

## CONSTITUTIONALISM AS THE OVERARCHING ANALYTICAL FRAMEWORK FOR JUDICIAL REVIEW

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### ***Introduction***

This article focuses on judicial reasoning employed in the Special Determinations of the Supreme Court of Sri Lanka specifically on the review of Legislative Bills presented for amendment of the currently operative 1978 Constitution of Sri Lanka (the Constitution). Recent attempts at constitutional amendment have mostly focused on the constitutional powers of the all-powerful executive presidency.

An examination of the Special Determinations points to judicial reasoning that is consistently based on the linkage drawn between the institutions of the three organs of government stipulated in Article 4 as repositories of sovereign powers of the people and the concept of people's sovereignty entrenched in Article 3 of the Constitution. As the Court has determined that the Constitution is not amenable to the recognition of a constitutional basic structure as under the Constitution of India,<sup>1</sup> it has largely relied on the above linkage as the framework for judicial reasoning to determine whether a proposed amendment violates an entrenched clause of the Constitution requiring approval by the people at a referendum.<sup>2</sup>

The article examines whether that framework of judicial reasoning has succeeded in upholding the idea of people's sovereignty as the foundational principle of democracy contributing to democratization of institutions and structures of governance. For that purpose, the article analyses judicial reasoning and outcomes in a recent line of relevant Supreme Court Special Determinations and concludes that reasoning based on the linkage drawn between Articles 3 and 4 of the

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<sup>1</sup> See, discussion in Part II (b) at (n 13) – (n 14) and Part III at (n 53) – (n 56).

<sup>2</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 83.

Constitution has at times resulted in outcomes that are contradictory and are not consistent with democratic principles anticipated by the democratic foundations of the Constitution. The article posits that such problematic outcomes are due to the reading of the concept of popular sovereignty as an end, rather than as a means to consolidating democratic governance. It argues that the democratic integrity of the Constitution would be best protected if the analysis of Articles 3 and 4 is located within the framework of democratic constitutional aspirations and principles set out in the Preamble ('Svasti') and Article 1 of the Constitution. It is argued that, in the final analysis, the concept of liberal constitutionalism should form the basis of judicial reasoning as it provides the normative framework to unpack the idea of constitutional democracy.

### ***Analysis of Recent Special Determinations of the Supreme Court on Bills Presented for Constitutional Reform***

*(a) Judicial Review of Legislative Bills for the Amendment of the Constitution*

Both the first (1972) and second (1978) republican constitutions of Sri Lanka are characterized by weaker systems of checks and balances than under the Soulbury Constitution (1946/47), which served as independent Sri Lanka's first constitution. Both republican constitutions disallow post-legislative judicial review although both contain chapters on fundamental rights. Both constitutions permit only pre-legislative judicial review.

Under the 1978 Constitution, the sole and exclusive jurisdiction to determine whether a legislative Bill is inconsistent with the Constitution lies with the Supreme Court.<sup>3</sup> The constitutionality of a Bill can be canvassed before the Court by the President by a written reference or by a citizen petition submitted within two weeks of a Bill being placed on the Order Paper of Parliament.<sup>4</sup> If a Bill is for the amendment or the repeal and replacement of the Constitution, the long title of the Bill must carry that description.<sup>5</sup> All such Bills must be adopted by a special majority of two-thirds of all Members of Parliament including those who are not present.<sup>6</sup> If such a Bill is found to be inconsistent with any of the entrenched provisions stipulated in Article 83 or attempts to extend the term of Parliament or the

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3 ibid Article 120.

4 ibid Article 121 (1).

5 ibid Article 82.

6 ibid Article 82 (5).

executive President beyond six years, such Bill will have to be approved by the people at a referendum after obtaining the special majority required by Article 82.<sup>7</sup> In the event a Bill for the amendment or repeal and replacement of the Constitution is challenged before the Supreme Court, all that the Court has to decide is whether it requires to be submitted to a referendum for approval per Article 83.

Thus far, the Constitution has been amended twenty-one times. As the only possibility to test the constitutionality of legislation is the brief window of opportunity provided by Article 121 for pre-legislative scrutiny, its use by citizens has been prolific.

*(b) Analysis of Jurisprudence*

In the recent past legislative Bills for the amendment of the Constitution have been presented in quick succession by successive governments or via private members' Bills. The focus of almost all proposed amendments is on either increasing or limiting the powers of the executive presidency introduced by the 1978 Constitution replacing the Westminster parliamentary mode of government.

Since its introduction, political discourse in Sri Lanka has been dominated by the pros and cons of the all-powerful executive presidency. Under the Constitution, the executive President is the head of state, head of government, head of the executive and the commander in chief of the armed forces.<sup>8</sup> Among other functions, the President appoints the Prime Minister and cabinet ministers, justices of the superior courts including the Chief Justice, all members and chairpersons of independent commissions including the Election Commission, Public Service Commission and the Human Rights Commission, the Attorney-General and the Auditor General, the Inspector General of Police and commanders of the tri-forces. The President heads the Cabinet of Ministers and presents the statement on government policy at the commencement of each session of Parliament. The President is also empowered to summon, prorogue, or dissolve Parliament.<sup>9</sup> Significantly, the Prime Minister can be dismissed by the President and is not obligated to assign cause.<sup>10</sup>

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7 ibid vide Article 82 (5) and Article 83.

8 ibid Article 30.

9 ibid Article 70.

10 ibid Article 47 (2) (a).

This extraordinary concentration of powers in the executive presidency was thought to be justified by its architect President J. R. Jayewardena, as providing political stability required for economic development, in particular, to steer the open economy that he introduced, and for the protection of the minority communities.<sup>11</sup> Critics point out that, on the contrary, the era of the executive presidency witnessed worsened ethnic relations culminating in a nearly three decade-long civil war (1983-2009) and the economy rapidly backsliding with the country declaring bankruptcy in 2022. Public demands for the imposition of constitutional limitations on the powers of the executive presidency or even its complete abolition have become widespread on the grounds that the concentration of powers has given rise to authoritarian tendencies impacting negatively on the rule of law and checks and balances.<sup>12</sup> It is in this backdrop that constitutional reform has been attempted.

The 17<sup>th</sup> (2001) and the 19<sup>th</sup> (2015) Amendments and, to an extent, the 21<sup>st</sup> Amendment (2022) (originally presented as the 22<sup>nd</sup> Amendment) attempted to limit powers of the executive presidency in response to public demands. The 18<sup>th</sup> Amendment (2010) and the 20<sup>th</sup> Amendment (2020) were initiated by Presidents Mahinda Rajapakse and Gotabhaya Rajapakse respectively with the aim of strengthening presidential powers. Additionally, there were the unsuccessful 19<sup>th</sup> Amendment (2002), 20<sup>th</sup> Amendment (2018) and the 21<sup>st</sup> Amendment (2022) presented respectively by Prime Minister Ranil Wickramasinghe, while serving in the government of President Chandrika Kumaratunga who was from a rival political party; the Janatha Vimukthi Peramuna (JVP); and the then main opposition, the Samagi Jana Balavegaya (SJB). The first of those sought to limit Presidential powers while the latter two proposed the abolition of the executive presidency. None was adopted pursuant to determinations by the Supreme Court which required submission to the people for approval at a referendum.

The legislative Bills pertaining to each of those amendments were challenged before the Supreme Court. This section engages in a discussion of the Special Determinations of the Court delivered in

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11 See A Jeyaratnam Wilson, *The Gaullist System in Asia: The Constitution of Sri Lanka 1978* (1edn, Macmillan 1980).

12 See in general, Asanga Welikala (ed), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Vol. I & II) (CPA, 2015).

those cases, mainly with a view to eliciting judicial reasoning underlying the judgments.

An examination of the Special Determinations points to the following common features:

First, the Supreme Court has consistently held that the 1978 Constitution is not amenable to a reading that recognizes a constitutional basic structure unlike its Indian counterpart.<sup>13</sup> Under the Basic Structure Doctrine recognized by the Indian Supreme Court, certain features of the Constitution that are considered to be parts of its basic structure cannot be amended by the legislature.<sup>14</sup> Under the 1978 Constitution, entrenched clauses in Article 83 too can be amended if approved by a special two-thirds majority in Parliament coupled with approval at a referendum.

Secondly, judicial reasoning used to determine whether a Bill or provisions thereof require a referendum for adoption is based on the linkage drawn between Articles 3 and 4 of the Constitution. Article 3 recognizes the foundational principle that sovereignty lies in the people. It is an entrenched clause per Article 83. Article 4 describes the institutions through which the sovereign legislative, executive, and judicial powers of the people are channelled for purposes of governance. Significantly, Article 4 is not an entrenched provision recognized by Article 83. The Court has, however, held that when a Bill or a provision that impacts Article 4 violates people's sovereignty recognized by Article 3, it requires approval at a referendum in addition to obtaining the special parliamentary majority. The enquiry, for the most part, is whether Presidential powers have been diminished by delegation or transfer to other organs. If the finding is affirmative, it is considered a breach of people's sovereignty. There does not appear to be a focus on whether conferment of certain

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<sup>13</sup> *Supreme Court Special Determination on the Twentieth Amendment to the Constitution*, SC SD Nos. 1/20239/2020; *Supreme Court Special Determination on the Twenty First Amendment to the Constitution*, SC SD Nos. 31,32,34,36,37/2022; *Supreme Court Special Determination on the Twenty Second Amendment to the Constitution*, SC SD Nos. 40/2022-49/2022.

<sup>14</sup> In the celebrated judgment in *Kesavananda Bharati v State of Kerala* [1973] Supp. (1) S.C.R. 1, the Supreme Court of India recognized the Basic Structure Doctrine whereby the Legislature is enjoined from amending features of the Constitution of India (1950) that are considered to be constituent elements of the Constitution's basic structure.

powers or concentration of powers in the presidency violates the democratic scheme of the constitution based on people's sovereignty.

For purposes of greater clarity Articles 3 and 4 of the Constitution are reproduced below:

**Article 3:**

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

**Article 4:**

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

- (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;
- (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;
- (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;...

**i) The Special Determination on the 17 Amendment Bill (2001):**

In the Special Determination on the 17<sup>th</sup> Amendment Bill (2001),<sup>15</sup> the Supreme Court mainly focused on whether the newly proposed Constitutional Council (CC) would erode the powers of the executive President. It is noteworthy that the 17<sup>th</sup> Amendment was proposed, with strong civil society support, at a time when the executive President and the Prime Minister were from rival political parties. The entire tenor of the Amendment was aimed at limiting the powers of the executive presidency. Its innovative feature was the proposed CC, which would limit the hitherto untrammelled powers of the President

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<sup>15</sup> *Supreme Court Special Determination on the Seventeenth Amendment to the Constitution*, SC SD No.6/2001.

to unilaterally nominate and appoint personnel to high office with a view to depoliticizing institutions vital to democratic governance.

The proposed CC would consist of the Speaker of Parliament (chair), the Prime Minister, the leader of the opposition, and seven other members who are non- Parliamentarians; one appointed by the President, five appointed by the President on the joint nomination by both the Prime Minister and leader of the opposition and another appointed by the President on the nomination by political parties and independent groups represented in Parliament other than from those represented by the Prime Minister and the leader of the opposition. The majority of the CC, therefore, are drawn from the citizenry. The appointment of chairpersons and members of independent commissions, including the Election, Public Service, and Human Rights Commissions could be made by the President only based on nominations presented by the CC. The President had the right to nominate candidates for the offices of the Chief Justice and Justices of the Supreme Court, President and Justices of the Court of Appeal, the Attorney-General, Auditor-General and the Inspector-General of Police, the Parliamentary commissioner for Administration and the Secretary-General of Parliament. However, appointment of nominees to those positions was contingent on receiving approval of the CC.

A three-judge bench of the Supreme Court presided by the Chief Justice found that, although the proposed scheme limits the powers of the President, executive powers of the President are not significantly circumscribed so as to be in violation of Article 3 read together with Article 4 (b) of the Constitution. The main reasons adduced to substantiate the decision were that the President gets to appoint one's own nominee to the CC, that the other non-*ex-officio* members of the CC are eventually appointed by the President, and that the President's powers to appoint tri-forces commanders remain intact.

The reasoning was based on whether Presidential powers were substantially diminished to negatively impact executive powers of the presidency as envisaged by Article 4 (b), in which event Article 3 would come into operation requiring approval of the Bill at a referendum. What is noteworthy is that the proposed limitations on Presidential powers were not examined from the perspective of the doctrine of checks and balances in order to make a finding on the impact, either negative or positive, on people's sovereignty as

envisioned by Article 3 which includes powers of government, fundamental rights and the franchise.

**ii) The Special Determination on the 19<sup>th</sup> Amendment Bill (2002)**

In the Special Determination on the 19<sup>th</sup> Amendment (2002),<sup>16</sup> a seven-judge bench of the Supreme Court further expanded on the linkage between Articles 3 and 4. The Court recognized that the powers of government are a component of the sovereignty of the people recognized by Article 3. Such powers are to be exercised via the institutions specified in Article 4. As sovereignty is entrenched and inalienable, the way sovereign powers are channeled in Article 4 also must be deemed entrenched. Article 4 is the constitutional explication of separation of powers in government. While the powers must be held by each institution in trust for the people, the balance in government forged by the separation of powers cannot be distorted. Hence, the sanctity attached to Article 4 even though the Constitution itself does not recognize it as an entrenched provision.

The Court went on to declare that:

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.<sup>17</sup>

Accordingly, the Court held that restricting the discretionary power of the executive President to dissolve Parliament by transferring that power to the Legislature was in violation of Article 4(a) read together with Article 3.

The 19<sup>th</sup> Amendment was moved one year after the 17<sup>th</sup> Amendment in the same political backdrop in which the President and the Prime Minister were from rival political parties. It sought to further restrict

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<sup>16</sup> *In re the Nineteenth Amendment to the Constitution*

[2002] 2 Sri L.R. 85.

<sup>17</sup> Ibid 98.

presidential powers by preventing the President from dissolving Parliament for a year after a general election and by making it mandatory for the President to dissolve Parliament when Parliament so decides by resolution. The existing provisions in the Constitution recognized presidential discretion even where Parliament seeks dissolution by resolution. The Amendment further proposed that where the majority in Parliament is held by a party other than the President's party, the President is enjoined from dissolving Parliament unless Parliament by resolution calls for dissolution in which event it is mandatory for the President to do so.

The Court recognized that the power of the executive to dissolve Parliament is a necessary component of the system of checks and balances and is necessary to maintain the aforesaid balance in government. Proponents of the Amendment had advanced arguments that the preservation of the integrity of the Legislature especially where the President can abuse the power of dissolution when the majority in Parliament is from a rival party. The Court refused to entertain such grounds as justifying limits on presidential powers on the premise that there is an expectation that constitutional checks must be exercised in trust for the people. It pointed out that '[i]n the process of enacting laws, especially in amending or reforming the Constitution, sharp edges of the divide should be blunted and we have to seek common ground, bearing uppermost in mind the interests of the People who are sovereign'.<sup>18</sup> The Court settled on a compromise formula whereby the President could exercise the discretion to dissolve Parliament only after three years from its first meeting instead of the existing one-year limitation.

Significantly, reference by parties supportive of the Amendment to limitations on presidential power to dissolve Parliament imposed by the iconic 1996 post-Apartheid Constitution of South Africa was not fully considered. According to that scheme, Parliament could be dissolved only three years after its election, and that too upon a resolution adopted by a majority in Parliament calling for such dissolution.<sup>19</sup>

In this Special Determination too, the reasoning of the Court was based on whether presidential powers were diminished by transfer to

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18 *ibid* 105.

19 *The Constitution of the Republic of South Africa, 2006*, Article 50.

another organ of government (in this instance the legislature) rather than on whether the proposed limitations on presidential powers were in conformity with democratic principles, especially with the doctrine of checks and balances. Admittedly, the Court's reasoning was based on the doctrine of separation of powers. However, the powers of the president being subject to a resolution of Parliament was found to be constitutionally problematic when it is possible to argue that qualified presidential powers are more in line with the doctrine of checks and balances than untrammelled powers. It is also noteworthy that in the Special Determination on the 17<sup>th</sup> Amendment Bill, the Court did not find presidential powers of appointment being subject to approval of the Constitutional Council to be offensive to the constitutional scheme.

As the legislature itself is a repository of people's sovereignty per Article 4, the preservation of its integrity is of paramount importance as well. The balance between presidential powers and of the legislature could have been better addressed if judicial reasoning was couched in terms of the doctrine of checks and balances. To what extent is it reasonable to limit Presidential powers to preserve the integrity of Parliament? Comparative constitutional design may have provided persuasive answers. The Semi-Presidential system of the Constitution of France (1958), on which the executive presidency of Sri Lanka is based, empowers the President to dissolve Parliament, but only in consultation with the Prime Minister and the Presidents of the Houses of Parliament.<sup>20</sup> The US Constitution (1789), which establishes an absolute executive presidency, authorizes the President to only prorogue, but not dissolve, the Congress.<sup>21</sup> As previously pointed out, the Court made reference to the provisions in the post Apartheid Constitution of South Africa (2006) which also had introduced strong limitations on the presidential power to dissolve Parliament but did not consider it for the purpose of the determination.

### **iii) The Special Determination on the 18<sup>th</sup> Amendment Bill (2010)**

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20 *The Constitution of the Republic of France*, 1958, Article 12.

21 *The Constitution of the United States of America*, 1789, Article 2 (3).

In the ***Special Determination on the 18<sup>th</sup> Amendment*** (2010),<sup>22</sup> a five-judge bench of the Supreme Court presided by the Chief Justice found, *inter alia*, that removing term limits of the President was in accordance with people's sovereignty which includes the people's franchise as recognized by Article 3. It was declared that the removal of the two-term limit imposed by the 1978 Constitution would further enhance the franchise of the people by expanding the available choice of candidates including those who have held office. Further, the removal of the Constitutional Council and replacing it with a Parliamentary Council empowered only to make 'observations' on nominees to high posts, and which 'observations' are not binding on the President as the appointing authority was found not to be in violation of Article 3.

In effect, the President was conferred with absolute discretion regarding high appointments reversing the scheme introduced by the 17<sup>th</sup> Amendment. The Court found that the limitations placed by the Constitutional Council on Presidential powers are only 'redefined' by the 18<sup>th</sup> Amendment. Further, it was pointed out that in ***Silva v. Bandaranaike***,<sup>23</sup> decided prior to the adoption of the 17<sup>th</sup> Amendment, the Supreme Court required the President to consult the Chief Justice before making appointments to the Supreme Court, and that, therefore, any aggrieved party can move the courts for a remedy. The basic thrust of the determination is that there existed adequate constitutional safeguards to ensure that presidential powers of appointment were not abused.

Judicial reasoning in the instant Special Determination too focuses on the importance of preserving executive presidential powers so as not to violate the sovereignty of the people. If, on the other hand, the reading of the concept of sovereignty was located in the original liberal social contract theory and the accompanying idea of constitutionalism- both of which call for limitations on the powers of government- the outcome may have been different.

There is a long tradition of imposing term limits on high office to prevent the entrenchment of personnel in power that would lead to abuse. In classical Athenian democracy, for example, the Committee of 50 which guided and made proposals to the *Ecclesio* (the assembly

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22 Supreme Court Special Determination on the Eighteenth Amendment to the Constitution, SC SD No.1/2010.

23 [1997] 1 Sri L.R. 92.

of citizens in which sovereignty lay) could hold office for only a month and the Assembly's President held office only for a day.<sup>24</sup> In his celebrated treatises, *The Politics* (BOOK V), Aristotle (384-322 BCE) pondered the issue of long tenure of office: '...it is not easy for a person to do great harm when his tenure of office is short, whereas long possession begets tyranny in oligarchies and democracies...'. Modern democracies too consider term limits for high office to prevent entrenchment in power resulting in authoritarianism.<sup>25</sup> In light of those developments in democratic theory and practice, the position that the removal of presidential term limits enhances people's sovereignty is not tenable.

Similarly, if the Court viewed limitations on presidential powers relating to high appointments from the perspective of checks and balances and required limitations on governmental power, the outcome may have been different. The Court viewed the establishment by the 18<sup>th</sup> Amendment of the Parliamentary Council, replacing the powerful Constitutional Council as only a 'redefinition' of the latter's powers. However, the nature of limitations imposed by the two Councils is vastly different. Under the 17<sup>th</sup> Amendment, the President could make appointments only with the approval of the Constitutional Council. Under the 18<sup>th</sup> Amendment, the President was not constitutionally bound by the 'observations' of the Parliamentary Council and could act unilaterally in making appointments. In that sense, the powers of the Constitutional Council were not 'redefined' but were 'reversed' by the 18<sup>th</sup> Amendment. The result was the conferment of vast discretionary powers on the presidency, the abuse of which could pave the way for politicizing of high appointments that the 17<sup>th</sup> Amendment had intended to prevent.

The creation of conditions conducive to abuse of governmental powers unarguably results in violating fundamental rights and the franchise of the people which fall within the concept of people's sovereignty in Article 3. The right to equal protection of the law under Article 12 (1) of the Constitution is negated through the conferment

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24 David Held, *Models of Democracy* (3 edn, Polity Press 2006), Chapter I, text at figure 1.1.

25 Asanga Welikala, 'The Eighteenth Amendment and the Abolition of the Presidential Term Limit' in Rohan Edrisinha and A Jayakody (eds), *The Eighteenth Amendment to the Constitution: Substance and Process* (FNS & CPA undated) 91.

of untrammelled discretion that paves the way for the politicization of the judiciary, independent commissions, the office of the Attorney-General and similar high offices, as would rights associated with the franchise via the possibility of the Election Commission losing its independence through political appointees.

The Court referred to *Silva v. Bandaranayake*<sup>26</sup> and *Premachandra v. Jayawickrama*<sup>27</sup> as authority for the proposition that public law does not recognize unfettered discretion as powers are held in trust for the people. As such, it was pointed out that even in the absence of the Constitutional Council the President could not exercise powers arbitrarily. The public would have recourse to remedies if there were transgressions.

However, *Silva v. Bandaranayake* itself proved the difficulties in challenging Presidential decisions on high appointments. In this instance, four Attorneys-at-Law challenged the appointment of Justice Shirani Bandaranayake as a Supreme Court Justice. They claimed violations of their fundamental rights as the President had made the appointment in an arbitrary manner disregarding the names proposed by the Chief Justice. In a closely divided judgement (4-3), the majority held that although not stipulated expressly in the Constitution, consultation between the President and the Chief Justice in matters relating to judicial appointments was necessary to properly discharge the constitutional duty of the President and that there already was an established practice to that effect. However, the petitioners had not been able to prove whether consultation had taken place in this instance or not. The Attorney-General had submitted that the consultation was a confidential matter that only the President and the Chief Justice were privy to. It was not clear what options were available to the petitioners in such circumstances. On the other hand, the minority of justices was of the opinion, that in any event, under Article 35(1) the President had absolute immunity from lawsuit and hence the petition could not be maintained. Eventually, all seven justices refused leave to proceed with the petition.

In any event, the *dictum* in *Silva* focused only on judicial appointments. Appointments to independent commissions and high offices such as the office of the Attorney-General, the Auditor

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26 *Silva* (n 23).

27 *Premachandra v Jayawickrama* [1994] 2 Sri L.R. 90.

General, and the Inspector General of Police have a profound impact on people's rights. Democratic constitutional governance presupposes adequate safeguards in the constitutional scheme to prevent abuse of authority. When almost unbridled discretionary powers are conferred on political authorities, the onus of correcting aberrations of such a constitutional scheme cannot fall on citizens, the protection of whose rights and liberties is the *raison d'être* of democratic governance.

#### **iv) Special Determination on the 19<sup>th</sup> Amendment Bill (2015)**

The intense public demand for the abolition of the 18<sup>th</sup> Amendment in the run-up to the 2015 Presidential Election saw it become a major plank of the opposition candidate's political campaign<sup>28</sup> and reflected, among other issues pertaining to the presidency, public anxiety over the abolition of the Constitutional Council. It is trite that the authoritarian tendencies of the executive presidency aided by the 18<sup>th</sup> Amendment were a reason for the defeat of the incumbent President Mahinda Rajapakse at the 2015 Presidential Election.

The newly elected 'Good Governance (*Yahapalanaya*)' Government of President Maithripala Sirisena sought consensus within Parliament to limit the powers of the executive presidency by, *inter alia*, re-establishing the Constitutional Council. The 19<sup>th</sup> Amendment re-introduced the Constitutional Council albeit in a weaker form (the majority now consisted of elected Parliamentarians with only 3 independent citizens). It also introduced the right to information as a fundamental right; added additional duties to the list of the Presidential duties; created two new independent commissions for greater checks on government (the Procurement Commission and the Audit Commission); re-introduced the two-term Presidential term limit; reduced the tenure of a Presidential term from six to five years; and limited Presidential immunities by making Presidential acts amenable to the fundamental rights jurisdiction of the Supreme Court vested by Article 126 of the Constitution.

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28 Manifesto of the New Democratic Front, *A Compassionate Maithri Governance: A Stable Country* (2014) 15, chrome extension ://efaidnbmnnnibpcajpcglclefindmkaj/https://groundviews.org/wpcontent/uploads/2014/12/ MS-2015.pdf accessed 4 October 2024.

In the Special Determination on the 19<sup>th</sup> Amendment (2015),<sup>29</sup> the Supreme Court, following the *dicta* of the Special Determination on the 17<sup>th</sup> Amendment Bill, found the re-introduction of the Constitutional Council, while restricting powers of the President, was not in itself a violation of the sovereignty of the people as the objective of the limitations was 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’.<sup>30</sup>

#### v) Special Determination on the 20<sup>th</sup> Amendment Bill (2020)

Five years later, the Constitutional Council was once again abolished in favour of the Parliamentary Council by the 20<sup>th</sup> Amendment. It was introduced by the administration of President Gotabaya Rajapakse. As under the 18<sup>th</sup> Amendment, the Parliamentary Council could only make non-binding observations on high appointments. In reviewing the 20<sup>th</sup> Amendment Bill, a five-judge bench of the Supreme Court citing the *Special Determination on the 18<sup>th</sup> Amendment Bill* (2010) held that ‘redefining safeguards on President’s powers on appointments does not extend to an extent that the change alienates the sovereignty of the people’.<sup>31</sup> The focus once again was on the sanctity of presidential powers.

Significantly, the Court also held that features that were in the 1978 Constitution at the time of its adoption are not precluded from constitutional review. The Court declared that constitutional amendments will be reviewed for compatibility with entrenched clauses at the time they come up for review considering their impact on the entrenched clauses. The matter arose as the 20<sup>th</sup> Amendment Bill sought to reintroduce the absolute immunity attached to the presidency. The Court held that although the 1978 Constitution originally recognized absolute Presidential immunity from lawsuit, attempts to reverse the exception to immunity introduced by the 19<sup>th</sup> Amendment whereby presidential acts and omissions were made amenable to fundamental rights jurisdiction of the Supreme Court, is a violation of the sovereignty of the people and would require

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29 *Supreme Court Special Determination on the Nineteenth Amendment to the Constitution*, SC SD Nos. 4-10, 14-17, 19/2015.

30 *ibid* 15.

31 *Supreme Court Special Determination on the Twentieth Amendment to the Constitution*, SC SD Nos. 2-39/2020, 41.

approval by the people at a referendum. This is a salutary outcome of the Determination.

It could similarly be argued that even though Presidential powers of appointment to high office were not fettered in the original 1978 Constitution, the imposition of constitutional limitations on such powers to ensure checks and balances to protect the integrity of independent institutions is of vital importance. A weak mechanism with non-binding powers such as the Parliamentary Council cannot aspire to achieve such a constitutional objective. For such purposes, a well defined consultation mechanism such as the Constitutional Council or a similar mechanism is required. If fundamental rights are entrenched via the sovereignty clause (Article 3) but the independence of mechanisms for rights protection is not constitutionally guaranteed, it gives rise to a major constitutional contradiction.

The Court also held that empowering the President to remove the Prime Minister is not a violation of people's sovereignty. Under the 19<sup>th</sup> Amendment, the President was precluded from removing the Prime Minister and Parliament could be dissolved only after four and a half years after its first meeting. In this instance, the Court was of the view that granting the President the power to dissolve parliament at the mid-way point of Parliament's tenure, i.e., two and a half years from its first meeting, is acceptable. Whether there was a need to limit presidential powers by constitutionally stipulated criteria for dissolution or the removal of the Prime Minister was not addressed.

#### **vi) Special Determination on the 22<sup>nd</sup> Amendment Bill (2022)**

The Constitutional Council was re-introduced by the 22<sup>nd</sup> Amendment Bill (later adopted as the 21<sup>st</sup> Amendment) presented a scant two years later (2022). It was initiated by President Ranil Wickramasinghe who was elected by Parliament to serve the remainder of the term of President Gotabaya Rajapakse who had previously moved the 20<sup>th</sup> Amendment. The latter resigned in July 2022 after a massive people's uprising (the '*Aragalaya*') demanding his ouster and introduction of radical political reforms ('system change'). The reconcentration of Presidential powers by the 20<sup>th</sup> Amendment, as under the 18<sup>th</sup> Amendment, was a major point of contention. The politicization of appointments to high offices with the removal of the Constitutional Council was a major public concern under both Amendments.

In the Special Determination on the 22<sup>nd</sup> Amendment Bill,<sup>32</sup> the Supreme Court, citing previous judgments, presented two tests to determine whether reconfiguration of Presidential powers by amendments would amount to a violation of sovereignty under Article 4 read with Article 3:

- a. Delegation test
- b. Alienation test

While delegation test is used to determine whether any other authority is authorized to exercise the executive powers of the people delegated to the Executive President, the alienation test is used to determine whether powers conferred on the President have been transferred, relinquished, or removed. These tests would be equally applicable to the powers of the other two branches of government as well.

Applying the tests and referring to precedents, the Court held that the Constitutional Council is a part of the executive and derives authority from the executive powers of the President. The President is the appointing authority of all non *ex officio* members of the Council. Even though the Council must provide its approval for all nominees, it is the President who eventually decides on the appointments as the appointing authority. Hence, there is no alienation of executive powers vested in the President:

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.<sup>33</sup>

Accordingly, the establishment of the Constitutional Council and its powers and functions were held not to be in violation of Article 4 read with Article 3.

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<sup>32</sup> *Supreme Court Special Determination on the Twenty Second Amendment to the Constitution* (n 13).

<sup>33</sup> *ibid* 20.

Proceeding based on that reasoning, the Court further held that the inclusion of a ‘deeming clause’, whereby nominees of the Council are deemed appointed if the President fails to appoint them within two weeks after nomination, was in violation of Article 4 read together with Article 3 as that would remove the power of the President to make the ultimate decision on appointments.

Significantly, however, such a deeming clause was incorporated into the Constitution via the 19<sup>th</sup> Amendment. The Special Determination on that Amendment did not make a finding that the clause was in violation of Article 3 and therefore required approval at a referendum. The clause was incorporated into the Constitution (as Article 41B (4)) pursuant to obtaining a special majority in Parliament. It was abrogated when the Constitutional Council was abolished by the 20<sup>th</sup> Amendment.

Similarly, the Court found the denial of discretion to the President to remove the Prime Minister in violation of the sovereign powers of the people, thereby requiring submission of the matter to a referendum. Eventually, the power of the President to remove the Prime Minister was retained to avoid a referendum. As discussed above, under constitutional reforms incorporated via the 19<sup>th</sup> Amendment, the President could not remove the Prime Minister. However, the Court did not find a violation of people’s sovereignty in that instance. The 20<sup>th</sup> Amendment re-introduced that power and that position stays confirmed under the 21<sup>st</sup> Amendment. It is noteworthy that in the two instances in which the presidential power to remove the Prime Minister was re-introduced, the question whether the power of removal requires limitations in the interests of checks and balances was not addressed by the Court.

#### **vii) Special Determinations on Amendments to Abolish the Executive Presidency**

Finally, when proposed constitutional reform attempted the abolition of the executive presidency, the Court applying the linkage between Article 4 and Article 3 held that abolition requires approval of a special majority in Parliament combined with approval by the people at a referendum as it violated people’s sovereign powers.<sup>34</sup> The Executive

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<sup>34</sup> See *Special Determination on the Eighteenth Amendment to the Constitution*, SD Nos.29-40/2018; *Special Determination on the Twenty First Amendment to the Constitution*, SD No.31/2022.

Presidency is the repository of sovereign executive powers of the people and its removal impact on the sovereignty of the people. There was no examination of whether the alternative executive institutions proposed could adequately discharge the functions of executive powers or whether their powers were in accordance with democratic principles and so on. Despite Article 4 not being an entrenched clause, the Court has consistently held that the Executive Presidency is privileged as representing the sovereign powers of the people.

Frequent attempts at constitutional reform in the recent past have given rise to a spate of Special Determinations. Quite often they deal with identical or similar issues. The analytical framework has remained the same, i.e., the linkage between Article 4 and Article 3. However, one can observe a degree of fluidity, a going back and forth, regarding judicial positions on several issues relating to presidential powers, e.g., on term limits, the Constitutional Council and presidential powers relating to high appointments, dissolution of Parliament, and dismissal of the Prime Minister. Such uncertainty has a negative impact on constitutionalism as there is no definitive position on the constitutional system regarding such important issues.

In fairness, it has to be acknowledged that the practice of amending the Constitution all too frequently, with each newly elected President initiating an amendment to fashion Presidential powers along one's personal views, does not create an environment that is conducive to constitutional certainty or consistency, including constitutional jurisprudence. In the absence of a Constitutional Court, the Supreme Court is constantly called on to deliver Special Determinations on constitutional amendments which must be delivered within three weeks of the court being moved by petitioners.<sup>35</sup>

### **III. Sovereignty of the People & Democratic Theory**

As discussed above, the linkage drawn between Article 3 and Article 4 has created a body of jurisprudence that privileges institutional powers. The main focus is not whether, for example, the powers of the executive presidency, are consonant with fundamental democratic principles such as the rule of law, checks and balances, and separation of powers; instead, the main enquiry is whether the powers of the Executive President are significantly diminished or not. That approach is taken on the premise that the sovereign executive powers

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<sup>35</sup> 1978 Constitution (n 2), Article 121 (3).

of the people are vested in the executive presidency. However, the concept of sovereignty of the people cannot be viewed in isolation; it must be viewed from the perspective of its moorings in democratic theory.

Unarguably, John Locke's theory of liberal democracy has influenced and formed the foundation of democratic governance around the world. The Lockean idea of the social contract, it could be argued, has been more influential than that of Jean Jacques Rousseau, the latter focusing more on a social contract among citizens, who through their general will form a sovereign entity to defend and protect them.<sup>36</sup> Locke's conceptualization of the social contract in his famous Two *Treatises of Government* (1690) envisages a compact between the people in whom sovereignty is reposed and their elected representatives. According to Locke's theory, sovereignty of the people is the capacity to determine the use of political power.<sup>37</sup> The contract forged did not transfer all sovereign powers of the people to the government, nor unconditionally. The fundamental condition on which sovereign powers were temporarily transferred to the political representatives was to protect the inherent natural rights of the people. Locke identified natural rights as 'life, liberty, and estate (property)'. If that condition was observed in the breach, the people were entitled to 'not obey the laws of government' and even engage in revolution seeking to establish a new social contract.<sup>38</sup> In essence, what was envisaged was a conditional transfer of sovereign powers of the people subject to limitations.

The French philosopher and political theorist Charles Louis de Secondat, Baron de Montesquieu (1689-1755), refined the social contract theory further by expounding an institutional scheme of government primarily aimed at protecting the rights and liberties of the subject. In his celebrated publication, *The Spirit of Laws* (1748), he drew a distinction between the 'public' and 'private' spheres of life in society.<sup>39</sup> A democratic system of government had to protect the individual and private activity from the caprice of those who wielded public authority. He refined Locke's theory of democratic government by recognizing three distinct branches—the executive,

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36 Jean Jacques Rousseau, *On the Social Contract* (Tr. GDH Cole, Dover NY 2003) 8-10.

37 David (n 24) Chapter 3.

38 *ibid.*

39 *ibid.*

legislative, and judicial-- whereas Locke had recognized only the legislative and the executive branches with the judiciary falling within the latter. The liberties of the individual are protected by confining to each branch its rightful powers and also by each branch checking whether the other branches have exceeded their powers.

Hence, the central focus of the social contract is whether transferred sovereign powers of the people are exercised by representative government in accordance with the limitations the contract is subject to. The preservation of the sanctity or integrity of specific powers of each branch is not the primary query. From a democratic constitutional design point of view, what is important is to ensure that governmental powers are distributed among the three branches of government in compliance with the requirements of constitutionalism such as separation of powers, checks and balances, and the rule of law. The next step is to monitor whether in practice the respective branches of government are usurping the authority so reposed in them in a manner that violates people's natural (inherent) rights.

Eventually, the theory of liberal democracy is about protecting the rights and liberties of the people in whom sovereignty is reposed. Governments and public institutions are legitimate only to the extent they can protect the rights and liberties of the people.

It is in this context that the theory of constitutionalism<sup>40</sup> gains significance. While there are many variants of the theory,<sup>41</sup> the idea of constitutionalism is an overarching political and constitutional concept that helps determine the democratic credentials and legitimacy of a State. Constitutionalism is not merely about governance under a constitution. Constitutionalism anticipates a constitutional system in which powers of governance are limited by a

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40 For a concise introduction to the concept see , Richard Bellamy, *Constitutionalism* (2010), <https://www.researchgate.net/publication/311261951> Constitutionalism; also, A Godden & J Morison, 'Constitutionalism' in *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2020), chrome extension : // efaidnbmnnnibpcajpcglclefindmkaj/https : // pure. qub. ac. uk/files/219631339/ Constitutional.pdf.

41 See, for example, Mark V Tushnet, 'Varieties of Constitutionalism' (June 25, 2023) Harvard Public Law Working Paper No 23-31, Available at SSRN: <https://ssrn.com/abstract=4490965> or <http://dx.doi.org/10.2139/ssrn.4490965>.

set of higher norms. The limitations are necessary to protect the liberties and rights of the people from the tyranny of the State. A State which proclaims a democratic constitution is not necessarily in compliance with the requirements of constitutionalism. A constitutional system meets the requirements of constitutionalism only when it is based on higher principles such as popular sovereignty, the rule of law (i.e., the supremacy of just laws), protection of inherent rights of the people, separation of powers and checks and balances (accountable governance) and independence of the judiciary. Without those features, a constitutional system lacks democratic legitimacy. While the legality of a policy or law may be established by reference to positive law, legitimacy is achieved only through compliance with higher democratic norms.

The idea of constitutionalism traces its antecedents to natural law thought, particularly of Aristotle (384-322 BC). In his celebrated work *The Politics* (Book III:117), Aristotle states that 'the supreme power should be lodged in laws duly made' and that:

...[I]t is plain that a well-formed government will have good laws, a bad one bad ones...and it is more proper that law should govern than any one of the citizens ; upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians and the servants of the laws, for the supreme power must be placed somewhere; but they say that it is unjust that where all are equal one person should continually enjoy it.

Aristotle thus calls attention to the need for the supremacy of laws, specifically of the rule of just laws, for the greater public good by avoiding arbitrary authority in government. Locke's theory of the social contract too, as discussed above, is grounded in natural law theory calling for limits to governmental power to protect 'natural rights' of the people.

From a positivist perspective, it may be argued that courts must base judicial reasoning on what is legal rather than legitimate. However, the Common Law tradition of judicial interpretation has focused on both dimensions as exemplified in the development of the law of equity and principles of natural justice. Often, the progressive approach to constitutional interpretation in that tradition has treated constitutions

as living instruments into which judicial reasoning must breathe life into considering the evolving circumstances of a society.<sup>42</sup>

In general, the Supreme Court of Sri Lanka has not made direct reference to the concept of constitutionalism as a framework of constitutional analysis. However, it has made constant reference to principles inherent in the idea of constitutionalism. For example, in the celebrated *Sampanthan et. al. v. Attorney-General*, a seven-judge bench of the Supreme Court unanimously holding that the dissolution of Parliament by the President was unconstitutional declared:

...[T]he effect of this interpretation also accords with the duty cast on this Court to read and give effect to the provisions in the Constitution so as to uphold democracy, the Rule of Law and the separation of powers and ensure that no unqualified and unfettered powers are vested in any public authority.<sup>43</sup>

The doctrine of ‘public trust’ consistently referred to by the Court in its reasoning in constitutional jurisprudence since the *Eppawala* judgment<sup>44</sup> views governmental powers as inherently limited. Arbitrary use of public authority<sup>45</sup> or failure to perform required functions<sup>46</sup> are viewed as violations of the public trust in which governmental powers ought to be held. **Direct reference by the Court to the broader concept of constitutionalism as an analytical framework, it is submitted, has the potential to further develop constitutional jurisprudence in a manner that coherently and consistently reinforces the democratic spirit of the Constitution.**

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42 E.g., in the *Supreme Court Special Determination on the Penal Code (Amendment) Bill*, SC SD No 13/2023; *Narsej Singh Johar v Union of India* AIR 2018 SC 4321; and *National Legal Services Authority (NALSA) v Union of India*, AIR 2014 SC 1863, the Supreme Courts of Sri Lanka and India delivered pathbreaking judgments based on constitutional interpretations that took into consideration evolving social mores on sexual orientation and gender identity.

43 SC FR Application [2018] Nos.351-356, 358-361/2018, 84.

44 *Bulankulama v Ministry of Industrial Development* [2000] 3 Sri L.R. 243.

45 *Sampanthan et.al.* (n 44).

46 *Dr. Athulasi Kumara Samarakoon et. al. v Minister of Finance*, SC FR 195/2022

(Judgment on the Financial Crisis); *Ravindra Gunawardena Kariyawasam v Central Environment Authority*, SC FR Application No. 141/2015.

From a comparative perspective, the jurisprudence of the Indian Supreme Court is highly instructive in this regard. The Court has delivered a series of celebrated judgments that limit governmental powers with the aim of protecting people's inherent rights. Whether or not there was direct reference to, or reliance on, the concept of constitutionalism, judgments such as the historic dissenting judgment of Justice Khanna in the *Habeas Corpus case*<sup>47</sup> that underscored the importance of the Rule of Law even during a period of public emergency to ensure the protection of inalienable rights of the people or that in *Bachan Singh v. State of Punjab*<sup>48</sup> that drew limits on the use of judicial discretion in sentencing, were upholding the idea of constitutionalism. Similarly, the new doctrine on equality propounded by the Indian Supreme Court which, in the words of Chief Justice Bhagwati viewed 'arbitrariness as the antithesis of equality', revolutionized constitutional jurisprudence on the right to equal protection of the law by capturing any act of governmental arbitrariness within its ambit.<sup>49</sup> Constitutional governance in Sri Lanka too has immensely benefitted from the new doctrine on equality. Since its adoption by the Supreme Court of Sri Lanka, a rich body of constitutional jurisprudence has evolved vigorously striking down arbitrary acts of public authorities as violating the equality clause of the Constitution.<sup>50</sup>

It could well be argued that the high point of contemporary Indian constitutional jurisprudence is the judicial recognition of the Basic Structure Doctrine. In *Kesavananda Bharati v. State of Kerala* (1973)<sup>51</sup> the majority of a thirteen-judge bench of the Supreme Court held that while Parliament was constitutionally empowered to amend the Constitution of India (*vide* Article 368), it was not empowered to exercise those powers in a manner that violates the basic structure of the Constitution so as to alter its identity. The implication is that Parliament is enjoined from enacting laws, including constitutional amendments, that transgress the features of the basic structure of the Constitution of India. Hence, change to any such feature could be

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47 *ADM Jabalpur v Shirkant Shukla*, AIR 1976 SC 1207.

48 AIR 1980 SC 898.

49 *EP Royappa v State of Tamilnadu*, AIR 1974 SC 555.

50 *Sampanthan et. al.* (n 44) is the most significant judgment in this line of jurisprudence. The Supreme Court struck down the dissolution of Parliament by the Executive President finding that he had done so arbitrarily, in complete violation of constitutional provisions, thus violating the right to equal protection of the law of petitioners.

51 *Kesavananda Bharati* (n 14).

brought about only through a revolutionary act that would radically shift the political *grundnorm* of India.

The following principles, among others, were considered to be part of the basic structure of the Constitution: (a) supremacy of the Constitution; (b) republican and democratic form of government; (c) the secular character of the Constitution; (d) Separation of powers among the legislature, the executive and the judiciary; (e) the federal character of the Constitution.<sup>52</sup>

The Court declared that:

[t]he above structure is built on the basic foundation, that is, the dignity and freedom of the individual. This is of supreme importance. This cannot be destroyed by any form of amendment. The above foundation and the above basic features are easily discernible not only from the Preamble but the whole scheme of the Constitution.<sup>53</sup>

Since then, many other additional features have been identified as constituting parts of the basic structure of the Constitution.<sup>54</sup>

The Jurisprudence of the Supreme Court of India relating to the appointment of Supreme Court justices is also highly instructive in this regard. Article 124 (2) of the Constitution of India empowers the President to appoint Justices of the Supreme Court “after consultation with such of the Judges of the Supreme Court and of the High Courts in the States *as the President may deem necessary for the purpose*” (emphasis added).

However, in the *Supreme Court Advocates on Record Association v. Union of India*,<sup>55</sup> a ninejudge bench of the Supreme Court held that the President does not have absolute discretion in the matter of consultation. The opinion of the Chief Justice must be

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52 *ibid* 165-66.

53 *ibid* 166.

54 For other principles that form the basic structure of the Indian Constitution see e.g., *Indira Gandhi v Raj Narain* [1975] Supp SCC 1 (free and fair elections); *Minerva Mills v Union of India* [1980] 3 SCC 625 (judicial review); *Supreme Court Advocates on Record Association v Union of India* [2016] 5 SCC 1 (independence of the judiciary).

55 AIR 1994 SC 268; [1993] 4 SCC 441.

solicited and should be given priority unless the President has strong grounds for opposing a nominee. The Chief Justice's opinion itself should be formed after consulting senior colleagues whose views should be taken into consideration to form an opinion. The appointment of the Chief Justice must be based on seniority, with the President consulting other senior judges of the Court if the senior-most judge was not thought fit for appointment.

In a moment of judicial activism, the Court arrived at a process that did not confer absolute discretion on either the executive or the judiciary. Agreement had to be reached through consultations. Also, opinions rendered in the consultation process must be made in writing. The ultimate objective of the formula was to ensure transparency and depoliticization of the appointment of judges to preserve independence of the judiciary. Subsequently, in an advisory opinion given pursuant to a reference made by the President, the Court went a step further and formalized a collegium of judges that the President should consult on judicial appointments.<sup>56</sup> The collegium consists of the Chief Justice of India and four senior-most judges of the Supreme Court. The recommendations made should be in writing.

A more recent trajectory of judicial reasoning has seen the Indian Supreme Court basing its reasoning on the concept of 'transformative constitutionalism'.<sup>57</sup> The concept envisages the transformation of society through progressive constitutional interpretation as well as other provisions of law to achieve the larger objectives of the Constitution:

The principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. The

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56 *In re: Presidential Reference*, AIR 1999 SC 1; The Constitution (Ninety-ninth Amendment) Act, 2014 proposed the setting up of a National Judicial Appointment Commission. However, the Supreme Court found the proposed amendment to be unconstitutional, *Supreme Court Advocates of Record Association v Union of India* [2016] 5 SCC 1.

57 *Navtej Singh Johar v. Union of India*, SC Writ Petition (Criminal) No.76 of 2016.

idea is to steer the country and its institutions in a democratic egalitarian direction where there is increased protection of fundamental rights and other freedoms. It is in this way that transformative constitutionalism attains the status of an ideal model, imbibing the philosophy and morals of constitutionalism and fostering greater respect for human rights.<sup>58</sup>

In that regard, the Court invoked the concept of ‘constitutional morality’ to buttress its reasoning:

The concept of constitutional morality is not limited to the mere observance of the core principles [of the Constitution] as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism.<sup>59</sup>

Significantly, the judgment drew a distinction between social morality and constitutional morality. Based on the reasoning, a five-judge bench of the Supreme Court unanimously held that s. 377 of the Penal Code of India which had criminalized ‘unnatural sex’ ‘against the order of nature’ was unconstitutional to the extent it criminalized consensual adult sexual activities including between individuals of the same sex.

The above seminal constitutional developments in India essentially focus on limiting governmental powers with reference to the principles that preserve the fundamental democratic nature of the constitution with the ultimate objective of protecting rights of the people. Recent reference by the Indian Supreme Court to ‘transformative constitutionalism’ has added a special dimension to its reasoning on constitutional matters.

#### **IV. People’s Sovereignty and the Constitution’s Democratic Framework**

The discussion in Part II above focused on the manner in which judicial reasoning linking Articles 3 and 4 of the Sri Lankan Constitution has become foundational to jurisprudence on judicial review of Bills relating to constitutional amendments. It was observed that, overall, the focus of those judgments was on the preservation of

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<sup>58</sup> *ibid* 73-74 per Deepak Misra, CJI (with Khanwilkar J concurring).

<sup>59</sup> *ibid* 74.

powers of organs of government (most of the amendments pertained to presidential powers) than on whether those powers are appropriately limited to meet the requirements of democratic governance.

In some instances, limitations imposed on presidential powers were justified as in the establishment of the Constitutional Council under the Seventeenth Amendment. However, the replacement of the powerful Constitutional Council with the weaker Parliamentary Council which could make only non-binding ‘observations’ on appointments was not viewed critically by the Court, opining that the replacement was merely a ‘redefinition’ of the Constitutional Council. If there was an examination of whether such a replacement would be in violation of the sovereignty of the people which includes fundamental rights and the franchise per Article 3, it may well have brought about a different outcome that was consonant with the democratic rights of the people, and more broadly with the concept of constitutionalism. Instead, the focus was on whether powers vested in the Executive President, as the repository of people’s sovereign executive powers per Article 4, were preserved or were diminished via transfer to another authority. The conferment of almost untrammelled powers of appointment to the Executive President under the Eighteenth and Twentieth Amendments raised deep concerns about the ability of independent institutions to function with integrity.<sup>60</sup>

The above outcome is a result of viewing the concept of people’s sovereignty as an end removed from its democratic foundations. The powers of institutions in which people’s sovereignty is vested are, therefore, deemed privileged and interpreted as constitutionally entrenched even though such powers may fall short of compliance with democratic norms. As noted above, the Constitution has not entrenched Article 4 whereas Article 3 is. One cannot ignore that constitutional arrangement.

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60 International Commission of Jurists, ‘Sri Lanka: Newly adopted 20<sup>th</sup> Amendment to the Constitution is Blow to the Rule of Law’ (ICJ.org, 27 October 2020) <https://www.icj.org/sri-lanka-newly-adopted-20th-amendment-to-the-constitution-is-blow-to-the-rule-of-law/> accessed 14 October 2024; Commonwealth Lawyers Association, ‘Statement on the 20<sup>th</sup> Amendment to the Constitution of Sri Lanka’ (Commonwealth Lawyers Association, 22 September 2020). <https://www.commonwealthlawyers.com/statement/statement-on-the-20th-amendment-to-the-constitution-of-sri-lanka/> accessed 14 October 2024.

Admittedly, powers vested in the three branches of government must accord with the doctrine of separation of powers. However, where wide powers have been vested in organs of government in a manner that defeats the idea of limited government envisaged by democratic theory, then such powers must be circumscribed as with the presidential powers over judicial appointments in India. What is entrenched by the Constitution is the foundational principle of people's sovereignty recognized by Article 3. The institutions specified in Article 4 are the vehicles through which people's executive, legislative, and judicial powers are operationalized and expressed. Constitutionalism, as per the idea of democratic governance, requires that those powers are appropriately limited to ensure compliance with fundamental democratic principles. In other words, the powers *per se* cannot be privileged only because they are deemed to represent the sovereign powers of the people. One cannot lose sight of the fact (and the irony in this instance) that in the scheme of the social contract theory the conferment of untrammelled powers on public authorities is the gravest threat to people's sovereignty.

The central feature of representative democracy as expounded by John Locke is how the social contract between the sovereign people and their political representatives is managed through conditional transfer of power. The conditionalities envisioned by Locke represent the limitations imposed on representative government to the end that government would protect 'life, liberty, and estate (property)' of the people. The concept of constitutionalism is a constant reminder of the need to focus on the limitations on governmental powers if a constitutional system is to find democratic legitimacy. Sovereignty of the people must necessarily be viewed in that light. Hence, for example, the powers of the President over high appointments or dissolution of Parliament *per se* cannot be privileged as an expression of people's sovereign powers unless tailored with necessary limitations to meet democratic ends.

The democratic foundations of the 1978 Constitution are contained in the Preamble (*Swast*) coupled with Article 1 which describes the nature of the State. The Preamble declares that the Constitution was drafted:

...[I]n order to achieve the goals of a DEMOCRATIC SOCIALIST REPUBLIC, ..., to constitute SRI LANKA into a

DEMOCRATIC SOCIALIST REPUBLIC whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY and assuring to all Peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA...

Article 1 follows with the proclamation that:

Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.

Article 3 of the Constitution then goes on to recognize the dimension of internal sovereignty of the Republic:

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.

Both Articles 1 and 3 are entrenched clauses per Article 83 of the Constitution, requiring any law that is in violation of them to be approved by the people at a referendum in addition to obtaining a special majority of Parliament.

In the *Special Determination on Municipal Councils (Amendment) Bill, Urban Councils (Amendment) Bill and Pradeshiya Sabha (Amendment) Bill*<sup>61</sup>, the Supreme Court referred to the Preamble and Article 1 of the Constitution to underscore the democratic foundations of the constitutional order of Sri Lanka and found that a common clause among the three Bills which conferred unfettered powers on the Minister to postpone local government elections in unspecified 'crisis' situations violated Article 1. The clause was found to confer arbitrary powers on the Minister in violation of the right of citizens to participate in elections as required by democratic principles.

It is submitted that the reasoning of the Court based on Article 1 read together with the Preamble provides a solid foundation for the development of constitutional jurisprudence that protects the democratic integrity of the Constitution in a robust manner. It

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61 SC SD Nos. 25-33, 36-41, 43-51, 53-56/2023 (2023) published in *The Hansard* (8 August 2023) Vol. 305 No. 1.

provides a strong jurisprudential basis for providing judicial oversight of both executive and legislative action consonant with the social contract theory and the overarching concept of constitutionalism.

In the pathbreaking judgment in ***Kesavananda Bharati v. State of Kerala***, the Chief Justice of India, referring to a long line of judgments of the Supreme Court, declared the Preamble of the Constitution of India to be a constituent part of the Constitution that provides guidance for interpretation:

It seems to me that the Preamble to our Constitution is of extreme importance and the Constitution should be read and interpreted in light of the grand and noble vision expressed in the Preamble.<sup>62</sup>

The majority of the Court concurred with the view. Similarly, in ***Minerva Mills v. Union of India***, the Supreme Court of India underscored the importance of the Preamble in illuminating the meaning of constitutional provision within the larger constitutional scheme.<sup>63</sup>

### ***Conclusion***

Taking these jurisprudential developments into account, it is submitted that Article 4 of the 1978 Constitution should be interpreted in light of the Preamble and Article 1 to provide vital constitutional context. Conceptually, Article 3 itself flows from the Preamble and Article 1. Hence, the extent and nature of powers conferred in the name of people's sovereignty on the various institutions stipulated in Article 4 should be reviewed in the context of democratic principles anticipated by Article 1 read together with the Preamble to the Constitution. From a democratic theory perspective, the concept of constitutionalism provides the overarching normative framework for such an exercise.

That Article 4 expressly stipulates the institutions in which sovereign powers of the people are to be reposed does not make for an exceptional situation. Under liberal democratic theory, sovereign powers of the people are to be reposed in the three organs of government whether expressly stipulated or not. Most democratic constitutions may not have a clause similar to Article 4, yet the separate sections dealing with the executive, legislature, and judiciary

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<sup>62</sup> Kesavananda Bharati (n 14), AIR 1973 SC 1461, 1506.

provide for the manner in which people's sovereign powers are to be channelled for purposes of governance. Such arrangements are expected to be subject to the limitations required by principles of democratic governance.

In conclusion, it is submitted that the reading of Article 4 combined with Article 3 of the Constitution of Sri Lanka has not provided a sound analytical framework for purposes of judicial review of powers of institutions in which sovereign powers of the people are reposed. Such an approach has given rise to contradictions and outcomes that challenge people's rights and liberties as discussed above. The concept of people's sovereignty in Article 3 is often not examined sufficiently to give expression to its roots in democratic theory. It has been viewed as an end unduly justifying the conferment of vast governmental powers, particularly on the executive presidency, that run counter to the idea of constitutionalism or limited governmental powers in democratic theory. This article argues for the adoption of an alternative approach to judicial reasoning that would see Article 4 being interpreted in light of the Preamble to the Constitution and Article 1 which recognizes the democratic foundations of the Constitution. Such an approach, it is argued, will be in conformity with the idea of liberal constitutionalism and ensure the better protection of rights and liberties of the people.