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

"TWENTY SECOND AMENDMENT TO THE CONSTITUTION"

SC (SD) No. 40/2022	**Petitioner**:	Lt. Col. (Retd.) Anil Sumedha Amarasekara, Puselahena Estate, Kindelpitiya, Millewa.
	Counsel:	Manohara De Silva, PC with Harithriya Kumarage and Kaveesha Gamage
SC (SD) No. 41/2022	**Petitioner**:	Nagananda Kodituwakku, 99, Subadrarama Road, Nugegoda.
		Petitioner in person
SC (SD) No. 42/2022	**Petitioner**:	R M W Tissa Bandara Ratnayake, 316, Weliyaya Road, Digana, Mahara.
	Counsel:	Nuwan Peiris
SC (SD) No. 43/2022	**Petitioner**:	H.S. Kumara, 298, Kottawa Road, Millewa.
	Counsel:	V.K. Choksy, PC with D.S. Ratnayake and Minoli Alexander
SC (SD) No. 44/2022	**Petitioner**:	Herath Dissanayake Jayantha Kulatunga, 203/10, Layards Broadway, Colombo 14.
	Counsel:	Saman Galappaththi
SC (SD) No. 45/2022	**Petitioner**:	Sandra Marakkalage Kushan Devinda, 109/57F, Weera Mawatha, Depanama, Pannipitiya.

	Counsel:	Saman Galappaththi
SC (SD) No. 46/2022	**Petitioner**:	Ballanthudawe Arachchige Nuwan Chamara Indunil, 415/34, High Level Road, Gangodawila.
	Counsel:	Canishka Witharana with Savani Rajakaruna
SC (SD) No. 47/2022	**Petitioner**:	Gunadasa Suriyaarachchi Amarasekera, 31/14/C, 2nd Lane, Koswatte, Nawala.
	Counsel:	Canishka Witharana with H.M. Tillekeratne and Savani Rajakaruna
SC (SD) No. 48/2022	**Petitioner**:	Bandulasena Dias Dahanayake, 42/11A, Sunshine Garden, Neelammahara, Maharagama.
	Counsel:	Priyantha Deniyaya
SC (SD) No. 49/2022	**Petitioner**:	Ven. Mathara Ananda Sagara Thero, Dharmashanthi Temple, 52, E.A. Cooray Mawatha, Colombo 6.
	Counsel:	Chrishmal Warnasuriya with Kumudu Hapuarachchi, Pramodya Thillekeratne and Lakshman Fernando

Respondent: Attorney General

Counsel: Sanjay Rajaratnam, PC, Attorney General with Nerin Pulle, PC, Additional Solicitor General, Kanishka De Silva Balapatabendi, Deputy Solicitor General, Shiloma David, State Counsel and Indumini Randeny, State Counsel

BEFORE: Jayantha Jayasuriya, PC — Chief Justice
Buwaneka Aluwihare, PC — Judge of the Supreme Court
Arjuna Obeyesekere — Judge of the Supreme Court

The Court assembled for hearings at 10.00 a.m. on 22nd August 2022 and 23rd August 2022.

A Bill in its long title referred to as "A Bill to amend the Constitution of the Democratic Socialist Republic of Sri Lanka," and in its short title referred to as the "Twenty Second Amendment to the Constitution" [the Bill] was published as a Supplement in Part II of the Government Gazette of 29th July 2022 and was presented in Parliament by the Hon. Minister of Justice, Prison Affairs and Constitutional Reforms.

In terms of Article 82(1) of the Constitution, "*No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution.*" The Bill, being compliant with Article 82(1), was accordingly placed on the Order Paper of Parliament on 10th August 2022.

Ten Petitioners have invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution by filing the above-numbered petitions in the Registry of the Supreme Court during the period of 15th August 2022 – 18th August 2022, praying *inter alia* that this Court:

(a) declare that the Bill in its entirety is in violation of Articles 2, 3, 4, 12(1), 12(2) and 83 of the Constitution; and

(b) determine that in addition to being passed with not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour [the special majority], the Bill must be approved by the People at a Referendum.

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

Jurisdiction of the Supreme Court

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

Article 83 goes on to provide as follows:

> "*Notwithstanding anything to the contrary in the provisions of Article 82 –*
>
> *(a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11 or of this Article; and*
>
> *(b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of, paragraph (2) of Article 62 which would extend the term of office of the President, or the duration of Parliament, as the case may be to over six years,*
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> *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.*"

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

"*Provided that –*

(a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;".

Hence, while the Bill shall be passed by the special majority of Parliament, the role of this Court is limited to determining whether the Bill or any part thereof seeks to amend, repeal, replace or is inconsistent with the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2), 62(2) or 83 of the Constitution. An affirmative determination by this Court would mean that the Bill or the relevant part must, in addition to being passed by the special majority of Parliament, be approved by the People at a Referendum.

Amendments to be moved at the Committee Stage

During the course of the hearing, the Hon. Attorney General informed this Court that he has received instructions that the following amendments are proposed to be moved at the Committee Stage of Parliament:

1) Clause 3 – the insertion of the following proviso to the proposed Article 43(3) – "*provided that notwithstanding the dissolution of the Cabinet of Ministers under the provisions of the Constitution, the President shall continue in office.*";

2) Article 111D(2) – the deletion of the words, "a Judge of a Court of First Instance" and substituting thereof with the words, "a Magistrate or a District Judge";

3) Article 111M [interpretation of "Judicial Officer"] – the deletion of the words, "or of the High Court";

4) Clause 27 – the insertion of the words "Provincial Councils" to the proposed Article 156H [interpretation of "government institution"].

It is observed that the amendment proposed to Article 43(3) in Clause 3 is consequent to the submissions of the learned President's Counsel for the Petitioner in SC (SD) Application No. 40/2022, and adds clarity.

The amendment to the proposed Article 156H results from a question posed by this Court. It is observed that Article 156H would now ensure that the meaning of the words "government institution" would have a broader ambit and as such would increase transparency in procurement across institutions in which substantial public funds have been invested or expended. The proposed clause includes companies registered under the Companies Act, No. 7 of 2007, in which the government or public corporations hold more than fifty per centum of the shares of that company. Naturally, subsidiaries of such companies would also be caught up within the ambit of this clause, and as such there is no necessity to make explicit reference to the subsidiaries of such companies. This provision would ensure that the procurement process in respect of institutions where substantial public funds are involved cannot avoid scrutiny through the mechanism of creating a separate legal personality.

We observe that none of the aforementioned proposed amendments including the proposed amendments sought to be introduced to Article 111D(2) and Article 111M are inconsistent with any provision of the Constitution.

There is one further observation that this Court wishes to make. Although Article 45(3) specifies that every Minister appointed under Article 45(1) of the Constitution shall be responsible and answerable to the Cabinet of Ministers and to Parliament, the proposed Article 45(4) in Clause 3 of the Bill has taken away the obligation of Ministers appointed under the proposed Article 45(1) to be answerable to Parliament.

Provisions of the Bill

The Bill consists of thirty-one clauses including Clause 1 (short title), Clause 29 (transitional provisions) and Clause 31 (Sinhala text to prevail in case of an inconsistency). Wherever the proposal is for the introduction of a complete Chapter, all proposed Articles of such Chapter have been listed under one Clause.

The submissions of the majority of the learned Counsel appearing for the Petitioners mainly relate to the provisions contained in Clauses 2, 3 and 18 of the Bill. The thrust of their argument was that some of the amendments sought to be effected by the said Clauses amount to an alienation or relinquishment of the executive power of the President and therefore are in violation of the provisions of Article 4(b) read together with Article 3, thus necessitating the said amendments to be passed by the special majority of Parliament and approved by the People at a Referendum.

Sovereignty of the People and its exercise

Article 3 of the Constitution 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 sets out the manner in which the Sovereignty is to be exercised, and reads as follows:

> "*The Sovereignty of the People shall be exercised and enjoyed in the following manner:*
>
> *(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*
>
> *(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*
>
> *(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privilege and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;*

(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."

In the **Nineteenth Amendment to the Constitution Bill** (2002) [Decisions of the Supreme Court on Parliamentary Bills (1991 – 2003), Vol. VII, page 313 at 319] a Divisional Bench of this Court observed as follows:

"*Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People, to include;*

(1) the powers of Government;
(2) the fundamental rights; and
(3) the franchise.

Fundamental rights and the franchise are exercised and enjoyed directly by the people and the organs of government are required to recognize, respect, secure and advance these rights.

The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also

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

Therefore, the statement in Article 3 that sovereignty is in the People and is "inalienable," being an essential element which pertains to the sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4. The relevant sub paragraphs would then read as follows:

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

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

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

It is relevant to note that in the **Eighteenth Amendment to the Constitution Bill**, [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII, page 303 at 305], a bench of seven judges of this Court observed (citing SC (SD) Nos. 5/80, 1/82, 2/83, 1/84 and 7/87) that Article 3 is linked with Article 4 of the Constitution and therefore these two Articles must be read together.

Further, in the **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991 – 2003), Vol. VII, page 389 at 394], this Court observed that *"Article 3 is a safeguard which prevents an alienation of the elements that constitute the sovereignty of the People and its exercise as provided in Article 4."*

Inalienability of Sovereignty and the Separation of Powers

In the **Nineteenth Amendment to the Constitution Bill** (2002) [supra; at pages 319-320] it was held that:

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

Elaborating on the balance struck between the three organs of government and its link to the People's Sovereignty, this Court, in the **Twenty First Amendment to the Constitution Bill** (2022) [SC (SD) Nos. 31, 32, 34, 36 and 37/2022; at pages 46-47] held as follows:

> "*The word "Sovereignty" when used in Article 3 has a meaning that could only be appreciated through a reading of Article 4. The word "Sovereignty" as employed in Article 3 is not exhaustive, and includes the powers of government, fundamental*

rights and franchise. The phrase "powers of government" are revealed to be the legislative power, executive power and judicial power as elaborated in Article 4(a), (b) and (c). Thus, when Article 3 refers to Sovereignty, such reference is predicated upon the assumption of there being a separation of powers as provided in Article 4. It is evident that Article 3 contemplates the separation of powers and appropriate checks and balances when it uses the term "Sovereignty" and it is in this context that this Court in the ***19th Amendment to the Constitution Bill*** *(2002) [supra] referred to the balance between the arms of government. Thus, any amendment to the Constitution that disrupts the balance or separation of powers would violate Sovereignty as envisaged in Article 3.*

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

Although Article 4 is not expressly included in the list of entrenched provisions in Article 83, an amendment to it could still affect entrenched provisions; although the list of entrenched provisions is a limited one, amendments made to other Articles of the Constitution may still have a bearing on the scope, operation and effectiveness of entrenched provisions. If this were to happen, then such amendments would require approval by the People at a Referendum.

The primary task before us is to consider whether the proposed amendments seek to amend Article 4 or any other Article of the Constitution in a manner that violates the provisions of Article 3 or any other entrenched Article.

Although different tests have been adopted in the past in analysing whether amendments violating Article 4 would also violate Article 3, this Court, having considered the **Thirteenth Amendment to the Constitution Bill** [Decisions of the Supreme Court on

Parliamentary Bills (1987), Vol. III, page 21] and other relevant determinations, held in the **Twenty First Amendment to the Constitution Bill** (2022) [supra; at page 41] as follows:

> "*Accordingly, it is our view that the proper tests to be adopted in determining whether a violation of Article 4 leads to a violation of Article 3 are as follows:*
>
> 1. *Different features of the Sovereignty that is reposed in the People can be delegated by the People to be exercised by an organ of government. Delegation by the People of the Sovereignty reposed in them is part of their Sovereignty identified in Article 3. Article 4 deals with both the delegation and the exercise of different features of Sovereignty. In terms of Article 4(b), the People have delegated their executive power to the President elected by them. Any change to such delegation which brings in another person or institution to exercise the executive power of the People must be with the approval of the People as otherwise it infringes Article 3* ***(Delegation Test)****.*
>
> 2. *The transfer, relinquishment or removal of a power attributed to one organ of Government to another organ or body would be inconsistent with Article 3 read with Article 4 of the Constitution* ***(Alienation Test)****."*

It is in line with these tests that the proposed amendments would be considered below.

The executive power of the People

This Court has on many occasions emphasised that under the 1978 Constitution, the executive power of the People is vested in and exercised by a President elected by the People. As held by this Court in the **Third Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1978 – 1983), Vol. I, page 141 at 146]:

> "*Article 4(b) envisages the executive power of the People being vested in and exercised only by a President who has been elected by the People. The foundation and justification for the grant of the executive power is election by the People. The election symbolizes the Sovereignty of the People. It is fundamental to the exercise*

of the Sovereignty of the People that the repository of the executive power should be a person elected by the People. …"

In the **Twenty First Amendment to the Constitution Bill** (2022) [supra], this Court, having considered previous determinations, held as follows:

"*Accordingly, under the present Constitution, the President elected by the People is the sole repository of the executive power of the People. Nonetheless, it does not mean that executive power cannot be exercised by any other person or body. It can be, provided that the executive power is distributed to such person or body through the President as* ***a delegate of the President. So long as the President remains the Head of the Executive, the exercise of his powers remains supreme or sovereign in the executive field and others to whom such power is given must derive the authority from the President***" [page 28].

"*… under the 1978 Constitution the President elected by the People is the sole repository of the executive power of the People. All other persons and bodies exercising executive power derive their authority through the President. … Accordingly, as Article 4(b) presently stands, the President is the custodian of the Executive power of the People*" [page 30].

Clause 2 – Constitutional Council

Clause 2 of the Bill seeks to repeal Chapter VIIA of the Constitution, which presently consists of Article 41A relating to the Parliamentary Council, and replace it with a new Chapter VIIA titled 'The Constitutional Council' consisting of Articles 41A – 41J, containing provisions relating to the re-introduction of the Constitutional Council.

In the **Seventeenth Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991 – 2003), Vol. VII, page 249], this Court, having considered the provisions relating to the introduction of the Constitutional Council, held as follows:

"*The Bill taken in its entirety has the objective of altering the legal regime for the appointment, regulation of service and disciplinary control of Public Officers forming part of the Executive, including Police Officers, Judges and Judicial Officers and of certain Commissions that wield governmental power.* ***It places a restriction on the discretion now vested in the President and the Cabinet of Ministers in relation to these matters and subjects the exercise of that discretion to the recommendation or approval of the new body to be established****, known as the 'The Constitutional Council.' In that respect the provisions relating to the establishment and functions of the Constitutional Council is the core of the Seventeenth Amendment. These provisions are contained as noted above in the new Chapter VIIA with Articles 41A to 41H. The Council is essentially a body that comes within the aegis of Parliament with the Speaker as its Chairman and nine members …*" [emphasis added; page 250].

The power of making appointments to the respective Commissions and the appointment of the officers referred to in Article 41B of the Bill is now exercised by the President. In relation to the Public Service the power is vested in terms of Article 55(1) of the Constitution in the Cabinet of Ministers, which too is headed by the President. As noted above ***the amendment seeks to subject the exercise of this discretion to recommendations and approval of the Constitutional Council****"* [emphasis added; page 251].

This Court thereafter took into consideration *inter alia* the fact that, (a) the President is empowered to appoint one member to the Constitutional Council, and that the presence of the said member would constitute a link between the President and the Constitutional Council, and (b) the President would be the appointing authority of the six nominees of the Prime Minister and the Leader of the Opposition, and held that the said matters:

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

2) ***Although there is a restriction*** *in the exercise of the discretion hitherto vested in the President****, this restriction per se would not be an erosion of the***

***executive power by the President**, so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution*."

In the **Nineteenth Amendment to the Constitution Bill** (2015) [Decisions of the Supreme Court on Parliamentary Bills (2014 – 2015), Vol. XII, page 26 at 36], this Court observed that:

"*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.*"

Article 41A(1) of the Constitution, as it presently stands, reads as follows:

"*The Chairmen and members of the Commissions referred to in Schedule I to this Article and the persons to be appointed to the offices referred to in Part I and Part II of Schedule II to this Article shall be appointed to such Commissions and such offices by the President. In making such appointments, the President shall seek the observations of a Parliamentary Council …*"

In terms of the proposed Article 41A(1), the Constitutional Council shall consist of ten members comprising of (a) the Prime Minister, (b) the Speaker, (c) the Leader of the Opposition in Parliament, (d) one Member of Parliament appointed by the President, and

(e) five persons **appointed by the President**, upon being **nominated** as follows:

(i) one Member of Parliament **nominated** by agreement of the majority of the Members of Parliament representing the Government;

(ii) one Member of Parliament **nominated** by agreement of the majority of the Members of Parliament of the political party or independent group to which the Leader of the Opposition belongs; and

(iii) three persons **nominated** by the Speaker in consultation with the Prime Minister and the Leader of the Opposition by agreement of the majority of Members of Parliament;

(f) one Member of Parliament **nominated** by agreement of the Members of Parliament other than those representing the Government and those belonging to the political party or independent group to which the Leader of the Opposition belongs, and appointed by the President.

While the Speaker shall be the Chairman of the Council [proposed Article 41A(2)], it shall be the duty of the Speaker to ensure that nominations for appointments are made under paragraphs (e) and (f) whenever an occasion for such nomination arises [proposed Article 41A(3)].

The proposed Articles 41A(4), (5) and (6) read as follows:

41(A)(4) – "*In **nominating** the five persons referred to in sub-paragraph (e) of paragraph (1), the Members of Parliament shall ensure that the Council **reflects the pluralistic character of Sri Lankan society, including professional and social diversity***."

41A(5) – "*The persons who are not Members of Parliament to be appointed under subparagraph (e) of paragraph (1) shall **be persons of eminence and integrity who have distinguished themselves in public or professional life** and who are not members of any political party whose nomination shall be approved by Parliament*."

41A(6) – "*The President shall, within fourteen days of the receipt of a written communication specifying the* ***nominations*** *made under subparagraphs (e) and (f) of paragraph (1),* ***make the necessary appointments****. In the event of the President failing to make the necessary appointments within such period of fourteen days, the persons nominated shall be* ***deemed*** *to have been appointed as members of the Council, with effect from the date of expiry of such period*."

Provisions similar to the proposed Article 41A(6) but with regard to the nomination and appointment of the Chairmen and members to the Commissions are found in the proposed Articles 41B (3) and (4), which reads as follows:

"(3) It shall be the duty of the Council to recommend to the President fit and proper persons for appointment as Chairmen or members of the Commissions specified in the Schedule to this Article, whenever the occasion for such appointments arises, and such recommendations shall endeavour to ensure that such recommendations reflect the pluralistic character of Sri Lankan society, including gender. In the case of the Chairmen of such Commissions, the Council shall recommend three persons for appointment, and the President shall appoint one of the persons recommended as Chairman.

(4) The President shall appoint the Chairmen and the members of the Commissions specified in the Schedule to this Article, within fourteen days of receiving the recommendations of the Council for such appointments. In the event of the President failing to make the necessary appointments within such period of fourteen days–

(a) the persons recommended under paragraph (3), to be appointed as members of a Commission, shall be deemed to have been appointed as the members of the Commissions; and

(b) the person whose name appears first in the list of names recommended under paragraph (3), to be appointed as the Chairman of a Commission, shall be deemed to have been appointed the Chairman of the respective Commission,

with effect from the date of expiry of such period."

Mr. Manohara De Silva, PC, appearing for the Petitioner in SC (SD) Application No. 40/2022, submitted that the power of making appointments to the Commissions and Offices set out in the Schedules to the proposed Articles 41B and 41C is currently a function of the executive which has been exclusively vested in its Head, the President. He submitted that another body may exercise executive powers as a delegate of the President or where such body derives authority from the President to do so. As held by this Court in the **Eighteenth Amendment to the Constitution Bill** (2002) [supra; at page 306], the Constitutional Council is part of the Executive and is attributed executive power by the President.

Mr. De Silva, PC, submitted further that he has no objection in principle to the re-introduction of the Constitutional Council, as it ensures checks and balances on the powers of the President in making appointments to the Commissions and Offices referred to in the Schedules to the proposed Articles 41B and 41C. His complaint to this Court was with regard to the deeming provision in relation to the procedure for the appointment of:

(a) members to the Constitutional Council [proposed Article 41A(6)]; and

(b) the Chairmen and members to the Commissions [proposed Articles 41B(4)(a) and 41B(4)(b)].

It was the contention of Mr. De Silva, PC, that the President must retain the final or ultimate decision with regard to his executive functions, and that the President cannot be made subordinate to any other person or body in the executive sphere.

The position of the Hon. Attorney General was fourfold.

The first was that even though the deeming provision is a restriction, it is only procedural in nature and serves as a check and balance on the powers of the President and prevents the arbitrary exercise of the executive powers.

The second was that the President is not compelled to make the appointment forthwith upon receipt of the nomination, as was the case when provisions relating to the Constitutional Council was introduced for the first time in 2001, and that the proposed Article 41A(6) has provided the President a period of fourteen days to make his views on a nominee known and enable a consultative process to take place with the Speaker during that period, although the proposed article does not explicitly provide for a consultative process. It was submitted that the use of the words '***necessary appointments***' demonstrate that the President still retains the discretion to make an individual assessment of the nominee and to reject a nomination, and that the deeming provision comes into operation only in the event of a failure on the part of the President to make an appointment to constitute a functioning Council, and not to a situation of 'refusal.'

The third was that the President has only shared his power with those with whom he maintains a link through his appointee and that the said provisions do not in any manner alter or affect the cardinal features of the Office of the Executive.

The fourth was that the said provision seeks to secure and strengthen the sovereignty of the People and does not in any way seek to alienate, relinquish, remove or erode the executive power of the President and that the executive power of the People will continue to be exercised by the President elected by the People in terms of Article 4(b) of the Constitution.

There are two considerations that arise. The first is whether the impugned Articles preserve the role of the President as the Head of the Executive, and reserve to him the right to monitor or to give directions to others who derive authority from him and thereby ensure that the ultimate act or decision remains with the President, or whether the deeming provision makes the President subordinate to the Council whom he has empowered. The second is whether the restriction of the discretion of the President to make the appointment has been taken too far by the deeming provision, resulting in an erosion of the executive power of the President.

The issue as this Court sees is far broader than an argument that the President must not be given wide powers that may result in the President stultifying a Constitutional process and that the deeming provision has been inserted to curtail the possibility of an abuse of executive power by the President. In terms of Article 41A, the power of appointing suitable persons to the Commissions and Offices in question is an executive function of the President. It is the President who must discharge that function, but in order to ensure good governance and transparency, it is proposed that the President empower a Council consisting of ten persons to assist him in the discharge of his executive functions. The President is then entitled to ensure that the three persons who are to be appointed under the proposed Article 41A(1)(e)(iii) in order to assist him/her shall be persons of eminence and integrity who have distinguished themselves in public or professional life. Similarly, the President is entitled to ensure that the Members of Parliament who are nominated reflects the pluralistic character of Sri Lankan society. Furthermore, once constituted, the Council would be exercising executive powers of the President, and therefore the President cannot be beholden to the very body that he has empowered to assist him, and be placed at their mercy to appoint persons recommended by them. It is the view of this Court that the ultimate decision with regard to the appointment of members to the Council must at all times remain with the President. If it does not so remain, that would amount to a relinquishment of the executive powers of the President.

This position has been clearly spelt out in the **Nineteenth Amendment to the Constitution Bill** (2015) [supra; at pages 32-33] where this Court held as follows:

> "*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 the Executive powers can be distributed to others via President. However, if there is no link between the President and the person exercising the Executive power, it may amount to a violation of mandate given by the people to the President. If the inalienable sovereignty of the people which they reposed on the President in trust is exercised by any other agency or instrument who do not have*

any authority from the President, then such exercise would necessarily affect the sovereignty of the People. 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***" [emphasis added].

Provisions relating to the Constitutional Council including a provision identical to the proposed Article 41A(6) was found in the **Twenty First Amendment to the Constitution Bill** (2022) [supra]. The composition of the Constitutional Council proposed in the said Bill did not provide for a nominee of the President as a member of the Council, and stipulated further, as in the present Bill, that where the President fails to appoint those persons nominated by the Prime Minister, the Leader of the Opposition and other political parties within fourteen days of the nomination being communicated, such persons shall be deemed to have been appointed as members of the Council.

In its determination in the **Twenty First Amendment to the Constitution Bill** (2022) [supra; at page 56], this Court, while observing that the persons to be appointed to the Constitutional Council must be persons of eminence and integrity who have distinguished themselves in public or professional life, stated as follows:

"*While the proposed amendment maintains the power of the President to make appointments to the Constitutional Council, only the power to make such* ***nominations*** *is given to the Prime Minister, Leader of the Opposition and other*

Political parties represented in Parliament. Accordingly, the constitutional duty of ensuring that the persons appointed as members of the Constitutional Council fulfill the eligibility criteria enumerated in the Constitution is vested on the President. In these circumstances, the deeming provisions violate the executive power of the President and therefore is inconsistent with Article 3 read together with Article 4(b) of the Constitution and may be enacted only by the special majority required by Article 84(2) and upon being approved by the People at a Referendum by virtue of Article 83. However, the necessity for a Referendum will cease if the deeming provision in the proposed Article 41A(6) is removed" [emphasis added].

Similarly, the mechanism put in place by the proposed Article 41B of obtaining recommendations of the Constitutional Council should not be seen as a one-way street where the President is compelled to accept the recommendations of the Council. Even though the Council comprises of an appointee of the President, the ultimate decision with regard to the appointments of the Chairmen and members to the Commissions, which forms part of the executive power of the President, must remain with the President.

It would perhaps be important to note at this juncture that the President does not have untrammeled power and cannot be compared to the proverbial runaway horse, for he shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution [present and proposed Article 42], and, more importantly, after the 19th Amendment to the Constitution his actions would be subject to the fundamental rights jurisdiction of this Court [proviso to Article 35(1)]. The powers of the President are therefore neither absolute nor unfettered.

This Court is therefore of the view that the insertion of the deeming provision goes beyond a mere restriction and amounts to a relinquishment of the executive power of the President, and impinges upon Article 3 of the Constitution, thus requiring the proposed Articles 41A(6) and 41B(4) to be approved by the People at a Referendum. The necessity for a Referendum will however cease if the deeming provisions in the said Articles are deleted.

There are two other matters that were raised with regard to Clause 2. The first was that the provisions in the proposed Article 41A(4) that in nominating Members of Parliament to the Council, the Members of Parliament shall ensure the Council reflects the pluralistic character of Sri Lankan society, including professional and social diversity, violates Articles 12(1) and (2) of the Constitution. The second was that excluding members of political parties from being appointed to the Constitutional Council under the proposed Article 41A(1)(e)(iii) is a violation of the fundamental rights guaranteed by Article 12(2) and Article 14(1)(c) and (g), and impinges upon Articles 4(d) and 3.

The submission of the Hon. Attorney General was that the composition of the Council has been formulated in a manner that ensures wide representation, strengthens independence, enhances democratic values, and bears a rational nexus to the objective of establishing a Constitutional Council. This Court has considered the context in which the above requirements have been specified and is of the view that the said provisions are not an infringement of Article 83 of the Constitution.

Clause 3 – acting on the advice of the Prime Minister

Clause 3 of the Bill seeks to repeal Chapter VIII titled, "The Executive – The Cabinet of Ministers" and replace it with a new Chapter VIII consisting of Articles 42 – 53, with the same title.

Article 30(1) stipulates that the President shall be the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces. This Article remains un-amended in the Bill. While Article 43(2) provides that the President shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers, Article 43(3) provides that the President shall appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament. The proposed Articles 43(3) and 43(4) in Clause 3 of the Bill contain similar provisions.

Article 44(1) reads as follows:

> "*The President shall, from time to time, in consultation with the Prime Minister, where he considers such consultation to be necessary –*
>
> *(a) determine the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions to such Ministers; and*
>
> *(b) appoint from among the Members of Parliament, Ministers to be in charge of the Ministries so determined*."

A similar provision is found in Articles 45(1) and 46(1) respectively, with regard to the appointment of Members of Parliament as (a) Ministers who are not members of the Cabinet of Ministers, and (b) Deputy Ministers, with the President required only to *consult* the Prime Minister in the appointment of the said Ministers and Deputy Ministers.

The Bill seeks to replace Article 44(1) with the following [proposed Articles 44(1) and (2)]:

> *"(1) The President shall, in consultation with the Prime Minister, where he considers such consultation to be necessary, determine the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions to such Ministers.*
>
> *(2) The President shall, **on the advice of the Prime Minister**, appoint from among Members of Parliament, Ministers, to be in charge of the Ministries so determined*."

A similar requirement for the President to act on the advice of the Prime Minister has been imposed in respect of five other situations. The first is with regard to the appointment of Members of Parliament as, (a) Ministers who are not members of the Cabinet of Ministers [proposed Article 45(1)], and (b) Deputy Ministers [proposed Article 46(1)]. The second is where the President assigns any subject or function to himself [the proviso to the proposed Article 44(3)]. The third is with regard to the power of the President to remove a Minister or Deputy Minister [proposed Article 47(3)(a)]. The fourth

is with regard to the filling of a vacancy in the office of a Cabinet Minister arising during the period intervening between the dissolution of Parliament and the conclusion of the General Election [proposed Article 48(3)]. The fifth relates to the filling of a vacancy in the office of a Minister or Deputy Minister owing to the inability to discharge the functions of the office [proposed Article 50].

Mr. De Silva, PC, with whom the majority of the learned Counsel for the Petitioners associated themselves, submitted that the requirement that the President act on the advice of the Prime Minister in the aforementioned situations removes the discretion that the President has *inter alia* in the selection of Ministers, and that this amounts to an erosion of the executive power of the President in terms of Article 4(b) and impinges on the sovereignty enshrined in Article 3.

The position of the Hon. Attorney General was twofold. Firstly, he submitted that the requirement to obtain the advice of the Prime Minister only requires the President to engage in a meaningful *consultation* with the Prime Minister in making such appointments and fortifies the sovereignty of the People by placing a check on the powers exercised by the President as well as ensuring that the executive and the legislature work together in arriving at such a decision. Secondly, he submitted that the language of the Bill does not in any manner suggest that the advice of the Prime Minister is final or that it prevails over the decision of the President, and that in fact, the final power to make such an appointment or removal is vested with the President and has not been alienated to the Prime Minister. He submitted further that, for that reason, the advice mandated in terms of the proposed Articles cannot be equated to an alienation and/or delegation of the executive power reposed in the President.

In **SC Reference No. 2/2003** [a reference made to this Court in terms of Article 129(1) of the Constitution], a five-member bench, after examining the relevant provisions of the 1946, 1972 and 1978 Constitutions, held that the removal from the 1978 Constitution of the requirement as contained in the 1946 and 1972 Constitutions for the Head of a State to act on the advice of the Cabinet of Ministers or of any Minister consolidates the executive power and the defence of Sri Lanka in the hands of the President as the sole repository of the executive power and the defence of Sri Lanka.

This Court went on to state as follows at pages 5-6:

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

In the **Nineteenth Amendment to the Constitution Bill** (2015) [supra; at page 34] this Court, having considered provisions which empowered the Prime Minister to determine the number of Ministers, Ministries, assignment of subjects etc., held as follows:

> *"ln 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. ln 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. ln the words of Wanasundera, J. as stated in Re the Thirteenth Amendment to the Constitution at page 359 "lf the Executive power of the People can be renounced in this manner, serious questions regarding the proper administration of the country could arise. At the bare minimum, legislation permitting such renunciation must have the approval of the People at a Referendum. …*
>
> *… The President cannot relinquish his Executive power and permit it to be exercised by another body or person without his express permission or delegated authority […]*

Thus, permitting the Prime Minister to exercise Executive power in relation to the six paragraphs referred to above had to be struck down as being in excess of authority and violative of Article 3."

Provisions relating to the President acting on the advice of the Prime Minister were considered in the **Twenty First Amendment to the Constitution Bill** (2022) [supra]. The primary objective of the said Bill was to abolish the executive Presidential form of Government and restore the Westminster system of Government that prevailed prior to 1977. Clause 6 of the said Bill [proposed Article 33B] provided that, "*The President shall always, except as otherwise provided by the Constitution, act on the advice of the Prime Minister*." This Court, having considered several previous Determinations, as well as several other clauses of the said Bill that were proposed to achieve the said primary objective, held as follows:

"*The proposed Article 33B effectively removes the Executive Power from the President and whenever he has to exercise Executive Power he can do so only on the advice of the Prime Minister*" [page 42].

"*Even taken alone, what this innocuous looking provision does in reality is to chain the President down to a situation where he cannot exercise any power under any law including the Constitution unless he obtains the advice of the Prime Minister, and thereafter act on such advice. Failure to do so would result in the President violating the Constitution. This provision amounts to relinquishment and surrender of the executive powers of the President in its purest form and amounts to an alienation of the executive powers of the President, which violates Article 4(b) and impinges upon Article 3*" [page 45].

While it is true that the said Clause 6 [in the **Twenty First Amendment to the Constitution Bill** (2022)] was intended to play a pivotal role in achieving the primary objective of the said Bill, the fact remains that even in the situations identified above, as provided in the Bill the President is still called upon to act on the advice of the Prime Minister.

A plain reading of the impugned proposed Articles in the present Bill, and especially the Sinhala text, makes it clear that it is mandatory for the President to act on the advice of the Prime Minister. This is in direct contrast to the provisions of Articles 44(1), 45(1) and 46(1) as they currently stand, which require the President to act in *consultation* with the Prime Minister, with the only exception being that consultation shall occur only where the President considers such consultation to be necessary. Thus, by the proposed amendments, a clear distinction is sought to be drawn in that the President shall act on the *advice* of the Prime Minister. The manner in which the proposed Articles have been drafted therefore does not reflect the submission of the Hon. Attorney General. If, on the other hand, what is required is a meaningful engagement between the President and the Prime Minister in the selection of the Ministers, that objective can still be achieved by requiring the President to act in consultation with the Prime Minister, and the necessity to insert a provision which requires the President to act on the advice of the Prime Minister does not arise.

In the above circumstances, it is the view of this Court that:

(a) the discretion vested in the President in appointing Cabinet Ministers, Ministers and Deputy Ministers has been removed as a result of the President being called upon to act on the advice of the Prime Minister;

(b) this amounts to a relinquishment of the executive power of the People and violates Article 4(b) and impinges upon Article 3.

(c) the proposed Article 44(2), the proviso to Article 44(3), Articles 45(1), 46(1), 47(3)(a), 48(3) and 50 would therefore need to be approved by the People at a Referendum. However, the necessity for a Referendum shall cease if the requirement for the President to act on the advice of the Prime Minister is replaced with the requirement for the President to act in consultation with the Prime Minister.

Clause 3 – removal of the Prime Minister

Article 47(2) as it presently stands, provides as follows:

> "*The Prime Minister, a Minister of the Cabinet of Ministers, any other Minister or Deputy Minister shall continue to hold office throughout the period during which the Cabinet of Ministers continues to function under the provisions of the Constitution unless he –*
>
> *(a) is removed by a writing under the hand of the President;*
>
> *(b) resigns his office by a writing under his hand addressed to the President; or*
>
> *(c) ceases to be a Member of Parliament*."

The proposed Article 47(2) seeks to take away the right of the President to remove the Prime Minister. It was contended by Mr. De Silva, PC, that the repeal of this power of the President violates Article 4(b) read with Article 3. The Hon. Attorney General submitted that the proposed Article 43(4) empowers the President to appoint as Prime Minister the person who, in the President's opinion, is most likely to command the confidence of Parliament, and that the removal of the Prime Minister should arise only where the Prime Minister ceases or fails to command the confidence of Parliament, and that in such an instance it is more appropriate for Parliament to move a motion of no confidence against the Prime Minister. He submitted further that the President acting on his own accord in removing the Prime Minister where *he is of the opinion* that the Prime Minister no longer commands the confidence of Parliament, would amount to an arbitrary exercise of power.

This Court must consider the proposed amendment in the context of the provision that currently exists, which is that the President has the power to remove the Prime Minister [Article 47(2)(a)]. The circumstances in which the Prime Minister may be removed will not be limited to a situation where the Prime Minister no longer commands the confidence of Parliament. Hence, it is the view of this Court that taking away that right affects the

balance of power that currently exists, and amounts to a relinquishment and erosion of the executive powers of the President, and violates Article 4(b) in a manner that impinges upon Article 3.

The proposed Article 47(2) would therefore have to be approved by the People at a Referendum, in addition to being passed by the special majority. However, the necessity for a Referendum shall cease if the provisions of Article 47(2)(a) are restored in the proposed Article 47(2).

Clause 3 – National Government

Mr. Chrishmal Warnasuriya, the learned Counsel for the Petitioner in SC (SD) Application No. 49/2022, submitted that the proposed Article 47(4) that enables Parliament to determine the number of Ministers in the event of a formation of a national government is violative of the executive powers of the President.

In terms of the proposed Article 44(1), "*The President shall, in consultation with the Prime Minister, where he considers such consultation to be necessary,* ***determine*** *the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions to such Ministers*."

The proposed Article 47(1), which is identical to Article 47(1), reads as follows:

> "*The total number of –*
>
> *(a) Ministers of the Cabinet of Ministers* ***shall not exceed thirty****; and*
>
> *(b) Ministers who are not members of the Cabinet of Ministers and Deputy Ministers* ***shall not****, in the aggregate,* ***exceed forty***."

The proposed Article 47(4), which in turn is identical to Article 47(4) as it currently stands, provides that:

> "*Notwithstanding anything contained in paragraph (1) of this Article, where the recognized political party or the independent group which obtains highest number of seats in Parliament forms a National Government, the number of Ministers in the Cabinet of Ministers, the number of Ministers who are not Cabinet of Ministers and the number of Deputy Ministers* ***shall be determined by Parliament***."

Thus, it is clear that the proposed Article 47(4) enables the Parliament to determine the number of Ministers and Deputy Ministers in the event of the formation of a national government, and acts as an exception to Article 47(1). Mr. Warnasuriya submitted that once a legislative decision has been made to limit the number of Cabinet Ministers to thirty and non-Cabinet Ministers and Deputy Ministers to forty, there is no rationale to increase the number of Cabinet Ministers, Ministers and Deputy Ministers in the event of the formation of a national government.

The provisions of Article 44(1) vests in the President, who is the Head of the State, the Head of the Executive and of the Government and the Head of the Cabinet of Ministers, the discretion to determine the number of the Cabinet of Ministers that are required to administer the affairs of State. While an upper limit in the number of Cabinet Ministers, Ministers and Deputy Ministers that could be appointed has been specified in Article 47(1), no such upper limit has been specified in the proposed Article 47(4). The absence of an upper limit in the proposed Article 47(4) does not mean that the President is compelled to appoint the number of Cabinet Ministers, Ministers and Deputy Ministers determined by Parliament in terms of the proposed Article 47(4) and the discretion vested in the President in terms of Article 44(1) to determine the number of Cabinet Ministers remains intact. Hence, the President, in exercising the discretion vested in him by the proposed Article 44(1) may appoint a lesser number of Ministers than the number of Ministers determined by Parliament under Article 47(4) of the Bill. A similar discretion is vested on the President in relation to the number of Ministers who are not Cabinet Ministers and Deputy Ministers, too.

Clause 18 –Audit Service Commission

Clause 18 of the Bill consists of the proposed Articles 153A – 153H and relates to the establishment of the Audit Service Commission. In terms of the proposed Article 153C(1), the powers of appointment, promotion, transfer, disciplinary control and dismissal of members belonging to the Sri Lanka State Audit Service, shall be vested in the Audit Service Commission and its core function is to "*make rules pertaining to schemes of recruitment, the appointment, transfer, disciplinary control and dismissal of the members belonging to the Sri Lanka State Audit Service, subject to any policy determined by the Cabinet of Ministers pertaining to the same*." The functions of the Commission are therefore akin to the functions performed by the Public Service Commission in respect of public officers.

The proposed Article 153E reads as follows:

> "*Subject to the jurisdiction conferred on the Supreme Court under Article 126 and to the powers granted to the Administrative Appeals Tribunal under Article 153G, no court or tribunal shall have the power or jurisdiction to inquire into, pronounce upon or in any manner whatsoever call in question any order or decision made by the Commission, in pursuance of any function assigned to such Commission under this Chapter or under any law."*

The learned Counsel for the Petitioner in SC (SD) Application No. 49/2022 submitted that subjecting the Audit Service Commission only to the jurisdiction of the Supreme Court under Article 126 of the Constitution and not to the jurisdiction of the Court of Appeal under Article 140 of the Constitution amounts to an alienation of the judicial power of the People.

While observing that decisions of the Public Service Commission too have been limited to the jurisdiction of this Court under Article 126 of the Constitution, this Court is of the view that there is no restriction on the judicial power of the People as a decision of the Audit Service Commission is subject to judicial scrutiny. It is further observed that any member of the Sri Lanka State Audit Service who is dissatisfied with a decision of the Audit Service

Commission may also seek relief from the Administrative Appeals Tribunal. This Court is therefore of the view that this provision may be passed with the special majority of Parliament.

Summary of the Determination

Accordingly, this Court determines that the Bill titled "the Twenty Second Amendment to the Constitution":

(1) Complies with the provisions of Article 82(1) of the Constitution;

(2) Requires to be passed by the special majority specified in Article 82(5) of the Constitution;

(3) Clause 2 of the Bill contains provisions inconsistent with Article 3 read together with Article 4(b) of the Constitution and as such may be enacted only by the special majority required by Article 82(5) and upon being approved by the People at a Referendum by virtue of Article 83. However, the necessity for a Referendum shall cease if the proposed Articles 41A(6) and 41B(4) in Clause 2 are suitably amended to remove the deeming provision set out therein.

(4) Clause 3 of the Bill contains provisions inconsistent with Article 3 read together with Article 4(b) of the Constitution and as such may be enacted only by the special majority required by Article 82(5) and upon being approved by the People at a Referendum by virtue of Article 83. However, the necessity for a Referendum shall cease:

    (a) if the proposed Article 44(2), the proviso to Article 44(3), Articles 45(1), 46(1), 47(3)(a), 48(3) and 50 in Clause 3 are suitably amended by deleting the reference to the President acting on the advice of the Prime Minister and replacing instead with the President acting in consultation with the Prime Minister;

(b) if the provisions of Article 47(2)(a) are restored in the proposed Article 47(2) in Clause 3.

We wish to place on record our deep appreciation of the assistance given by the Hon. Attorney General, the learned President's Counsel and all other learned Counsel who appeared for the Petitioners.

JAYANTHA JAYASURIYA, PC
CHIEF JUSTICE

BUWANEKA ALUWIHARE, PC
JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE
JUDGE OF THE SUPREME COURT