**SUPREME COURT**

**Determination of the Supreme Court in the matter of and application under Article 121 (1) of the Constitution with regard to the Bill entitled "Nineteenth Amendment to the Constitution"**

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| S.D. No. 04/2015 | S.D. No. 05/2015 |
| S.D. No. 06/2015 | S.D. No. 07/2015 |
| S.D. No. 08/2015 | S.D. No. 09/2015 |
| S.D. No. 10/2015 | S.D. No. 14/2015 |
| S.D. No. 15/2015 | S.D. No. 16/2015 |
| S.D. No. 17/2015 | S.D. No. 19/2015 |

Court assembled at 10 am on 1st, 2nd & 6th of April 2015

**Heard before K. Sripavan CJ, Chandra Ekanayale J, Priyasath Dep PC.J**

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 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 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 actons 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 the 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 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. 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.

The people in whom sovereignty is reposed having made the President as the Head of the Executive in terms of Articles 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 powers 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 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 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 if his Executive power. Failure to do so would lead to a prejudicial impact on the sovereignty of the People.

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 persons 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 the 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 group in Parliament and also be a political in so far as the non ex-officio members are concerned. The establishment of the Constitutional Council was considered by this Court in the 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

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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 the Judges of the Court of Appeal. Seeking the views of the different stakeholders can in no way be offensive to the exercise of the powers of appointments. 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 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 Ministry 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.

Accordingly this Court determines that the Bill titled "Nineteenth Amendments 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.
© 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 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 manner

Ref: 01/05-06/2015

## Life Membership (Honoris Causa)

Mr. Shibly Aziz,PC and Mr. Upali Gooneratne,PC were conferred the privilegeof Life Membership (Honoris Causa) of Bar Association of Sri Lanka at it's 41st Convocation held on 28th March 2015.

Late Deshamanya R. K. W. Goonasekera was also conferred posthumously the privilege of Life Membership (Honoris Causa) at the said 41st Convocation.

**Regulations made under Judicative Act No. 2 of 1978**

By the order published in Gazette Extraordinary No. 1890/17 dated 26.11.2014, order with regard to determination of Judicial Zones, Judicial Districts and Judicial Divisions published in the Gazette Extraordinary No. 1679/40 dated 10.11.2010 made under provisions of Section 3 of Judicative Act No. 2 of 1978 was amended, to effect the following Jurisdictions;

Colombo, Mount Lavinia, Gampaha, Gangodawila, Moratuwa, Kesbewa, Mahara, Minuwangoda, Baddegama, Galle, Ruwanwella, Kegalle, Theldeniya, Kandy, Nawalapitiya, Gampola, Pothuwil, Akkaraipattu, Hambantota, Ambilipitiya and Balapitiya. Further the Composition of Kaluthara and Panadura Judicial were also amended.

## Condolences

Late Mrs. Mala Priyanthi Fernando - Colombo
Late Mr. A.N. Ratnayake, PC - Colombo
Late Mr. Anton Fernando - Colombo
Late Mr. Kapila Abeyratne - Ratnapura
Late Mr. B.M. Amarasekara - Colombo
Late Ms. S.H. Weerasinghe - Colombo
Late Mr. Mahesh Kulathilaka - Colombo

**Justice N. Udalagama**
A kind and pleasant Judge who acted with dignity.





**Justice Gamini Amarathunga**
A strong Judge who did not fear any consequences.

## Announcements

- CLE Seminar organised by Nugegoda Bar Association will be held on 20th June 2015 at 9.30 a.m. at the Solis Reception Hall - Kotte. **Registration Required**
- CLE Seminar will be held on 11th July 2015 at 9.30 a.m. at the Dr. H.W. Jayawardene QC Auditorium
- Law Asia Conference will be held in Sydney, Australia on 06th - 09th November 2015
- 27th June 2015 at 12.00PM: Discussion on the findings of the National Survey on the Court System and the Preliminary Report of the Membership Survey conducted by the BASL for Members of the Bar Council at 12.00 pm at the Dr. H. W. Jayawardene QC Auditorium. Please confirm your participation on 011 3090030 by the 20th of June 2015.