not only would those poor refugees not go back but even those Sinhalese, including those in Ampara and Trincomalee, who are still living in the North and East, would necessarily leave their lands and flee to the South, if these proposals are implemented."

"These porposals are totally unacceptable. If they are implemented, the T.U.L.F. would have all but attained Eelam. It need hardly be said that even if the demand for a Tamil Linguistic State is granted, further problems and conflicts are bound to arise between that 'Tamil Linguistic State' of the North and East and the Centre. Water, hydropower, the apportioning of funds are some of the areas in which conflicts could arise. A cause or pretext for a conflict on which to base an unilateral declaration of independence could easily be found. There can be little doubt that what T.U.L.F. seeks to achieve by its demands is the necessary infrastructure for a State of Eelam, after which a final pustch could be made for the creation of a State of Eelam, comprising not only of the North and East, but of at least the hill country and the NCP as well."

I shall now deal with a few remaining matters urgued by counsel. The first is in respect of Article 82 of the Constitution.

Admittedly Parliament has the power to amend "any provision of the Constitution" or add "any provision to the Constitution". The procedure for the amendment of the Constitution is contained in Chapter XII. Article 82(1) deals with the amendment–and amendment is defined to include repeal, alteration and addition–of any provision of the Constitution. Clauses 2, 3, 5 and 6 of the Thirteenth Amendment would come under this category.

The only other provision is Article 82(2) which deals with the repeal of the Constitution and its replacement. In this connection see Article 75(*b*). This is not such a case.

The present matter in so far as it relates to Chapter XVIIA is the introduction of a new material into the Constitution unconnected with any particular provision except that some provisions may be consequentially affected. But these would be the principal and substantial provisions and those consequential. This is also not a repeal of the entire Constitution.

Chapter XII has not made provision for this situation, that is, for adding any provision to the Constitution. In Article 82(1) only the repeal, alteration of any provision of the Constitution or addition to a provision is contemplated. A new Chapter dealing with a new matter having no direct link with a provision cannot be said to be an addition to a provision.

I do not agree entirely with Mr. Wickremanayake about the kind of order we can make in relation to this matter. I agree that it can certainly be passed in terms of Article 84 with the consequent results. But in my view, if this has to be passed otherwise, a suitable amendment of Chapter XII would be necessary to enable this kind of amendment to be enacted.

Judicial Power

Mr. Senanayake argued that Article 154P interfered with the judicial power. Mr. Fernando and Dr. Jayewardene contended that the judicial power and the existing court structure is left untouched and the only innovation is taking justice close to the people.

I think there is much more to Article 154P than that and there is substance in Mr. Senanayake's argument. By subsection 4(*a*) and (*b*), a High Court is now given jurisdiction to issue orders in the nature of habeas corpus and the prerogative writs. This is a power vested in the superior courts, namely the Supreme Court and the Court of Appeal. These two Superior courts are constitutional courts and the High Court and the other courts do not stand in an entrenched position.

Habeas Corpus and the writs are part of the mechanism that protects fundamental freedoms of the individual and they cannot be vested in any institution that is not entrenched. If that is permitted, they could be eroded and taken away in stages.

It is said that this power would be exercised by a High Court concurrently with the Court of Appeal. This could lead to absurd situations.To take an example in the Western Province, there could be two applications for writs of Habeas Corpus, one in the High Court and the other in the Court of Appeal. The matter will not end there. The Court of Appeal could hear one in an original capacity and the other in an appellate capacity. One of them would have one appeal, the other will be entitled to two appeals. This most valuable remedy cannot be allowed to be trifled with in this manner. This provision has devalued this right by vesting it in a court which is not entrenched and by pro tanto removing that power from the Court of Appeal.

Franchise

Many of the petitioners submitted that the impugned legislation affects the franchise. Mr. Senanayake contended that the legislative and administrative division of the country to new units would affect

the franchise as at present exercised on the basis of a unitary State where every voter and member of Parliament have a voice in the overall administration of the whole country. These rights would be dismissed by the Bills.

It was also submitted that the proposed creation by Presidential Proclamation of a single Provincial Council for the Northern and Eastern Provinces would result in a dilution or erosion of the right to the franchise of the inhabitants of the Eastern Province, as decisions affecting them would not be taken soley by them, but will be joint decisions between their representatives and those of the Northern Province. It would be remembered in this connection that members of Parliament are permitted in certain circumstances to participate and vote in the proceedings of the Provincial Councils. The fact that voters and members of Parliament of the seven remaining Provinces have no voice in this constitutes also a violation of the franchise. Mr. Fernando sought to show that what was involved was a regional franchise and not the national franchise and that any franchise where the people are given a vote would not offend the Constitution. From the above it would be seen that this not so. S.C. No. 5 of 1980–P/cf. 185/B.

Finance

A number of petitioners challenged Article 154R. This Article provides for the establishment of a Finance Commission. It is the duty of the Finance Commission to recommend to the President–

(*a*) the principle of apportionment of funds between various Provinces of funds granted annually by the Government;

(*b*) any other matter relating to Provincial Finance referred to it by the President.

It is quite clear from Article 154R(3) that the Government shall on the recommendation of and in consultation with the Commission allocate from the Annual Budget such funds as are adequate for the purpose of meeting the needs of the Provinces.

Article 154R(7) states that the President shall cause every recommendation made by the Finance Commission to be laid before Parliament and shall notify Parliament as to the action taken thereon.

These provisions indicate that monies from the Annual Budget have to be allocated to the provinces. This is mandatory. Parliament has no control over this operation except to be informed and if necessary to debate it. This is after the event. Control over public finance is one of the cardinal principles of a Parliamentary democracy. The passing of the Appropriation bill is the most effective control Parliament has over the Executive. This right was won after long struggle. I cannot agree with Mr. Mark Fernando that the impugned provisions mean otherwise. This provision contravenes the provisions of Chapter XVII of the Constitution, which cannot be considered as a basic feature of the Constitution.

Official Language

Counsel challenging the Bill submitted that the amendment of Article 18 making Tamil also an official language and English a link language contravenes a fundamental feature of the Constitution. It is not necessary to delve into the history of the language problem in this country except to state that it has been a live issue since 1956, and Sinhala as the only official language in this country (with reasonable use of Tamil in Northern and Eastern Provinces and by Tamils) has been the major plank in the manifestos of the leading Sinhala political parties throughout the last four decades. It has been submitted that such a fundamental change cannot be effected without consulting the People.

It was also submitted that the existing language provisions are set out in Chapter IV and run into eight sections. All those are left untouched. What is sought to be done is to add three sub-paragraphs to paragraph (1) of Article 18. Counsel asked what is going to happen to all those provisions which are basically inconsistent with the proposed Articles. At the least, counsel submitted that the suspension of any part of the Constitution contravenes the proviso to Article 75, which is entrenched by implication.

Oath

Some counsel also drew our attention to the omission of any provision, making the Governor, the Chief Minister and the other Ministers, and presumably all other provincial officers, from subscribing to the oath which was brought in by the Sixth Amendment to safeguard the independence, sovereignty, unity and territorial

integrity of Sri Lanka, which was threatened by persons and political parties and organisations claiming self determination and a separate state. All State officers have hereto subscribed to this oath.

The Thirteenth Amendment requires all such persons mentioned above to take instead the oath of office set out in the Fourth Schedule to the Constitution. This omission, it has been submitted, is discriminatory and also shows the intention of the Bill to create or to remove the restraints that prevent the creation of conditions for a separate State.

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

RANASINGHE, J.

Several objections alleging, *inter alia,* that the provisions of Articles 2, 3, 4, 9, 76, 83 of the Constitution would be violated, have been raised by the Petitioners in regard to the constitutionality of the two Bills—the Thirteenth Amendment to the Constitution, and the Provincial Councils Bill—which have been referred to this Court by His Excellency the President.

I agree with the view expressed by His Lordship the Chief Justice that no provision of the aforesaid Bill, the Thirteenth Amendment to the Constitution, is inconsistent with any of the provisions of Articles 2, 3, 4 or 9 of the Constitution.

Although it seems to me that the powers of legislation sought to be conferred upon the Provincial Councils referred to in the said Bills cannot, in law, be held to be "subordinate legislation", as set out in sub-article (3) of Article 76, and would, therefore, be inconsistent with the provisions of the said Article 76(3), yet, as the supremacy of the Parliament is retained—in that it has the power to legislate, even though in a special manner and form, not only to render ineffective any statute passed by a Provincial Council in respect of even a subject set

out in the Provincial Council List, but also to repeal the provisions of Chapter XVII A itself in its entirety–I am of the view that the provisions of neither Article 3, nor of Article 2–having regard to the essential characteristics of a Unitary State, as set out by both the earlier and the more recent text writers, and also to the recent legislation passed by the Parliament of the United Kingdom, in respect of Scotland, Wales and Northern Ireland which were referred to by learned Counsel at the argument before us–could be said to be violated. The executive power of the people entrusted to the President of the Republic is not whittled down.

In regard to Article 9, which was also referred to as being an Article of the Constitution with the provisions of which the provisions of the aforesaid Bills are inconsistent, it appears to me that the solemn duty cast upon the Central Government by the provisions of the said Article would remain untrammelled and undiminished. The Provincial Councils will not, in law, have the power to interfere with the discharge of the duties cast upon the Central Government by the provisions of this Article. If an act of a Provincial Council, purporting to be done in terms of item 25:2 or item 28 set out in the Provincial Council List contained in the 9th Schedule, in respect of which submissions were made by learned Counsel appearing for several of the Petitioners, were to constitute an encroachment of, or an interference with the duty cast upon the Central Government resulting in an erosion of the rights guaranteed to the Buddhists, or a diminution of the rights assured to the other religions, the Central Government could then, in law, take steps to discharge the obligations cast upon it by the provisions of this Article. It is indeed the duty of the Central Government to do so, and do so effectively. The power now conferred upon the Central Government in this behalf under the Constitution remains untouched and unimpaired. The law of the Constitution provides for prompt action. How effective such action will, in practice, be, would depend entirely on the response of the Central Government. Fears were expressed, particularly by learned Counsel appearing on behalf of the Young Men's Buddhist Association and the Colombo Buddhist Theosophical Society, about the safety and the preservation of places of worship of, and the freedom to exercise the rights of the Buddhist in certain specified provinces. Such fears are based upon incidents that are said to have taken place in those areas in the recent past. The Sansoni Report provides ample incontrovertible proof in supports; and its findings do justify the fears so entertained and expressed. If, however, there is a recurrence of such incidents after the provisions of

the two Bills, referred to above, become operative it would not be because another body has been vested with power which entitles it to act in that manner. Nor would the failure to prevent any such recurrence be due to any diminution of the authority which is presently vested by law, in that behalf, in the Central Government.

I shall now proceed to consider the objection put forward by the Petitioners founded upon the provisions of Article 83.

Clauses 154 G(2)(b) and (3) (b) in the Thirteenth Amendment set out the manner in which a Bill for the amendment of Chapter XVII A, and a Bill in respect of any matter set out in the Provincial Councils List respectively shall become law, in the event of one or more Provincial Councils not agreeing either to an amendment or repeal of the said Chapter or to the passing of such Bill, as the case may be. In each of these instances the manner and the form for the process of amendment is as required by the provisions of Article 83, for the amendment of either that Article itself or any of the other Articles, viz: 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2) and 60(2), set out therein.

In the Constitution all the articles which should be amended only by a 2/3 majority and by a Referendum, have been grouped together in Article 83. In Article 83 are included all the Articles of the Constitution which are entrenched in that special way; and, in order to prevent an amendment of Article 83 itself in the ordinary way, and thereby taking the Articles so grouped together in Article 83 out of the category of Articles which require such special manner and form for amending them, Article 83 itself has been made alterable only by the selfsame process of a 2/3 majority and a Referendum. That is the effect of the provisions of Article 83. The resulting position then was, that, once the Constitution came into operation, any amendment of the provision of Article 83, could be effected not in the ordinary manner by a simple majority, but only in that special manner and form of a 2/3 majority and a Referendum so expressly and clearly set out in Article 83. This then is the scheme of the Constitution. Thenceforth any amendment of the Constitution, which constitutes an amendment, either expressly or by necessary implication, of an already entrenched provision such as Article 83, could be validly effected only by compliance with the procedure so laid down in Article 83. That being so, any steps taken thereafter to entrench any other Article, included or to be included in the Constitution, by laying down the selfsame special process for amendment would, in truth and in fact, amount to an "addition" to the existing provisions enumerated in the said Article 83. Sub-Article (7)

of Article 82, which is in the same chapter as Article 83, provides that: "in this Chapter 'amendment' includes repeal, alteration and addition". The introduction, therefore, of any such new Article to the Constitution, without having recourse to Article 83 and expressly including such new Article too in the list of Articles already included in, and entrenched by the said Article 83, would have the effect of adding a new provision to the Articles already set out in Article 83; and would, in law, amount to an "implied amendment" of Article 83. It would amount to an amendment by implication. The term "implied amendment" has been used by Courts in determining whether the Constitutional requirement as to the form of an amendatory Act has been violated–(*Bindra: Interpretation of Statutes* (*7 edt.*) *p. 915*). It is not, in my opinion, open to state that, because the new provision carries with it an ultimate appeal to the People, the legal Sovereign under the Constitution, such provision could be entrenched in the Constitution separately and independently of Article 83. Such an approach would not be in keeping with the spirit of the Constitution either. The intention of the makers of the Constitution seems also to have been that, after the date on which the Constitution comes into operation, no provision was also to be entrenched in the Constitution without it being expressly approved by the People. That the provisions of only a Sub-Article of an Article in a Constitution could be entrenched without the rest of the Article being entrenched is clear law–*A.G. of Trinidad vs. McLeod,* [1984] (1) AER 697. Any attempt to have a new Article entrenched in the Constitution without reference to Article 83 and without having recourse to the special manner and form required by Article 83 would be tantamount to doing indirectly what cannot be done directly. Such a procedure is not permissable.

In this view of the matter, I am of opinion that the provisions of Clauses 154G(2)(*b*), and (3)(*b*) of the said Thirteenth Amendment to the Constitution constitute an amendment of Article 83, and that, therefore, it is an amendment which shall become law only if passed in the manner and form spelt out by the provisions of the said Article 83.

My determination, therefore, in regard to the questions referred to this Court by His Excellency the President is that:

(1) The provisions of Clauses 154G(2)(*b*) and (3)(*b*) of the Bill to amend the Constitution of Sri Lanka (Thirteenth Amendment to the Constitution) require approval by the People at a Referendum by virtue of the provisions of Article 83;

(2) That the Constitutionality of the provisions of the Provincial Councils Bill will depend upon the aforesaid Thirteenth Amendment to the Constitution becoming law, as set out in the answer (1) above, in terms of Sec.83 of the Constitution.

There is just one other matter to be referred to. Article 123(2) of the Constitution provides that, where this Court "determines that a Bill or any provision thereof is inconsistent with the Constitution", this Court "may" also "specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent". I have considered whether such a statement should be made. In view, however, of the fact that the Reference requires this Court only to state whether a Referendum is required, the fact that it was also submitted at the hearing that the only jurisdiction this Court exercises in these proceedings is to determine, in terms of Proviso (*a*) of Article 120 of the Constitution, whether the Bill referred to requires the approval by the People at a Referendum, and the fact that, at the hearing, this matter was also put to learned Counsel for the Petitioners but was not pursued, I do not propose to make any such statement.

SENEVIRATNE, J.

His Excellency the President of Sri Lanka has referred to this Court:–

(*a*) S. D. No. 1/87 of 15.10.1987, and
(*b*) S. D. No. 2/87 of 15.10.1987,

In terms of Article 121 of the Constitution of Sri Lanka for determination whether "the Bills:–

(*a*) A Bill to amend the Constitution of Sri Lanka (THIRTEENTH AMENDMENT TO THE CONSTITUTION); and
(*b*) Provincial Councils Bill,

or any provisions thereof, require approval by the People at a Referendum by virtue of provisions of Article 83". Four petitions have been filed in support of the proposition that these two abovenamed Bills do not require approval by the People at a Referendum as required by Article 83–Nos: 33 and 34/87, 35/87 and 36/87. Petitions Nos. 7/87 to 48/87 have been filed by various petitioners submitting that these two Bills require the approval by the People at a Referendum. Some of these petitioners have filed petitions only as regards the Bill to amend the Constitution, the THIRTEENTH

AMENDMENT and some of the petitioners have filed petitions in respect of both Bills, the THIRTEENTH AMENDMENT and Provincial Councils Bill.

Dr. H. W. Jayewardene, Q. C., and K. N. Choksy, P. C. made submissions on behalf of His Excellency the President to the effect that these two Bills do not require approval by the People at a Referendum. The petitions of some of the petitioners were supported by learned counsel, and some petitioners supported their petitions in person.

I will at the outset refer to a submission made by certain petitioners on the basis that the Bill THIRTEENTH AMENDMENT TO THE CONSTITUTION has not been properly placed before the Parliament, and as such is not properly before this Court. Chapter XII of the Constitution THE LEGISLATURE–AMENDMENT OF THE CONSTITUTION, has Section 82, sub-section (7), which defines the term "Amendment" as follows:– "In this Chapter 'Amendment' includes repeal, alteration and addition". Article 4 of this "Amendment" is as follows:– "The following Chapter and Articles are hereby inserted after Article 154, and shall have effect as Chapter XVIIA and Articles 154A–154T of the Constitution". Plainly Article 4 adds certain Articles to Chapter XVII of the Constitution. Articles 2 and 3 of this "Amendment" are described as "Amendments". Article 2 states that Article 18 of the Constitution is amended as follows, and Article 3 states that Article 138 of the Constitution is hereby amended as follows, and the consequential amendments are specified in Article 3. The objection was in respect of Article 4 of this Bill on the ground that it does not comply with Articles 82(1) and 82(2) of the Constitution. Article 4, which is Chapter XVIIA adds to the Constitution. It is not so stated that it is an amendment by addition, and what is added to the Constitution. Dr. H. W. Jayewardene, Q. C., submitted that it is for the Speaker to determine whether a Bill is properly before Parliament. What is before Court now is a Reference made by His Excellency the President, and the Court has to make a determination under Article 120 of the Proviso, which is as follows:– "In 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 provisions of Article 83".

I will not make any ruling on this procedural matter. I will consider and rule on the submissions made that this THIRTEENTH AMENDMENT and the Provincial Councils Bill require not less than two-third votes in the Parliament, and have to be approved by the People at a Referendum, as this legislation was inconsistent with Articles 2 and 3 of the Constitution read with other consequential Articles. Submissions were made that Article 4 of the THIRTEENTH AMENDMENT Chapter XVIIA Articles 154A–154T is violative of Article 2 which has laid down that Sri Lanka is a Unitary State, and also of Article 3, as it alienates the Sovereignty in the People. As such Article 83 should operate, that is these two Bills can become law only if approved by the People at a Referendum.

Those who opposed the above proposition relied mainly on Article 27(4) of the Constitution, which is as follows:– "The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government". The submission was that clause 4 Chapter XVIIA of this THIRTEENTH AMENDMENT did not derogate from the character of the State or alienate the sovereignty of the People, it only seeks to decentralise the administration, and that the power of legislation given to the Provincial Councils was in fact and in law "subordinate legislation" in terms of Article 76(3) of the Constitution. It was submitted that Article 27(4) lays down a directive principle of State policy which the legislature is implementing in this instance.

In reply to this submission the advocates of the proposition that a Referendum must be held submitted that even in an instance of implementing the State policy set out in Article 27(4), the Legislature should also pay consideration and implement the State policy set down in Article 27(3) to wit:– "The State shall safeguard, the independence, sovereignty, unity, and the territorial integrity of Sri Lanka". Under the guise of implementing the policy set out in Article 27(4) the policy laid down in Article 27(3) quoted above cannot be ignored. Further, that under the guise of implementing–The Directive Principles of State Policy–(chapter 6), the Parliament cannot violate the mandatory provision of Article 76(1), which is as follows:– "Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power". From the submissions based on our Consititution, the submissions

and arguments flowed into the sphere of political theory and philosophy, which submissions were made at such a high level that I would describe what was propounded as metaphysical political theory and philosophy. In propounding these metaphysical theories the parties appeared to lose sight of the history and the background in which these pieces of legislation have been drafted. A volume of such material has been placed before this Court by various petitioners. I must state that I have voraciously read and digested such material, but I would not make references to them: firstly, because such material is now history and known to the intelligent and educated public of Sri Lanka, and because there is no time to discuss such material. But I must record that in coming to my conclusions I have considered all such background material, the copies of the texts submitted, and consulted as many texts and authorities referred to, and even such other texts which were available to me. These two Bills have to be considered in the light of the background and the situation in which this legislation has been drafted. The statutory time factor placed on this Court to foward the determination to His Excellency the President and the Speaker prevents me from making such detailed reference.

For the consideration of the submissions made by these parties, it is necessary to analyse in brief the provisions of the THIRTEENTH AMENDMENT in respect of the three standard categories of separation of powers set out in our Constitution (1978).

(1) The Executive,
(2) The Legislature,
(3) The Judiciary.

I must state at the outset, that 3 above, the Judiciary as at present under our Constitution has not been that much affected by the Amendment. The material part of this Amendment is clause 4, the insertion of Chapter XVIIA in the Constitution as Articles 154A–54T of the Constitution. The heading Chapter XVIIA is followed by an unnumbered paragraph which can be called a "preamble" with the marginal note "effect and construction of this chapter". This so-called "preamble" is in two parts–

(1) "The provisions of this Chapter shall be subject to Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2), 62(2), and 83, and shall not affect or derogate from, or be read or construed as affecting or derogating from, any such Article,

(2) but, save as aforesaid, nothing contained in the Constitution or any other law in force on the date on which this Chapter comes into force shall be interpreted as derogating from the provisions of this Chapter. The provisions of such other law shall mutatis mutandis apply".

Much criticism was made on the first part of this "preamble". The criticism was that it was misleading and inserted merely to enable this Amendment Chapter XVIIA to be passed in Parliament by a mere two-thirds majority as a common Amendment to the Constitution–Article 82(5). It was submitted that it was the duty of the Court nevertheless to test whether this Amendment Chapter XVIIA is violative of any of the Articles referred to in the "preamble", and is required to be passed in terms of Article 83. The second part of the "Preamble" makes Articles 154A–154T a part of the Constitution and gives it such a status. I agree with the submissions that the first part of this "preamble" is a facade to cover the dangers lurking in several provisions of this Amendment. Even though this "preamble" states that this Chapter "shall not affect or derogate from" the Articles mentioned in the "preamble", it is the duty of this Court to consider whether any provison in this Amendment is inconsistent with the said Articles which are the entrenched provisions of the Constitution (1978).

It is necessary to set out the main provisions of this Amendment, to understand the status of the Provincial Councils re Executive, Legislature, Judiciary and consider the same, in order to determine whether this Amendment "requires approval by the People at a Referendum by virtue of provisions of Article 83"

The Executive–

The intention of this THIRTEENTH AMENDMENT is to create a new body–a Legislature, the Provincial Councils as a separate administration unit with its own Provincial Council, and Governor, Chief Minister and Board of Ministers.

Article 154B–"A Governor to be appointed for each Provincial Council".

Article 154B(2)–"The Governor shall be appointed by the President by warrant in accordance with Article 4B to hold office during the pleasure of the President".

Article 154B(5)–"The Governor to hold office for a period of five years".

Article 154B(8)(*a*), B(8)(*b*) & B(8)(*c*)–"The Governor shall summon the Provicial Council, prorogue the Provincial Council, may dissolve the Provincial Council".

Article 154B(8)(*d*)–"The Governor shall exercise his powers in accordance with the advice of the Chief Minister".

Article 154B(10)–"Provided where the Governor does not agree with the advice of the Board or Ministers, he may refer that case to the President for orders".

Article 154(f)(1)–"The Governor shall, in the exercise of his functions, act in accordance with the advice of the Board of Ministers".

Article 154(f)(2)–"Where the Governor has to exercise his discretion, such discretion shall be exercised on the President's direction".

Article 154H(2), (3) & (4)–The Governor shall give his assent to the statute. When a statute is presented for assent the Governor can return it to the Provincial Council with a message to reconsider the statute. If, after reconsideration the statute is presented to the Governor, he may assent to the statute or reserve it for reference by the President to the Supreme Court for determination whether the statute is consistent with the provisions of the Constitution.

The important powers of the Governor are found in the Provincial Councils Bill, Part III–Finance Sections 24(1), 25(1), and such sections, and in Part IV of the same Bill, Provincial Public Service Commission, Sections 32(2), 32(3) and such. In terms of Section 31 of the Provincial Councils Bill the President shall appoint the Chief Secretary for each Province with the concurrence of the Chief Minister of the Province. This Amendment is silent on the executive functions of the Chief Minister and the Board of Ministers. The powers of the Governor in respect of Finance, the Provincial Public Service, and Law and Order are vast. It can be said that the Governor is sharing executive power with the President which is contrary to Article 4(b). One of the pillars of our Constitution is that the executive power of the

(3) No Bill in respect of any matter set out in the Provincial Council list shall become law unless such Bill has been referred by the President; ....to every Provincial Council for the expression of its views thereon................and–

(*a*) where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the members of Parliament present and voting; and

(*b*) where one or more Councils do not agree to the passing of the Bill, such Bill is–

(i) Passed by a special majority required by Article 82, and

–Provided.........some, but not all the Provincial Councils agree to the passing of a Bill, such Bill shall become law applicable only to the Provinces for which the Provincial Councils agreeing to the Bill........... upon such Bill being passed by a majority of the members of Parliament present and voting

Article 154S(1)–A Provincial Council may by resolution decide not to exercise its powers under Article 154G with respect to any matter or part thereof set out in the Provincial Council list or the concurrent list of the Ninth Schedule.

Article 154S(2)–where resolution has been passed by a Provincial Council under paragraph 1, the Parliament may make laws with respect to that matter applicable to such Provincial Council.

Article 154G(5*a*)–Parliament may make laws with respect to any matter.

I have now set out the constitution of the Executive and the Legislature of a Provincial Council. Before I discuss the legal or constitutional effect of these provisions, it is essential that references should be made to the list of subjects referred to above. Ninth Schedule List I the Provincial Council List is the most exhaustive List with appendices i, ii and iii. This List I with the appendices set out the area of authority vested in a Provincial Council. The list begins with No. 1 Police and Public Order–but not including National Defence, National Security. The details of these subjects are set out in an exhaustive appendix No. 1–Law and Order. This appendix deals with the exercise of police powers by a Provincial Council.

People "shall be exercised by the President". Article 4(*b*). There is no room for the sharing of the executive power with the President. The powers of the President in the instance of an Emergency situation are rightly preserved, and must be preserved.

The Legislature–

The Amendment Article 154A–Provides for the establishment of a Provincial Council for every Province specified in the Eighth Schedule. (Nine Provinces subject to Section 37 of the Provincial Councils Bill which enables the President initially to amalgamate two Provinces).

Provincial Councils Bill Part I–Sections 2–6.–Provides for Membership of the Provincial Councils.

Amendment Bill Article 154G(1)–G(11)–Article 154H(1)–(4).–Provides for the legislative power of the Councils.

Article 154G(1)–Every Provincial Council may, subject to the provisions of the Constitution make statutes applicable to the Province for which it is established with respect to any matter set out in List I of the Ninth Schedule (hereinafter referred to as ("The Provincial Council List").

154G(2)–No Bill for the Amendment or repeal of the provisions of this Chapter of the Ninth Schedule shall become law unless such Bill has been referred by the President..........to every Provincial Council for the expression of its views thereon, ...as may be specified in the reference,–

(*a*) where every such Council agrees to the Amendment or repeal of such Bill, and 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–

(i) Passed by the special majority required by article 82; and

(ii) Approved by the People at a Referendum,

APPENDIX 1
Law and Order

(2) The Sri Lanka Police Force shall be divided into–

(*a*) National Division.
(*b*) A Provincial Division for each police.

(4) Recruitment to each Provincial Police Division shall be made by a Provincial Police Commission composed of three members, namely–

(*a*) The D.I.G. of the Province.
(*b*) A person nominated by the Public Service Commission in consultation with the President; and
(*c*) A nominee of the Chief Minister of the Province.

(6) The Inspector General of Police shall appoint a Deputy Inspector General of Police for each Province *with the concurrence of the Chief Minister of the Province.* (Thus it will be seen that two members of the Provincial Police Commission will be agents of the Chief Minister of the Province).

12:1–The Provincial Police Division shall be responsible for the preservation of Public Order within the Province.

APPENDIX II
Land and Land Settlement

State Land shall continue to vest in the Republic...............Subject as aforesaid land shall be a Provincial subject. (This will mean private land, even land belonging to religious institutions which may have a bearing on Article 9 of the Constitution).

APPENDIX III
Education

The question arises what is the nature and content of the Provincial Council Unit sought to be created by the THIRTEENTH AMENDMENT. To make this query posed by me clearer the question is, is the Provincial Unit sought to be created by this THIRTEENTH AMENDMENT, a mere Administrative District as at present or any

Local Government Unit? These problems were posed because it was submitted by most of the petitioners who spoke against this Amendment, that what was sought to be created was an independent Provincial Unit which undermined or eroded the very basis of a Unitary State. To consider this submission as I have stated, the Court has to consider the executive structure and power of the Unit, the legislative power conferred on the Unit and the State subjects Provincial List and Concurrent List assigned to a Provincial Council Unit. It was submitted that the division of the Republic of Sri Lanka into these Provincial Units which are in the nature of independent or quasi independent Units was a first step in the erosion of the Unitary State and the make up of a federal structure of Government. On the other hand the learned President's Counsel who supported this Amendment on behalf of the Intervenient-Petitioners in Applications Nos. 33/87 and 34/87, submitted that these Units were extensions of Local Government Administration Units, such as inter alia, the new Local Government Units, Pradeshiya Sabhas or Gramodhaya Mandalayas. Learned President's Counsel submitted that these Provincial Units were not Bodies that can be called "subsidiary sovereign bodies," a body which has rights in respect of legislation and executive power which the Central Government was incapable of diminishing and in any event these Provincial Units were not Bodies which had independent powers of legislation and which were in their sphere sovereign. Learned President's Counsel submitted that these Bodies were not Bodies that had the power of legislation beyond the control of the central legislature. The fact that there was some difficulty in diminishing the powers of these subsidiary Bodies was not sufficient to make these Bodies sovereign bodies. It was only if the central legislature was incapable of diminishing such powers, that such body can be said to be a subsidiary sovereign body.

The learned counsel—the Queen's Counsel, the President's Counsel who appeared for His Excellency, and the President's Counsel who appeared for the Intervenient-Petitioners in Applications Nos. 33/87 and 34/87 submitted that the Provincial Units sought to be created by this Amendment must be considered as the implementation of a directive principle of State policy contained in Article 27(4) of the Constitution to wit—"the State shall strengthen and broaden the democratic structure of Government and democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in

national life and in Government". The emphasis was on decentralising the administration. The question arose, whether decentralising the administration meant the extension of the Government Agent–Kachcheri administration of the Province from the time of British rule, whether the later extensions of the decentralisation of the administration by Local Government Units such as Municipal Councils, Urban Councils and the present day bodies–District Development Councils, Pradheshiya Sabhas and Gramodhaya Mandalayas, (In fact the District Development Councils were established in the North and East), were the Bodies intended by the phrase–decentralising the administration in Article 27(4).

On the other hand learned counsel who supported the petitioners' cases that the THIRTEENTH AMENDMENT was inconsistent with the Constitution submitted that these Provincial Units created almost Federal Units or in the least quasi federal Units and resulted in a federal structure of the State. A question was asked by the Court from the learned counsel who supported the petitions Nos. 33/87 and 34/87, thus–if it is your case that these Council Units are not "Subsidiary Sovereign Bodies", how would you describe the nature and content of these bodies, whether autonomous, or semi-autonomous or any such? The answer was that he would describe these Provincial Units as semi autonomous Units. I am of opinion that in a Unitary State such as ours there is no room even for semi-autonomous Units. Learned counsel for the petitioners' whose case was that the Provincial Councils were not units which decentralised the administration, but independent bodies, submitted that in implementing the policy contained in Article 27(4) the State must also give paramount consideration to the directive principle of State policy contained in article 27(3) as follows:– "The State shall safeguard the independence, sovereignty, unity and the territorial integrity of Sri Lanka". It was their submission that the creation of these Provincial Councils was a violation of the above Article.

I will now proceed to analyse the nature of these Provincial Units with reference to the legislative power conferred to the Units. The learned counsel who supported the THIRTEENTH AMENDMENT submitted that the legislative power given to the Provincial Council was covered by Article 76(3) of the Constitution, which is as follows:–"It shall not be a contravention of the provisions of paragraph

1(1) of this Article for Parliament to make any law containing any provision empowering any person or body to make subordinate legislation for prescribed purposes, including the power–

(a)

(b) "

that is, the learned counsel related the legislation by the Provincial Councils to the category of subordinate legislation on the ground that it was the legislation made by a body created by the Parliament and under the powers conferred by the Parliament.

Mr. Choksy P.C. one of the counsel, who supported the Amendment on behalf of His Excellency the President strenuously submitted that the modern concept of what is subordinate legislation has advanced, and that, now, the concept subordinate legislation takes into account that there was one supreme Legislature and subordinate Legislatures created by this supreme body, hence the legislation arising from the Provincial Council List in the Amendment will be subordinate legislation in terms of Article 76(3) of the Constitution. Mr. Choksy P.C. referred to the Scotland Act of 1978 passed by the Parliament of the United Kingdom to give a legislative body to Scotland, which Act for reasons not relevant to us, had not been implemented. He submitted that this was an instance where the Unitary State of Britain having a supreme Parliament gave powers of legislation to a legislative body in Scotland. He submitted that there was some resemblance of this Scotland Act of 1978 to the THIRTEENTH AMENDMENT. In my view in making this submission the learned President's Counsel did not take into account two necessary factors:–

Firstly–was that Britain did not have a written Constitution. Britain had an unwritten Constitution, a Unitary State with a supreme Parliament. The Constitution being an unwritten Constitution, it was guided by constitutional precedents and practices. Our Parliament is not supreme in that sense. When we refer to the legislative power of our Parliament we must consider it with reference to Article 4 of our Constitution–

4(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".

We must take into account that under Article 3 "in the Republic of Sri Lanka sovereignty is in the People". The Parliament is not supreme, it is the Parliament and the People that are supreme in Sri Lanka. And further Sri Lanka has a written Constitution to guide the Legislation. When legislation is mooted in Sri Lanka, one has to consider whether it is inconsistent with any entrenched provisions (in that case Article 83 will be involved) or any other provisions of our Constitution, (in which case Article 82(5) will apply). That is the very question that has arisen in these References, whether the THIRTEENTH AMENDMENT is inconsistent with the Constitution to the extent that a Referendum will also become necessary–Article 83.

Secondly whether any provision of law will erode the constitutional concept of the Unitary State of Sri Lanka must also be considered in the political background in which both the 1972 Constitution and the present 1978 Constitution have been made. Article 2 of the 1972 Constitution lays down–"The Republic of Sri Lanka is a Unitary State". There is the identical Article 2 in the present Constitution (1978). The only reason that can be adduced for incorporating this provision in the Constitution must be that both Constitutions have been drafted at a time when there was a demand for a Federal State of Sri Lanka or a separate state for the North and East. In fact the 1978 Constitution has been drafted after the famous or what may even be called infamous Vaddukoddai Resolution which called for a separate state for the North and East.

I am of the view that a construction advocated by learned President's Counsel Mr. Choksy cannot be placed on the phrase subordinate legislation in Article 76(3) of the Constitution. The term "subordinate legislation" has an accepted meaning in Constitutional Law. The Constitution of Sri Lanka (1972) had a similar provision,

45(3)(*a*) – "The National State Assembly may by law confer the power of making subordinate legislation for prescribed purposes on any person or body,

(*b*) – whenever any provision in an existing written law confers the power of making subordinate legislation for prescribed purposes on any person or body, such power shall be deemed to have been conferred by a law of the National State Assembly."

A comparison of the above Articles 3(*a*) & (*b*) with Article 76(3) of the present Constitution shows that the 1972 Constitution Articles are clear and explicit on the face of the Articles as to what is "subordinate legislation". The term "subordinate legislation" is a term of Constitutional law which is understood in a certain sense. Two authorities on English Constitutional Law, Wade and Phillips in their well known text–Constitutional and Administrative Law state as follows:–

> "the term statute law covers both Acts of Parliament and delegated legislation, or as it is sometimes called *subordinate legislation* (underlining is mine for emphasis) is made in the form of statutory instruments". Chapter 33, Delegated Legislation, Page 564.

These Learned authors further state as follows:– "delegated legislation is an inevitable feature of the modern State for the following reasons:–

(1) pressure upon Parliamentary time,
(2) technicality of subject matter,
(3) the need for flexibility,
(4) the state of emergency.

Chapter 33. Pages 556-567".

C. K. Allen – another authority on Constitutional law deals with this aspect of law in his authoritative and well known book Law in the Making, Chapter 7, Page 516 – "Subordinate and Autonomic Legislation, and Page 521 Chief Spheres of Delegated Legislation".

The Administration of Justice Bill of 1973 came up for consideration before the Constitutional Court under the Constitution (1972). His Excellency the President J. R. Jayewardene, then as Leader of the United National Party gave notice to the Speaker that several provisos of the Administration of Justice Bill are inconsistent with the Constitution (1972). The Constitutional Court consisting of three Judges of the Supreme Court met to determine these objections, and Mr. H. W. Jayewardene Q.C., with Mr. Mark Fernando and several other counsel appeared for Mr. J. R. Jayewardene in support of the objection. Objection had been taken that under clause 47 of the Bill the Minister was given power to legislate which was contrary to the clause in the Bill which said that the "National State Assembly may not abdicate, delegate, or in any

manner alienate its legislative power". The Constitutional Court ruled as follows:– We are of the view that clause 47(1) empowers the Minister to make Regulations to carry out the purposes set out in that clause. This, we say is subordinate legislation as contemplated in section 45 of the Constitution; besides as we pointed out, this regulation must come under clause 61 before the National State Assembly for approval. If the National State Assembly does not approve the regulation, it can reject it thereby asserting its supremacy. As we understand the words "subordinate legislation", it means all legislation other than that which is passed by the National State Assembly under the law making powers in chapter 9 of the Constitution. We are also fortified by the view expressed in Halisbury's Laws of England, Volume 36, Page 476, paragraph 723, which states as follows:–

> "subordinate legislation is legislation made by a person or body other than the sovereign in Parliament by virtue of powers conferred either by statute or by legislation which is itself made under statutory Powers".

Therefore, this is "subordinate legislation" as is ordinarily understood and as contemplated in section 45(3) of the Constitution. (Decisions of the Constitutional Court of Sri Lanka–Volume I, 1973, page 57 at 70) – Article 45(3)(*a*) & (*b*) of the Constitution (1972) almost corresponds to Articles 76(3)(*a*), (*b*) & (*c*) of the present Constitution. The then Constitutional Court has determined the meaning of the phrase "subordinate legislation" in Article 45(3) of the Constitution (1972). On the rules of interpretation this Court has to hold that the phrase "subordinate legislation" used in Article 76(3) of our Constitution must bear the same meaning. As the THIRTEENTH AMENDMENT chapter 17(*a*) has been drafted on the lines of the relevant Chapters of the Constitution of India, it is relevant to pose this question – Can the legislation passed by the Legislative Councils of the States in India be called "subordinate legislation"? I do not agree with the submissions that the legislation by the Provincial Councils should be classed as subordinate legislation in terms of Articles 76(3) of the Constitution.

The learned counsel who had opposed this amendment have submitted that if the THIRTEENTH AMENDMENT is incorporated into our Constitution, our Constitution will have certain hallmarks of a Federal Constitution, that is–

(1) A written Constitution,
(2) Division of the country into Units or Components,
(3) Division of Executive and Legislative Powers between the Centre and the Units.
(4) Division of state subjects into Lists as in this amendment, and such other features, of a Federal State.

It has been strongly submitted that the legislative power granted to the Provinces is a kind of power that erodes the supremacy of the Parliament and the People, and also that certain powers granted to the Provincial Legislatures restricts the supremacy of the Parliament and the People under our Constitution, and as such is violative of Articles (2) & (3) of the Constitution read with Articles 4 (*a*) and 4(*b*). It was also submitted that the learned counsel who supported this Amendment has relied on Article 76(3) ignoring the more important provisions of Article 76(1) –"Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power". There was a similar provision in the Constitution (1972) Article 45(1)– "The National State Assembly may not abdicate, delegate or in any manner alienate its legislative power, nor may set up an authority with any legislative power other than the power to make subordinate laws". It will be noted that the present Constitution Article 76(1) has dropped the word "delegate" in Article 45(1) of the Constitution (1972), and kept the same phrase in a more imperative way–"shall not abdicate or in any manner alienate its legislative power". It is not clear why the word "delegate" has been dropped. The scope of the parallel Article, that is Article 45(1) of the Constitution (1972) has been raised before the Constitutional Court in the objections made to the Associated Newspapers of Ceylon Ltd. (Special Provisions) Bill heard on 24.6.73–(Decisions of the Constitutional Court of Sri Lanka, Volume I, 1973, page 35 at page 38). In its ruling on this objection the Constitutional Court has stated–"Lastly, it is submitted that the provisions of clause 15(2) of the Bill are inconsistent with sections 3, 4, 5, 44 and 45 of the Constitution, in that this clause, if enacted into law, will constitute an abdication, delegation or alienation, of the legislative power of the People which can be exercised by the National State Assembly, to the

extent and in a manner prohibited by the Constitution for the reason that it enables the Minister to nullify and modify the provisions of the Companies Ordinance". The next reference to this objection is at page 54, and is as follows:– "Another contention which was not pressed by counsel was that clause 15(2) of the Bill was inconsistent with sections 3, 4, 5, 44 and 45 of the Constitution, in that this clause, if enacted into law, will constitute an abdication, delegation, or other alienation of the legislative power of the People which can be exercised by the National State Assembly to an extent that it purports to empower the Minister to nullify, modify and amend the provision of the Companies Ordinance. We see nothing inconsistent in this provision with the Constitution". Unfortunately, the Constitutional Court has not considered the interpretation of the phrase "abdication, delegation, or other alienation, of legislative power", probably because the contention was not pressed by counsel. Article 45(1) of the Constitution particularly the word "abdicate" was interpreted by the Constitutional Court in its decision on the Companies (Special Provisions) Bill, in which case Mr. Mark Fernando the learned President's Counsel who is appearing for the Intervenient-Petitioners in Applications Nos. 33/87 and 34/87 has appeared. Mr. Mark Fernando P.C. had objected to a clause in the above bill which vested power in the Minister to issue written directions exempting certain Companies from the application of the provisions of clause 2 of the Bill. Mr. Mark Fernando P.C. has submitted that the clause so empowering the Minister "would amount to a delegation of the legislative power of the National State Assembly which is prohibited by section 45(1) of the Constitution". In that case, after considering all authorities, the Constitutional Court accepted the interpretation placed by the then Acting Attorney-General (now Senior Justice R. S. Wanasundera), which was as follows:– "The learned Acting Attorney-General submitted that the word "delegate" in Section 45(1) juxtaposed as it is between the words "may not abdicate" and "or in any manner alienate necessarily means "divest itself of", and that only such legislation as divested the National State Assembly of its legislative power would be inconsistent with section 45(1) of the Constitution". This Constitutional Court then ruled as follows:– "the modern State, which has become so complex and would be increasingly so as many years pass by, cannot be effectively and smoothly run without a certain amount of delegation of limited powers to the executive provided the delegation does not involve divestiture of the powers of the legislature"–(Decisions of the Constitutional Court

of Sri Lanka– Volume III, 1974, Page 1). It will be seen the word "delegate" in Article 45 of the Constitution (1972) has been given a very limited interpretation. This interpretation cannot cover an instance such as the one before this Court where the Parliament, and the People are divesting its power to a Provincial Legislature.

I will now deal with the legislative power of the Provincial Council with reference to two aspects –

(1) the legislative powers of the Provincial Council,

(2) the manner in which the provisions pertaining to the legislative power of the Provincial Councils restrict and curtail the supreme power of the Parliament–Articles 3 and 4 (*a*)

I have set out earlier almost verbatim relevant Articles of the Amendment giving legislative power to the Provincial Councils. The power of making legislation is the power to legislate in respect of any matter set out in List I of the Ninth Schedule described as the Provincial List. The legislative power of the Parliament is restricted in this manner in this Amendment Bill. In terms of Articles 154(a)(1) and 154(a)(2) only if the Provincial Council by resolution decides not to exercise its powers in respect of the Provincial Councils List or the Concurrent List the Parliament may make laws on those matters in respect of such Provincial Councils–Article 154(g)(8) is a provision which provides for a statute made by the Provincial Council to prevail over a law made in respect of a matter on the Provincial Councils List. This is an imperative provision that "the law so long only as that statute is in force remains suspended and be inoperative within that province". What I call the drastic provisions which restrict and curtail the legislative power of the Parliament and the people are contained in Articles 154G(2) and 154G(3) cited above Article 154G sets down– "no Bill for the amendment or repeal of the provisions of this Chapter or the Ninth Schedule shall become law" except under the terms and conditions set in Articles 154(2)(b) and 154(3)(b). These provisions restrict, curtail and abrogate the powers of the Parliament (and of the People) to pass such law to the extent of bringing into operation Articles 82 & 83 of the Constitution. That is, such a Bill must be passed by the special majority of not less than two-thirds and approved by the people at a Referendum. In fact though the so called preamble to Chapter 17A of the Amendment states that the provisions of this Chapter shall be subject to Article 83 and shall not

affect or derogate from such Article the said Articles 154G(2)(b) and (3)(b) introduced in this Chapter, an Article comparable to Article 83. Article 82(7) states that Amendment includes an "addition". Articles 154G(2) and (3) can only be considered as an Amendment of Article 83 by means of an addition to this Article. This Amendment by way of addition alone requires that this Amendment Bill should be approved by the people at a Referendum.

Mr. E. S. Amerasinghe P.C. who appeared for the Petitioner–Young Men's Buddhist Association, Colombo in petition No. 16/87 lamented that in respect of the said two Articles, the Parliament was abdicating and alienating its power without the consent of the people, but to get back that power which it abdicates and alienates the Parliament will have to go to the People. The legislative power that I have referred to above violates Article 3, read with Article 4(b) of the Constitution, that is the Sovereignty of the People and the legislative power of the People exercised through the Parliament.

BUDDHISM

I will now refer to another matter very ably urged by Mr. E. S. Amerasinghe P.C. who appeared for the Young Men's Buddhist Association, in his inimitable, courteous, but forceful style. Mr. Amerasinghe P.C. submitted that the Ninth Schedule List I (Provincial Councils List) in clause 25(2) assigns to the Provincial Council exclusively the subject "ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance". There is no explanation as to what are these "ancient and historical monuments". There is no reference to any place of Buddhist worship or worship of any other religions, Christian and Muslim. There is no reference to those that can be called recent place of worship, assuming that the word "monuments", covers places of religious worship.

LIST II–(Reserved List)

Has a clause which comes under the head Provincial and Occupational training (Page 37) (seems to be unnumbered) as follows: "National Archives, Archaeological activities and sites, and this would include ancient and historical monuments and records". These subjects also do not cover up directly religious places of worship.

LIST III–(Concurrent List)

There is clause 34 Archaeological sites and remains. In none of these lists is mentioned directly religious places of worship, and land belonging to religious institutions–recent or otherwise.

Mr. Amerasinghe P.C. has in the written submissions of the said Application produced extracts from the report of the eminent Chief Justice Sansoni, which sets out a number of instances of proved deliberate desecration and destruction of Buddhist places of worship. In the List of subjects which are in the Ninth Schedule to this Amendment there is no reference whatsoever as to whose duty it was (which is really "the duty of the State") "to protect and foster the Buddha Sasana, while assuring to all religions rights granted by Articles 10 and 14(1)(*e*)".

I hold that to this extent the Amendment is also violative of Article 9 of the Constitution which is related to Article 83 of the Constitution.

OATH

Articles 154B(6) and 154F(7) has presented an Oath for the Governor and the Chief Minister respectively as set out in the Fourth Schedule. The Provincial Councils Bill Section 4 prescribes the Oath set out in the Fourth Schedule to the Constitution for a member of the Provincial Council. The Fourth Schedule sets out the Oath as follows:

"I............affirm............that I will be faithful to the Republic of Sri Lanka, and that I will to the best of my ability uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka". Article 165(1) of the Constitution provides that "every public officer", Judicial Officer and every other person as is required by the Consitution to take an Oath, before the prescribed date and if he does not do so he shall cease to be in service or hold office". Articles 32 and 53 provide that the President and the Cabinet of Ministers respectively, should take the Oath set out in the Fourth Schedule. The Sixth Amendment to the Constitution which came into force on 8th August 1983 amended the Oath that has to be taken under the Constitution by the Amending Article 157A(7) which brought in a new Oath of office set out in the Amendment as the Seventh Schedule. This Amendment lays down that "all persons required to take an Oath of office shall take Oath in the form set out in the Seventh Schedule". Certain penal consequences were provided for those who did not take

this Oath within one month of the appointment. The Oath set out in the Seventh Schedule is as follows:—"I affirm............that I will uphold and defend the Constitution..........of Sri Lanka and that I will not, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within territory of Sri Lanka". No apparent reason can be found in this THIRTEENTH AMENDMENT for dropping the Oath in the Seventh Schedule which is a part and parcel of the Constitution and for reviving the Oath in the Fourth Schedule and must be deemed to be repealed by this Amendment to the Constitution. A Sovereign State cannnot have two Oaths in its Constitution for different classes of citizens.

I am of the view that, if the Oath, in the now repealed Fourth Schedule is to be revived it will be an Amendment of the Sixth Amendment and its Seventh Schedule. The reference to the Fourth Schedule is an openly unconstitutional act of draftsmanship which affects the Sovereignty of the People referred to in Article 3. An Oath of office is a mode by which a State asserts its Sovereignty, and a mode by which a subject of the state submits to the Sovereignty of the State. I am of the view that the reference to a repealed Oath—Fourth Schedule of the Constitution—is violative of Article 3 of the Constitution.

For the reasons given by me above, and for many other reasons which cannot be set out for lack of time, I hold that the THIRTEENTH AMENDMENT and the consequent Provincial Councils Bill are violative of Articles 2 and 3 of the Constitution, read with the relevant subsections of Article 4, and that in terms of Article 83, the THIRTEENTH AMENDMENT and the Provincial Councils Bill require approval by the People at a Referendum.

I have read the order made by my brother Wanasundera, J., and I fully agree with the order which has held that for many multitudinous reasons that the THIRTEENTH AMENDMENT requires a Referendum.

L. H. DE ALWIS, J. and H. A. G. DE SILVA, J.

A Bill to amend the Constitution of Sri Lanka
(Thirteenth Amendment to the Constitution):

Our view is that the provisions of the Thirteenth Amendment to the Constitution, referred to below, require the approval by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

Section 4 of the Thirteenth Amendment to the Constitution which is described as "An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka" provides that "Chapter XVIIA" containing Articles 154A to 154T be inserted after Article 154 of the Constitution.

(1) Chapter XVIIA commences as follows:–

"The provisions of this Chapter shall be subject to Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2), 62(2), and 83 and shall not affect or derogate from, or be read or construed as affecting or derogating from, any such Article, but, save as aforesaid, nothing contained in the Constitution or any other law in force on the date on which this Chapter comes into force shall be interpreted as derogating from the provisions of this Chapter. The provisions of such other law shall, mutatis mutandis, apply".

These words, described by some Counsel at the hearing, as a "preamble", appear at first sight to be ambiguous. But if we consider that this Chapter deals with the establishment of Provincial Councils and their powers, it would mean that this Chapter overrides the provisions of the Constitution other than the entrenched Articles. This amounts to a diminution of the legislative power of the People who gave their mandate to Parliament to enact the Constitution and will result in an erosion of the Sovereignty of the People as enshrined in Article 3 of the Constitution.

This provision thus contravenes Articles 3 and 4(*a*) of the Constitution and requires to be passed by the two-thirds majority approved by the People at a Referendum by virtue of the provisions of Article 83.

(2) Article 154G(2) enacts that:

"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 view thereon, within such period as may be specified in the reference, and–

(*a*) where every such Council agrees to the amendment or repeal and 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–

(1) passed by the special majority required by Article 82; and

(2) approved by the People at a Referendum".

This Article provides that a special majority and the approval by the People at a Referendum are required for the amendment of this Chapter or the Ninth Schedule thereto, in the event of one or more Provincial Councils not agreeing to the amendment or repeal of the Bill.

Article 75 of the Constitution provides that "the 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. . . . ."

Article 154G(2) therefore imposes a fetter on the Parliament in amending or repealing Chapter XVIIA or the Ninth Schedule and thereby abridges the Sovereignty of the People, in the exercise of its legislative power by Parliament, in contravention of Articles 3 and 4(*a*) of the Constitution.

(3) Article 154G(3) which relates to Bills concerning matters set out in the Provincial Councils List provides as follows:

"No Bill in respect of any matter set out in the Provincial Councils List 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 passing of the Bill, 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 passing of the Bill, such Bill is–

(i) passed by the special majority required by Article 82; and

(ii) approved by the People at a Referendum:

Provided that where on such reference, some but not all the Provincial Councils agree to the passing of a Bill, such Bill shall become law applicable only to the Provinces for which the Provincial Councils agreeing to the Bill have been established, upon such Bill being passed by a majority of the Members of Parliament present and voting".

As in the preceding Sub-Article, a special majority and approval by the People at a Referendum are required even for the passage of a Bill relating to a matter in the Provincial Councils List, in respect of a Provincial Council which does not agree to the passing of the Bill. This again restricts the power of Parliament to pass an ordinary Bill on a subject in the Provincial Councils List except by a special majority and a Referendum. For the same reasons stated earlier the Sovereignty of the People enshrined in Article 3 read with Article 4(*a*) of the Constitution is eroded.

Articles 154G(2) and (3) therefore, also require to be passed by the two-thirds majority and approved by the People at a Referendum, by virtue of the provisions of Article 83.

(4) The provisions of Articles 154G(2) and (3) are in truth and in fact an addition to the Articles entrenched in Article 83 of the Constitution. An "addition" is included in the word "amendment" by virtue of Article 82(7). Hence the amendment of Article 83 of the Constitution by the addition of Articles 154G(2) and (3) will require to be passed by the two-thirds majority referred to in Article 83 and approved by the People at a Referendum.

After we had prepared our determination we have had the benefit of perusing the determination of Wanasundera, J. We find that all the matters dealt with by us are covered by Wanasundera, J. We are further in entire agreement with him on all the other matters referred to in his determination.

PROVINCIAL COUNCILS BILL

Determination

In view of our determination on the Bill titled "Thirteenth Amendment to the Constitution", we are of the view that a determination on the questions raised in the reference by His Excellency the President relating to the Provincial Councils Bill be given after the Thirteenth Amendment becomes law.

Referendum unnecessary except for Clauses 154 G(2)(b) and (3)(b) of Thirteenth Amendment