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2015

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

**A Bill entitled, "NINETEENTH AMENDMENT TO THE CONSTITUTION"
In the matter of applications under Article 121(1) of the Constitution**

PRESENT

K. Sripavan	-	Chief Justice
Chandra Ekanayake,	-	Judge of the Supreme Court
Priyasath Dep, PC	-	Judge of the Supreme Court

S.D. No. 04/2015	Petitioner	Gomin Kavinda Dayasiri
	Counsel	Gomin Dayasiri with Manoli Jinadasa, J.P. Gamage, Rakitha Abeygunawardena and Sulakshana Senanayake
	Intervenient Counsel	Suren Fernando, M.A.Sumanthiran, Dr. Jayampathy Wickramaratne, P.C, with Nizam Kariappar, Ms. Pubudini Wickramaratne, Nayantha Wijesundera and Ms. Galusha Wiriththamulla Chrishmal Warnasuriya instructed by Sunil Watagala
S.D. No. 05/2015	Petitioner	Liyana Pathiranage Ivan Perera
	Counsel	Prabath Colombage
	Intervenient Counsel	Chrishmal Warnasuriya instructed by Sunil Watagala
S.D. No. 06/2015	Petitioner	Udaya Prabath Gammanpila

	Counsel	Manohara de Silva, P.C. with Rajitha Hettiarachchi, Arinda Wijesurendra and Hirosha Munasinghe
	Intervient Counsel	Faiz Musthapa, P.C. with Faizer Marker and Ashiq Hashin, Suren Fernando, Saliya Pieris with Asthika Devendra, Thanuka Nandasiri Viran Corea with Santa de Fonseka and Vdya Nathaniel Mr Alagaratnam, P.C. ,Chrishmal Warnasuriya instructed by Sunil Watagala, J.C. Weliamuna with Pulasthi Hewamanne, Pasindu Silva, Senura Abeywardena
S.D. No. 07/2015	Petitioner	Dharshan Arjuna Narendra Weerasekera
	Counsel	Dharshan Weerasekera appears in person
S.D. No. 08/2015	Petitioner	Ven.Bengamuwe Nalaka Thero
	Counsel	Manohara de Silva, P.C. with Rajitha Hettiarachchi, Arinda Wijesurendra and Hirosha Munasinghe
S.D. No. 09/2015	Petitioner	Swarnapali Wanigasekera, A-A-L
	Counsel	Kalyanada Tiranagama with Sandamali Ekanayake
S.D. No. 10/2015	Petitioner	Ven.Matara Ananda Sagara Thero
	Counsel	Kushan D' Alwis, P.C. with Kaushalya Navaratne and Chamath Fernando
S.D. No. 14/2015	Petitioner	Dampahalage Don Somaweera Chandrasiri, Vice Chairman, Mahajana Eksath Peramuna
	Counsel	Canishka Witharana with Tissa Yapa and Dakshina Coorey

S.D. No. 15/2015	Petitioner	Gayana Nishantha Sri Warnasinghe
	Counsel	M.C.Jayaratne with Nadika N. Seneviratne, M.D.J. Bandara and M. Nilanthi Abeyratne instructed by S.M.D.Tuder Perera
S.D. No. 16/2015	Petitioner	MTV Channel (Pvt.) Limited
	Counsel	Romesh de Silva P.C. with Sanjeewa Jayawardena, P.C. Sugath Caldera, Rajeeve Amarasuriya, Niranjan Arulpragasam and Viswa De Livera Tennakone instructed by G.G.Arulpragasam
S.D. No. 17/2015	Petitioner	MBC Networks (Private) Limited
	Counsel	Romesh de Silva P.C. with Sanjeewa Jayawardena, P.C., Sugath Caldera, Rajeeve Amarasuriya, Niranjan Arulpragasam and Viswa De Livera Tennakone instructed by G.G. Arulpragasam
S.D. No. 19/2015	Petitioner	Jayakodi Arachchige Sisira Jayakodi,
	Counsel	J.C. Boange

Y.J.W. Wijeyatilake, P.C., Attorney General with Anusha Navaratne, Addl. Solicitor General, Indika Demuni de Silva, Senior Deputy Solicitor General, Nerin Pulle, Deputy Solicitor General, Yuresha Fernando, Senior State Counsel and Suren Gnanaraj, State Counsel for the Attorney General.

Court assembled at 10.00 a.m. on 01st, 02nd and 6th of April 2015

A Bill bearing the title "An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka" - "19th Amendment to the Constitution" was placed on the Order Paper of Parliament on 24th March 2015. Thirteen petitions, numbered as above have been presented invoking the jurisdiction of this Court in terms of Article 121(1) for a determination, in respect of the Bill.

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

The Petitioners and/or Counsel representing them, the Intervenient Petitioners and the Hon. Attorney General were heard before this Bench at the sittings held on 01st April 2015, 02nd April 2015 and 06th April 2015.

The proposed 19th Amendment as contained in the Bill seeks to make the following principal amendments which could be categorized as follows :

1. Inclusion of a right to information
2. Reducing the term of office of the President
3. Introducing a two term limit on the number of terms a person can hold office as President
- ✓ 4. Provision for an acting President in the event of death/absence of the incumbent President
5. Imposition of additional duties on the President
- ✓ 6. Effective renumbering of Article 42 as Article 33A
7. The circumstances in which Presidential immunity will not apply
8. Amendments relating to the time period within which an election shall be held if an election is determined to be void
9. Reintroduction of the Constitutional Council
10. Changes made to Chapter VIII with regard to matters concerning the Executive, the Cabinet of Ministers, the appointment of Ministers and the ceiling on the number of Ministers
11. Reducing the Term of Parliament
12. Amendments relating to the prorogation of Parliament
13. The jurisdiction of the Supreme Court relating to disciplinary actions against Members of Parliament
14. Removal of the provisions relating to urgent Bills

15. Provisions relating to the Independent Commissions (to be appointed based on the recommendations of the Constitutional Council)

16. Special provisions applicable to the incumbent President

While the Supreme Court has sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution, in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, Article

120(a) provides that the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83.

Article 83 states :

Notwithstanding anything to the contrary in the provisions of Article 82-

(a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1,2,3,6,7,8,9,10 and 11 or of this Article, and

(b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or off paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over six years. Bills inconsistent with the Constitution.

Shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

The people therefore have chosen and mandated the legislature to make constitutional amendments save and except those affecting the entrenched Articles referred to in Article 83.

In most of the petitions, the Petitioners argued that the Bill alters the basic structure of the Constitution by diminishing the final discretionary authority of the President to make decisions concerning executive governance and thereby violates the basic structure of the Constitution. Mr. Manohara de Silva, P.C. claimed that if the Executive power is alienated from the President, the very act of alienation or transfer of Executive power from the President to another body would violate Article 3 of the Constitution.

Article 3 provides that :

"In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise."

Article 4 provides that :

"The Sovereignty of the People shall be exercised and enjoyed in the following manner:

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

It has to be borne in mind that the Sovereign people have chosen not to entrench Article 4. Therefore, it is clear that not all violations of Article 4 will necessarily result in a violation of Article 3.

The first two Articles in Chapter VIII of the Constitution are of crucial importance in describing the structure in which executive power was sought to be distributed. Article 42 states *"The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers,*

duties and functions under the Constitution and any written law, including the law for the time being relating to public security”.(emphasis added) Thus, the President’s responsibility to Parliament for the exercise of Executive power is established. Because the Constitution must be read as a whole, Article 4(b) must also be read in the light of Article 42. **Clearly, the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance.** (emphasis added)

In fact, Mr. Sumanthiran contended that Article 42 is identical to the corresponding provision in the 1st Republic Constitution of 1972, which stated in Article 91 that *“the President shall be responsible to the National State Assembly for the due execution and performance of the powers and functions of his office under the Constitution and under other law, including the law for the time being relating to public security.”* Thus, the position of the President vis-à-vis the legislature, in which the President is responsible to the legislature, was untouched by the 1978 Constitution.

Article 43 of the 1978 Constitution states:

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

(2) The President shall be a member of the Cabinet of Ministers, and shall be the Head of the Cabinet of Ministers.

Provided that notwithstanding the dissolution of the Cabinet of Ministers under the provisions of the Constitution, the President shall continue in office.

(3) The President shall appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament.”

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

charged with the direction and control of Government. Further, this Cabinet is answerable to Parliament.

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

It may be relevant to note the following observations made by Court in the determination of the Nineteenth Amendment (S.C.S.D. 11/02-S.C.S.D. 40/02) with regard to the Executive power of the President :

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

Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People. Similarly, legislative power should not be identified with the Prime Minister or of any party or group in Parliament and thereby be given a partisan form and character. It should be seen at all times as the power of People. Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as "weapons" in the hands of the particular organ of government. (emphasis added)

The role of the Cabinet in the Executive in Re the Thirteenth Amendment Determination [(1987) 2 S.L.R. 312 at 341] as observed by Wanasundera, J. in his dissenting judgment is stated thus:

*"It is quite clear from the above provisions that the Cabinet of Ministers of which the President is a component is an integral part of the mechanism of government and the distribution of the Executive power and any attempt to by-pass it and exercise Executive powers without the valve and conduit of the Cabinet would be contrary to the fundamental mechanism and design of the Constitution. It could even be said that the exercise of Executive power by the President is subject to this condition. **The 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 modeled 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." (emphasis added)*

The People in whom sovereignty is reposed having made the President as the Head of the Executive in terms of Article 30 of the Constitution entrusted in the President, the exercise of the Executive power being the custodian of such power. If the people have conferred such power on the President, it must be either exercised by the President directly or someone who derives authority from the President. There is no doubt that Executive powers can be distributed to others via President. However, if there is no link between the President and the person exercising the Executive power, it may amount to a violation of mandate given by the people to the President. If the inalienable sovereignty of the people which they reposed on the President in trust is exercised by any other agency or instrument who do not have any authority from the President then such exercise would necessarily affect the sovereignty of the People. It is in this backdrop the Court in the Nineteenth Amendment Determination came to a conclusion that the transfer, relinquishment or removal of a power attributed to one organ of government to another organ or body would be inconsistent with Article 3 read with Article 4 of the Constitution. Though Article 4 provides the form and manner of exercise of the sovereignty of the people, the ultimate act or decision of his executive functions must be retained by the President. So long as the President remains the Head of the Executive, the exercise of his powers remain supreme or sovereign in the executive field and others to whom to such power is given must derive the

authority from the President or exercise the Executive power vested in the President as a delegate of the President. The President must be in a position to monitor or to give directions to others who derive authority from the President in relation to the exercise of his Executive power. Failure to do so would lead to a prejudicial impact on the sovereignty of the People. The constitutionality of the following Clauses are examined, keeping in mind the observations referred to above.

Clause 11

- (i) 42(3) The Prime Minister shall be the head of the Cabinet of Ministers.**
- (ii) 43(1) The Prime Minister shall determine the number of Ministers of the Cabinet of Ministers, and the Ministries and the assignment of subjects and functions to such Ministers.**
- (iii) 43 (3) The Prime Minister may at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet of Ministers. Such changes shall not affect the continuity of the Cabinet of Ministers and the continuity of its responsibility to Parliament.**
- (iv) 44 (2) The Prime Minister shall determine the subjects and functions which are to be assigned to Ministers appointed under paragraph (1) of this Article, and the Ministries, if any, which are to be in charge of, such Ministers.**
- (v) 44 (3) The Prime Minister may at any time change any assignment made under paragraph (2)**
- (vi) 44(5) At the request of the Prime Minister, any Minister of the Cabinet of Ministers may by Notification published in the Gazette, delegate to any Minister who is not a member of the Cabinet of Ministers, any power or duty pertaining to any subject or function assigned to such Cabinet Minister, or any power or duty conferred or imposed on him or her by any written law, and it shall be lawful for such other Minister to exercise and perform any power or duty delegated notwithstanding anything to the**

contrary in the written law by which that power or duty is conferred or imposed on such Minister of the Cabinet of Ministers.

Clause 11 deals with “The Executive – The Cabinet of Ministers”. In the absence of any delegated authority from the President, if the Prime Minister seeks to exercise the powers referred to in the aforesaid Clause, then the Prime Minister would be exercising such powers which are reposed by the People to be exercised by the Executive, namely, the President and not by the Prime Minister. In reality, the Executive power would be exercised by the Prime Minister from below and does not in fact constitute a power coming from the above, from the President. In the words of Wanasundera, J. as stated in *Re the Thirteenth Amendment to the Constitution* at page 359 *“If the Executive power of the People can be renounced in this manner, serious questions regarding the proper administration of the country could arise. At the bare minimum, legislation permitting such a renunciation must have the approval of the People at a Referendum.”*

By virtue of the Executive power vested in the President, as guaranteed in Article 4(b) of the Constitution, certain rights flow to the citizens enabling them to enjoy those rights in its fullest measure, subject of course to permissible restrictions. The President cannot relinquish his Executive power and permit it to be exercised by another body or person without his express permission or delegated authority. As laid down by Sarath N. Silva, CJ. In *Patrick Lowe and Sons Vs. Commercial Bank of Ceylon Ltd.* (2001) 1 S.L.R. 280, *“What is not permitted by the provisions of the enabling statute should be taken as forbidden and struck down by Court as being in excess of authority.”* (emphasis added). Thus, permitting the Prime Minister to exercise Executive power in relation to the six paragraphs referred to above had to be struck down as being in excess of authority and violative of Article 3.

Clause 2

14A(1)- Every citizen shall have the right of access to any information held by:-

- (a) the State a Ministry or any Government Department or any statutory body established or created by or under any law;**
- (b) any Ministry of a Province or any Government Department or any statutory body established or created by a statute of the Provincial Council;**

(c) any local authority; and

(d) any other person,

being information that is required for the exercise or protection of the citizens' rights.

(2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the of the judiciary.

(3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three - fourths of the members of such body are citizens.

The thrust of the submission of Mr. Gomin Dayasiri was that paragraph 14A(1) enables even foreigners to receive benefits as they become the beneficiaries of the rights by virtue of the synthetic definition of a citizen given in the Bill as per the proposed paragraph 14A(3). It was also stressed on the fact that the proposed amendment enables a foreigner with the help of four other citizens of Sri Lanka living abroad or living in Sri Lanka to access this information via setting up a hoaxed unincorporated body. Further it was the contention of the Counsel that when a fundamental right of this nature is conferred it amounts to a right as provided for by law and therefore it amounts to granting of a right conferred by paragraph 14A(1) against an individual and secondly, the said paragraph 14A(1) becomes a source of law by which that 'right of access' is granted to the accessory. Counsel heavily laid stress on the following aspect also with regard to the proposed paragraph 14A(2), that is, the defenses under 14A(2) are restricted by the inclusion of the phrase "prescribed by law", as there are no specific laws which have been enacted in relation to the right of privacy of an individual or reputation of others which are vague principles for which no defenses would be available for a Court to consider. The Court notes that the

definition given to a "citizen" is identical to the definition given in Article 121(1) of the Constitution.

Having considered the submissions of the Counsel the Hon. Attorney General informs Court that he wishes to bring in the following amendments at the Committee stage:

(a) to delete the words "held by" in above 14A(1) and following to be added thereof -

"Being information that is required for the exercise or protection of the citizens' rights held by any person of."

(b) In paragraph 14A(2) after the word privacy following words to be interpolated -

'Contempt of Court, Parliamentary privilege.'

(c) In paragraph 14A(2) to delete the words 'information received' and to replace with

'information communicated.'

It was the submission of the Counsel that the sub-paragraph 14A(1)(d) violates the rights of the people. However, the Hon. Attorney General has agreed to delete the above 14A(1)(d), and to replace it with the following provision:-

14A(1)(d) Any other person, being information that is required for the exercise or protection of the citizen's right of access to information in relation to a person or an institution referred to in sub-paragraph (a), (b) or (c) of this paragraph.

We are of the view that, Clause 2 does not become inconsistent with any of the entrenched provisions of the Constitution.

Submission was made with regard to Clause 5 of the Bill which reads as follows:-

Clause 5 33(1) The President shall be the symbol of National unity.

Mr. Canishka Witharana brought to the notice of Court that the origin of our National Flag is based on a Report of the National Flag Committee. Counsel submitted that in 1979, a Cabinet Memorandum has been submitted by the Minister of State on the use of National Flag and was approved by the Cabinet of Ministers in 1981. The Code for the use of National Flag prepared by the Cabinet Sub Committee provides that each of us have to think more deeply of the National Flag and when we see our National Flag automatically our shoulders will strengthen, our hearts

lift and our thoughts go to our motherland. Thus, the message and the significance of the National Flag is stated as follows:-

“Respect the National Flag and it will inspire you. This is the basic message of the National Flag. It is a message which should reach every Sri Lankan because the National Flag is a symbol of our motherland, our Independence and the unity of our People. It is a symbol of our hopes and aspirations in the Nation’s future.”

Thus, it has been categorically stated that the National Flag is the symbol of the unity of our People. Considering the above, we are of the view that Paragraph 33(1) in Clause 5 is incorrect and be deleted.

It was argued by the Counsel for the Petitioners that the establishment of the Constitutional Council and its composition will impinge on the sovereignty of the people, in as much as it will impose a fetter on the executive power of the people. It was contended that the Constitutional Council will not be a representative of the people. Clause 10 provides that the Constitutional Council shall consist of the Prime Minister, the Speaker, the Leader of the Opposition, one person appointed by the President, five persons appointed by the President on the nomination of both by the Prime Minister and the Leader of the Opposition and one person nominated by agreement of the majority of the Members of Parliament belonging to political parties other than to which the Prime Minister and the Leader of the Opposition belong.

All appointments of non ex-officio members of the Constitutional Council are made by the President. Subparagraph (5) requires all non ex-officio members to be persons of eminence and integrity who have distinguished themselves in public or professional life and who are not members of any political party. Considering the composition of the Constitutional Council one could see that it would be a representative body, reflecting the views of the diverse groups in Parliament, and also be apolitical in so far as the non ex-officio members are concerned. The establishment of the Constitutional Council was considered by this Court In Re Seventeenth Amendment to the Constitution (S.C. Determination 6/2001), which held that the establishment of the Constitutional Council would not impinge on Article 3 or 4 of the Constitution, even though the Court noted that there is a restriction in the exercise of the discretion hitherto vested in the

President, the said restriction per se would not be an erosion of the Executive power by the President, so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution.

The purpose and object of the Constitutional Council is to impose safeguards in respect of the exercising of the President's discretion, and to ensure the propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions. It sets out a framework within which the President will exercise his duties pertaining to appointments. When Sub Clause 41B, is considered the President continues to be empowered to make the appointments of Chairmen and members of the Independent Commissions. However, such appointments are to be made on a recommendation of the Constitutional Council on which a duty is cast to recommend fit and proper persons to such offices. Similarly in terms of Sub Clause 41C the President makes the appointments to key offices including the Judges of Superior Courts. However, prior to the appointments his recommendations would have to be approved by the Constitutional Council.

Sub Clause 41C(4) of the Bill sets out that the Constitutional Council shall obtain the views of the Chief Justice, the Minister of Justice, the Hon. Attorney-General and the President of the Bar Association of Sri Lanka, in the discharge of its functions relating to the appointment of the Judges of the Supreme Court and the President and Judges of the Court of Appeal. Seeking the views of different stakeholders can in no way be offensive to the exercise of the powers of appointment. In fact a consultative process will only enhance the quality of the appointments concerned. In the *Silva V Shirani Bandaranayake (1997) 1 SLR 93* Mark Fernando J observed that a practice had been developed where relevant stakeholders were consulted. At page 95, His Lordship quoted from an article written by the then President of the Court of Appeal which had stated as follows:- "*Under the Constitution, the President of the Republic has the sole prerogative to appoint Judges.....In practice Judges are selected through a process of nomination by the Chief Justice, the Attorney General and the Minister of Justice.*" Therefore, we are of the opinion that Clause 10 and the provisions contained therein (Chapter VII A) do not violate any of the entrenched provisions in Article 83 of the Constitution.

Clause 26

104 B (5)(c) -

Where the Sri Lanka Broadcasting Corporation, the Sri Lanka Rupavahini Corporation or the Independent Television Network or any other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of every private broadcasting or telecasting operator, as the case may be, contravenes any guidelines issued by the Commission under sub-paragraph (a) , the Commission may appoint a Competent Authority by name or by office, who shall, with effect from the date of such appointment, take over the management of such Broadcasting Corporation, Rupavahini Corporation or Independent Television Network, or other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of such private broadcasting or telecasting operator, as the case may be, insofar as such management relates to all political broadcasts or any other broadcast, which in the opinion of the Commission impinge on the election, until the conclusion of the election, and the Sri Lanka Broadcasting Corporation, the Sri Lanka Rupavahini Corporation and the Independent Television Network or other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of such private broadcasting or telecasting operator, shall not, during such period, discharge any function connected with, or relating to, such management which is taken over by the Competent Authority.

While making submissions on the aforesaid provision, Mr. Faiz Musthapa, P.C. and Mr. Sanjeewa Jayawardene, P.C. submitted that as to what is a “political broadcast”, or what is the factor which impinges on an election are not matters which should be left to the formation of a subjective, arbitrary and collaterally motivated opinion which promotes an arbitrary exercise. Counsel further submitted that the Election Commission should not be vested with such a far-reaching power to take over a private broadcasting/telecasting station on the purported basis of various subjective factors. The State taking over its own media institutions may be permitted, but if it is extended to private media institutions, providing balanced and multi perspective news and views the same will be most prejudicial. Furthermore, this provision does not set out the qualification and/or the post that a person holds in order to be appointed as a Competent Authority and this too will severely impinge upon the rights of the citizens and also rights and interests of the media

institutions who may well be supervised and effectually managed by persons not eligible or suitable for same.

The Election Commission has been vested with untrammelled power and the eligibility and suitability of the members would be of paramount consideration in the public interest. There does not appear to be a mechanism where an aggrieved citizen could impugn and challenge an appointment of a Competent Authority that is not fitting. We are therefore of the view that the functions of the Competent Authority would directly affect and have a bearing on the franchise of the people and the process of selection of the representatives of people which has a direct nexus to the exercise of the sovereignty of the People. Accordingly, we are of the view that the aforesaid Clause violates Article 3 of the Constitution and therefore has to be approved by the People at a Referendum as provided in Article 83 of the Constitution.

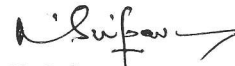
We note that paragraph 153c in Clause 40 does not permit the Rules framed by the Audit Service Commission to be placed before Parliament. Failure to do so would undermine the Parliamentary control over the Rule making powers of the Audit Service Commission established by the Constitution. Hence, we suggest that the said paragraph be amended to enable the Audit Service Commission to place its Rules before the Parliament for its approval.

We have considered the remaining provisions of the Bill with the assistance of the Hon. Attorney General and we do not see any other matters that would require consideration by this court in terms of Article 83 of the Constitution.

Accordingly, this Court determines that the Bill titled "The Nineteenth Amendment to the Constitution" :-

- a) complies with the provisions of Article 82(1) of the Constitution;
- b) requires to be passed by a special majority specified in Article 82(5) of the Constitution;
- c) that paragraphs 42(3), 43(1), 43(3), 44(2) , 44(3) and 44(5) in Clause 11 and paragraph 104B(5)(c) in Clause 26 require the approval of the People at a Referendum in terms of the provisions of Article 83 of the Constitution.

We wish to place on record our deep appreciation of the assistance given by the Hon. Attorney General, learned President's Counsel who appeared for the Petitioners, learned Counsel who appeared for the intervenient petitioners and the Petitioners who appeared in person and made submissions in this matter.



K. Sripavan
Chief Justice



Chandra Ekanayake
Judge of the Supreme Court



Priyasath Dep P.C.
Judge of the Supreme Court